

Understanding Europe's Role in the Area of Liberty, Security and Justice as an International Actor

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Abstract—The area of liberty, security and justice within the European Union is still a work in progress. No one can deny that the EU struggles between a monistic and a dualist approach.

The aim of our essay is to first review how the European law is perceived by the rest of the international scene. It will then discuss two main mechanisms at play: the interpretation of larger international treaties and the penal mechanisms of European law. Finally, it will help us understand the role of a penal Europe on the international scene with concrete examples.

Special attention will be paid to cases that deal with fundamental rights as they represent an interesting case study in Europe and in the rest of the World. It could illustrate the aforementioned duality currently present in the Union's interpretation of international public law. On the other hand, it will explore some specific European penal mechanism through mutual recognition and the European arrest warrant in the transnational criminality frame.

Concerning the interpretation of the treaties, it will first, underline the ambiguity and the general nature of some treaties that leave the EU exposed to tension and misunderstanding then it will review the validity of an EU act (whether or not it is compatible with the rules of International law).

Finally, it will focus on the most complete manifestation of liberty, security and justice through the principle of mutual recognition. Used initially in commercial matters, it has become "the cornerstone" of European construction. It will see how it is applied in judicial decisions (its main event and achieving success is via the European arrest warrant) and how European member states have managed to develop this cooperation.

Keywords—European penal law, International scene, Liberty security and justice area, mutual recognition.

I. INTRODUCTION

DESCRIBING the nature of the European Union is jokingly compared to the Hindu parable of five blind men describing an elephant. The multi-faceted and complex nature of the Union's legal frameworks is often the source of paradoxical and complex behaviour. Naturally, the European court of justice (ECJ) has also struggled to maintain consistency and harmony as it emerges as a strong institutional body within the community. This paper will explore how the European community has emerged as a new actor on the international scene and how its nature has been defined and perceived by the broader international legal order. More precisely, does the community's constitutional nature enhance the enforcement and application of public international law on member states? Or does it challenge it, since it establishes its own international supremacy that breaks away from the international legal tradition? Using the Robert Louis

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Stevenson novel *the strange Case of Dr. Jekyll and Mr. Hyde* as an analogy to illustrate the nature of the Union, it will be demonstrated that union struggles between a monist and a dualist behaviour, exposing a tearing duality within the institutional frameworks that often results in inharmonious behaviour on the international scene.

The discussion of the legal nature of European law in this paper will specifically focus on two mechanisms at play: 'direct effect' and interpretation of larger international treaties. Special attention will be paid to cases that deal with fundamental rights as they represent an interesting case study category that illustrates very well the aforementioned duality present in the union's interpretation of public international law. For this purpose, it will first discuss the theoretical considerations, and the articles in the corresponding treaties, that set the background foundation for our discussion. Next, this paper will explore how the European Union has behaved as a collaborator in larger international public law regarding the reinforcement of a monist approach, making use of case law and theoretical considerations. A contrasting view will be then presented in order to illustrate the unavoidable tension between two different approaches. As a synthesis, this paper will attempt to determine if there exists some sort of theological consideration guiding the ECJ behaviour, or if it is simply a series of paradoxical contradictory decisions.

II. THEORETICAL CONSIDERATIONS: UNDERSTANDING THE DYNAMICS AND ARTICLES AT STAKE

One of main theoretical questions at the core of this discussion concerns what constitutes the legal identity of the European Union as an international actor. This question challenges the very capacity of the European Union to sign and participate in international treaties and organizations, as it is unclear if one is to treat the union as a state; an international organization; or simply as a completely new entity, that lacks legal precedent on the international scene. For the purposes of this paper, the belief that through practice and mutual recognition the Union has already demonstrated its legal capacity in international public legal frameworks, will serve as a baseline throughout. Theorist Piet Eeckhout clarifies this in his assertion that the European union should be treated categorically as a *sue generis* entity that nevertheless has de facto become an actor with the legal identity of a state, capable of signing treaties and enforcing them accordingly within its legal framework [1].

