Constitutionalism and the Moral Point of Constitutional Pluralism:  
Institutional Civil Disobedience and Conscientious Objection  

Mattias Kumm

(in: Dickson/Eleftheriadis, Philosophical Foundations of EU Law [OUP 2012])

I. Some questions about constitutional pluralism

Those who embrace constitutional pluralism, notwithstanding important differences between them, take a particular position on how the problem of conflict between different legal orders should be resolved. They emphasize two points.

On the one hand they insist on a pluralist account of the world of public law in the following specific sense: They insist that the different legal orders making up the world of public law are not hierarchically integrated. They disagree with the claim put forward by the ECJ in Costa, that Member States courts should always set aside national law, including national constitutional law, when it conflicts with the requirements of EU Law as interpreted by the ECJ. And they agree, at least in principle, with most national courts, to the extent they insist that there are red lines, grounded in constitutional commitments, that limit the enforcement of EU decisions domestically. They disagree with the European Court of First Instance in Kadi that European Union law should always be set aside when it conflicts with obligations arising under UN Law. And they agree with the ECJ, at least in principle, that EU Law may sometimes preclude the enforcement of obligations of UN Law. In other words constitutional pluralists reject the claim that national law is hierarchically integrated into EU Law and that EU Law is hierarchically integrated into the law of the wider international community.

---

1 Inge Rennert Professor of Law, New York University School of Law, Research Professor for “Rule of Law in the Age of Globalization”, WZB and Humboldt University, Berlin.
On the other hand constitutional pluralists insist that different legal orders don’t simply coexist besides one-another, as self-enclosed Leibnizian monads with at best contingent relationships between them. Notwithstanding the pluralist nature of legal practice, the relevant actors – and courts in particular – have established mechanisms and designed doctrines that allow for constructive mutual engagement between different legal orders. Legal pluralism in Europe is guided, constrained and structured in a way that justifies describing that practice in constitutional terms, even in the absence of hierarchical ordering. Constitutional pluralists describe how legal coherence is possible even absent hierarchical integration. The idea of constitutional pluralism carves out a third way of conceiving of the legal world between hierarchical integration within one legal order on the one hand and a radical pluralism on the other, where actors of each legal order proceed without systemic regard for the coherence of the whole.

It is relatively uncontroversial that the constitutional pluralist account descriptively captures two important features of European constitutional practice. What is less clear is its normative assessment. How should one make sense of a practice that has this

---


5 For scepticism regarding a constitutionalist frame for the construction of European Union Law specifically see P Lindseth, Power and Legitimacy: Reconciling Europe and the Nation State (OUP 2011) and for law beyond the state generally, see N Krisch, Beyond Constitutionalism (OUP 2010).

6 What is also less clear is how to make sense of it jurisprudentially, see G Letsas, ‘Harmonic Law: The Case against Pluralism and Dialogue’, in J Dickson, P Eleftheriadis (eds), Philosophical Foundations of European Union Law, (Oxford University Press, forthcoming in 2012), as well as P Eleftheriadis, ‘Pluralism and Integrity’, (2010), Ratio Juris 23, 365-89. Both authors are convincing in their argument that constitutional pluralism does not provide a strong argument either way in jurisprudential debates between positivists and interpretivists. But even if constitutional pluralism is not a challenge to any of the more sophisticated positions within classical jurisprudential debates, it poses significant challenges to traditional
structure in normative terms? Is it attractive? Are national courts right not to accept the primacy claim of the ECJ about EU Law? Is the ECJ right not to accept that UN Law trumps EU Law, even when Art. 103 of the UN Charter declares UN Law to have primacy over all other Treaty obligations? If so, why? What is it about the ECJ’s claim to primacy that is wrong? And what exactly limits and constrains this pluralism to ensure the coherence of legal practice, seen as a whole? What about those constraints justifies calling that legal practice constitutional? In other words, what is the constitutional theory that can provide an account of the normative point, structure and limits of constitutional pluralism?

There is what some have regarded as a fashionable disposition to embrace legal pluralism without providing an account of the conditions under which it is desirable and the conditions under which it is not. It is not very plausible to believe that legal pluralism is always attractive. To illustrate the point, think of the context of a classical federal state and its relationship to its constituent units: If the state Supreme Court of New York were to start questioning the supremacy of US federal law as interpreted by the U.S. Supreme Court on state law grounds, few would conclude that state courts have at last begun to embrace the virtues of legal pluralism. Instead most would insist that something has gone awry. The same is true if Bavaria were to start subjecting the law of the Federal Republic of Germany to state constitutional requirements. What is it about these contexts that justifies the hierarchical integration of state legal orders in the legal order of the larger entity that is different from the EU context? It is not enough to simply presuppose that hierarchical integration is appropriate when the more comprehensive legal order is that of a state, whereas pluralism should be embraced when the more comprehensive order is not a state. Even if this were the right answer - and I will argue that it is not - the question would still remain which salient features of statehood would justify hierarchical integration positions within constitutional theory relating to the grounds of constitutional authority. Those are the focus of this paper.

7 See JHH Weiler, in JHH Weiler, G de Burca (eds.), The Worlds of Constitutionalism (CUP 2011) at 1 calling it “an academic Pandemic” so dominant that “Constitutional Pluralism is today the only Party Membership Card which will guarantee a seat at the High Tables of the public law Professoriate”. See also J Baquero Cruz, ‘The Legacy of the Maastricht Judgment and the Pluralist Movement, (2008) European Law Journal 14, 389-422.
that are absent beyond the state and why pluralism would be a virtue in the relationship between states and non state legal orders. The general question, then, is the following: Under what circumstances is it appropriate to conceive of⁸ the relationship between different legal orders in pluralist terms, rather than thinking about them in terms of hierarchical integration? Under what circumstances should, for example, the legal order of the European Union and the legal order of Member States be regarded as hierarchically integrated whole? Under what circumstances should the European legal order be regarded as an integrative element of an international legal order? What are the conditions under which legal pluralism is a virtue and what are the conditions under which it is a vice? What exactly is the normative point of pluralism? And what does that imply about the nature of the constraints that ensure the kind of mutual deference and engagement that ensures the coherence of the whole?

From an external point of view – the point of view of a legal sociologist– the answer to the question whether the relationship between legal orders should be conceived in a pluralist or hierarchically way is relatively easy to give. If the highest court of a legal order insists on applying the law of the more encompassing legal order only under conditions defined by its legal order and the decision of that court are generally taken as authoritative by other officials of that legal order, then the relationship between the legal orders is pluralist as a matter of fact. But the perspective to be taken here is not the external perspective of the sociologist, but the internal point of view taken by a participant in legal practice. Here the question changes: Under what circumstances should a judge on the highest court of a legal order – the ECJ when adjudicating questions involving UN law as in the Kadi case, or a national constitutional court adjudicating questions involving EU law – legally recognize or refuse to recognize hierarchical integration in the more encompassing legal order? Or to put it another way: Under what circumstances should a court accept the hierarchical integration in

---

⁸ This way of talking assumes that law is constructed by lawyers and legal thinkers in the same sense as mathematical models, scientific conjectures or theories are constructed by scientists. Such a position is perfectly compatible with the idea that there are correct and false, plausible and implausible constructions.
the more encompassing legal order? If the ECJ was right to insist on the autonomy of the European legal order in Kadi, what would need to happen for the ECJ to accept that primacy of UN law as indicated by Art. 103? If Member States courts are right not to accept the ECJ’s claim that EU law has primacy over national law at the current state of integration, what would need to happen for that to change? What is the right conceptual framework for thinking about these issues? What kind of constitutional theory provides the most plausible account of these issues?

In order to develop the broad contours of a constitutional theory that makes normative sense of constitutional pluralism I will first discuss the structure, implications and shortcomings of two widely endorsed theoretical frameworks used by different courts at different times that I claim are incompatible with constitutional pluralism properly so called. I will refer to them as Democratic Statism (I) and Legal Monism (II) respectively. Democratic Statism insists on a pluralist construction of the legal world, but insists that constitutionalism properly so called is tied to a genuine political community establishing a supreme legal authority within the framework of a sovereign state. There can be no constitutionalism properly so called beyond the state, even though States might sometimes have good reasons to open up their respective legal orders to the law beyond the state and that law can be institutionally complex. Legal Monism, on the other hand, is sceptical about any kind of legal pluralism and can analyse it only it as a case of law in crisis. If either of these positions is right, there can be no constitutional pluralism in any meaningful sense. These positions are incompatible with constitutional pluralism properly so called.

After analyzing the structure of these positions and their implications for conflict between legal orders, I will briefly describe the contours of what I have called Constitutionalism (III). Constitutionalism is the name of a conceptual framework

---

9 “More encompassing” merely refers to the fact that the international legal order is a legal order of all states, the EU legal order is a legal order of some states, and a domestic legal order is the legal order of only one state (itself perhaps made up of a number of constituent states).


