

ARTICLES

BUILDING SUPRANATIONAL IDENTITY: LEGAL REASONING AND OUTCOME IN KADI I AND OPINION 2/13 OF THE COURT OF JUSTICE

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Abstract

This article offers a comparison between the Kadi saga and Opinion 2/13 in light of what identity studies suggest. More specifically, this work looks at the case law of the Court of Justice of the European Union (CJEU) in order to explore its role as interpreter of the constitutional identity of the EU. To this aim, I shall divide this work into three parts: In the first part I shall introduce some key concepts borrowed from political philosophy in order to apply them to the Van Gend en Loos and Costa/Enel jurisprudence. In the second part, I shall explore the Kadi saga, paying particular attention to the shift occurred in the legal reasoning of European courts, from heteronomy to autonomy. Thirdly, I shall look at Opinion 2/13, trying to emphasize how its legal reasoning is quite similar to that employed by the CJEU in Kadi I. At the same time, although the techniques used in the legal reasoning are comparable, the outcome, in terms of impact over the protection of fundamental rights, is radically different. Finally, some conclusive remarks will be presented**.

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1. Introduction

The discussion on national constitutional identity in EU law has been fostered by the entry into force of the Lisbon Treaty, thanks to Art. 4(2) TEU. On the contrary, the topic of the supranational constitutional identity in the case law of the Court of Justice has been explored by scholars to a much smaller extent. This article tries to fill this gap by offering a comparison between Kadi and Opinion 2/13 in light of what identity studies can suggest. More specifically, this work looks at the case law of the Court of Justice of the European Union (CJEU) in order to explore its role as interpreter of the constitutional identity of the EU. To this aim, I shall divide this work into three parts: In the first part I shall introduce some key concepts borrowed from political philosophy in order to apply them to the Van Gend en Loos and Costa/Enel jurisprudence. In the second part, I shall explore the Kadi saga, paying particular attention to the shift occurred in the legal reasoning of European courts, from heteronomy to autonomy. Thirdly, I shall look at Opinion 2/13, trying to emphasize how its legal reasoning is quite similar to that employed by the CJEU in Kadi I. At the same time, although the techniques used in the legal reasoning are comparable, the outcome, in terms of impact over the protection of fundamental rights, is radically different. Finally, some conclusive remarks will be presented.

In order to compare the legal reasoning followed by the CJEU in Kadi I and in Opinion 2/13 I shall insist on the following factors:

1. The key role played by the concept of autonomy in both the decisions;
2. The effort made by the CJEU to underline the continuity between these decisions and its foundational case law;
3. The constitutional jargon employed in the text of these decisions;
4. The identification, in both cases, of an untouchable core of values that may not be jeopardized;
5. The polemical and unilateral (in De Búrca's words "chauvinist and parochial"¹) spirit of these decisions.

2. Building Identity: Definition and Identification

According to Gattini Kadi I² would be "a direct, if late, offspring of the Van Gend en Loos³ and Costa/Enel jurisprudence"⁴. Starting from this idea this section aims to make a comparison between Van Gend en Loos and Kadi II⁵, taken as emblematic of two different stages of the EU constitutionalisation process. The connecting thread between the two cases is represented by the idea of autonomy of a legal order, constructed in two different manners by the Court of Justice⁶, and by the attention paid to the "individual", conceived as the holder of a set of rights stemming from European sources.

However, while in Van Gend en Loos the idea of autonomy was used to construct the narrative of the *sui generis* nature of the Community legal order, in Kadi autonomy was employed to justify the intervention of the CJEU to protect some fundamental goods belonging to the EU fundamental core, even in cases of

¹ G. de Búrca *The European Court of Justice and the International Legal Order After Kadi*, 51 Harv. Int'l L.J. 1 (2010).

² Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2005] ECR, II-3649.

³ Case 26/62, *Van Gend en Loos* [1963] ECR 3.

⁴ A. Gattini, *Joined Cases C-402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, judgment of the Grand Chamber of 3 September 2008*, 46 Comm. Mkt. L. Rev., 213 (2009), 224.

⁵ Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council, United Kingdom v Yassin Abdullah Kadi*, available at: www.curia.europa.it

⁶ On the principle of autonomy of EU law see R. Barents, *The Autonomy of Community Law* (2004).

unclear jurisdiction of the Court. In order to develop a comparison between these two decisions, this chapter is based on the distinction between *definition* and *identification*. “Definition” comes from the Latin word *finis* (border, boundary) and refers to the act of making something distinct from something else, constructing, this way, identity in a negative manner and emphasizing what makes a subject different from the interlocutor (according to the logic “I recognize myself as other than you”).

One could describe this concept through the image of the “wall-identity”- frequently employed by scholars in identity studies-, whereas the other crucial step, consisting of the positive identification of some common elements through a moment of self-reflection, has been described with the formula “mirror-identity”⁷. Both “definition” (corresponding to the “wall-identify” moment) and “identification” (corresponding to the “mirror-identity” phase) are classical in any process of identity-building. These two metaphors describe any kind of identity-building process, but they can be very helpful to study the recent evolution of the case law of the Court of Justice. The Court seems to be eager to clarify which elements make its legal system different from other forms of public international law, thus completing the revolution started in Van Gend en Loos. These elements only

⁷ F. Cerutti, *Political Identity and Conflict: A Comparison of Definitions*, in F. Cerutti and R. Ragonieri (eds.), *Identities and Conflicts* (2001). “Furio Cerruti has, in a text dealing with group identities and political identities, suggested two metaphorical concepts that can be used as analytical tools: the mirror-identity and the wall-identity. The mirror identity is dependent on the values, normative principles, life forms and life styles, within which a group recognises itself. This process essentially consists of the group members recognising or mirroring themselves in those values, and through this mirroring they form their image as a group ‘Self’, as something that gives sense to their behaviour as a group. The mirror identity creates a ‘we’ but it does not create an ‘other’. The wall-identity, on the other hand, is more ambivalent. A wall gives support; it gives consistency to a group, preventing disintegration in times of political or social crises. A wall is also enclosing; it separates the group from other groups; it efficiently shuts out the Other. Which of the two walls will dominate or prevail depends on the wall’s constitutive elements (universal integrative or self centred-exclusive) as well as on the trials (e.g. existential or political threats) to which the group is subjected”, K.G. Hammarlund, *Between the Mirror and the Wall: Boundary and Identity in Peter Weiss’ Novel Die Ästhetik des Widerstands*, in K.G. Hammarlund (ed.), *Borders as Experience* (2009), 117. From a constitutional perspective see also M. Rosenfeld, *The Identity of the Constitutional Subject* (2009).

partially correspond to those listed in Art. 2 TEU, since that provision includes values shared by the EU and its member States (as the Union is based on them, and they are “common to the Member States”⁸). In other words, Art. 2 does not exhaust the set of elements which compose the EU constitutional identity, since some of them can be seen as exclusive to the EU and thus not shared with the member States. This means that the Court of Justice plays a role in adding or making explicit the other elements of the supranational identity, and this intuition justifies the attention paid to its case law in this article. When trying to apply this dichotomy to the case law of the CJEU one could say that in a first moment the Luxembourg Court clarified what “Community law is not”, while in a second moment it tried to show what “Community law” is by means of some elements that are treated as an “indicator” of its speciality, because they are supposed to belong to its unchangeable core. According to this reading, *Van Gend en Loos* was on the definition of the Community legal order as *sui generis* and autonomous, while *Kadi* was more on the identification of the untouchable core of this special legal order⁹.