Even if there is still some unresolved controversy, the Union has nonetheless clarified its own power and identity with article 216 of the Treaty on the Functioning of the

European Union (TFEU), previously Article 300. The article articulates that it is within the Union's powers to sign international treaties that fall under the competence of the Union and that will consequently be implemented in a binding way on institutions and member states. It is also important to highlight that article 3 (5) TEU establishes *prima facie* the teleology guiding the court, as it establishes that the Union is to respect and reinforce broader international law principles. It could be argued that the union has attempted to differentiate itself from states like the United States, which is often accused of undermining international legal structures by adhering to them only in instrumental ways. However, as it will demonstrate, The European community and the corresponding ECJ have departed significantly from the ideal articulated in article 3.

A. Interpretation of Treaties

With these articles in consideration, one faces the problem of interpretation. At a first glance, Article 216(2) settles the matter by hinting that the Union is to impose, transpose and apply international agreements recognized by the community within its legal order. However, the ambiguity and general nature of some treaties leaves the Union exposed to opportunities for tension and misunderstanding. Also, there exists debate over the interpretation of customary international law and what its role should be in the Union's rationale for interpreting the legal validity of some community's directives. In other words, the validity of an EU act may be affected by the fact that it is incompatible with the rules of international law. Furthermore, problems may arise when the ECJ is confronted with treaties that have not been signed by the Union, but have been signed by all European member states; especially if these treaties overlap the Union's competence and thus create opportunities for confrontation of competence [2].

B. Direct Effect as the Missing Piece

It is hard to think of a more significant and revolutionary legal case than *Van Gend & Loos*. This case became a fundamental part of the ECJ's jurisprudence that gave the court unprecedented powers over the implementation of directives embedded in the treaties and directives that compose the European community's legal order.

In order to properly understand the contrast created by the European legal order in the international system in its use of direct effect, one must be reminded of the shortcoming of traditional international law. Professor Eeckhout considers this;

"International Law does not of itself have the characteristics of direct effect and supremacy. A state may, under its constitution, confer these features on international law, but it is not required by international law to do so. The latter only demands, in very general terms, that it is complied with. Precisely which effects international law have in domestic or 'municipal' legal systems is a matter largely left to such a system's basic rules"

This in effect shows that the 'direct effect' mechanism is one of the primordial components that have also taken the European union to enter a *sui generis* category as it presents individuals with the tools to contest the validity of national law if determined that it violates the directive or principles of the European Union. Furthermore, as previously mentioned, it is an unprecedented legal mechanism used by an international organization. Its novelty and efficiency serve as the basis for the debate that surrounds the mantra of the Union's nature, which suggests a progressive legal and political conversion into a state-like entity. A thought that is repudiated by many and that invokes reactionary nationalist sentiments by those who still see value in keeping intact the supremacy of the state.

Explaining direct effect in the context of international treaties is, however, a far more complex question; especially considering that *Van Gend & Loos* could, in theory, be interpreted as being a precedent that involved only internal directives written and adopted by and for the European community. In the case of international treaties and conventions that involve third parties, it is unclear if 'direct effect' should have the same application. This question is paramount as it would translate into conferring rights to individuals within member states, in order to challenge national and community law that may violate an international agreement adopted by the community. This consideration adds another layer of complexity to an already convoluted legal system, and it ultimately calls for the development of a system that establishes a legal hierarchy, and standard for discretion, to be adopted by the community's judges. Legal theorist Christine Kaddous believes that case law, such as the case *Demirel* [3], has slowly refined the logic of interpretation and the use of direct effect. She asserts that,

"According to the settled case law, the court considers that a provision of an international agreement must be regarded as having direct effect when, 'regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'" [4]

However, the discretion that has been used by the court in application of such logic has not come without controversy and challenges. The interpretational behaviour of the ECJ may seem at times instrumentalist and inconsistent, even in light of its own provisions. And the application of 'direct effect' is much more limited, even if the EU is bound by a convention that is meant to impose obligations on the Union (this idea will be explored in more detail further on in the paper) [5].