11 I have on other occasions also referred to the theory as “Cosmopolitan Constitutionalism”, see M Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and
that can help make sense of the idea of constitutional pluralism both analytically and normatively, while also being able to generate an account of the conditions under which hierarchical integration is preferable to pluralism. The refusal of a legal order to recognize itself as hierarchically integrated into a more comprehensive legal order is justified, if the more comprehensive legal order suffers from a structural legitimacy deficit that the less comprehensive legal order does not suffer from. The concrete doctrines governing the management of the interface between legal orders are justified, if they are designed to ensure that the legitimacy conditions for liberal democratic governance are secured. In practice that means that there are a variety reasons that support a presumption in favour of applying the law of the more comprehensive order over the law of the more parochial one, unless there are countervailing concerns of sufficient weight. The point of constitutional pluralism, I will argue, is to create a normative space both for justified institutionalized civil disobedience and justified institutionalized collective conscientious objection.

II. The Old World of Public Law: Democratic Statism and the Deep Divide

1. Statism in three historical versions: conceptual, realist and democratic

The core feature of statist accounts of the world of law is a deep divide: there is national or state law on the one hand and there is international or interstate law on the other. State law is the paradigmatic case of law. International law is the impoverished stepchild of state law. The former is in some sense derived from the latter and yet it seems lacking in some basic way. Historically three different accounts of that divide were offered, distinguishable by their account of what exactly international law lacked.

During much of the 19th century legal theorists spent a great deal of time grappling with the conceptual question whether international law properly so called could exist, or whether it was really just a kind of positive morality, given the absence of an...
international sovereign. If law was the command of a sovereign\textsuperscript{12} or sovereignty was a predicate that precluded being subject to legal obligations\textsuperscript{13}, how could international law exist as law properly so called?

Even though conceptual arguments lost their sway in the 20\textsuperscript{th} century, after WWII so called ‘realism’\textsuperscript{14} provided what was believed to be an empirically grounded account of why the structure of the international system made the establishment of the rule of law beyond the state a utopian exercise. In an international system where states simply followed their national interests, international law could not function as an independent guide or constraint for state action.

But by the end of the Cold War, with the spread of failed states on the one hand and the rise of relatively effective Treaty regimes and practices of global governance on the other, that argument too, fell out of favour. The terms of the debate shifted again. General scepticism was in retreat as a rich literature burgeoned that tried to explain the widespread phenomenon of compliance with international law.\textsuperscript{15} As liberal constitutional democracies were increasingly constrained perhaps not by a Weberian iron cage but at least a strong web of transnational legal norms, statism took a democratic turn: now the deep divide between national law and international law was justified with reference to democratic constitutional theory. State law ultimately derives its authority from “We the People” imagined as having acted as a pouvoir constituant to establish a national constitution as a supreme legal framework for democratic self-government.\textsuperscript{16} International law, on the other hand, derives its authority from the consent of states. Of course states may decide to establish all kinds of international institutions to address specific issues. They can also establish courts and tribunals and even establish Treaties that create rights and obligations for individuals. But no matter how important these Treaties might be to address basic collective action or coordination problems, no matter

\textsuperscript{12} J Austin, \textit{The Province of Jurisprudence Determined} (London, John Murray 1832).
\textsuperscript{13} See for example A Lasson, \textit{Prinzip und Zukunft des Völkerrechts} (Berlin, Hertz 1871). The argument was actually pleaded and dismissed by the Permanent Court of Justice, the predecessor of the ICJ, see the S.S. Wimbledon Case, \textit{U.K. v. Japan}, 1923 P.C.I.J. (ser A.) No. 1, at 25.
\textsuperscript{15} An overview of the debate as it stood in the nineties and further references can be found in H Koh, ‘Why Do Nations Obey International Law?’, (1997) Yale L. J. 106, 2634.
the internal complexity of the institutions they set up: none of this takes away from the fact that these international institutions are ultimately based on Treaties requiring the ratification by states following national constitutional requirements. Member States remain the Masters of international Treaties, for so long as they are not replaced by genuine constitutions attributable to a constitutive act of “We the People”.

There are two important consequences connected to a construction of the legal world informed by democratic statism. First, democratic statism insists that national constitutional law, as the supreme law of the land, determines if and under what conditions international law is to be enforced domestically. The authority of international law, from the perspective of national law, remains a matter to be determined by national constitutional law. Of course a violation of international law may trigger the responsibility of the violating state on the international level, but as a matter of domestic law such a consequence might well be legally irrelevant. The legal world thus has a dualist structure. Second, given that state law is connected to the idea of “We the People” governing themselves democratically, and the institutional and social infrastructure for collective self-government is absent beyond the state, international law is inherently infected by a democratic deficit. That deficit is less when there is a close and concrete link between a specific international legal obligation and state consent. But even then there is a residual problem, because many international obligations can’t be unilaterally revoked by the state as a matter of international law, even when the majority of citizens using democratic procedures wants to do so. Problems of democratic legitimacy become even more serious, when Treaties authorize international institutions to make important social and political choices. Even if ultimately problem-solving or cooperation-enhancing benefits associated with international law may legitimate international law, there remains an aura of a legitimacy deficit that hangs over international law.

2. Democratic Statism and the ECJ’s claim to primacy over domestic constitutional law
When the ECJ made the claim in *Costa v. Enel* that EU law has primacy over national law, even national constitutional law, the court implicitly rejected Democratic Statism and embraced an alternative account of public law. That will be described below. Here the focus is on how to make sense of such a claim from the point of view of Democratic Statism, a framework adopted by some Member States’ highest courts, perhaps most prominently the German Federal Constitutional Court in its *Maastricht* and *Lisbon* decisions. Within the framework of Democratic Statism a claim to primacy is plausible only if the European Union has in fact become a federal state with a constitution properly so called. The central question becomes: Is the EU an international organization, ultimately based on Treaties deriving their authority from the ratification of Member States according to their national constitutional requirements? Or has the EU become a federal state, based on an act by “We the People” acting as a *pouvoir constituant*? If it is the former EU law can not, at least as a matter of domestic law, claim primacy over national constitutional law. If it is the latter, Member States have lost their ultimate authority as their national constitutional order has been hierarchically integrated into the legal order of the new federal superstate.

Note that within the democratic statist model there is no third alternative. The EU qualifies either as a state or as an international institution. Calling the EU an institution *sui generis*, as has become customary in EU Law circles to avoid asking that question, just clouds the issue. The EU may be *sui generis* in all kinds of ways, but it will be either a *sui generis* state or a *sui generis* international institution, *tertium non datur*. The question is whether it is one or the other.

a) The test for establishing statehood: Why the EU is no state

So how would one go about establishing whether it is one or the other? Courts and scholars using a Democratic Statist framework generally focus on some combination of three factors. The first is *institutional* and focuses on the structure of the EU Treaties.

---

Here the general focus tends to be whether Member States can still plausibly be described as the “Masters of the Treaty” or whether EU institutions have emancipated themselves from the control of Member States to a sufficient degree. The focus is on a variety of factors that include but are not limited to the amendment procedure (is the unanimity required to amend the Treaties or is a qualified majority enough?), the ordinary legislative procedure (is the Council in charge or does Parliament dominate the legislative process and even if it does, is it constituted in a way that reflects the idea of equality of citizens), competencies (how far does EU law authorize legislation in core traditional areas of sovereignty, such as taxes, defence, social security and criminal law?). The second factor is procedural. Were the Treaties the result of an ordinary Treaty ratification procedure or was there a constitutional convention or some other mechanism which allowed for the kind of high level participation and deliberation associated with actions appropriately attributable to “We the People”? Third, there are sociological factors: Do EU citizens have the kind of cohesion, do they share the kind of bond characteristic of “the people”? Do they have what it takes to be a “Demos”? To determine whether that is the case some authors focus on shared history, culture, religion, language etc.. Others focus on the structure of the public sphere and the institutions of civil society relating to media, political parties, interest group organizations etc. These differences cannot be addressed here and it must suffice to point to the basic structure of the argument.