Indeed, *Van Gend en Loos*, *Costa/Enel* and many other decisions of the foundational period marked the existence of a difference (by the means of a kind of *actio finium regundorum*), but they did not clarify the “content” of such a special legal order. This happened later, when the CJEU progressively paid attention to fundamental rights issues, conceiving the constitutionalisation process no longer as a mere shift from the categories of public international law to something else (either expressly definable as constitutional or not), but also as a legal phenomenon characterised by some principles aimed at protecting fundamental

⁸ Art. 2 TEU: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

⁹ For a similar point see: D. Sarmiento, *The EU’s Constitutional Core*, in A. Saiz Arnaiz and C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration* (2013). N. Lavranos, *Revisiting Article 307 EC: The untouchable core of fundamental European constitutional law values*, in F. Fontanelli, G. Martinico and P. Carrozza (eds.), *Shaping rule of law through dialogue: international and supranational experiences* (2010).

goods, like human rights. This way the Court of Justice filled the empty and ideological box of autonomy. An evidence of this can be also found in the language employed by the Court in these two decisions.

Although scholars normally refer to Van Gend as a decision of “constitutional” relevance, a closer look at its text reveals that the label “constitutional” was not in the text of the decision. On the contrary, on that occasion the reference to international law came with no sign of a constitutional vocabulary. In fact, the Court of Justice used a much more ambiguous formulation to separate the destiny of its own community from that of the other international organisations, since it described the system of the Treaties as “a new legal order of international law for the benefit of which the states have limited their sovereign rights”¹⁰. As I shall try to underline, while, originally, the doctrine of autonomy did not need the constitutional language, more recently the constitutional terminology has represented an important ally used by the Court of Justice to reaffirm the *sui generis* nature of EU law.

When commenting on these lines Franz Mayer argued that: “The formula used by the Court to describe the European construct, however, has evolved over the years, replacing the reference to international law with a reference to constitutional law”¹¹. In other words, the constitutional “vocabulary” did not come (at least immediately) together with the ideology of autonomy¹². This ambiguity (neither fully international nor fully constitutional) is at the essence of the *sui generis* narrative of supranational law and was probably unintended at that time. Yet, it has thrived over the years also for strategic reasons, to afford the Court an escape from the straightjacket categories of public international law and, at the same time, spare it from being subject to the laws of the Member States¹³. However, in Van Gend en

¹⁰ Case 26/62, Van Gend en Loos [1963] ECR 3

¹¹ F. Mayer, *Van Gend en Loos: The Foundation of a Community of Law*, in M. Poiares Maduro and L. Azoulai (eds.) *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (2010), 20.

¹² D. Curtin, *The Shaping of a European Constitution and the 1996 IGC: Flexibility as a Key Paradigm?*, 50 *Aussenwirtschaft* 237 (1995).

¹³ On this process see M. Avbelj, *The Pitfalls of (Comparative) Constitutionalism for European Integration*, Eric Stein Working Paper (2008), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334216.

Loos, the Luxembourg Court proclaimed the autonomy of Community law, but did not exhaust the revolutionary moment.

As Mayer again pointed out, this concept was not defined in an isolated moment by the CJEU. This has happened over time, through a long series of decisions: for instance in *Costa/Enel* the Court slightly changed the terminology, by describing Community law in the following terms: "By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply"¹⁴. Going even beyond, in *Les Verts*, it finally employed the constitutional language: "It must first be emphasized in this regard that the European economic community is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty"¹⁵. However, from the beginning many authors have described *Van Gend en Loos* as characterised by a constitutional afflatus¹⁶ and there is no doubt that, because of this impact over the history of EU law, this decision can be defined as foundational and, therefore, constitutional in the etymological sense of the word (constitution from *constituere* = to found, to establish), despite the absence of a constitutional terminology.

In order to solve this terminological *impasse*, it is maybe useful to recall that "constitutionalisation" has traditionally been used in two ways by EU law scholars. Normally by the formula "constitutionalization" of the EU legal order, authors¹⁷ mean the progressive shift of Community law from the perspective of an international organisation to that of a (quasi) federal entity. To this aim, the idea of direct effect (*Van Gend en Loos*) and primacy (*Costa/Enel*) have been crucial in "federalising"

¹⁴ Case 6/64, *Costa/Enel* [1964] ECR, 1141.

¹⁵ Case 294/83, *Parti Ecologiste "Les Verts" v Parliament* [1986] ECR 1365.

¹⁶ D. Halberstam, *Pluralism in Marbury and Van Gend*, in M. Poirares Maduro and L. Azoulai, *The past and the future*, cit. at 11.

¹⁷ For example, M. Cartabia and J.H.H. Weiler, *L'Italia in Europa* (2000), 73. About the ambiguity of the notion of constitutionalisation in EC/EU Law see F. Snyder, *The unfinished constitution of the European Union*, in J.H.H. Weiler and M. Wind (eds.), *European constitutionalism beyond the state* (2003).

Community law, making national judges the key actors of this process of integration.¹⁸

However, “constitutionalisation” in the EU context might be also employed to refer to the progressive “humanisation” (i.e. the progressive affirmation of the human rights issue at supranational level) of the law of the common market.¹⁹

Of course these two meanings are related²⁰ and connected to a broader process of polity building (even in terms of politicization of the Union), but it is possible to say that the foundational jurisprudence of autonomy implies a move in constitutional terms understood *lato sensu*, while the post-Internationale Handelsgesellschaft²¹ case law implies a move in constitutional terms understood *stricto sensu*.

3. The Kadi Saga

As we saw, the *sui generis* narrative created by foundational decisions like Van Gend en Loos and Costa responds to the need for a demarcation from the rest of international law without the need to further label (at least, not immediately) its nature as “constitutional” and without the effort to determine the very peculiar content of this new legal order. As said, I shall look at the Kadi saga - paying particular attention to Kadi I of the CJEU - in light of five factors (the way in which autonomy was used by the CJEU; the continuity between these decisions and its foundational case law; the constitutional jargon employed by the Court; the identification, in both cases, of an untouchable core of values; the polemical and unilateral approach endorsed by the CJEU). Almost unanimously, Kadi I has been seen as a perfect representation of the jurisprudential boldness of the CJEU, as it was very rich in

¹⁸ On this idea of constitutionalisation as federalisation see E. Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 Am. J. Int'l. L. 1 (1981); P. Hay, *Federalism and Supranational Organizations. Patterns for New Legal Structures* (1966); P. Hay, *Supremacy of Community Law in National Courts. A Progress Report on Referrals Under the EEC Treaty*, 16 Am. J. Comp. L. 524 (1968).

¹⁹ On this process, see K. Lenaerts, *Fundamental rights in the European Union*, 25 Eur. L. Rev. 575 (2000).

²⁰ J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L.J. 2403 (1991)

²¹ Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.

“constitutional intimations”²² and “constitutional symbolism”²³. Kadi I also recalled the idea of a community based on the rule of law and, more concretely, that of a complete and coherent system of judicial protection²⁴ (all elements retaken from the *Les Verts* doctrine). These references marked the continuity with the jurisprudence of the foundation of Community law²⁵, in particular with *Van Gend en Loos*, as Gattini and others aptly pointed out:

“On the one hand, one cannot but welcome the unbending commitment of the European Court of Justice to the respect of fundamental human rights, but on the other hand the relatively high price, in terms of coherence and unity of the international legal system, that had to be paid in order to arrive at the conclusion of the invalidity of the contested Regulation, is worrying. Of course, one might argue that the ECJ was all too willing to pay that price, and that it could have even felt it as no price at all, but as a golden opportunity to bring a step further the proclaimed ‘constitutionalization’ and autonomy of the Community legal system. The Kadi judgment is a direct, if late, offspring of the *van Gend en Loos* and *Costa/Enel* jurisprudence, and, without wanting to sound too rhetorical, one might even venture to say that similarly to those decisions it will be a landmark in the history of EC law”.²⁶

In this section I shall focus on the Kadi saga by showing its “added value” in the history of EU law.

