Consensus not Constitutionalism: 
Fundamental Rights in EU law after Kadi

Carl Lebeck*

Contents
1. Introduction
2. Constitutionalisation or “Constitutionalisation” of the EU
3. Relations between EC Law and National Law – Theoretical Models
   3.1. Conferred Powers – Delegation as Source of Legitimacy
   3.2. Constitutional Tolerance – Avoidance of Conflicts through Mutual Accommodation
   3.3. Institutionalisation – Constitutionalism Constituted through Practice
   3.4. Comity – Constitutionalism through Consensus?
   3.5. Conclusions
4. Targeted Sanctions through “Blacklisting” – Enforcement of International Law through EC/EU Law
   4.1. A Short Background
   4.2. Legal Effects of Blacklisting
5. Judicial Review of Kadi and Yusuf
   5.1. Kadi and Yusuf in the EC Court of First Instance
      5.1.1. International Obligations as EC Law
      5.1.2. Reviewability of International Legal Norms
      5.1.3. The Competency of the EC/EU
      5.1.4. Fundamental Rights in the CFI
      5.1.5. Conclusion
   5.2. Judicial Review of Kadi in the ECJ
6. The Question of the Scope of Powers of the EC – The Limited Limits of EC Powers
   6.1. Articles 60 and 301 as a Sufficient and Independent Legal Basis for Targeted Sanctions
   6.2. Articles 60, 301 and 308 EC Treaty
   6.3. Article 308 EC Treaty and the Democratic Deficit
7. Fundamental Rights and Constitutional Structure under EC Law
   7.1. Review of Rights in Substance: Distinguishing Procedural Rights and Property Rights

* Jur.kand. (Stockholm), M.Sc., M.Jur. (Oxon), LL.M. (Harvard), Research scholar, Faculty of Law, Stockholm University / External lecturer in law, University of Copenhagen. This study was completed before the final ratification and entry into force of the Lisbon Treaty; the terminology of EC/EU and ECJ has been retained.
Carl Lebeck

7.2. Fundamental Rights versus International Law?
   7.2.1 The Claims of the Appellants
   7.2.2 The Approaches of the Member States
   7.2.3 The Approach of the European Commission
   7.2.4 The Approach of the ECJ – Living with International Legal Pluralism?
      7.2.4.1 EC/EU Law, International Law and the UN Charter
      7.2.4.2 EC/EU Law, International Law and Human Rights

8. Rule of Law and Judicial Supremacy
9. Sanctions Lists and EU Powers after the Lisbon Treaty
10. Conclusions

1. Introduction

In 2008, the European Court of Justice (ECJ) decided the case of Kadi and Al-Barakaat v. Council and Commission. The case emerged in the aftermath of reactions to 9/11 when freezing of funds of alleged terrorists throughout the world was decided by the United Nations Security Council (hereafter the UNSC). In the European Union (EU), it was implemented by the member States through their representatives in the Council of Ministers of the European Union, and decided that the measures of freezing funds were to be carried out through legislation of the EU (and the European Community (EC)). The case of Kadi was the central case among several legal challenges to the role of EC/EU (and in particular the role of the supranational pillar of EC) in counterterrorism policies pursued by the member States through the EC/EU in recent years. There has been already extensive and important comments published on many aspects of the Kadi case; the focus here is on one of the less discussed aspects: namely how Kadi both contributes to and is an effect of the continuing mutual negotiations between national and supranational courts that tend to define central constitutional aspects of EU law.

In this paper, the aim is to analyse the importance of Kadi from a structural constitutional perspective focusing less on individual rights than on the relations between the EC/EU and the member States. The judgment of the ECJ enhanced protection of fundamental rights under EC/EU law, but it also meant that the competencies of the EC/EU became even less clearly defined and delimited. The conclusion is that whereas fundamental rights are protected in several respects through the judgement,  

---