Even though applying these factors to the EU might plausibly give rise to debate whether or not the EU qualifies as a state, there is not a single court or author I am aware of that has embraced the democratic statist framework and then concluded that, on applying some set of criteria along these lines, the EU qualifies as a state. Among democratic statists there seems to be a consensus that the EU is based on Treaties, not a constitution properly so called and that it qualifies not as a state, but as an international institution. Democratic Statists thus conclude that the primacy claim made by the ECJ is mistaken, at least if it is understood as a claim that national courts should apply EU Law even in the face of opposing national constitutional norms. Since there is no European Constitution plausibly grounded in an act of a European ‘pouvoir constituant’ and

ensuring the democratic self-government of a European People, European law cannot plausibly be conceived as the supreme law of the land in the European Union. Recognizing the position of the ECJ would undermine commitments to democratic self-government central to democratic statism. Instead EU Law, on this view, ultimately derives its authority from Member States who have ratified the Treaties according to their national constitutional requirements. The status of EU Law as a matter of domestic law depends ultimately on what the national constitution determines. EU Law trumps national law only to the extent prescribed by the national constitution. National constitutional law remains the supreme law of the land.

b) Consequences for the domestic application of EU Law

Where does that leave the application of EU Law by national courts? Those who adopt a Democratic Statist framework insist that such a commitment is distinct from national constitutional parochialism. It does not necessarily entail a commitment to national constitutional doctrines that are inimical to the application of EU Law and the functional imperatives of European integration. States might well adopt an ‘open constitution’, allowing for far reaching openness to and engagement with the international legal order. Fears invoked by those advocating European Law’s primacy in the name of ensuring the effective and uniform enforcement are overblown. It is a mistake to believe that only the recognition that EU Law is the supreme law of the land ensures the effective and uniform functioning of EU Law. National constitutions may well contain norms that specifically authorize the enforcement of EU Law in most cases. There is no problem inherent to the idea of constitutional self-government as it is conceived by democratic statists. The real question is merely how to conceive of the self that governs itself constitutionally and how that identity translates into national constitutional conflict norms. The core point is this: Following the disasters of WWI and WWII, the national selves that govern themselves constitutionally within the framework

---

of the state have committed themselves to constitutionally tolerate European laws enacted collectively by Member States and their peoples. On this authors ranging from conservatives such as Paul Kirchhof\(^{21}\), Judge Rapporteur of the Maastricht judgment\(^{22}\) to liberal constitutionalists, such as Dieter Grimm\(^{23}\) or Joseph Weiler\(^{24}\), notwithstanding important differences among them, would agree. The idea of constitutional tolerance lies at the heart of what makes European integration possible and describes its normative core.\(^{25}\) Most national constitutions have been amended in the process of European integration. All of them are interpreted by national courts to require the enforcement of EU Law, even when it conflicts with national statutory law. Constitutional tolerance of EU Law – the openness of national legal orders to EU Law – is hardwired into national constitutional law as it is interpreted by Member States highest courts. But tolerance remains very much a feature of the national constitution and those who interpret it. Tolerance is, from the perspective of those who decide upon the contours of the constitutional framework within which they govern themselves, voluntary.\(^{26}\) Conceptually, Democratic Statism and its connection between the supremacy of the constitution and the idea of constitutional self-government remain untouched. Focusing on the Schmittian question – who has the final say? – misses the point. It obscures the remarkable fact that in Europe the everyday enforcement of European law is guaranteed by national constitutional provisions and their interpretation by national courts. The true innovation in European integration is the not the establishment of a new ultimate constitutional authority on the European level. And it is not the abdication of national constitutional authority. Europe’s genius and the key to understanding its \textit{sui generis} character lies in is the reinterpretation of national constitutional traditions to reflect a commitment to constitutional tolerance. National constitutional authority, structured and exercised to reflect a commitment to constitutional tolerance, lies at the heart of the European integration process. The challenge is to amend and interpret national constitutions in such a way that it reflects appropriate respect for national democratic


\(^{22}\) See BVErfGE 89, 189 (1993).


\(^{24}\) JHH Weiler, \textit{Constitutionalism Beyond the State}, (CUP 2003), 7.

\(^{25}\) JHH Weiler, see supra note 15.

commitments, while enabling appropriate engagement with European law. European integration is inherently beset by a tension between genuine democratic self-government that takes place on the national level, and functional considerations that justify some delegation of powers to the European Union and some degree of opening up of the national legal orders to EU Law. That tension has to be carefully calibrated and reflected in the constitutional doctrines that national courts as ultimate guardians of constitutional legality enforce. EU Law, no doubt in many ways *sui generis*, ultimately remains Treaty based international law and not constitutional law properly so called.

3. Democratic Statism and the relationship between UN Law and European Law

Democratic Statists would have an easy time addressing the central issue in *Kadi*\(^{27}\), whether the ECJ had the authority to effectively review a UN Security Council Resolution on the grounds that it violated European fundamental rights. The EU is, like the UN, a Treaty based organization. It came about by states negotiating, signing and ratifying a Treaty according to their national constitutional requirements. Given that both Treaties derive their authority from the same source and are both equally international law, the relationship between the two can’t be resolved with reference to source based conflict rules. Instead the issue is one of conflicting Treaty provisions. Conflicts between Treaties are resolved first of all with reference to stipulations made by the Treaties themselves about their status in case of conflict.\(^{28}\) Luckily both Treaties contain concurring propositions that indicate what should be done in case of conflict. Both the UN Treaties and the EU Treaties require or permit that EU primary Law is not applied to prevent the effective implementation to UN Law. On the one hand Art. 103 UN Charter in conjunction with Art. 25 UN Charter clearly stipulates that in case of a conflict between the obligations of the Members of the United Nations under the Charter and their

---

\(^{27}\) C-402/05 *P Yassin Abdullah Kadi v. Council of the EU and Commission of the EC* [2008] ECR I-6351.

\(^{28}\) For the interpretation of Treaties see *Vienna Convention on the Law of Treaties (VCLT)*, Done at Vienna on 23 May 1969. Entered into force on 27 January 1980, Art. 31-33. Note that Art. 30 *VCLT* contains a specific set of conflict rules governing Treaties relating to the same subject matter.
obligations under any other international agreement the Charter shall prevail. On the EU side Art. 351 of the Treaty on the Functioning of European Union (hereinafter: TFEU) specifically provides that nothing in the Treaty is to be considered as incompatible with previously assumed international obligations by Member States. 29 Since UN obligations were assumed before Member States joined the EU, the EU Treaties should not preclude the application of UN Law. Nothing suggests that the Treaties should have primacy over the UN. Clearly, therefore, the ultimate conclusion reached by the ECFI that UN Law is not to be effectively subjected to EU Law fundamental rights review is correct and the position of the ECJ is wrong.

The position of the ECJ in Kadi does become more plausible, however, if one starts off with the assumption that the EU is a state and that EU primary law is like the constitution of a state the supreme law in the European Union. Is that how the ECJ justifies its claim that it can effectively subject UN Law to EU fundamental rights review? At the crucial juncture of the decision the court is remarkably obscure in its reasoning and apodictic in its formulation: The EU is committed to the rule of law and can’t avoid reviewing acts it undertakes on the basis of its own constitutional charter, that establishes an autonomous legal. 30 Obligations imposed by international agreements cannot change the allocation of powers under that constitutional charter and cannot have the effect have the effect of prejudicing constitutional principles, that form part of the foundations of the Community. 31 Ultimately the ECJ is only pronouncing on an EU measure, not a UN measure and it is doing so applying EU fundamental principles.

One obvious criticism of this type of rhetoric is that it is statist in the worst sense: It is not even Democratic Statist. It may sound like some of the more recalcitrant Member States courts asserting the supremacy of their national constitutions, when confronted with the ECJ’s claim that EU law takes primacy over national law, including national constitutional law. The only difference is that the rhetoric of “the EU as an autonomous

29 According to Art. 30 (2) VCLT, when a Treaty specifies that it is not to be incompatible with an earlier Treaty, the provision of the earlier Treaty shall prevail.
30 Kadi, supra note 27, para 281 and 282.
31 Kadi, para. 282 and 285.
legal order” substitutes for the invocation of state sovereignty. But notice how this kind of argument resembles a pre-democratic conceptual statism: A conceptual claim – this time not ‘statehood’ or sovereignty’, but the idea of an ‘autonomous legal order’ - substitutes for an argument relating to “We the People” and democracy. The idea of an autonomous legal order is not enriched by arguments about what it is about an order that has certain features that justifies according primacy to it. Read in this way the ECJ’s Kadi decision is even worse than national constitutional decisions that make claim to supreme authority. If you take the more articulate cases of national recalcitrance, perhaps best exemplified by the German Constitutional Court in its Maastricht and more recent Lisbon decision, these decision at least provide a theoretical basis for their recalcitrant approach: they provide for a democratic statist constitutional theory. Democratic statism may be ultimately unconvincing, but it is made explicit and allows for serious engagement and criticism.

Of course it is not surprising that the ECJ does not draw on Democratic Statism to justify the EU’s primacy over UN Law. Arguments about democracy and the role of a ‘pouvoir constituant’ would not resonate when applied to the EU. As discussed above, the perceived absence of a ‘demos’ and the perception that the EU is based on Treaties rather than an act of a European ‘pouvoir constituant’ has made it plausible for many national courts to insist on limiting the extent to which the primacy claim of the ECJ is enforced over specific national constitutional commitments. Not surprisingly the ECJ in Costa did not rely on democracy based arguments to justify the primacy of EU Law over Member States’ law either. So if the ECJ did not embrace democratic statism to justify its claim to primacy in Costa v. Enel what did it rely on? And how might that justification fit with the Court’s position with regard to UN Law in Kadi?