The Kadi saga responds to a double logic: on the one hand, it develops from a strong perception of EU law autonomy, while on the other hand it reflects the idea of the existence of a mature system in terms of fundamental rights protection. These ideas of autonomy and maturity have been used by the CJEU as a fundamental premise to justify its intervention in a rather sensitive case from a legal (and geopolitical) point of view. Indeed, at first sight, the Kadi saga seems to feature a progressive “appropriation” of a question that was originally presented as an

²² N. Walker, *Opening or Closure? The Constitutional Intimations of the ECJ*, in L. Azoulai and M. Poiares Maduro, *The past and the future*, cit. at 11, 333.

²³ N. Walker, *Opening or Closure?*, cit. at 22, 333

²⁴ See the contributions by K. Lenaerts, *The Basic Constitutional Charter of a Community Based on the Rule of Law*; J. P. Jacqu e, *Les Verts v The European Parliament*; A. Alemanno, *What Has Been, and What Could Be, Thirty Years after Les Verts/European Parliament*, all included in L. Azoulai and M. Poiares Maduro, *The past and the future*, cit. at 11.

²⁵ F. Mayer, *Van Gend en Loos: The Foundation of a Community of Law*, L. Azoulai and M. Poiares Maduro, *The past and the future*, cit. at 11.

²⁶ A. Gattini, *Joined Cases*, cit. at 4, 224.

issue regulated by an external set of norms belonging to public international law (i.e. one can perceive in this saga the progressive efforts made by the Court of Justice at “internalising” the legal questions at stake)²⁷.

In *Kadi I* the former Court of First Instance admitted the possibility of reviewing the regulation that implemented the UN resolution only in case of violation of *jus cogens*, that is to say a *corpus* of norms originally alien to the body of EU/ law²⁸. This was a consequence of the approach chosen by the Court of First Instance, which adopted as point of reference a set of norms that do not belong to the EU legal order understood *stricto sensu*, i.e. norms of international law. On the contrary, moving to the Opinion of Advocate General Maduro in *Kadi II*²⁹, one can realise that his point of departure was very different, since he focused on stressing the potential violation by the UN resolution of some norms peculiar to EU law. By following a similar line *Kadi I* of the Court of Justice constantly referred to the autonomy of EU law³⁰,

²⁷ For a similar approach see: M. Cremona, *European Law and international law after Kadi*, speech given in Bristol University on 3 November 2008, available at: http://denning.law.ox.ac.uk/news/events_files/European_Law_and_international_law_after_Kadi.pdf

²⁸ Case T-315/01 *Kadi v Council and Commission*, [2005] ECR II-3649, par. 226: “None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible”. See also par. 213-215.

²⁹ Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, Opinion of Advocate General Poiares Maduro [2008] ECR I-6351, especially at par. 34: “The implication that the present case concerns a ‘political question’, in respect of which even the most humble degree of judicial interference would be inappropriate, is, in my view, untenable. The claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights. This does not detract from the importance of the interest in maintaining international peace and security; it simply means that it remains the duty of the courts to assess the lawfulness of measures that may conflict with other interests that are equally of great importance and with the protection of which the courts are entrusted”.

³⁰ See for instance par. 282 of *Kadi I* of the Court of Justice: “It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive

but the Court went even further on that occasion. Indeed, the issue of the autonomy of EU law was more emphasised, as the Court neglected what was an essential step in the Opinion of the Advocate General: the analysis of the question from the viewpoint of former Art. 307 TEC³¹.

Starting from former Art. 307 TEC, the Advocate General in *Kadi I* attempted to stress that no obligations envisaged therein can be interpreted “so as to silence the general principles of Community law and deprive individuals of their fundamental rights”³². Coherently with this reconstruction, it was fundamental to find the right way for the European order to interact with the international legal order’s obligations and judges.

It is not a coincidence that the Advocate General devoted several lines of his Opinion to recall the importance of judicial deference in the relationship between the Court of Justice and other judges.

This deference, though, must find a limit in the possible risk for the fundamental values of the EU legal order: “Consequently, in situations where the Community’s fundamental values are in the balance, the Court may be required to reassess, and possibly

jurisdiction conferred on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community (see, to that effect, Opinion 1/91 [1991] ECR I-6079, paragraphs 35 and 71, and Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraph 123 and case-law cited)”.

³¹ Former Art. 307 TEC (now Art. 351 TFEU) read: “The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States”. On this see N. Lavranos, *Revisiting Article 307 EC*, cit. at 9.

³² Opinion of Advocate General Poiares Maduro, cit. at 29, par. 34.

annul, measures adopted by the Community institutions, even when those measures reflect the wishes of the Security Council"³³.

In the Advocate General's own words, these values represent "the constitutional framework created by the Treaty"³⁴. In its reasoning, the CJEU seemed to pay more attention to the peculiar nature of the EU legal order than to its relationship with international law. This can be noticed by looking at the use of the idea of autonomy employed in the decision. Thus, one could say that the Court of Justice's initial assumptions were more unilateral, since they were not centred around the terms of the relationship between international and EU law, but rather around the constitutional and peculiar nature of EU law. This is also proved by the fact that the Court of Justice missed the opportunity to clarify the scope of former Art. 307, for example, specifying "its position on the consequences if the 'appropriate steps' of Member States remain unsuccessful"³⁵.

In sum, in *Kadi I* the Court of Justice disregarded former Art. 307 TEC following a precise argumentative strategy: first it contextualised the question of the relationship between international and Community law within the boundaries of its own legal order, second, it gave the question an "internal answer" by insisting on the values of its own "order".

This also explains why the *Kadi* saga is a *summa* of many of the traditional arguments employed in the "Classics" of the Court of Justice³⁶ (*Van Gend en Loos*, *Costa/Enel*³⁷, *Les Verts*³⁸, *Opinion 1/91*³⁹ etc.). I think that *Kadi II*⁴⁰ can be read coherently with *Kadi I* of the CJEU, although the two decisions differ for some reasons,

³³ Opinion of Advocate General Pöiares Maduro, cit. at 29, par. 44.

³⁴ Moreover: "The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community", Opinion of Advocate General Pöiares Maduro, cit. at 29, par. 24.

³⁵ A. Gattini, *Joined Cases*, cit. at 4, 235.

³⁶ L. Azoulay and M. Pöiares Maduro, *The past and the future*, cit. at 11.

³⁷ Case 6/64, cit. at 14.

³⁸ Case 294/83, cit. at 15.

³⁹ *Opinion 1/91*, Draft agreement relating to the creation of the European Economic Area [1991] ECR I-6079.

⁴⁰ *Joined Cases C-584/10 P, C-593/10 P and C-595/10 P*, cit. at 5.

first of all for the language employed by the Luxembourg Court in Kadi II.

Indeed, it is evident from initial analysis that Kadi II does not present the powerful rhetoric contained in Kadi I. The adjective “constitutional” was employed 14 times in Kadi I (including the summary of the judgment), while “constitutional” is recalled just twice in Kadi II and it should be stressed that in the first of these 2 citations⁴¹ the CJEU was summing up the decision held in 2008. Another evident difference in the terminology employed by the CJEU is the absence of the word “autonomy” in Kadi II. These remarks might lead to considering Kadi II as different from Kadi I, but when looking at the substance of the decision it is possible to find strong continuity⁴².