III. HOW RESPECTING AND REINFORCING INTERNATIONAL LAW

Robert Louis Stevenson's Dr. Jekyll is a typically well-behaved citizen, soft spoken, educated and respectful of society's constraint. Correspondingly, one of the mandates of the European union in Article 3(5) is to keep "the strict observance and the development of international law,

including respect for the principles of the United Nations Charter” [6]. In light of, the court has been active judging the validity and implementation of broader treaties, especially those concerning international commerce, as it is the Union’s least contentious competence. The Case *Kupferberg* thus represents one of the main precedents in community law dealing with the proper implementation and application of ‘direct effect’ of free trade agreements. Part of the ECJ’s decision in *Kupferberg* specified this mechanism:

“The measures needed to implement the provisions of an agreement concluded by the community are to be adopted, according to the state of community law for the time being in the areas affected by the provisions of the agreement, either by the community institutions or by the member states. that is particularly true of agreements such as those concerning free trade where the obligations entered into extend to many areas of a very diverse nature” [7]

These principles are applicable to agreements to which the community is a party, including mixed agreements, as well as to the decisions of associations councils adopted under the agreements. In essence, *Kupferberg* seems to suggest that treaties of this nature automatically have supremacy over national law.

This decision was fundamentally revolutionary, and it advanced one of the biggest limitations that riddle international law- that is the unwillingness and sometimes inconsistency with which states implement international law. The potential of the European Community to trigger a paradigm shift is illustrated specially by its capacity to do away with the structural and ontological considerations that have historically undermined the implementation of international law. It is especially through ‘direct effect’ that the ECJ has been able to establish a post-modern liberal ideal of strong transnationalism, the dream of philosophers and liberal thinkers for more than two centuries. Kantian philosophers argue that that a law abiding international system is the ultimate goal of our modern society. And in that respect, the European Union has succeeded tremendously within its internal multinational sphere.

Nonetheless, commercial agreements are positivist in nature, and in a way it is, in essence, rather straightforward and easy to advance the values of international law if no other issue is at stake in this type of legal disputes. This is particularly the case if one considers that the European experiment was in essence intended as a commercial experiment of free trade and most European states give in relatively easily to mutually beneficial policies that advance market ventures. The real challenge arises from the later development in the European union, which contains much more political and social undertones, and even if many states have been reluctant to concede to the Union powers beyond the financial realm, the reality is that the European commission and ECJ have already decided to make non-market legal matters a concern of the Union. Contrary to market disputes, social; political and environmental cases have received a much less straightforward interpretation by the

ECJ, but this has not necessarily been to the detriment of the rights and legal principles that seek to be advanced [8].

IV. MR. HYDE: EUROPE’S ESTABLISHING OF PARALLEL LEGAL PARADIGMS

The duality at the core of the ECJ is better explained by one of Dr. Jekyll’s last enlightened remarks before losing all sanity:

“I learned to recognize the thorough and primitive duality of man; I saw that, of the two natures that contended in the field of my consciousness, even if I could rightly be said to be either, it was only because I was radically both....I had learned to dwell with pleasure as a beloved daydream on the thought of the separation of these elements. If each I told myself could be housed in separate identities life would be relieved of all that was unbearable the unjust might go his way delivered from the aspirations and remorse of his more upright twin and the just could walk steadfastly and securely on his upward path doing the good things in which he found his pleasure and no longer exposed to disgrace and penitence by the hands of this extraneous evil. [9]”

In Stevenson’s work, constrains that enslave and limit the inner liberation of Dr. Jekyll serve as the trigger to Mr. Hyde’s birth. Eventually, Mr. Hyde functions as a parallel identity that coexists and represents that inner duality that was contained with Dr. Jekyll. It could be said equally that the European union has emerged as a parallel legal international order that is subversive and independent of its legal ancestor.

Despite the suggestion in Article 216 (2) that the Union is to follow a monist approach that respects and implements the binding power of treaties and conventions that fall within the competence of the Union, even suggesting that there is no need of particular acts of transposition [10], case law shows a far more complex picture. For instance when it comes to challenging the validity of a EU act or disposition, it is only the ECJ who can determine any violation of broader international law. This was affirmed in the *Foto-Frost* case [11], when the ECJ defended with jealousy its competence and determined its exclusivity over matters of validity, thus attributing itself international constitutional supremacy.