III. The Modernist Challenge: Legalist Monism

---

Democratic Statism has, over time, been challenged by another model of the world of public law: Legalist Monism. Legalist Monism is the position that underlies the ECJ’s jurisprudence in Costa v. Enel, justifying the primacy of EU Law over all national law, including national constitutional law. The ECJ justified the primacy of EU Law not by coming up with a competing interpretation of the criteria established by Democratic Statism as they concern the EU. Instead the ECJ insisted on using a very different conceptual framework to justify that EU law trumps national law. The following will briefly analyze the justification of that position in Costa v. Enel (1) and then assess what the implication of such an account of the world of public law would be for assessing the relationship between EU and UN Law (2). As will become apparent, there is a tension between Costa and Kadi. The Legal Monist position in Costa should have led the ECJ to confirm the ECFI’s decision that it should not review acts implementing UN Law on European fundamental rights grounds.

1. The primacy of EU Law

As every student of EU Law knows, since the 1960s the ECJ has consistently held that in case of a conflict between European and national law Member States courts are under an obligation to set aside all national law, even national constitutional law. For all practical purposes European law as interpreted by the ECJ is claimed to be the supreme law of the land in the European Union. The ECJ has supported that claim with the proposition that the EC Treaties established a new legal order and later referred to the Treaties as Europe’s ‘constitutional charter’. To substantiate this claim the ECJ employed three arguments.

First, the Court makes a conceptual argument. If the Treaty is to establish legal obligation properly so called, it can’t be permissible for a Member State to unilaterally set it aside

---

unless authorized to do so by EU Law. Such unilateral unauthorized action would undermine the status of EU Law as law properly so called binding on all Member States. This argument is of Kelsenian heritage. According to Kelsen the world of law has to be conceived in monist terms. Taking a legal point of view is incompatible with the claim that from the point of view of one legal order (say, the European legal order) x is the case, but from the point of view of another legal order (the legal order of Member States) y is the case. There can be no coexistence of different legal systems constituted by different ultimate legal rules. The world of law is unified not as an empirically contingent matter, but as a conceptual matter.\(^{38}\)

This is not the place to provide a comprehensive discussion and critique of the argument. Here it must suffice to point out that the argument is not at all obvious. It is not clear why it would undermine the status of EU Law as law that there is another legal system that incorporates EU Law on its own terms. It is unclear why it should be conceptually impossible, as opposed to, say, undesirable on pragmatic grounds, to imagine the legal world in pluralist terms. What is conceptually wrong with acknowledging the possibility of the existence of different legal orders, each of which recognize the authority of the law of the other on its own terms? There does not have to be only one legal point of view, even though it might be desirable that there be only one on other normative grounds. Member States may or may not be doing the right thing if they insist on determining the status of EU Law in light of their own national constitutional requirements. But they are not thereby undermining the status of EU Law as law properly so called.

\(^{38}\) According to Kelsen, the demand that the world of law be monist does not require a Grundnorm according to which transnational law trumps national law. It is also possible to posit a Grundnorm according to which there is no law except as established by national law. But the choice of the latter Grundnorm would imply a kind of national solipsism, comparable to a Cartesian subject that denies the existence of other such subjects and claims that all other persons are nothing but emanations of his consciousness. Adopting such a position is logically possible. Notwithstanding significant efforts by generations of philosophers, solipsism is a position remarkably difficult to refute conclusively. On the other hand there are just no plausible arguments in its favour, so only the most anxious foundationalists have been troubled by the problem. Others have been happy to assume the reality of other subjects as the more plausible starting point. Similarly lawyers, it might be implied from Kelsen, would do well to posit that there is a European legal order and that the legal orders of Member States are equally subject to it. But of course the whole argument depends on the non-obvious claim that there can only be one legal order and that the idea of legal pluralism is untenable for conceptual reasons. That is an issue not to be discussed further here.
The second argument put forward by the ECJ is, at first sight, no less mysterious. The Court lists a number of features of the Treaties that distinguish it from ordinary Treaties of international law: Within the considerable competencies defined in the Treaty EC institutions can enact legislation directly binding citizens in Member States. Furthermore since the enactment of the Single European Act most decisions concerning the Common Market and, increasingly in other domains as well, are made following a procedure that allows valid legislation to be passed by qualified majority vote and the participation of a European Parliament, even in the face of resistance of some Member States. European law, then, has emancipated itself in its day to day workings from its international law foundations and the idea of state consent. It has established its own autonomous legal order.

It is not easy to make sense of this argument. It might be understood in one of two ways. First it could be understood as a weak claim that the EU is sufficiently different from ordinary Treaties that it should not be assessed within the conventional statist paradigm, which constructs international law in contractualist terms based on state consent. But for that argument to be persuasive it would have been necessary to point out how exactly the highlighted features and the relative autonomy of EU Law are relevant to the claim of primacy. The Treaties of Rome might be different from most run of the mill Treaties, but they are still Treaties and not a genuine constitution of a new state. At least that would be the claim made by a Democratic Statist. What exactly is wrong with that claim? The ECJ does not say.

But the listing of ways in which the EU is different from other Treaties might just have the function of opening the door to the third argument, that lies at the heart of the case for primacy. It turns out that the particular features of the EU and the autonomy of the legal order matter for functional reasons. A Treaty regime that has these features and has been designed to fulfill ambitious purposes – including the establishment of a common market - can only function in a coherent way, if the laws it establishes have primacy over national law. Without primacy, the effective and uniform enforcement of
Europe’s laws would be endangered. The purpose of the European Union to fulfill its various objectives, including the establishment of a common market, could not be achieved, if Member States did not accept the primacy of EU Law. An aggressively purposive interpretation of the Treaties leads the ECJ to conclude that for all practical purposes EU law has to be accepted as the supreme law of the land in order to fulfill its purpose. This is a contestable empirical claim about the consequences of not accepting the unconditional primacy of EU Law connected to a normatively contestable functional account of the basis of public authority.

The claim to primacy is further strengthened by two further arguments, not explicitly made in Costa, but standard fare in the literature supporting that decision. The first concerns democratic empowerment and has been made most forcefully by Christian Jörges and Miguel Maduro. It is not only the case that EU institutions can solve coordination and cooperation problems, thereby providing a functional justification for their legitimacy. They also make available procedures that empower those who are affected by the policies to participate in the process, even if participation is generally more mediated than in the national process. The point is that national processes by themselves are lacking in a central range of cases: They lack the capacity to address certain classes of problems that require coordination and cooperation between States (think of a national fisheries policy trying to establish standards for sustainable use in the North Sea). Self-government exclusively on the level of the state leaves out too much that is of importance for anyone seeking effective self-government. Beyond the national level the idea of self-government requires the availability of jurisgenerative processes – open to participation even if in a more mediated form than electoral democracy – beyond the state level. Furthermore without a transnational check states are left to decide on policies that have significant externalities, without those who are affected having a say (think of the monetary policy of the Bundesbank before Monetary Union, which effectively set monetary policies for much of Europe). The second argument is historically informed: Legally constraining the relationship between Member States is an effective remedy against the great evils that have haunted the continent throughout much of the 19th and first half of the 20th century: Clashes of interest between nation states have a dangerous
propensity to degenerate into bloody wars. Within the framework of a coherent legal order the definition, articulation and negotiation of national interests occurs in such a manner as to make such a development highly unlikely. Legal integration can be seen as a mechanism which tends to immunize nationally organized peoples from the kind of passionate political eruptions that have led to totalitarian or authoritarian governments and/or discrimination of minorities that have characterized European history in the 19th and 20th century. This could not be achieved to the same degree, so the argument goes, if the final decision concerning what is to be applied as law in a Member State rests on a decision ultimately made by Member States themselves.

Clearly these arguments have to be read as a critique of Democratic Statism and they embrace a different account of the grounds of public law. Those who claim that the Treaties as the constitution of the European Union are the supreme law of the land in Europe in fact claim that Democratic Statism, which connects the idea of an ultimate legal authority with a strong conception of democratic self-government, is mistaken and needs to be modified. Democratic Statism is unable to incorporate into its account of supremacy the importance of expanding the idea of effective legal authority beyond the boundaries of the nation state. There may not be a European People and a European democracy in a meaningful sense, but the value of national constitutional self-government is not absolute. The idea of Europe as a legal community – a Rechtsgemeinschaft[^39] - integrated by European institutions and European law in the service of prosperity and peace trumps the limitations this imposes on constitutional self-government.