In Kadi II, the Court rejected the argument according to which the challenged Regulation enjoyed immunity from judicial review. It did so relying on its previous decision and borrowing the same reasoning, since “there has been no change in those factors which could justify reconsideration of that position” (par. 66). As a consequence, all EU acts must be reviewed for compliance with fundamental rights (par. 67). It also confirmed that the intensity of the review, in principle, must be full, thus standing by its precedent. The CJEU also showed not to suffer from the pressure coming from an international context and academic circles, as it was not afraid of the possible impact of this decision over similar delisting cases. It constructed the controversy as a “domestic” case for at least two reasons: firstly, because the issue concerned an EU act, secondly, because it was about a possible violation of some fundamental rights protected by the EU legal order.

Thus, the CJEU confirmed the approach followed in Kadi I and the idea of autonomy stemming from that decision. In conclusion, the first way to read Kadi II by the CJEU is therefore the asymmetry existing between the form of this decision (which seems to abandon the constitutional language used in Kadi I) and the substance of the judgment which maintains its approach towards public international law. Despite the different

⁴¹Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, cit. at 5, par. 21-22.

⁴² *Contra* see N. Lavranos and M. Vatsov, *Kadi II: Backtracking from Kadi I?*, in M. Avbelj, F. Fontanelli and G. Martinico (eds.), *Kadi on Trial. A multifaceted analysis of the Kadi judgment* (2014).

terminology employed, if one goes beyond form and looks at the substance one can see that the confirmation of the idea “in principle full review” confirms the strong claims of Kadi I.

In order to do so, the CJEU even defended the core of the decision taken by the General Court (former Court of First Instance) in Kadi II⁴³. On that occasion the General Court had accepted to revise its previous decision and to comply with the decision of the Court of Justice, serving as a “loyal soldier”, despite the many doubts it had on the decision of the CJEU⁴⁴.

This is evident in those passages where the General Court wanted to recall the decisions of other courts or tribunals which had shared the original position of the former Court of First Instance⁴⁵. In Kadi II the CJEU defended the core of the decision of the General Court endorsing the idea according to which the EU presents an untouchable nucleus of principles that may not be jeopardised by international law, not even by the UN Charter⁴⁶.

4. Reading the Kadi saga in context: the CJEU between definition and identification

In this section, I seek to show that Kadi II belongs to a new generation of decisions in which the CJEU does not merely

⁴³ Case T-85/09 *Kadi v Commission* [2010] ECR II-5177.

⁴⁴ Case T-85/09, cit. at 43, par. 121.

⁴⁵“It should be observed, as an ancillary point, that, although some higher national courts have adopted a rather similar approach to that taken by this Court in its judgment in *Kadi* (see, to that effect, the decision of the Tribunal fédéral de Lausanne (Switzerland) of 14 November 2007 in Case 1A.45/2007 *Youssef Mustapha Nada v Secrétariat d’État pour l’Économie* and the judgment of the House of Lords (United Kingdom) in *Al-Jedda v. Secretary of State for Defence* [2007] UKHL 58, which is currently the subject of an action pending before the European Court of Human Rights (Case No 227021/08 *Al-Jedda v United Kingdom*), others have tended to follow the approach taken by the Court of Justice, holding the Sanctions Committee’s system of designation to be incompatible with the fundamental right to effective review before an independent and impartial court (see, to that effect, the judgment of the Federal Court of Canada of 4 June 2009 in *Abdelrazik v Canada (Minister of Foreign Affairs)* 2009 FC 580, cited at paragraph 69 of the UK Supreme Court judgment in *Ahmed and Others*)”, Case T-85/09, cit. at 43, par. 122.

⁴⁶ At the same time, the CJEU recognised that the General Court had erred in law in pa.138 to 140 and 142 to 149 but also confirmed that these errors did not vitiate the validity of the decision under appeal.

proclaim the EU law autonomy from both national and international laws, but sets out to identify a constitutional core of principles whose violation justifies its intervention even in cases of dubious jurisdiction.

As Rosas and Armati pointed out: “in Kadi, the ECJ confirmed and made more explicit a tendency discernible in previous case-law according to which the EU constitutional order consists of some core principles which may prevail over provisions of the Treaties and thus of written primary law”.⁴⁷ This is evident from the wording of Kadi I, whereby the Court of Justice maintained that: “Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, which include the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union” (par. 304).

When doing so, the Court of Justice acts as many Constitutional Courts do: in fact, in these cases the CJEU selects a group of principles which may not be jeopardised because their violation would imply the denial of the axiological bases on which the EU legal order is founded. At national level, constitutional law scholars call this set of principles in different ways – “Republican form” (“*forma repubblicana*”⁴⁸) in Italy, eternity clause (“*Ewigkeitsklausel*”⁴⁹) in Germany⁵⁰ -, but in the concrete task of identifying the principles that may be traced back to such an untouchable core a primary role has always been played by constitutional judges. Thus, it is no coincidence that some interesting contributions in this field come from research focusing on amendments in EU law⁵¹.

⁴⁷ A. Rosas and L. Armati, *EU Constitutional Law. An Introduction* (2011), 43.

⁴⁸ Art. 139 of the Italian Constitution.

⁴⁹ Art. 79 par. (3) of the Basic Law (*Grundgesetz-GG*) for the Federal Republic of Germany.

⁵⁰ For an overview of these clauses see F. Palermo, *La forma di stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sovranazionale* (2005).

⁵¹ R. Passchier and M. Stremler, *Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision*, 5 *Cambridge Journal of International and Comparative Law* forthcoming, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561209

This has happened with particular regard to human rights, whose language has been codified by national constitutions more or less since the end of World War II.

This codification of rights has made those norms aimed at protecting rights constitutional principles, and the rights protected by such constitutional principles have become fundamental rights, i.e. meta-norms of many contemporary legal orders. “Fundamental rights are to be understood as encompassing those selective and substantive criteria which, together with others, enable judgments of ‘validity’: the recognition of belonging to a legal order, legitimacy, compatibility of institutional behaviour and norms within a given legal-political system”⁵². Other evidences of this approach may be found in the case law of the CJEU. For instance, in some cases the CJEU has acknowledged the existence of a group of rights that cannot be subjected to any form of balancing, i.e. absolute rights. An example of this way to proceed is Schmidberger⁵³ where the Court of Justice distinguished between two groups of fundamental rights: the absolute rights (which admit no restrictions) and other fundamental rights. Concerning the second category of rights, the Court of Justice admitted the necessity to evaluate, through a case-by-case approach, the proportionality of their possible restrictions⁵⁴. By doing so, the Luxembourg Court paved the way for the creation of a hierarchy of principles (and rights).

⁵² G. Palombella, *From Human Rights to Fundamental Rights. Consequences of a conceptual distinction*, EUI Working Paper LAW No. 2006/34 (2006), available at: <http://cadmus.eui.eu/bitstream/handle/1814/6400/LAW-2006-34.pdf;jsessionid=57A331FDFF3245D221C04E57E8469D36?sequence=1>

⁵³ Case C-112/00 Schmidberger [2003] ECR I-5659.

⁵⁴ “Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed”, case C-112/00, cit. at 53, par. 80.

