Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

Case Comment: Kadi and Al Barakaat International Foundation vs Council and Commission

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Received 30 November 2022; *Accepted* 10 December 2022; *Published* 19 December 2022

INTRODUCTION

With its 2008 Kadi and Al Barakaat ('Kadi') judgement, the European Court of Justice (ECJ) has once again sparked a flurry of activity in the European legal theory community. This is not surprising, given that the case at hand raises an unusually dense array of grand constitutional questions, including the relationship between the EU legal order and international law, the status of fundamental rights norms within EU law, the human rights obligations of the United Nations (UN) Security Council, and the relationship between the primarily economic mandate of the European Community and the foreign policy functions of the United Nations.

This article is part of the second wave of comment on the ECJ's appeal decision in Kadi, inasmuch as it deals with a few diverse interpretations provided by observers in its immediate aftermath. The article's argument is developed in two stages. First, the paper will explore briefly the constitutional position of basic rights within the European legal system previous to Kadi in order to establish the ex ante background. It will then provide an alternate reading of the ECJ's

ruling as a type of "civil disobedience." In conclusion, the constitutional ramifications of ECJ's reasoning in Kadi will be examined.

FACTS

According to the United Nations Security Council, '**targeted**' and '**smart**' sanctions are becoming a regular technique. The campaign of sanctions against Iran is an example of a programme that targets people suspected of supporting international terrorism. Countries are obligated by *UNSC Resolution 1267*[1] to freeze the assets of anybody suspected of engaging with the Taliban government in Afghanistan.

In accordance with the EU context, the European Union has a two-stage implementation plan. Considering this, a structural law would essentially prohibit the movement's members from leaving Afghanistan and would freeze their assets. Individuals inside the EU took this dispute before the ECFI and later the ECJ. The purpose of this section is to outline how the ECFI and the ECHR have dealt with UNSC judgments to date.

ISSUES

- Does the EU Council have the *authority* to enact *Regulation 881/2002*[2] and its revisions to prevent the use of secondary legislation to seize the commercial assets of individuals directly or indirectly associated with organisations believed to be engaged in global terrorism?
- Does the regulation comply with *A249* of the EU's founding treaties?
- How closely do rules *adhere* to European Union's FR?

RULE

Article 60 of EC: Pertaining to *A301,* and *297* for which urgent action will be taken and which will be removed or modified per Council's proposals.

[1] UNSC Resolution 1267
[2] Council Regulation 2002

A301: In accordance with the convention on international relations, the Council has the authority to take prompt action to sever financial links if a united stance has been adopted to that effect.

Article 249: In accordance with the Treaty, all legislative bodies create rules, directives, etc.

Article 307: Individual nations should reduce the incompatibility of agreements concluded prior to their accession date that is not affected by the treaty.

Article 308: It grants the council the authority to act unanimously on a proposal.

ANALYSIS

In conclusion, the "ECJ" concurred with AG Madurao. It was agreed that the EU has the authority to impose its will via the provisions of the Consolidated Treaties.

Supreme Court on CFI

Supreme Court adopted a precise statute pertaining to the European Community Foundation Initiative. However, regional authorities cannot assess the statute's internal legality. Also, the inclusion of a clause signifying support of UNSC legislation in violation of a higher legal standard would not challenge the resolution's pre-eminence. The court ruled that it was unnecessary to assess the challenged statute considering jus cogens principles and the constitutionality of laws that comply with the FR and constitute community law must be evaluated.

Comparative Analysis

This decision is comparable to the decisions made by the Supreme Court in the Medellin case[3], in which the court ruled that an ICJ ruling was not enforceable in the United States absent prior action by Congress.

[3] *Medellin v Texas* [2008] 552 U.S. 491

Emphasis on Human Rights as per the precedents of ECHR:

Considering *Bosphorus v Ireland*[4], this issue pertains to the sanctions imposed on the Federal Republic of Yugoslavia. This threshold for equal protection is compatible with the court's history stating that international collaboration is welcomed, but must not result in a surrender of ECHR commitments, as described in the Matthews Case. This case only involves sanctions on the Federal Republic of Yugoslavia. Judiciary lacked defining standards that have per se comparable preservation for the United Nations and refrained from participating.

A. Behrami & B. Behrami v France & Saramati v Germany & Norway[5]: This case presents an opportunity to unify systems to take into consideration the UN Charter's basic value as reflected in its primary instrument and the duty of combating extremism.

Understanding connection and gaps uniting UN & EU/EC Legislation

The Charter only applies to UN members. The court started its rather exhaustive investigation by examining the confluence of UN Law. Apex court (judiciary) judgement on A25[6] & 103[7] included in the UN Charter rather surprisingly, A27[8] of "Vienna Convention" stating that a party cannot always use home law as a reason for not implementing a treaty. Subsequently, the judiciary joined in a complicated conversation. Initially, it was determined that "Some appraisal of the domestic enforceability of the disputed law would suggest that the jury would tacitly consider the UNSC's legality."

CONCLUSION

The judiciary undermines the UNSC. International law permits the non-application of UNSC decisions only in certain circumstances, although the majority of state constitutions do not grant the UN Charter precedence over state law. We can therefore conclude that the Apex Court of territorial procedure in question used the present incident to "*proclaim the internal and external*

[4] *Bosphorus v Ireland* [2006] 42 EHRR 1
[5] *A. Behrami & B. Behrami v France & Saramati v. Germany & Norway* App No. 71412/01 (ECtHR, 2 May 2007)
[6] Charter of the United Nations 1945, art. 25
[7] Charter of the United Nations 1945, art. 103
[8] Vienna Convention on the Law of Treaties 1969, art. 27

autonomy" and "*disconnectedness of the EC's legal system from the International realm, and the ranking of its internal constitutional values over the rules of international law.*"

It has questioned whether European Courts have taken a bold stance, prioritising local ideologies over geopolitical collaboration, or whether they have shown respect for the former in addressing the issue of UNSC resolutions being incorporated into European law, or whether they have found a middle ground. The focus should not be on superiority, but on enhancing credibility. Council and courts must determine the amount of authority to claim and cede. Concepts of power sharing are no restrictions. They should instead be seen as a safety net.

In conclusion, this ruling establishes that the Security Council's authority is not limitless. Given the absence of a judicial body or judicial proceedings at the international level where the targeted persons and entities would be able to contest the primacy of the relevant Security Council resolution on the international plane, the judgement illustrates the significant role played by the EC courts in assuming their competence to review EC acts implementing Security Council sanctions. This affects their implementation at the EC and national levels. The Security Council should improve the sanctions regime in order to bolster its own authority and the effectiveness of the counterterrorism sanctions regime. Rather than merely observing the proliferation of unfavourable court decisions, which could lead to widespread noncompliance by states and the EU with the relevant Security Council resolutions, the Security Council should improve the sanctions regime in order to bolster its own authority and the effectiveness of the counterterrorism sanctions regime. Prior to the Kadi ruling, the Security Council had already implemented a number of enhancements in response to criticisms of the sanctions regime and its draconian restrictions on the human rights of those targeted. It is time for the Security Council to implement additional reforms to remedy the violations identified by the ECJ.