2. **EU Law and International Law: Kadi**

What are the implications of such a position for deciding whether the ECJ should subject an EU Regulation implementing a UN Security Council obligation to EU fundamental rights law? It turns out that the arguments for the primacy of EU Law in *Costa* should

also push the ECJ towards recognizing the primacy of UN Law over EU Law. First, if the conceptual argument is plausible in the context of the relationship between EU Law and the law of Member States, there is no reason why it should not also be determinative in the relation between UN Law and EU Law. If the fact that Member States subject EU Law to national constitutional standards subverts the very idea that EU Law is law properly so called, does not the fact that the ECJ effectively subjects UN Resolutions to review based on EU standards undermine the very idea that UN Law is law properly so called? Second, there are many features of the UN that distinguish it from an ordinary Treaty. The UN Charter establishes complex institutions with their own competencies. It allows the UN Security Council to create new legal obligations following a qualified majority procedure among the 15 states represented on the UN Security Council that generate binding obligations for all Member States (affirmative votes of nine states can therefore bind 193 states). And is the UN Charter not also a constitutional charter of an autonomous legal order? Of course there are differences between the UN and the EU: The ECJ has compulsory jurisdiction over issues of EU Law, for example, whereas the ICJ does not have compulsory jurisdiction over issues arising under the UN Charter. There is no comparable doctrine of direct effect with regard to UN Law. But not all differences suggest that the EU is more of an ‘autonomous legal order’ than the UN. Some differences point in the opposite direction. Take the name: The UN is called a Charter, not a Treaty. Think of the explicit claim to primacy in Art. 103 UN Charter, a claim still not explicitly made by the EU Treaties even after the latest rounds of reform.40 At any rate, whatever differences may exist between the UN and the EU, it remains unclear why these differences should be decisive for the purpose of establishing that the EU is an autonomous legal order that makes a claim to primacy, whereas the UN is not.

Third, the functional reasons supporting primacy of EU Law over Member States law also support the claim to primacy of UN Law of EU Law. If the UN is to effectively succeed in ‘maintaining peace and security’ and if the UN Security Council is to effectively take up its ‘primary responsibility for the maintenance of international peace and security’, does that not require that other actors accept the primacy of UN Security Council Resolutions? Would anything else not undermine the effective and uniform enforcement of UN Law? The judgment of the ECFI, with its emphasis on functional arguments, to a large extent reflects the Legal Monist positions embraced by the ECJ in *Costa*. But the position of the ECJ does not. Is the only way to make sense of the ECJ’s *Kadi* decision to understand it as the ECJ having taken a statist turn, albeit a statist turn without the resources of democratic constitutional theory to back it up?

**IV. Second Modernity: Cosmopolitan Constitutionalism in a Pluralist key**

There seems to be an irresolvable tension between *Kadi* and *Costa*, just as there is seems to be an irresolvable tension between *Costa* and most of the decisions of national constitutional courts, that insist on drawing constitutional red lines in the sand. But there is a way to reread *Kadi, Costa* and national constitutional court decisions that suggests all three in fact embrace a very similar conception of public law. But that conception is neither Democratic Statist, nor is it Legal Monist. Instead it is what I call Cosmopolitan Constitutionalist.41 Constitutionalism refers to a position according to which a set of universal principles central to liberal democratic constitutionalism undergird the authority of public law. Constitutioinalist principles constitute the law and guide its interpretation and progressive development. They also determine which norms take precedence over others in particular circumstances. Contrary to Democratic Statism it is not the case that the idea of ‘democracy’ and ‘national self-government’ connected to statehood and sovereignty provide the decisive principles to determine where ultimate authority lies. But nor is it the case the idea of legality and the functional reasons in support of it are sufficient to justify a hierarchically structured, source-based Monist account of the legal world. Both of these competing conceptions address relevant moral concerns, but neither

First, Legalist Monism is right that the idea of legality – respect for the rule of law – and the functional and procedural considerations that support extending it to the level beyond the state plausibly provide for a presumption of some weight: that the law of the more expansive community should be respected by public authorities, regional or national law to the contrary notwithstanding. There is a presumption that UN Law trumps EU Law and that EU Law trumps Member States Law ultimately grounded in functional and participatory considerations. Given the collective action and coordination problems that these regimes are trying to solve that States individually are unable to address effectively, the resolution provided for by the more expansive regimes ought to carry with them a presumption of authoritativeness. But in liberal democracies, legitimate authority is not tied to formal and functional considerations alone. It is also tied to procedural and substantive requirements that are reflected in constitutional commitments to democracy and the protection of rights. And it takes seriously the idea of self-government of a national community. That does not mean that the authority of UN Law, from the perspective of EU Law, should be determined exclusively by EU primary law or that the authority of EU Law should be determined exclusively by Member States constitutions. Both Legalist Monism and the Democratic Statist conception of the legal world provided by the statist version of national constitutionalism ultimately provide one-sided and thus unpersuasive accounts of the principle of legality. What it suggests instead is that the presumption in favour of applying the law of the more expansive community can be rebutted if, in a specific context, the law of the more expansive community violates countervailing principles in a sufficiently serious way.

What then are those countervailing principles and what is the implication of them being violated? Here it must suffice to name them and then briefly illustrate how they operate: besides the principle of legality, which establishes a presumptive duty to enforce international law, the normatively complementary but potentially countervailing
principles are the jurisdictional principle of subsidiarity, the procedural principle of due process, and the substantive principle of respect for human rights and reasonableness.42

The basic building blocks of a conception of legality that is tied to a framework of constitutionalism are now in place: the law of the more expansive community should presumptively be applied even against conflicting national law, unless there is a sufficiently serious violation of countervailing constitutional principles relating to jurisdiction, procedure, or substance.

To illustrate the idea of Constitutionalism as a distinct model of the world of public law I will first provide an alternative account of the approach taken by some Member States’ courts in their engagement with the ECJ’s primacy claim (1), then revisit Costa (2) and finally provide another reading of Kadi (3). The point is to illustrate how central elements of these decisions can be understood as reflecting a commitment to Constitutionalism, rather than Statism or Legalist Monism. It will also become clear that the kind of resistance by courts to the claims to authority by the more comprehensive legal orders are best understood as a form of either institutionalized civil disobedience43 or identity based conscientious objection demanding asymmetric accommodation.

1. Constitutionalism and the German Constitutional Court’s response to Costa

One important consequence of conceiving of legal authority as a function of the realization of a set of principles is that whether or not EU Law should be recognized as having primacy over national constitutional law is a question that allows for qualified answers. It admits to more answers than just yes or no. Even if the European Union Law does not, without some qualification, establish the supreme law of the land, it could still effectively reconstitute legal and political authority in Europe. The authority of EU Law is possibly a question of degree. It may depend on the degree to which constitutional principles are realized by EU institutions. It admits of the possibility that neither EU Law

43 For the idea of linking the pluralism debate to institutional disobedience, see J Baquero Cruz, ‘Legal Pluralism and Institutional Disobedience in the European Union’ in J Komarek and M Avbelj (eds.), Constitutional Pluralism in the European Union and Beyond (Hart, 2011).
nor national constitutional law effectively establishes the supreme law of the land. In this way constitutionalism can help shed light on a fascinating aspect of national courts reception of EU Law. For the most part national courts have not accepted that EU Law is the supreme law of the land. But nor have they simply assumed that national constitutional law is the supreme law of the land and that EU Law is applied only to the extent authorized by the national constitution. There is something deeply misleading in claiming that, to the extent that national courts have not accepted EU Law as the supreme law of the land, they are merely interpreting their national constitutions to establish what the status of EU Law should be as a matter of domestic law. National courts have generally adopted an intermediate position. They generally accept neither EU Law nor the national constitution as the supreme law of the land. Instead they look to both EU law and the national constitution and try to make sense of what the best understanding of the competing principles in play requires them to do. 44 Theirs is a constitutionalist conception of public law. To flesh out what this means practically and provide an example, a brief and somewhat schematic analysis of the German Federal Constitutional Court’s approach to the authority of EU Law will follow. The jurisprudence of the Court may be widely known by European Union lawyers, but its reconstruction in terms of a commitment to constitutionalism may prove illuminating, even if it can only be brief and schematic.