Many scholars were sure that another decision like that was hardly possible but the CJEU reiterated its message to the international community, confirming the boldness of the Court⁵⁵. This leads me to my last point. Kadi I (but the same applies to Kadi II) has been accused of being conducive to systemic conflicts, of being “blind” from a diplomatic point of view.⁵⁶ However, when accepting the point that in Kadi I and II the CJEU assumed a constitutional approach, these considerations lose appeal and the conclusion repeated by the CJEU becomes coherent with the premises of the decision (the existence of a strong axiological core in EU law). In this sense one should look at Kadi II as an emblematic judgement that goes beyond the particular situation of Mr. Kadi. A confirmation is given by the choice of the Court to face the question frontally in spite of the occurred delisting of *Kadi*⁵⁷ and of the very different approach suggested by Advocate General Bot. It is now to be seen whether Kadi I and II will influence the long list of pending cases in this field, but probably the CJEU thought it necessary to send a strong message to the UN, just to make clear the bases of a future convergence. It would not be the first time in the history of the EU and even on a comparative level it is possible to detect similar decisions rendered by domestic courts. Especially in federal systems, domestic courts have insisted on the need to preserve constitutional rights at the domestic level in order to “justify” the breach of some international obligations (like in Kadi)⁵⁸ allowed

⁵⁵ Compare, for a different approach, the decision of the CJEU with the Opinion given by AG Bot to Kadi II.

⁵⁶ On this debate see J. Larik, *Two Ships in the Night or in the Same Boat Together: How the ECJ Squared the Circle and Foreshadowed Lisbon in its Kadi Judgment*, 13 Yearbook of Polish Eur. St. 149 (2010).

⁵⁷ One might argue that the Court has deliberately chosen not to exercise its discretionary power to discontinue the case for having become “devoid of purpose” in light of Art. 149 of the Rules of Procedure for instance. On this see the considerations made by F. Fontanelli, *Kadiou: connecting the dots – from Resolution 1267 to Judgment C-584/10 P: the coming of age of judicial review*, in M. Avbelj, F. Fontanelli and G. Martinico (eds.), *Kadi on Trial*, cit. at. 42.

⁵⁸ For instance Madras High Court, *Novartis v. Union of India & Others.*, Judgment of 6 Aug. 2007, available at: http://judis.nic.in/judis_chennai/qrydispfree.aspx?filename=11121: “We have borne in mind the object which the Amending Act wanted to achieve namely, [...] to provide easy access to the citizens of this country to life saving drugs and to discharge the [legislature’s] Constitutional obligation of providing good

the federal intervention in a State domain (like in Rottmann⁵⁹ or Zambrano⁶⁰) on the basis of the necessary preservation of those homogeneity clauses through which the federal constitution limits the fundamental charters of its Member States ⁶¹.

5. Opinion 2/13: The Problematic Relationship Between Autonomy and Fundamental Rights

Opinion 2/13 was triggered by the European Commission in light of Art. 218.11 TFEU⁶². On that occasion the CJEU concluded that: “The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms”. With reference to the consequences of this Opinion, Art. 218.11 TFEU reads that: “Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties [of the EU] are revised”. Other authors have tried to present some additional options to overcome this *impasse*, suggesting the possibility of interpretative

health care to its [sic] citizens.” (par.19)”. On this see E. Benvenisti and G.W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 *European Journal of International Law* 72 (2009). More recently (on 1 April 2013) even the Supreme Court of India ruled on the case, available at: <http://supremecourtfindia.nic.in/outtoday/patent.pdf>.

⁵⁹ Case C-135/08 Rottmann [2010] ECR I-01449.

⁶⁰ Case C-34/09 Ruiz Zambrano, available at: www.curia.europa.eu. For a parallelism between Zambrano and Kadi see D. Sarmiento, *The EU's Constitutional Core*, cit. at 9 and G. Martinico and A. M. Russo, *Is the European Union a Militant Democracy? The Perspective of the Court of Justice in Zambrano and Kadi*, 21 *Eur. Publ. L.* 659 (2015).

⁶¹ For instance Art. 28 of the Basic Law for the Federal Republic of Germany. On this see F. Palermo, *La forma di stato dell'Unione europea*, cit. at 50.

⁶² Art. 218.11 TFEU: “A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised”.

declarations⁶³ or, even, the adoption of a notwithstanding protocol (hypothesis which seems to me very problematic⁶⁴). There is no need to recall the details of this very long Opinion⁶⁵, whose essence can be found in the last eight to nine page, as Douglas Scott pointed out. Rather, I shall focus on the legal reasoning followed by the CJEU. As we will see the reasoning of the Court resembles that of Kadi I⁶⁶.

In a nutshell, the CJEU concluded that the Agreement conflicted with the EU Treaties for the following reasons:

1. Relationship between Art. 53 of the Charter of Fundamental

⁶³ P. J. Kuijper, *Reaction to Leonard Besselink's*, ACELG Blog (2015), available at <https://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks%E2%80%99s-acelg-blog>

⁶⁴L. Besselink, *Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13* (2014), available at: <http://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213-2/> "Seeking inspiration in clauses of national constitutions of some of the Member States that provide a constitutional way out of constitutional divergences for the sake of further European integration, I propose solving the matter with a 'Notwithstanding Protocol'. It should read: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014.' In this manner the Treaties have been amended fully in accordance with the requirements of the Court as well as Article 218 (11) of the TFEU. All of the several objections of the Court are covered by such a Protocol".

⁶⁵Opinion 2/13, available at: www.curia.europa.eu. On Opinion 2/13 see, at least, R. Alonso Garcia, *Análisis crítico del veto judicial de la UE al CEDH en el Dictamen 2/13, de 18 de diciembre de 2014*, WP IDEIR 26 (2015), available at: <https://www.ucm.es/data/cont/docs/595-2015-11-25-Binder1.pdf>; F. Fabbrini and J. Larik, *The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights*, 35 Yearbook of European Law 1 (2016).

⁶⁶"Much of the Court's Opinion considers the arguments made by EU Institutions and Member States. Indeed, only just over one quarter of the judgement, about 8 web pages, actually sets out the Court's own position on compatibility of accession with EU law", S. Douglas-Scott, *Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice* (2014), available at: <http://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/>

Rights⁶⁷ and Art. 53 of the ECHR⁶⁸. In this sense, the Agreement was not compatible with the EU Treaties because “there is no provision in the agreement envisaged to ensure such coordination”⁶⁹.

2. Principle of mutual trust⁷⁰, being the accession, as designed by the Agreement, a menace for the equilibrium inspiring the European horizontal cooperation.
3. Protocol n. 16 to the ECHR, which is not part of the Agreement but which could call into question the direct relationship between the CJEU and national judges⁷¹.

⁶⁷ Art. 53 CFREU: “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions”.

⁶⁸ Art. 53 ECHR: “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”.

⁶⁹ Opinion 2/13, cit. at 65, par. 190.

⁷⁰ “In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law. However, the agreement envisaged contains no provision to prevent such a development”, Opinion 2/13 cit. at 65, par. 194-195.

⁷¹ “In the third place, it must be pointed out that Protocol No 16 permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto, even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU. It is indeed the case that the agreement envisaged does not provide for the accession of the EU as such to Protocol No 16 and that the latter was signed on 2 October 2013, that is to say, after the agreement reached by the negotiators in relation to the draft accession instruments, namely on 5 April 2013; nevertheless, since the ECHR would form an integral part of EU law, the mechanism established by that protocol could – notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR – affect the autonomy and effectiveness of the preliminary ruling

4. The possibility of bypassing Art. 344 TFEU: there is the risk that Member States can resort to the ECtHR by bringing to Strasbourg issues connected with EU law or with a potential impact over the interpretation and validity of EU law⁷².
5. The corresponding mechanism which might lead to the breach of the distribution of competences between the Union and its Member States⁷³.

procedure provided for in Article 267 TFEU. In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties. By failing to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure”, Opinion 2/13, cit. at 65, par. 196-199.

⁷² “Consequently, the fact that Member States or the EU are able to submit an application to the ECtHR is liable in itself to undermine the objective of Article 344 TFEU and, moreover, goes against the very nature of EU law, which, as noted in paragraph 193 of this Opinion, requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law. In those circumstances, only the express exclusion of the ECtHR’s jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope *ratione materiae* of EU law would be compatible with Article 344 TFEU”, Opinion 2/13, cit. at 65, par. 212-213.