A similar affirmation of supremacy was expressed in *Commission v Portugal* [12] when the ECJ determined that Infringement of Union Law by Portugal could not be justified on the basis that another international agreement- ratified before EU convention- held Portugal responsible towards another state. Portugal in this case was required, with certain degree of flexibility, to make sure of rendering the agreement concerned compatible with Union Law. Another aspect, brought up in one of the Union’s case law [13] that one may consider as being part of a behaviour that disempowers the broader application of international law within the union, rests in the self-restraining mechanisms put on the ‘direct effect’ clause. As Geert De Baere points out, “The ECJ has appeared to dissociate direct effect from the possibility for the Courts to oversee compliance by the Union with international agreements that are binding upon it [14]”

A. Supremacy of ECJ as a Guardian of Human Rights Consideration

Interestingly, the court has also asserted its supremacy in cases where the commission was trying to comply with international law, but the ECJ determined that such compliance violated EU law. This principle was made famous by the case *Kadi* that, as the court points out in its decision in paragraph 285,

“It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty [15]”

Hence, the plaintiff was able to demonstrate that the European regulation 881/2002 violates Mr. Kadi's fundamental rights as prescribed in Article 230 EC treaty. This is not only reminiscent of the supremacy and independence of the ECJ, but also surprising considering that the UN is many times seen as the champion of fundamental rights. In this case, the ECJ did not only challenge the supremacy of the UN in matters of international law, but it also effectively established a precedent that entrenched fundamental rights as significant in the Community's legal order. In this paper's opinion, this sort of decisions elevate the sanctity of fundamental rights over political considerations taken by the *security council*, that in anyway tarnish the reputation of international law as being political in nature.

Another aspect that may also serve as an example of non-collaboration between the union and broader international law, in order to maintain the validity of novel reforms that challenge traditional law, is exemplified by the ECJ's hesitance to give legitimate competence to international conventions that have been accepted by all the member states, but have not been signed by the Union itself. Such an approach may seem counterintuitive considering that it is almost natural to attribute binding power to a convention that has been accepted by all members, along the lines of Article 3(5) TEU. The *ATA* case was an example of the ECJ's uneasiness with complying with broader legal international frameworks such as the convention of Chicago of 1944. In this case the court denied the challenge presented by the *Air Association of America* against disposition 2008/101, which allowed the inclusion of aviation activities in the European scheme for greenhouse gas emission allowance trading. In doing so, the court displayed behaviour that may be understood as instrumentalist, in deciding to cherry pick what conventions apply to the Union, and to what extent international public law has relevance to the disposition in question. Given the sensibility of environmental law it may even be suggested that the ECJ displayed excessive discretion, and in turn hinted towards what may be perceived as political and why not fundamental rights considerations. In this paper's opinion, a safe climate could be easily perceived as public

order concern that could justify the court discretion on the basis of *salus populi suprema lex esto* thus also hinting at subtle teleology guiding the ECJ's decision in these sort of matters.

Both in the *Kadi* and *ATA* cases, the court acted in a revolutionary and unconventional manner. Moreover, it established its supremacy over other frameworks of international law, while it defended teleological principles articulated in Article 3 (3) in TUE Lisbon. Furthermore, in my opinion, the court applied its discretion in a pragmatic manner on the basis of *salus populi suprema lex esto* which is to be admired given the perils that we face as a global community and that need to be tackling at all costs.

V. MR. HYDE ON TRIAL: ASSESSING EUROPE'S POTENTIAL AND CHALLENGES

It is tempting to think that Kantian ideals are being better served by the subversive role that the union has taken, tackling matters of international nature in a much more pragmatic way. Increasingly state-like in nature, the European model could serve as an example for a global confederation able to implement and manage environmental, human rights and problems that may concern public order. Problems such as climate change that if not resolve would contravene what is reasonable for the assurance of our own existence. In this light, the ECJ should be acting more in using the principle of *quod est necessarium est licitum*

As the ECJ is able to establish a more consistent role in its defence of pragmatism in the defence of environmental and human rights, Dr. Jekyll's brief admiration of his newly found duality and liberation would seem uncannily relevant to our discussion.

Then these agonies began swiftly to subside, and I came to myself as if out of a great sickness. There was something strange in my sensations, something indescribably sweet. I felt younger, lighter, happier in body; within I was conscious of a heady recklessness, a current of disordered sensual images running like a millrace in my fancy, a solution of the bonds of obligation, an unknown but innocent freedom of the soul. I knew myself, at the first breath of this new life, to be more wicked, tenfold more wicked, sold a slave to my original evil and the thought, in that moment, braced and delighted me like wine. [16]”

Although, the liberation to which this paper makes reference cannot be described as *evil* in the case of the ECJ, it is tempting to think that the world of international law is experiencing a similar feeling of empowerment and acceleration as it watches how the European experiment transforms out-dated national law across the different European member states, as well as international law.

This word of admiration comes however with a word of caution, as it is possible for the ECJ to become engulfed in uncontrolled processes of expanding competences and power. Just as Dr. Jekyll lost control of its newly found freedom, and became subsequently an irrational being intoxicated in his own power. In other words, the ECJ could also become an

institution that endows itself with too much power and starts acting *ultra-vires* in matters of fundamental rights that should be treated by national courts. In short, it could be suggested that the court should find a balance between harmonising the implementations of fundamental rights while allowing for some sort of diversity across the cultural range that determines conceptions of these rights.

VI. CONCLUSION

As it has been discussed, the ECJ has been the victim of the tearing duality that arises from contradictory provisions and acts. On one hand, the ECJ has embraced Article 3(5) TEU by respecting and collaborating with international organizations, and interpreting A.216 TFEU unambiguously, especially when it concerns commercial treaties. On the other hand, the court has been reluctant to lose any sort of discretionary power to larger international law and organisms, especially when it comes to interpretation of validity of community law, safeguarding it even from *Security Council* directives. In either situation, the principle of direct effect and supremacy of interpretation have empowered the role of the union in advancing both the monist and dualist approaches. Considering that both are present at the ECJ core, it has however demonstrated through case law that the role of the court has been subversive in nature, more inclined to a dualist approach. This represents a breakaway from traditional paradigms of international law. Consequently, it is also possible to imagine how the European experiment has one of the biggest potential in international law to change our conceptions of human rights as well as broader international legal culture. Finally, despite using the rather unconventional analogy of Mr. Hyde to describe the ECJ, it was shown that it is relevant to think that the 'liberating subordination' of new paradigms of international law is to be desired if we are to resolve our planet's most fundamental problems.

REFERENCES

- [1] Eeckhout, Piet; *External relations of the European Union: Legal and Constitutional Foundations*; Oxford University Press, 2000; p 278
- [2] *European convention on Human rights* (1950) or the *Chicago convention* (1944)
- [3] Case C-12/86 *Demirel* (1987) ECR 3719, para 4
- [4] Kaddous, Christine; "Effect of international agreements in the EU legal order" in *EU Foreign Relations Law: Constitutional fundamentals*; ed M.Cremona and B. de Witte; Hart Publishing 2008, p. 301
- [5] Case 21-24/72 *International Fruit Comapany* (1972) ECR 1219
- [6] Lisbon treaty 2008, Article 3
- [7] Case C-104/81 *Kupferberg* (1982) ECR 3641
- [8] Ott, Andrea; "The ECJ and International Law", , *The European Union and the International Legal Order: Doscord or Harmony?* ed V. Kronenberger; TMC Asser Press, 2001; p. 130
- [9] Stevenson, Robert Louis; *The Strange Case of Dr. Jekyll and Mr. Hyde*; Drover Thrift Editions, 1991; p 54
- [10] Kaddous Christine, 'Effects of International Agreements in the EU Legal Order', *EU foreign relations law: Constitutional fundamentals*; pg 293
- [11] Case 314/85 *Foto-Frost* (1987) ECR 4199, para 17
- [12] Case C-62/98 *Commission v Portugal* (2000) ECR I 5171, para 49
- [13] Case C-377/98 *Netherlands v Parliament abd council* (2001) ECR I-7079, para 54.
- [14] G. De Baere and C. Ryngaert, 'Air Transport Association of America and The EU's Contribution to the 'Strict Observance and Development of International Law', *European International Affaires Journal*, 2012, pp. 5.
- [15] Case C-402/05 *Kadi v Council and Commission*.
- [16] Stevenson, Robert Louis; *The Strange Case of Dr. Jekyll and Mr. Hyde*; Drover Thrift Editions, 1991; p 91.