The German constitution, until the early nineties45, contained no specific provisions addressing European integration, though the Preamble mentions Germany’s commitment to strive for peace in a united Europe. The constitution did authorize Germany to enter into Treaties establishing international institutions.46 And it contained general provisions giving international Treaties the same status as domestic statutes.47 Yet the ECJ had claimed that EU Law was to be regarded as the supreme law of the land in the European Union requiring Member States courts to set aside any national law, even national

45 In the context of the ratification of the Maastricht Treaty Art. 23, Basic Law was amended to address questions of European integration.
46 See Art. 24 Basic Law.
47 This is the dominant interpretation of Art. 59 II Basic Law.
constitutional law, if it was in conflict. How were national courts to respond? Was the ECJ’s claim really plausible that Member States had established a new supreme law of the land by signing and ratifying a set of Treaties the core objective of which was to establish a common market? On the other hand, was it plausible to claim that the EU Treaties, which established institutions that had been endowed with significant legislative authority, and played a significant role to secure peace and prosperity in war ravaged Europe, should be treated like any other Treaty? Was it really adequate to apply the general rule applicable to Treaties according to which an ordinary statute enacted after the Treaty was ratified would trump it? If the national courts simply accepted the basic ideas underlying Democratic Statism and its idea of constitutional self-government, that is probably the conclusion the court would have reached. If, on the other hand, the court accepted EU Law as legitimate constitutional authority on legalist grounds, it would follow the ECJ. But the court chose neither of these options. It embraced an intermediate solution. That intermediate solution illustrates the connection between a constitutionalism and the complex set of doctrines that national courts have in fact developed for assessing the ECJ’s claims concerning the supremacy of EU Law.

First the German Federal Constitutional Court (hereinafter: FCC) accepted without much ado that EU Law trumps ordinary statutes, even statutes enacted later in time, because of the importance of securing an effective and uniformly enforced European legal order.\footnote{BVerfGE 22, 293 (1967) and BVerfGE 31, 145 (1971).} The principle of ensuring the effective and uniform enforcement of EU Law – expanding the rule of law beyond the nation state – was a central reason for the court to recognize the authority of EU Law over national statutes. This meant that in Germany EU Treaties were effectively granted a more elevated status than ordinary Treaties, to which a ‘last in time’ conflict rule generally applies.

Yet, contrary to the position of the ECJ, the court recognized that that principle was insufficient to justify the supremacy of EU Law over all national law. The principle of legality matters, but it is not all that matters. The second issue before the Court was whether it should subject EU Law to national constitutional rights scrutiny. Could a
resident in Germany rely on German constitutional rights against EU Law? Could the protection of national residents against rights violations guaranteed in the national constitution be sacrificed on the altar of European integration? Like other questions concerning the relationship between EU Law and national law, the German constitution provided no specific guidance on that question. In Solange I the FCC balanced the need to secure the fundamental rights of residents against the needs of effective and uniform enforcement of EU Law and established a flexible approach: For so long as the EU did not provide for a protection of fundamental rights that is the equivalent to the protection provided on the national level, the court would subject EU Law to national constitutional scrutiny. At a later point in Solange II the court determined that the ECJ had significantly developed its review of EU legislation and held that the standard applied by the ECJ was essentially equivalent to the protection provided by the FCC’s interpretation of the German Constitution. For so long as that remained the case, the FCC would not exercise its jurisdiction to review EU law on national constitutional grounds. Because the ECJ though its own jurisprudence, provided the structural guarantees that fundamental rights violations by EU institutions would generally be prevented, it conditionally accepted the authority of EU law. To put it another way: Structural deficits in the protection of fundamental rights on the European level were the reason for the FCC to originally insist that it should not accept the authority of EU Law, insofar as constitutional rights claims were in play. When those specific concerns were effectively addressed by the ECJ, the authority of EU Law extended also over national constitutional rights guarantees and the FCC as their interpreter. The authority of EU Law, then, was in part a function of the substantive and procedural fundamental rights protections available to citizens as a matter of EU Law against acts of the European Union. If within such a framework the court was to refuse to enforce EU Law, it would amount to a form of civil disobedience: A public act refusing compliance, based on principles that are imagined to be shared by both EU and national law, also taken with a view to change European law. The whole threat of exercising jurisdiction with regard to fundamental rights at all is tied to existence of a structural deficit on the European level. Only because there are

50 BVerfGE 73, 339 (1986).
structural concerns relating to fundamental rights protection does the German Court assert jurisdiction. Once the structural concern is addressed on the EU level, concerns relating to uniform and effective enforcement of EU Law trump any possibility that, in a given case, the FCC might to a better job at identifying the disputed proper scope and limits of a right.

But there is a third issue. In its Maastricht decision51 and later in its Lisbon decision52 the FCC determined that it had jurisdiction to review whether or not legislative acts by the European Union were enacted ultra vires or not. If such legislation were enacted ultra vires, it would not be applicable in Germany. As a matter of EU Law it is up to the ECJ, of course, to determine as the ultimate arbiter of EU Law whether or not acts of the European Union are within the competencies established by Treaties.53 But the ECJ had adopted an extremely expansive approach to the interpretation of the EU’s competencies, raising the charge that it allowed for Treaty amendments under the auspices of Treaty interpretation. Under these circumstances the FCC believed it appropriate for it to play a subsidiary role as the enforcer of limitations on EU competencies of last resort. Both in the Maastricht and Lisbon decisions arguments from democracy played a central role. Democracy in Europe remains underdeveloped, with electoral politics playing a marginal role. The national domain remains the primary locus of democratic politics. Under those circumstances ensuring that EU institutions would remain within in the competencies established in the Treaties is of paramount importance. Yet even while insisting that it had the competency to review EU law on jurisdictional grounds, the FCC made it clear that that review would be highly deferential.54: Only if the transgression of the EU competencies is sufficiently serious and the act in question leads to a structurally significant shift in the allocation of competencies, would the acts be deemed ultra vires

53 See Art. 230 ECT.
54 Decision of 6 July 2010, 2 BvR 2661/06 - Honeywell. See also Judgment of 7 September 2011, 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 (Greece aid and Euro rescue package).
This deferential standard reflects concerns for the rule of law and effective functioning of a transnationally integrated community, where reasonable interpretative disagreement about the jurisdictional limits of the EU is possible, in particular given open-ended jurisdictional norms such as subsidiarity and proportionality. These doctrinal tests can thus be understood to determine the conditions under which claims to justified institutional disobedience in the name of the protection of democracy and subsidiarity can be made.

This points to a final line of national resistance. When a national constitution contains a specific rule containing a concrete national commitment – say a commitment to free secondary education\(^{56}\), or a restriction to national citizens of the right to vote in municipal elections\(^{57}\), or a categorical prohibition of extradition of citizens to another country\(^{58}\) – these commitments will not generally be set aside by national courts. Instead national courts will insist that the constitution is politically amended to ensure compliance with EU Law. This line of cases reflects an understanding that the realm of the national remains the primary locus of democratic politics and primary focal point for the identification of citizens. For so long as that remains the case, a commitment to democracy is interpreted by some Member States courts as precluding setting aside specific national constitutional commitments, to the extent they are embodied in concrete and specific rules. It is then up to the constitutional legislature to initiate the necessary constitutional amendments.

To the extent that such commitments are understood as part of a national constitutional identity, the claims made by a court in the name of constitutional identity is structurally equivalent to a person demanding to be exempt from a generally applicable rule as a conscientious objector: It is a demand to accommodate a specific addressee of a legal obligation because of deeply held commitments that it would, on balance, be


\(^{56}\) Belgian Constitutional Court, European Schools, Arbitragehof, Arrest no. 12/94, B.S. 1994, 6137-6146.


unreasonable for the legal order to require the addressee to give up. Unlike civil disobedience conscientious objection is not directed towards legal reform. The claim is merely to be left alone with regard to an obligation whose appropriateness for others is not put into question. When a national court invokes the constitutional identity of the national community as an argument not to comply with a legal obligation, it is thus not implausible to understand this claim as the democratically constitutionalized version of what on an individual basis would be recognized as conscientious objection.\textsuperscript{59}

This highly stylized and schematic account illustrates the operation of a conception of legitimate constitutional authority that puts the principles of constitutionalism front and centre.\textsuperscript{60} The principle of legality and its extension beyond the nation state has an important role to play to support the authority of EU Law, but concerns relating to subsidiarity, democracy and human rights may provide countervailing reasons for limiting the authority of EU Law in certain circumstances. Furthermore the principles that govern the relationship between national and EU Law do not themselves derive their authority from either the national constitution or EU Law. The relative authority of EU and national constitutions is a question to be determined by striking the appropriate balance between competing principles of constitutionalism in a concrete context. The result of such an exercise is a doctrinal framework that defines the conditions under which either institutionalized civil disobedience or constitution-based conscientious objection are justified.

2. Constitutionalist elements in Costa and beyond

As was argued above, \textit{Costa v. Enel} more than any other decision reflects a commitment to Legal Monism, not Constitutionalism. But in the following I will demonstrate there are elements in \textit{Costa} that make better sense when interpreted in a constitutionalist, rather

\textsuperscript{59} I thank Victor Ferreres Comella for bringing this analogy to my attention. For a general discussion on civil disobedience and conscientious objection and their different justification see J. Raz, \textit{The Authority of Law} (OUP 1979), 263-289.

than Legal Monist prism (a). Furthermore I will argue that EU Law has evolved in a way that suggests that the courts continued insistence on primacy may not only be justifiable in Constitutionalist terms, but also be generally compatible with the positions actually taken by Member States’ courts (b).

a) Costa and Constitutionalism: Making sense of the idea of an autonomous legal order

So how does constitutionalism make sense of the claim that the authority of EU Law is not simply derived from the fact that Member States have signed and ratified the founding EU following their respective constitutional requirements? What, if anything, justifies the claim that EU Law establishes an autonomous legal order and what follows from it?