⁷³ “A decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission. Accordingly, to permit the ECtHR to adopt such a decision would also risk adversely affecting the division of powers between the EU and its Member States. That conclusion is not affected by the fact that the ECtHR would have to give its decision solely on the basis of the reasons given by the respondent and the co-respondent. Contrary to the submissions of some of the Member States that participated in the present procedure and of the Commission, it is not clear from reading Article 3(7) of the draft agreement and paragraph 62 of the draft explanatory report that the reasons to be given by the respondent and co-respondent must be given by them jointly. In any event, even it is assumed that a request for the apportionment of responsibility is based on an agreement between the co-

6. The so-called “prior intervention”, established in order to preserve the CJEU’s monopoly over EU law norms. This mechanism, at the end of the day, was perceived as dangerous for the interpretative monopoly of the CJEU, since it might give the ECtHR the possibility of interpreting the case law of the Luxembourg Court, and allowing, this way, Strasbourg to have a sort of “meta-interpretative” function (as said in par. 239: “To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice”). Moreover, the Agreement also “excludes the possibility of bringing a matter before the Court of Justice in order for it to rule on a question of interpretation of secondary law by means of the prior involvement procedure”⁷⁴.
7. Jurisdiction of the ECtHR in the area of the Common

respondent and the respondent, that in itself would not be sufficient to rule out any adverse effect on the autonomy of EU law. The question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules. To permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter’s exclusive jurisdiction. Having regard to the foregoing, it must be held that the arrangements for the operation of the co-respondent mechanism laid down by the agreement envisaged do not ensure that the specific characteristics of the EU and EU law are preserved”, Opinion 2/13, cit. at 65, par. 230-235.

⁷⁴ Opinion 2/13, par. 243. “The interpretation of a provision of EU law, including of secondary law, requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation. If the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law. Accordingly, limiting the scope of the prior involvement procedure, in the case of secondary law, solely to questions of validity adversely affects the competences of the EU and the powers of the Court of Justice in that it does not allow the Court to provide a definitive interpretation of secondary law in the light of the rights guaranteed by the ECHR”, Opinion 2/13, cit. at 65, par. 245-247.

Foreign and Security Policy. Here one can clearly see the reluctance of the CJEU which does not accept that the ECtHR (a body which is external to the EU judiciary) can have jurisdiction in an area belonging to EU law but where the Luxembourg Court itself does not have competence⁷⁵.

To understand Opinion 2/13 it is necessary to look at the premises used by the CJEU from the very first lines of its text. Like in *Kadi*, in this Opinion the CJEU makes reference to its most important decisions, trying to emphasize the continuity between the Opinion and its glorious jurisprudence: from *Van Gend en Loos* to *Kadi*, also recalling some recent (but already well known) decisions, like *Melki*⁷⁶ and *Melloni*⁷⁷, among others. In this sense, there is a decision which is crucial in order to get the logic followed by the CJEU: *Haegeman*⁷⁸.

According to the *Haegeman* doctrine, the agreements concluded by the European Communities' institutions (and now by the EU) benefit from a kind of "automatic treaty incorporation"⁷⁹ into EU law, since the provisions of these agreements "form an integral part of Community law"⁸⁰. This mechanism has allowed, over the years, the CJEU to transform itself into the "gatekeeper"⁸¹ of the effects of the international agreements concluded by the EU, giving the Court the possibility of opening or closing the doors of direct effect in EU law. In other words, once these agreements are concluded they are part of the interpretative garden of the Luxembourg Court.

Now, this approach can perhaps work with those international agreements which are not "provided" with an

⁷⁵ "The Court has already had occasion to find that jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU", Opinion 2/13, cit. at 65, par. 256.

⁷⁶ Joint cases C 188/10 and C 189/10 *Melki* [2010] ECR I-5667.

⁷⁷ Case C-399/11 *Melloni*, available at: www.curia.europa.eu

⁷⁸ Case 181/73 *Haegeman* [1974] ECR00449.

⁷⁹ On this see M. Mendez, *The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, 21 *Eur. J. Int'l L.* 83 (2010).

⁸⁰ Case C-181/73 *Haegeman* cit. at 78, par. 5.

⁸¹ F. Snyder, *The gatekeepers: the European courts and WTO law*, 40 *Comm. Mkt. L. Rev.* 313 (2003).

authentic interpreter but actually one of the main features of the ECHR is the presence of an interpreter of the Convention. This perspective explains how the Luxembourg Court has read the issues behind the Accession as a question of judicial politics and why in defending the autonomy of its legal order the CJEU has also protected its interpretative monopoly. It is not the first time, in fact, that the CJEU has presented itself as a jealous judge, worried about not losing the interpretative monopoly of EU law and its direct relationship with national judges⁸².

If seen this way, Opinion 2 is tremendously coherent with its previous case law (Mox Plant, Melki, Melloni) because what the CJEU did was: 1) preventing Member States from using the ECHR and the case law of the ECtHR in order to avoid complying with supranational obligations; 2) preventing the ECtHR from affecting the interpretative monopoly of the CJEU, taking into account the number of corresponding provisions in the Charter of Fundamental Rights and the ECHR; 3) raising some specific points (like that concerning the limited jurisdiction of the CJEU in the area of the Common Foreign and Security Policy, CFSP) that can be connected to the concern of guaranteeing its interpretative monopoly⁸³.

As it did in Kadi I, the CJEU first identified the pillars of its autonomy, considered them as the untouchable core of its legal system, and did not disregard what makes its legal system special. See for instance par. 159 et seq.⁸⁴, where after having recalled what

⁸² See Case C-459/03, *European Commission v. Ireland (Mox Plant)* [2006] ECR I-4635. N. Lavranos, *Jurisdictional Competition. Selected Cases in International and European Law* (2009).

⁸³ Similarly, R. Alonso Garcia, *Análisis crítico del veto judicial*, cit. at 65.

⁸⁴ "Thus, first of all, having provided that the EU is to accede to the ECHR, Article 6(2) TEU makes clear at the outset, in the second sentence, that '[s]uch accession shall not affect the Union's competences as defined in the Treaties'. Next, Protocol No 8 EU, which has the same legal value as the Treaties, provides in particular that the accession agreement is to make provision for preserving the specific characteristics of the EU and EU law and ensure that accession does not affect the competences of the EU or the powers of its institutions, or the situation of Member States in relation to the ECHR, or indeed Article 344 TFEU. Lastly, by the Declaration on Article 6(2) of the Treaty on European Union, the Intergovernmental Conference which adopted the Treaty of Lisbon agreed that accession must be arranged in such a way as to preserve the specific features of EU law", Opinion 2/13, cit. at 65, par. 160-162.

these conditions that the Accession must respect⁸⁵, the CJEU regained the rhetoric of the *sui generis* nature of the EU legal order and then moved to the “specific characteristics arising from the very nature of EU law” (par. 165). The CJEU started by recalling the principle of EU law autonomy, making it the premise of its discourse, then moved to the existence of an untouchable core of principles that may not be jeopardized:

“In particular, as the Court of Justice has noted many times, EU law is characterised by the fact that it stems from an *independent source of law, the Treaties*, by its primacy over the laws of the Member States [...]. These essential characteristics of EU law have given rise to a *structured network of principles, rules and mutually interdependent legal relations* linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’. This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU”⁸⁶.

⁸⁵ Art. 6.2 TEU: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties”. See also Protocol 8 relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms: Art. 1: “The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the “European Convention”) provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention; (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate”. Art. 2: “The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof”. Art. 3: “Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union”.

⁸⁶ Opinion 2/13, cit. at 65, par. 166-168.

In a second moment, and this is what I called “identification” in the first part of this article, the CJEU listed the factors composing this untouchable core:

“That premiss implies and justifies the existence of *mutual trust* between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected. Also at the heart of that legal structure are the *fundamental rights recognised by the Charter* (which, under Article 6(1) TEU, has the same legal value as the Treaties), respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU [...] *The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU* [...]. As regards the structure of the EU, it must be emphasised that not only are the institutions, bodies, offices and agencies of the EU required to respect the Charter but so too are the Member States when they are implementing EU law [...] The pursuit of the EU’s objectives, as set out in Article 3 TEU, is entrusted to a series of *fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy*. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute – each within its specific field and with its own particular characteristics – to the implementation of the process of integration that is the *raison d’être* of the EU itself. Similarly, the Member States are obliged, by reason, *inter alia*, of the *principle of sincere cooperation* set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In addition, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure *fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU*”⁸⁷.

Among these factors, a special role is played by the direct relationship existing between national judges and the Luxembourg Court, thanks to the preliminary ruling mechanism:

“*In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law*. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual’s rights under that law [...]. *In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU*, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the

⁸⁷ Opinion 2/13, cit. at 65, par. 168- 173.

Member States, has the object of securing uniform interpretation of EU law [...], thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties”.

Finally, fundamental rights’ protection is also seen as part of the untouchable core but it does not seem to be premise of the reasoning of the Court. On the contrary fundamental rights - as guaranteed by the EU Charter- are somehow made functional to the EU law architecture as one can infer from the following line:

“Fundamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the constitutional framework referred to in paragraphs 155 to 176 above”⁸⁸.

Like in *Kadi I* one can find in Opinion 2/13 the following key elements in the legal reasoning of the Luxembourg Court: 1) the instrumental use of autonomy; 2) the persistent recalling to its precedents; 3) the emphasis on the existence of an untouchable core of principles; 4) the constitutional jargon and 5) a unilateral and polemical approach. The word autonomy was employed 16 times throughout the text of the Opinion and also the constitutional jargon was recalled by the CJEU without forgetting that *Kadi* was mentioned 5 times.

Perhaps the toughest point made by the CJEU was that concerning its limited jurisdiction in the area of CFSP, since it makes the accession to the ECHR very hard, being necessary to amend the EU Treaties to overcome it and nowadays Member States seem to have other priorities. Moreover this point makes Opinion 2/13 very different from *Kadi* in terms of outcome. While *Kadi*, at the end of the day, made the protection of fundamental rights an essential point of its concept of autonomy, here, between autonomy and possible increase of the fundamental rights protection, the CJEU seem to consider the former as the prevailing interest (although in its decision the protection of fundamental rights is part of the untouchable core identified in par. 169 of the Opinion). This point has been made clear by Kuijper. In his own words:

“All the beautiful words of the Court on this subject cannot hide that here the emperor is naked. The Court has no jurisdiction except in two well-

⁸⁸ Opinion 2/13, cit. at 65, par. 177.

circumscribed cases and that is it. That the Court in Strasbourg will have something to say about upholding fundamental rights in the CFSP can only be welcome news. Just as it has always been welcome news that in countries, where there is no constitutional review of the laws passed by Parliament in the light of the bill of rights (as in the Netherlands), there is at least the Court in Strasbourg that will uphold a minimum level of human rights in these countries. I fail to see why that would not be the case for the CFSP, in a situation where there is no constitutional review in part of CFSP 'law' and why the Court of Justice should not be able to live with that, if the Supreme Courts of some Member States have been able to live with that".⁸⁹

It is impossible not to agree with those lines and not to recognize that, in Opinion 2, the logic "Thou shalt have no other courts before me"⁹⁰ has prevailed unless one does not want to conceive this Opinion as a sort of blackmail to oblige Member States to reinforce the protection of fundamental rights by giving more jurisdiction to the Luxembourg Court.

6. Final Remarks

This article tried to stress the importance of identity in EU law, looking at Kadi and Opinion 2/13. These two important pronouncements of the Luxembourg Court emphasized, once again, the difference between the EU legal system and other international regimes. However, as I argued, these two cases should be seen as emblematic of a recent trend in which the Court seems to be eager to clarify and make explicit some of the elements belonging to the EU untouchable core, thus completing the revolution started in Van Gend en Loos. When doing so it employed some techniques that characterized its legal reasoning, *in primis* the use of the constitutional jargon. This strand of research aims to confirm the importance of constitutional interpretation in this ambit, since the list of values present in art. 2 TEU should not be seen as exhaustive. On the contrary, the values of the EU seem to go beyond that unavoidable basis represented by the letter of the Treaties and they need to be interpreted and elaborated by the Court. We also saw that in forging the core of its constitutional identity, the Court does not refrain from building it

⁸⁹ P. J. Kuijper, *Reaction to*, cit. at 63.

⁹⁰ W. Michl, *Thou shalt have no other courts before me* (2015), available at: <http://verfassungsblog.de/thou-shalt-no-courts/>

in a polemical way, by using conflicts to construct its untouchable core. In this sense, those who criticise Kadi I and II may have forgotten the importance that conflicts have traditionally had in the development of the EU legal order. It is sufficient to think of the genesis of Article 6 of the TEU - codifying the human rights commitment of the EU - to find proof of this.

Indeed, Article 6 was the indirect consequence of a long confrontation between Constitutional Courts and the Court of Justice, started in the '70s after the delivery of *Internationale Handelsgesellschaft*⁹¹ which triggered the reaction of the national constitutional guardians with the well-known *Solange*⁹² and counter-limits⁹³ doctrines. Without entering the debate on the similarities (and differences⁹⁴) existing between Kadi and *Solange*⁹⁵, the *Solange* and the counter-limits doctrines are a perfect example of the importance of constitutional conflicts for the development of the EU legal order. They represented a potential crisis of the European process which actually served as a turning point, opening a new season in the case law of the CJEU and of the Constitutional Courts.

⁹¹ Case 11/70, *Internationale*, cit. at 21, par. 3, whereby the Court of Justice stated: "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure".

⁹² BVerfGE (German Constitutional Court) 37, 271 (*Solange I*); English translation at 2 Comm. Mkt. L. Reports 540 (1974); 73, 339 (*Solange II*); English translation at 3 Comm. Mkt. L. Reports 225 (1987). See also BVerfGE 89, 155, BVerfGE 102, 147.

⁹³ This formula has been introduced in the Italian scholarly debate by P. Barile, *Ancora su diritto comunitario e diritto interno*, in *Studi per il XX anniversario dell'Assemblea costituente*, VI (1969), 49. For this doctrine see Corte Costituzionale (Italian Constitutional Court), Decision No. 183 of 18 December 1973; see also Decision No. 170 of 5 June 1984 and Decision No. 232 of 13 April 1989, available at: www.cortecostituzionale.it

⁹⁴ "The difference, however, is that the ECJ, in its own understanding, is not such an international supervisory body [a human rights supervisory body] but a juridical body analogous to a domestic court", A. Gattini, *Joined Cases*, cit. at 4, 234-235.

⁹⁵ See A. Tzanakopoulos, *The Solange argument as a justification for disobeying the Security Council in the Kadi judgments*, in M. Avbelj, F. Fontanelli and G. Martinico (eds.), *Kadi on Trial*, cit. at 42.