Whether a Treaty qualifies as a constitution of an autonomous legal order or merely as an ordinary Treaty under international law depends on how its claim to legal authority is best understood. If its claim to legal authority is best understood to rest exclusively on the fact that Member States have signed and ratified it, then it is an ordinary Treaty of international law. The decisive feature of constitutional Treaties establishing an autonomous legal order in some sense is that its claim to authority is in part directly grounded in constitutional principles. Its claim to authority is not grounded exclusively in the fact that Member States have signed and ratified it, even if it would not have come into existence of Member States had not signed and ratified it. The idea of a Constitutional Treaty, then, is contrary to claims by Democratic Statists, not a contradiction in terms. Nor does it matter that the Treaties of the European Union have gradually evolved in a piecemeal fashion, rather than having been created in a legal revolutionary moment, a kind of constitutional ‘big bang’ or a ‘creatio ex nihilo’. Whether or not something that takes the form of a Treaty is in fact merely a Treaty of

international law or a form of transnational constitutional law that has greater authority is a question of interpretation.

The European Union explicitly claims to be founded on constitutional principles. Art. 6 of the Treaty on European Union 62 states that the “Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States.” The EU, in its self-presentation, is neither founded on the will of a European “We the People”, nor is it founded on the “will of Member States”. It is founded on the constitutional principles that are a common heritage of the European constitutional tradition as it has emerged in the second half of the 20\textsuperscript{th} century. And, as the ECJ has found more than forty years ago and is now recognized in Declaration 17 of Appended to the EUT\textsuperscript{63}, EU Law makes a claim to primacy. Whether and to what that claim to authority deserves to be recognized by Member States courts is not an easy question and gives rise the kind of concerns that were described above. But an answer to that question will not make use of unhelpful dichotomies between Treaties and constitutions or the “will of Member States” or “We the People”.

b) Costa today

---


\textsuperscript{63} Declaration 17 States: “The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260): ‘Opinion of the Council Legal Service of 22 June 2007: It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL,15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.’"
When the ECJ made the claim that EU law has primacy over all national law, including national constitutional law, it was making a claim that national courts were right not to accept in an unqualified way. At the time EU Law did not provide for adequate constitutional rights protection, it did not provide for an adequate democratic legislative procedure and there was no indication that the court took seriously the limits of competencies in the Treaty. These concerns became more serious as the decision-making moved from unanimity to qualified majority vote in more and more areas since the mid-eighties. To a significant extent the response of Member States’ courts can be understood as a general acceptance of the ECJ’s claim to primacy, but with the proviso that EU Law does not violate fundamental rights, remains within its competencies and does not encroach on fundamental constitutional commitments that defined the democratic identity of the Member State. To the extent that Member States’ responses fit this description, they generally comply with constitutionalist requirements. What is remarkable, however, is that all of these concerns are now addressed to a large extent, even if not always effectively, by EU Law itself. The story about the evolution of the EU’s fundamental rights guarantees is well known and has finally led to the entry into force of the European Charter of Fundamental Rights in Dec. 2009. The concerns relating to competencies has arguably led the ECJ to pay greater attention to delimitation of competencies, even though here there are still good grounds for scepticism. Furthermore the Treaty of Lisbon contains interesting procedural innovations involving national Parliaments that might make some contribution to help establish a culture of subsidiarity in Europe. Finally the structural problems relating to democracy have not really been addressed so far by EU actors even though the legal framework established by the Treaty of Lisbon might allow for the evolution of greater electoral accountability of the Commission in the future thereby making the elections of the European parliament more meaningful. But more importantly EU law now specifically requires that Member States constitutional identity be respected. A plausible interpretation of that provision suggests that it might not violate EU Law if a Member State refused to apply EU law in a situation where a

66 See Art. 4 Sect. 2 EUT: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional (…)”.

33
fundamental national constitutional commitment is in play. If that is correct, it is not implausible that a claim to primacy made by EU Law that shares these features may no longer be implausible from a constitutionalist point of view. The justification for the primacy of EU Law at the time Costa was decided might not have been plausible. And the limited acceptance by Member States might in most instances have been justified. But to a significant extent EU Law has absorbed the concerns that fostered legitimate resistance by Member States, just as Member States have, over time, opened up their legal orders to accept the application of EU over national law in most instances. Shared constitutional principles seem to have provided the focal point of complementary evolutions of both EU Law and national constitutional law. The tensions created by a conflict between Legalist Monism and Democratic Statism have to a large extent been replaced by a common commitment to Constitutionalism. That still leaves open the possibility of conflict on application, but it ensures a common framework within which concrete disagreements are addressed.

3. A Constitutionalist reading of Kadi

But is Kadi compatible with an account that emphasizes the spread of constitutionalism? On the surface the ECJ may seem to have adopted a relatively conventional dualist, statist approach. It insisted on the primacy of EU constitutional principles and explicitly rejected applying these principles deferentially, even though the EU Regulation implemented a UN Security Council Resolution. But on close examination it becomes apparent that important elements of that decision reflect constitutionalist analysis. First, the court specifically acknowledges the function of the UN Security Council as the body with primary responsibility to make determinations regarding the maintenance of international peace and security. Second, the court examines the argument whether it should grant deference to the UN decisions and rejects such an approach only because at the time the complaint was filed there were no meaningful review procedures on the UN

68 Kadi, Recital 297.[I THINK “PARAGRAPH” OR “PARA” IS A MORE COMMON WAY TO CITE SPECIFIC PARTS OF A JUDGEMENT?]
level and even those that had been established since then still provide no judicial protection. Only after an assessment of the UN review procedures does the court conclude that full review is the appropriate standard. This suggests that, echoing the ECHR’s approach in *Bosphorus*, more adequate procedures on the UN level might have justified more deferential review. This is further supported by the ECJ’s conclusion that under the circumstances the plaintiff’s right to be heard and the right to effective judicial review were *patently* not respected. This language suggests that even under a more deferential form of judicial review the court would have had to come to the same conclusion. It also suggests that the court was fully attuned to constitutionalist sensibilities. It just turns out that the procedures used by the UN Sanctions Committee established by the UN Security Council Resolution were so manifestly inappropriate given what was at stake for the black-listed individuals, that any jurisdictional considerations in favour of deference were trumped by these procedural deficiencies, thus undermining the case not just for abstaining from judicial review altogether, but also for engaging in a more deferential form of review. Third, the court shows itself attuned to the functional division of labour between the UN Security Council and itself when discussing judicial remedies: The court does not determine that the sanctions must be lifted immediately, but instead permits them to be maintained for three months, allowing the Council to find a way to bring about a review procedure that meets fundamental rights requirements. Finally, during all of this the court is careful to emphasize that nothing it does violates the UN resolution, given that international law leaves it to states to determine by which procedures obligations are enforced. Notwithstanding serious problems that remain, it seems that forceful judicial intervention has had a salutary effect, with serious reform proposals discussed and in part enacted at the UN level. An ECJ committed to constitutionalism takes international law seriously. But taking international law seriously does not require unqualified deference to a seriously flawed global security regime. On the contrary, the threat of subjecting these decisions to meaningful review

---

70 *Kadi*, Recital 321, 322. See most recently S.C. Res. 1904 (Dec. 17 2009) that provides at least certain minimal guarantees.
71 *Bosphorus Hava Yolları Туризм v. Ireland* [2005] ECHR.
72 See most recently Security Council Resolution 1904 (Dec. 17, 2009) that finally provides at least minimal, even if still inadequate, procedural guarantees.
might help bring about reforms on the UN level. Only once these efforts bear more significant fruit will the ECJ have reasons not to insist on meaningful independent review of individual cases in the future.

Even if the above suggests that it is a mistake to read Kadi merely as a case of entrepreneurial but jurisprudentially dubious state-building by the ECJ73, there are still plausible grounds to criticize Kadi on constitutionalist grounds: Why did the court not emphasize the universal nature of the human rights it was applying? Why did the court not follow the Advocate Generals lead and be more explicit about the conditional nature of its lack of deference? And was it justifiable for the court to preclude Member States from finding their own ways to address the tensions between compliance with UN Sanctions and the relevant human rights concerns? But notwithstanding scope for legitimate criticism, constitutionalist sensibilities were not lacking in Kadi.

V. Challenges and a Response to Critics

Constitutionalism establishes a framework of principles that provide the grounds and limits of legal authority of any legal order within the liberal democratic tradition. These principles guide the inquiry into whether the result of certain jurisgenerative procedures on the level of the more comprehensive legal order effectively establish legal obligations or whether, in a particular context, noncompliance on the level of the more parochial legal order is justified. The principle of establishing the rule of law or beyond the state and the functional and procedural concerns that support it, provide a presumption that the outcomes of law generating procedures on the level of the more comprehensive legal order should be respected by its addressees. That presumption can be rebutted, if and to the extent noncompliance is necessary to further countervailing principles relating to jurisdiction, procedure or substance that, in the relevant context, have greater weight. The doctrines used by courts to structure the relationship between

different legal orders establish the jurisdictional, procedural and substantive conditions under which courts claim to be justified to practice institutionalized civil disobedience or protect the constitutional identity – the institutionalized collective equivalent of individual conscience - of the more parochial legal order. Those doctrines are justified, if, all things considered they can be reconstructed as the result of balancing the relevant competing normative concerns.

This account of constitutional pluralism can help clarify what is right and what is wrong about a number of criticisms that constitutional pluralist accounts have recently been subjected to. According to one view constitutional pluralists with their happy go lucky embrace of “discourse among courts” and “heterarchy rather than hierarchy” or “contrapuntal harmonics” are insufficiently attuned to the functional prerogatives of European integration74 or virtues of obedience75. There is something to that claim. On the one hand talking about the structure of pluralism in terms of a discourse among courts or contrapuntal harmonics does capture the reasoned and dynamic form that engagement with the more comprehensive legal order frequently takes. But it falls short conceptually. This way of talking is not sufficiently sensitive to the graduated claims of authority that various doctrinal frameworks have built into them. The really interesting questions concern the structures of graduated authority built into doctrinal frameworks: who needs to look at what and give what kind of consideration to what is being said and done. This is still the world of law. It takes the form of constitutional principles generating doctrinal structures, not a Habermasian world of “herrschaftsfreier Diskurs”, or a world of contrapuntally structured discretionally improvised or diplomatic negotiation based on “comity” between well-mannered gentleman judges. In the relationship between different legal orders, pluralism takes the form of a limited but legally structured space constrained by a presumption of authority in favour of the more comprehensive legal order.

But is the account perhaps still too permissive? In a brilliant article Julio Baquero Cruz
has recently argued that the talk of pluralism is exaggerated and misguided and that
instead of constitutional pluralism the best way to make sense of constitutional conflict
in the European Union is to see it as a form of institutional disobedience. As I have
argued above, there are good grounds to believe that much of what national courts do can
best be understood in that way. But there are two points of disagreement worth noting.
First, the moral point of pluralism is not just to offer space for institutional disobedience
but also institutional conscientious objection. And second and more importantly such a
claim does not stand in opposition to the idea of constitutional pluralism as it is defended
here. On the contrary, a constitutional theory of constitutional pluralism provides an
account of the conditions under which such practices of resistance are justified. Without
an account of the moral stakes, that only some version of constitutional theory (even if it
is only the barebone structure of an account as provided here) can provide, no account of
the legitimate grounds of institutionalized civil disobedience or conscientious objection
or the nature of the trade-offs necessary can be offered. However the argument Cruz
provides has persuaded me, that -along with the idea of “identity based” constitutional
conscientious objection- the idea of official disobedience captures well the moral point of
the kind of pluralism that is justified by the constitutionalist account. When courts
develop doctrines managing the interface between different legal orders, derived from
the correct interpretation of principles of constitutionalism as they apply them to the
relevant context, we might say that they are laying down the jurisdictional, procedural
and substantive standards for the exercise of institutionalized civil disobedience or

---

76 See J Baquero Cruz, ‘Legal Pluralism and Institutional Disobedience in the European Union’, in J.
Komarek and M Avbelj, Constitutional Pluralism in the European Union and Beyond (Hart, forthcoming
2012). The issue was first broached in an exchange between Cruz and myself also involving M Maduro
European Journal of Legal Studies 2(1), 325-370. Furthermore an illuminating article by N T Isiksel has
recently linked the jurisprudence of the ECJ in the Kadi case to the ideal of institutional civil disobedience,
577.

77 The contours of that account were first presented in M Kumm, ‘Who is the final arbiter of
constitutionality in Europe? Three conceptions of the Relationship between the Federal Constitutional
Court and the European Court of Justice’ (1999) Common Market Law Review 36, 351-386 and more fully
developed in M Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy before
connect this account with the idea of institutional disobedience and conscientious objection as the moral
point of constitutional pluralism.
conscientious objection. The idea of institutionalized conscientious objection and civil disobedience, then, provides a good way of capturing the moral point of constitutional pluralism.

Finally there are those who insist that the kind of account of constitutional pluralism provided here is not really pluralist, but effectively monist. Ultimately Constitutionalism as it is described here is based on a framework of principles that defines the grounds of law both on the state level and beyond. This is not pluralism, so the claim goes, but Monism. I think that claim is correct on one level, even though it is misleading on another. It is correct on the level of jurisprudential reconstruction. Jurisprudentially speaking, the account provided here is monist in the following sense: The moral principles that ground law – that is the principles that determine which social facts are relevant and how exactly they are relevant in establishing something as a correct legal proposition - hang together and form a coherent whole, whether they concern national, European or UN Law. It is difficult to make sense of the idea of a deep discontinuity on the level of principles that ground the practice of law. But even if constitutional pluralism is accounted for within unified framework of principles – a monist jurisprudential account - the idea of legal pluralism describes something morally important and jurisprudentially interesting. The type of account provided here insists that whether a lower legal order should be conceived as being hierarchically integrated within a larger legal order depends on contingent features of the structure of the legal world. The states that are part of the German federation are right to interpret state law as being hierarchically integrated and inferior to the law of the more comprehensive legal order. There are ultimately Constitutionalist grounds – that is: grounds of moral principle - that justify the recognitions of such a hierarchy in some contexts, just as there are Constitutionalist grounds for not recognizing such a hierarchy in other contexts. That is neither a trivial nor uncontested proposition. As I hope to have shown above, it is not possible to make sense of constitutional pluralism within either a Democratic Statist or Monist Legalist framework. If the correct theory of European public law has a

---

79 For an exploration of these themes, see R Dworkin, Justice for Hedgehogs (Harvard 2010).
80 See G Letsas, supra note 77, at 34, claiming that within an interpretivist account the problem of constitutional conflict is not a genuine problem, and can be debunked as a pseudo-problem.
Democratic Statist or Legalist Monist structure, there is no place for a meaningful idea of constitutional pluralism. But if the correct theory of European public law has a Constitutionalist structure then there is an important space for constitutional pluralism.

So what are the core characteristics of a world of public law described in constitutionalist terms? First, unlike the world imagined within the framework of Democratic Statism, the world of public law is imagined as constituted and held together by a shared commitment to constitutional principles. There is no fundamental distinction between state law and law beyond the state. State law and law beyond the state have more in common than statists suggest. Constitutional authority and constitutional principles are constitutive not only of national law and politics, but of law and politics tout court. In that sense constitutionalism is reconceived in a cosmopolitan and not statist framework. Second, nor is the legal world of imagined as a monist whole, if what is meant by that is a hierarchically unified structure of norms, in which all conflicts can be resolved by reference to source based conflict rules. Instead constitutionalism helps give an account of the principled, but deeply pluralist and fragmentized nature of the world of public law.

There are two ways in which constitutionalism and pluralism are connected. First, constitutionalism explains how there can be a plurality of legal regimes that make claims to authority which go beyond their origin in the consent of states. These regimes may be based on a Treaty, but these Treaties are, just like domestic constitutions in traditional constitutional theory, genuinely constitutive: with them a new legal authority comes into the world. Instead of deriving their authority from the legal acts that made them possible, their claims to authority derive at least in part directly from the constitutional principles they embody and help realize. Second, constitutional principles provide the mediating principles for a deeply pluralist structure of public law. In practice regime pluralism sometimes leads to the enactment of rules that conflict with one another. When they do there is no guarantee that conflicts between them will be resolved in the same way by each regime. So there is a distinct possibility of contradictory claims that are part of the legal world without law having the resources to resolve them conclusively. But
notwithstanding the possibility of irresolvable legal conflict, *this kind of pluralism* is not deep and hard, but shallow and soft. It is shallow and not deep because constitutionalist principles are the shared *grounds* of public law practices. And it is not hard but soft, because constitutionalist principles serve as a *common framework* to mediate potential disputes and give rise to principled practices of engagement and deference that reduce the occasions and limit the stakes of conflict. The moral point of pluralism in such a world is to create a space for justified institutionalized disobedience and constitutional identity-based conscientious objection without inappropriately undermining the integrity of the whole.