This does not mean that after that season of confrontation conflicts faded away. On the contrary, judicial clashes are still frequent in the life of the multilevel legal order. This is consistent with the explanations given by scholars interested in conflicts⁹⁶: although the actors operating in this arena now share the necessity to respect fundamental rights conceived as constitutional goods according to the multilevel case law, it is always possible to have interpretative disagreements. I think this is the description which best explains the current state of the relationship between Constitutional Courts and the CJEU: they are competitors and antagonists, but this is not pathological at all, as it also occurs in other contexts⁹⁷.

More in general, conflicts belong to the life of constitutional polities. This has been demonstrated by scholars in sociology and political science (mainly with regard to social conflicts⁹⁸), but conflicts also belong to the essence of constitutionalism as such which has a “polemical” (and not irenic) nature being founded on a never-ending friction between liberty and power, as Luciani wrote⁹⁹. In this sense Kadi is the manifestation (at its best) of the “polemical” spirit of European constitutional law¹⁰⁰: it is likely

⁹⁶ C. Mouffe, *The Return of the Political* (1993); C. Mouffe, *The Democratic Paradox* (2000); C. Mouffe, *On the Political* (2005).

⁹⁷ D. Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States* in J. Dunoff and J. Trachtman (eds.), *In Ruling the World? Constitutionalism, International Law and Global Governance* (2009): “In one important sense, however, the relationship between the European Union and its Member States is, of course, different from that between the United States and the several states. In the United States, the relationship between federal and state law, and, in particular, between the federal Supreme Court and the state judiciary, are fully ordered...In the European Union, by contrast, the relationship between the central and component state legal orders is fundamentally unsettled”.

⁹⁸ J. Knight, *Institutions and Social Conflict* (1992); A. Pizzorno *Le classi sociali* (1959); A. Pizzorno, *Le radici della politica assoluta* (1993); C. Crouch and A. Pizzorno, *Conflitti in Europa* (1977); R. Dahrendorf, *Toward a Theory of Social Conflict*, 2 *The Journal of Conflict Resolution* 170 (1958); R. Dahrendorf, *Essays in the Theory of Society* (1968).

⁹⁹ M. Luciani, *Costituzionalismo irenico e costituzionalismo polemico* (2013), available at: http://archivio.rivistaaic.it/materiali/anticipazioni/costituzionalismo_irenico/index.html

¹⁰⁰ G. Martinico, *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe* (2012), 107-162.

that, even after the Kadi, conflicts - as expression of interpretative disagreement - will not magically disappear. Perhaps the Kadi saga will pave the way for a new season of contestation and, hopefully, for an improved protection of fundamental rights at the international level. The *Schrems*¹⁰¹ case shares the same spirit (and indeed Kadi was mentioned in the text of the judgment). On that occasion the CJEU declared Decision 2000/520 invalid since it breached, among other things, “the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter” (pár. 94). As said, Kadi was mentioned at par. 60 in order to recall that settled case law “according to which the European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights”. As Sarmiento pointed out *Schrems* tells us that “privacy is a super-fundamental right that reigns supreme above all other rights”¹⁰² and together with other decisions it gives us the impression of a court which is very eager to protect fundamental rights and to use the Charter of Fundamental Rights¹⁰³.

It is much more difficult to trace Opinion 2/13 back to this trend, since therein the CJEU focused on the idea of autonomy, creating uncertainty about the “place” of fundamental rights within the identity of the EU as a constitutional subject. Moreover,

¹⁰¹Case C 362/14 Maximilian Schrems v Data Protection Commissioner, available at: www.curia.europa.eu

¹⁰² D. Sarmiento, *What Schrems, Delvigne and Celaj tell us about the state of fundamental rights in the EU* (2015), available at: <http://verfassungsblog.de/what-schrems-delvigne-and-celaj-tell-us-about-the-state-of-fundamental-rights-in-the-eu/>

¹⁰³ Case C-92/09 and C-93/09, Volker und Markus Schecke e Eifert, [2010] ECR I-11063; Case C-293/12, Digital Rights Ireland, available at: www.curia.europa.eu. “The Court is proving to be an active guarantor of fundamental rights when it comes to the scrutiny of EU action. When the Court faces general or individual EU acts, it is generally applying a high standard of fundamental rights protection, certainly a higher one than the one it seems to be using for Member States. Thus the judgments in Markus Schecke, Test Achats, Digital Rights Ireland or, more recently, Schrems. These cases, like many others, concern the validity of EU acts in light of the Charter, and there the Court has proved to be enthusiastic to develop a robust and intensive degree of fundamental rights scrutiny”, D. Sarmiento, *What Schrems*, cit. at 102.

in a declaration released in the plenary session of the FIDE conference the (at that time) President of the CJEU said that: “The Court is not a human rights court: it is the Supreme Court of the Union”¹⁰⁴. These are the words of a Court which is not comfortable with its own Bill for Rights, the Charter of Fundamental Rights of the EU (whose scope of application is still unclear after decisions like *Fransson* and *Siragusa*¹⁰⁵). This factor is not secondary at all; on the contrary, it is very telling about the recent difficulties encountered by this Court. In this sense the Opinion can be seen as part of a broader crisis of values which has put the application of Art. 6 in question. Moreover this Opinion can be read in conjunction with other decisions of many national courts opposing the activism of the ECtHR and in this sense I agree with those colleagues who argued that the word “autonomy” in Opinion 2 should be understood as equivalent to “sovereignty”¹⁰⁶.

Against this background, the words pronounced by the former President of the ECtHR, Spielmann, who recalled that the victims of this situation will be the citizens of the EU, are very emblematic:

“Let us not forget, however, that the principal victims will be those citizens

¹⁰⁴ Reported by L. Besselink, *The ECJ as the European “Supreme Court”: Setting Aside Citizens’ Rights for EU Law Supremacy* (2014), available at: <http://verfassungsblog.de/ecj-european-supreme-court-setting-aside-citizens-rights-eu-law-supremacy/>

¹⁰⁵ Case C-617/10, *Åklagaren v Hans Åkerberg Fransson* (2013) available at: www.curia.europa.eu. Case C-206/13 *Siragusa* (2014), available at: www.curia.europa.eu. On this: F. Fontanelli, *Implementation of EU Law through Domestic Measures after Fransson: the Court of Justice Buys Time and ‘Non-preclusion, Troubles Loom Large*, 39 *Eur. L. Rev.* 682 (2014).

¹⁰⁶ “Structurally, the ECJ seems to understand autonomy in a similar way as national constitutional courts conceive of sovereignty: EU law should reign supreme in its jurisdiction and any encroachment by another authority must be put under the ECJ’s check. This comes in the form of various instruments safeguarding the ECJ a place, which is quite unparalleled to that of any constitutional court of the parties to the Convention. It shall be remembered that the ECJ asked for these safeguards in a ‘discussion paper’, by which it became involved in the drafting process of the Accession Agreement in a way unthinkable in any European constitutional system”, J. Komárek, *It’s a stupid autonomy* (2014), available at: <http://verfassungsblog.de/its-a-stupid-autonomy-2/>

whom this opinion (no. 2/13) deprives of the right to have acts of the European Union subjected to the same external scrutiny as regards respect for human rights as that which applies to each member State".¹⁰⁷

Without any doubt this Opinion is the product of a Court which does not know how to handle the axiological part of its constitution (the Charter of Fundamental Rights) and understands the ECHR as a source of problems rather than an added value. This has clear consequences on what we could call the jurisprudence of the EU constitutional identity. The CJEU has had an approach which could appear schizophrenic at a first look. Yet, such an approach is extremely coherent once seen from the perspective of a court which has always been interested in protecting the autonomy of its legal system and, thus, its interpretative monopoly.

¹⁰⁷ D. Spielmann, *Annual Report 2014, Foreword* (2015), available at: http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf