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# Kadi in Sight of Autopoiesis

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## Abstract

The long-running saga of the prominent Kadi case raises a variety of issues, not least the Court of Justice of the European Union (CJEU)'s overt acknowledgment of the European Union (EU) as a 'virtuous international actor' (de Búrca 2009) in terms of rights protection, and the monism / dualism / pluralism issue in terms of global governance. This chapter will consider these from the standpoint of autopoiesis or 'systems' theory in order to present a fresh perspective on both legal-systemic unity and considerations of 'justice' vis-à-vis human rights.

## Introduction

Over the past decade the name Kadi has become well known to legal scholars, especially those with interests in European Union (EU) law, EU external relations, EU constitutionalism, fundamental rights, global administrative law, international security, international law, and the fight against global terrorism. Indeed, the surname of Mr. Yassin Abdullah Kadi has since 2001 come to represent a variety of arguments, approaches and standpoints, and to encompass all of this reasoning and all of these articles and judgments under a single word that is simultaneously representative of and detached from the individual most profoundly affected by the case. The attenuation of the legal hullabaloo from the human individual at its heart is mirrored by this chapter, which will proceed in a similar vein of engagement and detachment in terms of the circumstances and contours of Mr. Kadi's particular case,<sup>1</sup> its effects and repercussions, and the scholarly discussion arising from it.

This chapter takes as its core approach and frame the theory of autopoietic social systems (systems theory) established and made famous by Niklas Luhmann,<sup>2</sup> and most notably further developed in relation to law and normativity by Gunther Teubner.<sup>3</sup> While a 'radically antihumanist, radically antiregional, and radically constructivistic' theory might appear to be a strange one to utilize when the focus

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<sup>1</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P. Also, Cases C-402/05P and C-415/05P, Kadi and Al Barakaat, judgment of the Court (Grand Chamber) of 3 September 2008. In 2008 the Court was still the European Court of Justice (ECJ) but by 2013 it had been renamed the Court of Justice of the European Union (CJEU).

<sup>2</sup> See, for example, Niklas Luhmann, *The Differentiation of Society* (Columbia University Press 1982); *Social Systems* (Stanford 1995); and *Law As A Social System* (OUP 2004).

<sup>3</sup> See, for example, Gunther Teubner, *Law As An Autopoietic System* (Blackwell 1998); 'The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors' in 69 *Modern Law Review* 327-346 (2006). See also Gunther Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' (Storrs Lectures 2003/04 Yale Law School) in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds) *Constitutionalism and Transnational Governance* (Hart 2004), and *Constitutional Fragments: Societal Constitutionalism and Globali*

rests, as it does here, upon the respective authority claims of international and European Union law, and human rights protection under the EU and UN regimes, I submit that systems theory offers a useful different angle on world society (Weltgesellschaft), the legal system's (Rechtssystem) regulation of the social, and the possibilities and potentialities in functional differentiation, pluralism and fragmentation. The modest aim of this chapter is to scrutinize and critique from the perspective of systems theory the main strands of the Kadi legal saga. The facts have already been covered comprehensively in the introduction to this volume so I will not repeat them beyond what is required for clarity and will instead proceed directly to outline the component parts of this chapter's analysis.

Foremost among these strands is the issue of human rights protection and its corollary of good governance. The CJEU's decision in Kadi can be taken to represent its overt declaration to be a human rights actor in its own right. The position taken by the Grand Chamber in July 2013 was to uphold the Court's 2008 casting of the EU as a 'virtuous international actor'<sup>4</sup> and to privilege the rule of law and its protection of individual fundamental rights over compliance with an international regime providing a lesser standard and offering lesser guarantees. While the political motivations of the European Court's judiciary in taking such a hard line on EU legal autonomy could of course be queried, the CJEU's firm stance concerning its 2008 decision in Kadi had the effect of reifying the position that, within the EU at least, fundamental rights cannot be eroded 'under the cover of generic security concerns'.<sup>5</sup> Such overt commitment to rights protection and rights compliant action would be viewed in a positive light by both of the main protagonists of systems theory; nevertheless it is important to note that there is no clear consensus between the two as to the scope of rights within the theory. The reason for this is that it is within the field of rights that the differences between the determinedly non-normative sociological approach of Luhmann<sup>6</sup> and the more normatively open (no pun intended) standpoint adopted by Teubner<sup>7</sup> are cast in sharpest relief. The 'rights' section of this chapter will tease out the differences between the two approaches and relate them both to the issue of fundamental rights in the case of Kadi and then to 'good governance' within the EU, which is to say, in terms of the EU's self-description as a virtuous actor.

The next strand to come under scrutiny will be that of the conflict over the locus of ultimate legal authority, which could be phrased as the question of Kompetenz-Kompetenz. It can be said that Kadi represents a marked departure for the CJEU from its 'traditional embrace of international law' and a reorientation more towards a more pluralist approach to the issue of the 'multiplication, overlap and conflict of normative orders in the global realm'.<sup>8</sup> This change of direction is at odds with the more

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<sup>4</sup> Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' (2009) 51 *Harvard International Law Journal* 1-49, 1

<sup>5</sup> Filippo Fontanelli, <http://www.diritticomparati.it/2013/07/kadi-ii-or-the-happy-ending-of-ks-trial-court-of-justice-of-the-european-union-18-july-2013.html>, accessed September 2013, 5

<sup>6</sup> Niklas Luhmann, *Grundrechte als Institution* (Duncker and Humblot 1965). See also Gert Verschraegen, 'Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory', 29 *Journal of Law & Society* (2002) 258-281, 261

<sup>7</sup> Gunther Teubner, 'The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors' (2006) *Modern Law Review* 69; also 'Justice Under Global Capitalism', Michael Blecher and Jennifer Hendry (eds) 'Governance, Civil Society and Social Movements: Special Issue' (2008) *Law & Critique* 19(3) 329-334.

<sup>8</sup> Gráinne de Búrca *supra* note 4, 36.

obliging approaches taken by both the European Court of Human Rights (ECtHR) and the Court of First Instance (CFI), which adopted positions that could be described as ‘strongly constitutionalist’.<sup>9</sup> However, it cannot simply be downplayed as a misstep on the part of the CJEU. On the contrary, the Kadi case appears to have been selected intentionally as the platform for the Court’s ‘you shall not pass’<sup>10</sup> moment, whereby it asserted the European Union’s distinctiveness and separation from the international order.<sup>11</sup> It appears that the opportunity presented itself in Kadi for a clear statement of EU autonomy in the international realm and this chance was seized upon by the CJEU. From a systems-theoretical perspective, the points of interest here are this robust assertion of autonomy on the part of the CJEU and its result in generating a situation of overt plurality within international (multi-level) governance. A systems approach here not only elides, after a fashion, the hard regime boundaries that lawyers are used to working with and within, but also facilitates the accommodation of such complexity by means of its founding premise of functional differentiation.<sup>12</sup>

Finally, a little attention ought to be paid to the individual-nominate of the case in question, Mr. Kadi, or rather, to his status and position within systems theory. This will form the focus of the next section, subsequent to which the sections will follow on the topics of: human rights, ‘good’ governance, and will conclude with a discussion of multi-level governance, plurality and authority.

### **Mr. Kadi in Sight of Autopoiesis**

As stated above, systems theory is at variance to the majority of sociological theories that, more conventionally, hold the human actor, the human agent, to be the protagonist of activity within the social. In spite of being renowned (or notorious) for its ambivalent treatment of human individuals,<sup>13</sup> systems theory is not, as often alleged, an entirely anti-individualistic theory. On the contrary, individual human beings have an important dual role within systems theory: they exist both as psychic autopoietic systems in their own right as well as being point of attributions for the elements of the system, communications. This deliberate decentering of the individual within systems theory can be explained by reference to what Luhmann was aiming to accomplish, namely to construct a complete theory of society.<sup>14</sup> Taking as his starting premise the idea that ‘society [...] was never human’, that ‘the notion of a “human

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<sup>9</sup> *ibid*, 19ff and 38-42.

<sup>10</sup> While this is hardly an obscure reference, I should point out that it comes from JRR Tolkien’s Gandalf in *The Fellowship of the Ring* and denotes extreme wizarding stubbornness.

<sup>11</sup> Gráinne de Búrca, *supra* note 4, 4.

<sup>12</sup> The founding premise may be more accurately cited as the fundamental distinction between system and environment, from which functional differentiation – that is to say, the differentiation of social subsystems on the basis of their function – can be said to stem. This functional differentiation establishes the boundary between a system and its environment: for example, the legal system (system) and society (environment). Other function systems include: politics, the economy, science, education, religion, the mass media, art and sport.

<sup>13</sup> Zenon Bankowski, ‘How Does It Feel To Be On Your Own?’ *The Person in Sight of Autopoiesis*, 7(2) *Ratio Juris* (1994) 254-266. For a reply to Bankowski’s argument, see John Paterson, ‘Who Is Zenon Bankowski Talking To? The Person in Sight of Autopoiesis’, 8(2) *Ratio Juris* (1995) 212-29

<sup>14</sup> There is an old rumour in circulation about Luhmann, who, it is alleged, on his appointment to the Sociology Department at the University of Bielefeld in 1969, was asked for details about his project. His answer was: Project: to develop a theory of society; Duration: thirty years; Cost: none.

being” has always been theoretically problematic and a sociology based upon human terms has always been misguided’,<sup>15</sup> Luhmann’s approach was an antihumanist one that attempted to move beyond thinking of society in merely human terms. This decentering required a number of elegant moves on Luhmann’s part but the main one was the recognition of communications over actions as the systemic elements, which in turn facilitated the all-important distinction to be drawn between system/environment, removing the requirement for further reliance upon the classic dichotomy of subject/object. Luhmann combined these insights to produce an ‘overarching epistemological framework’ that ‘organised and structured communicative processes by providing for the autopoietic linkage of communicative acts to other communicative acts in the form of “codes”, “programmes”, “media”, “expectations”.’<sup>16</sup>

Under a systems-theoretical construction, therefore, world society can be described as a ‘multitude of self-constituted and functionally differentiated social subsystems’,<sup>17</sup> such as politics, the economy, education, law, health, art, and so on, in relation to which individuals participate on a daily basis but within which they are never included nor into which are they ever subsumed. It can be stated thus, that Mr. Kadi is neither, nor was he ever, a part of the legal system, and this in spite of his engagement with legal orders of both the UN and the EU. He, along with his lawyers and representatives, the judges and advocates-general, even the academics, has no more physical place within the legal system than he does in any other function system, which is to say, none whatsoever. The interaction of individuals with a system is always-already determined by the system; in this fashion a human being can be a point of communicative attribution or a source of systemic perturbation, or can even be constituted by a system – indeed, by any number of systems – as actors within it.<sup>18</sup> We can say that Mr. Kadi is constituted by the relevant social systems as, among other things, an economic actor, a EU citizen, and a bearer of human rights.<sup>19</sup>

It is concerning the issue of human rights, however, that the role of the individual in systems theory is perhaps the most counterintuitive, as a result of the disconnect between their psychic and social selves. Teubner conveys this as follows:

‘The paradoxical circular relationship between society and individual (society constitutes the individual person, who in turn constitutes society) is, as it were, the a priori that underlies all historically variable human rights concepts. Flesh-and-blood people, communicatively constituted as persons, make themselves disruptively noticeable, despite all their socialization, as non-

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<sup>15</sup> Hans-Georg Moeller, *The Radical Luhmann* (Columbia University Press: 2012) 21

<sup>16</sup> Moritz Renner, ‘Death By Complexity – The Financial Crisis and the Crisis of Law in World Society’. In Kjaer, P., Teubner, G. and Febbrajo, A. (eds) *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart: 2011)

<sup>17</sup> Jiri Pribán, ‘Multiple Sovereignty: On Europe’s Self-Constitutionalization and Legal Self-Reference’, 23(1) *Ratio Juris* (2010) 41–64, 42

<sup>18</sup> Richard Nobles and David Schiff, *Observing Law Through Systems Theory* (Hart: 2013) 253

<sup>19</sup> Space unfortunately does not permit me to engage with the temporal issue raised by the discrepancy of ruling as far as rights protection is concerned between the CFI, the ECtHR, and the CJEU. For a general discussion of time in terms of systems theory, see Niklas Luhmann, *Social Systems* (Stanford UP 1995) 41-52

communicatively constituted individuals/bodies, and hammer for their 'rights'.<sup>20</sup>

It is important to note here that human rights attach, nay, belong to a human being as a human being, to the individual instead of the 'person' within a function system. The next section will analyze the 'role' of rights within systems theory in more detail and with specific reference to the Kadi case.

## **Human Rights**

In systems theory, rights are conceptualized as a social institution by means of which society is able to 'protect its own structure against self-destructive tendencies'.<sup>21</sup> For Luhmann, rights operate as political communications that serve to introduce self-limitations to the political system; in essence, they provide a restraint on the potential excesses of the political system (power), which otherwise would tend to exert too great an influence upon individuals within society, which in turn has detrimental effects upon and within the social. This can be best observed in terms of participation or inclusion: property rights facilitate participation within the economy, for example, while freedom of expression provides communications for the systems of the media and art, to name but two, while at the same time ensuring variety within politics.

It is important to note here that Luhmann's conceptualization of rights is neither liberal nor ideological but rather completely sociological, which is to say that he omits any rose-tintedness in favour of a robustly functionalist understanding. To him rights are a social institution with a precise function, namely, to protect the society from the dangers of functional differentiation. Rights represent a curb upon systemic operations in that they constitute coalesced and concretized expectations, which, in their very concreteness, take on the nature of fixed points, of facts. Fundamental rights therefore have innate facticity – they are universal and individual human entitlements<sup>22</sup> - and operate to 'protect the autonomy of spheres of action from political instrumentalization'.<sup>23</sup> Without such limitations upon its operations, the political system runs the risk of over-extending its influence and imposing thresholds of regulation that undermine 'the ability of other systems to operate in ways that are productive for society'.<sup>24</sup>

The functional importance of rights is easier to recognize when cast against the backdrop of the highly specialized global systems of world society, which is where those excesses relevant to the Kadi case can be identified. The identification of the political and economic systems as having been guilty of overstepping their bounds

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<sup>20</sup> Teubner, G. (2004) 'Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?' (Storrs Lectures 2003/04 Yale Law School), in Joerges, C., Sand, I-J and Teubner, G. (eds) *Constitutionalism and Transnational Governance* Hart: Oxford 3-28, 6

<sup>21</sup> Gert Verschragen, *supra* note 6, 262

<sup>22</sup> This acknowledgment of universal fundamental rights arguably runs somewhat counter to the positivism at the core of Luhmanian systems theory, which has been referred to as the 'daughter of positivism'.

<sup>23</sup> Gunther Teubner, 'Justice Under Global Capitalism'. In Michael Blecher and Jennifer Hendry (eds) 'Governance, Civil Society and Social Movements: Special Issue' (2008) *Law & Critique* 19(3) 329-334, 332.

<sup>24</sup> Richard Nobles and David Schiff, *supra* note 18, 199-200.

will come as little surprise, although the issue of most interest here is actually the interplay or rather ‘structural coupling’ of these two systems with each other, and with the resultant effects both upon the general operation of the legal system and more widespread juridification dynamics.

In terms of the political system, fingers can be pointed at the rights-violating (counterfactual) excesses immediately post-9/11, some of which, such as the Guantanamo Bay detention camp, still persist to this day. The ground for these political excesses was cleared by the shock of the 2001 international terrorist attack upon the twin towers of the World Trade Center, which not only sent many of the function systems of global society into spasm or crisis<sup>25</sup> by disrupting their operations,<sup>26</sup> albeit momentarily, but then also contributed to a state of exception whereby the system of international politics was able to expand its sphere of influence. The means by which these particular circumstances gave rise to such developments are straightforward enough to pinpoint: they undermined the conditions under which the systemic safeguards of constitutional and human rights and social movements could operate, thus disrupting the legal system’s operation of rights stabilization<sup>27</sup> and removing the demands for systemic self-restriction. In this regard, Teubner’s observation that the ‘real dangers are posed less by the dynamics of international politics and more by economic, scientific and technological rationality spheres’,<sup>28</sup> while being both astute and prescient vis-à-vis the global financial crisis, as will be discussed in just a moment, nonetheless arguably downplays the destructive potential of international political power, especially when it is asymmetric to law.

This quote from Teubner brings to the fore the difference between his standpoint and that of Luhmann on the issue of the scope of constitutional and human rights. Whereas Luhmann considers the political system to be the only one requiring self-restraint, Teubner insists that other social systems need to be subject to the same controls provided for the political system by constitutional and human rights. The dangers of functional differentiation are as apparent and pernicious in other systems, such as the economy, which is ‘as capable of distorting the conditional programmes of other systems as is politics’.<sup>29</sup> While recent excesses and crises within the economic system corroborate this claim, it does not immediately follow that the need to curb such expansionist tendencies makes constitutional and human rights the mechanism to do so. This is the ‘normative turn’ on the part of Teubner, the designation of human rights as the ‘line of defence against the structural violence of

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<sup>25</sup> The excellent collection *The Financial Crisis from Constitutional Perspective* from Poul Kjaer, Gunther Teubner and Alberto Febbrajo (eds) (2011: Hart) has drawn attention to the issue of crisis and its articulation from systems-theoretical perspective. See, in particular, R. Stichweh, ‘Towards A General Theory of Function System Crises’, 43-58

<sup>26</sup> This notion of systemic ‘spasm’ toys with the idea that there is some environmental ‘noise’ or ‘irritation’ that is simply so great that it has the effect of momentarily disrupting the order created by operational closure. A spasm could arguably be generated through intense and cumulative perturbations to a system’s primary function; in terms of the legal system, this primary function is the stabilization of normative expectations, based upon its coding of legal/illegal.

<sup>27</sup> As Verschraegen notes, the legal system operations pertaining to rights are positivization, interpretation and stabilization. *Supra* note 6, 263.

<sup>28</sup> Gunther Teubner, *supra* note 23, 330.

<sup>29</sup> Richard Nobles and David Schiff, *supra* note 18, 200.

the logics of systems running amok'.<sup>30</sup> Therefore while Luhmann would restrict the curbing effect of rights to the political system, based upon his descriptive premise and the evolution of human rights through periods of social segmentation, stratification and, finally, functional differentiation, Teubner detaches rights from the political with the aim of reorienting them towards 'the independent logic and independent rationality of diverse social contexts'.<sup>31</sup>

So how do these observations relate to the specifics of the Kadi case? Interestingly, what can be observed is actually a situation of congruence of three function systems: politics, economics and law. To start at the beginning, we can say that UN Resolution 1267 (and indeed any other) is a structural coupling between the political and legal systems, representing the connection between the 'institutionalized politics' of the UN (Teubner 2012: 50) and the normative (regulatory) character of the Resolution. Moreover, as the decision to blacklist on the strength of this Resolution affects the participation of Mr. Kadi within the economic system – genuinely limiting his inclusion and participation with that system – then the coupling can also be considered as one connecting the political and economic systems. Insofar as the issue concerns the enforcement of anti-terrorist-financing norms, however, these waters are muddied, for it is less immediately apparent as to whether the Resolution also represents a structural coupling between the legal and economic systems. To put this in another way, while the blacklisting of Mr. Kadi under Resolution 1267 and the 'freezing' of his financial assets certainly had normative effect by virtue of constituting an economic sanction, the normal operations of the legal system appear to have been disrupted by the excesses of the political system. The decision-making (power) occurs within the political, which in this case – as we can now assert with the benefit of hindsight – bypassed legal due process and overstepped its bounds.

Accordingly, from systems perspective, it is the dominance of the global political system, represented here by the UN, that is problematic in terms of systemic excesses. First, the initial UN inclusion of Mr. Kadi on the UN's consolidated anti-terrorism lists under Security Council Resolution 1267 was not rights-compliant either in terms of procedure or in terms of ensuring adequate levels of judicial protection. Second, although the economic 'sanctions' suffered by Mr. Kadi appear on first glance to pertain to both the economy and the legal system, these are actually political decisions based upon protectionist ideologies and 'soft power' dynamics that are networked beyond the ambit of the UN and thus also beyond its steering and/or control. In this regard these dynamics resemble more Teubner's 'anonymous matrix'<sup>32</sup> than the recognized political power exertion by nation States and their international representatives. The danger to individuals' integrity, as he would put it, can be said to arise from 'a multiplicity of anonymous and globalized communicative processes', whereby the anonymous matrix of an autonomized communicative action is the 'fundamental-rights violator'.<sup>33</sup> Finally, it can be asserted that there are inherent flaws

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<sup>30</sup> Lyana Francot-Timmermans and Emilios Christodoulidis, 'The Normative Turn in Teubner's Systems Theory of Law', Introduction to the Special Issue with Gunther Teubner, 40) 3 *Netherlands Journal of Legal Philosophy* E. (2011) 187-190, 188

<sup>31</sup> *ibid*, 188; also Richard Nobles and David Schiff, *supra* note 18, 200-202

<sup>32</sup> Gunther Teubner, 'The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors' (2006) *Modern Law Review* 69

<sup>33</sup> Gunther Teubner, *supra* note 23



within the UN's operation, a situation that was obviously recognized and reacted to by the creation of the UN Office of the Ombudsperson.

## Good Governance

Whereby the issue of rights within systems theory can be discussed at the level of world society, that of 'good governance' relates specifically to the European Union as a 'virtuous actor'. Although systems theory is often understood as an anti-regional theory, like its anti-individualistic reputation this is somewhat over-stated. While systems of world society are differentiated from each other on the basis of their function, it is also the case that there is a subsequent system-internal differentiation (Binnendifferenzierung) that facilitates systemic understanding of environmental complexity in the form of jurisdiction- or territorial difference.<sup>34</sup> To be clear, the EU can be considered as being both a legal and political actor. Indeed, its own boundaries and the borders of its constituent Member States are communications from the political system,<sup>35</sup> which have an 'irritant' effect<sup>36</sup> upon the secondary operations and programmes of the legal system. It is also important to note here that the virtue or otherwise of a position adopted by any actor, be it the CJEU or the EU more generally, goes effectively 'unseen' by the legal system, which understands its environment in terms of its binary coding of legal/illegal,<sup>37</sup> and it alone.

As discussed above, the standpoint taken by the CJEU in its landmark judgment of September 2008 had the effect of establishing its clear stance on EU-internal human rights protections. While the procedural delay of three months prior to EU Commission implementation<sup>38</sup> reduced the 2008 decision's impact to being more rhetorical than actual, especially insofar as it affected the specifics of Mr. Kadi's situation vis-à-vis the 'frozen' assets, I submit that this judgment and, more importantly, its subsequent confirmation by the CJEU Grand Chamber in 2013 had the effect of generating and constituting an unchangeable standard<sup>39</sup> within the legal system. Having stated its case with such fanfare, the EU has effectively now established a normative standard for itself that it now must maintain. This self-restraint does not only pertain to the legal system, however, as it also has effects within the political system. The Court's decision had overt political consequences, partly in terms of the EU's relationship with the UN, which will be discussed in the next section, and partly in terms of its own identity as a rights-respecting, rights-

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<sup>34</sup> Jennifer Hendry, 'The Double Fragmentation of Law: Legal System-Internal Differentiation and the Process of Europeanization'. In Daniel Augenstein (ed), *Integration Through Law Revisited: The Making of the European Polity* (Ashgate 2012).

<sup>35</sup> Anton Schütz, 'The Twilight of the Global Polis. On Losing Paradigms, Environing Systems and Observing World Society'. In Gunther Teubner (ed.) *Global Law Without a State* (Aldershot 1997) 279-294

<sup>36</sup> Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences' 61 *Modern Law Review* (1998) 11-32

<sup>37</sup> Niklas Luhmann, 'The Coding of the Legal System'. In Alberto Febbrajo and Gunther Teubner (eds) *State, Law, Economy as Autopoietic Systems* (Giuffrè 1992).

<sup>38</sup> The ECJ followed the reasoning in Advocate General Maduro's Opinion and decided in favour of protecting fundamental rights but stopped short of the immediate invalidation of the challenged EU measures, instead allowing their continuation for another three months and thus providing time for the Commission to become rights-compliant.

<sup>39</sup> Niklas Luhmann, *Law As A Social System* (OUP 2004) 17.

compliant polity. When viewed from a system's theoretical perspective, the 2008 legal ruling in Kadi has the irritant effect of constituting this (restricted) political position for the EU, and thus generating a "rule of law" relationship between [politics] and law'.<sup>40</sup> In essence, the limitations placed upon the political are simultaneously self-limitations – in a similar sense to those represented by constitutional and human rights, as discussed above – and limitations derived from the operations of the legal system.

Even more interesting is the subsequent challenge to this stance in the form of the appeal by the Commission, the Council and the United Kingdom (UK) and its 2013 rejection, as this allows us to chart its development from a 'rule of law' relationship to a constitutional one. Nobles and Schiff outline this trajectory as follows:

'The next step, if one is to move into a 'constitutional' level, is for the legal rules which support a social system to develop a distinction between changeable and unchangeable law.<sup>41</sup> This distinction provides a basis for the legal system to limit what support it provides to the social system. For this distinction to operate as a mutual self-limitation, it must be repeated (re-entered) within that social system's own communications, generating structures of communication which identify the system's own version of what is fundamental, and not open to change.'<sup>42</sup>

As stated, the requirement for mutual systemic self-limitation is that the distinction between law that is changeable and law that is not is re-entered into the system, in this case the political system. This process of re-entry (Wiedereintritt) presents us with one of the paradoxes at the heart of systems theory, namely that what is being reintroduced into the system is the very distinction between system and environment upon which the system depends.<sup>43</sup> The distinction re-entered into the political system, therefore, can be recognized as its (political) systemic understanding of the (legal) judgment, which has the effect of operating as a mutual self-limitation on both of the function systems. The effect of the CJEU setting out their stall in Kadi 2008 to characterize the EU as both virtuous and rights-compliant – a stance generally accepted as being political in nature<sup>44</sup> – is that the political system at the EU level is now subject to self-imposed restraints pertaining to that virtuous declaration of intent.

Not that this is a new position in terms of EU politics, of course, especially in the field of human rights. These have been employed collectively as jurisdictional and identity determinants for the EU ever since their genesis, developing internally within the EU 'in conjunction with a narrative that sought to construct an identity with the Community[, while e]xternally, the narrative was concerned with the identity of the Community'.<sup>45</sup> The EU's self-description in this respect becomes altogether more

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<sup>40</sup> Richard Nobles and David Schiff, 'Pulling Back from the Edge? Review of Teubner's Constitutional Fragments', 76(3) *Modern Law Review* (2013) 620–638, 623

<sup>41</sup> My emphasis. Please note that Nobles & Schiff here rely on insights from Niklas Luhmann, *supra* note 38, 17.

<sup>42</sup> Richard Nobles and David Schiff, *supra* note 39, 623.

<sup>43</sup> Miguel Torres Morales, *Systemtheorie, Diskurstheorie und das Recht der Transzendentalphilosophie* (Königshausen & Neumann, 2002) 118.

<sup>44</sup> Gráinne de Búrca, *supra* note 4

<sup>45</sup> Andrew Williams, *EU Human Rights Policies: A Study in Irony* (Oxford: OUP) 179.

important when the focus is extended from ‘good governance’ at the level of the EU to that of global governance, most notably in terms of the apparent disconnect, at least in practical terms, between the respective stances of the EU and the UN. The vagaries of multi-level governance and the attendant issues of authority and plurality are the focus of the next section.

### **Multi-level Governance, Plurality and Authority**

Takis Tridimas recently observed that, when it comes to Kadi, we are ‘faced ... with the problem of Kompetenz-Kompetenz, to which there is no conclusive answer’.<sup>46</sup> The clash of legitimate authority claims illuminated by this case has been a subject of much debate since even before the decision was handed down; indeed, it would be disingenuous even now to suggest that the recent appeal judgment has put this debate to bed. In that regard, a systems theorist might be forgiven for the temptation to assert the theory’s radically anti-regional character and potential for abstraction: to point to the decentralization and fragmentation of world politics<sup>47</sup> and skip merrily away from the problems of complex structure! But systems theory offers much in terms of fresh perspectives on entrenched debates, so this final section will endeavour to suggest some alternatives to debating the same established tension with reference to the asymmetry between the legal and political systems at the global level. It should be noted at this stage that the ‘plurality’ generated by the decision in Kadi is not that of worldwide legal pluralism and the normative diversity that is claimed by and attaches to ethnic and cultural communities<sup>48</sup> but rather one of multiple (dual) authority and competence claims from regulatory regimes at various levels of world society.

First, having mentioned the innate anti-regionality of systems theory, a note on spatial issues. The particular accommodation of territorial considerations within systems theory have already been discussed in the preceding section but they bear some more scrutiny here, especially in terms of how the interaction of different ‘levels’<sup>49</sup> of different function systems is understood from systems theoretical perspective. The hard regime boundaries that create such ‘levels’ are subject to elision by a theoretical approach that differentiates primarily upon the basis of function, but this is not to say that they are vanquished entirely. On the contrary, instead of an absolute ‘dismissal of geography’,<sup>50</sup> subsequent system-internal processes of differentiation occur to reconstruct jurisdictional and territorial specificity within the relevant function systems on the terms of those function systems. To give an example here: the internally differentiated ‘German’ part of the legal system will ‘see’ and operationalize a judgment of the Bundesverfassungsgericht differently to equivalent parts corresponding to other EU Member States. Any multi-level conflict arising is,

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<sup>46</sup> Takis Tridimas, ‘Economic Sanctions, Procedural Rights and Judicial Scrutiny: Post-Kadi Developments’ (2013) 489.

<sup>47</sup> Marcelo Neves, *Transconstitutionalism* (Hart 2013) 58

<sup>48</sup> Gunther Teubner, ‘Global Bukowina: Legal Pluralism in the World-Society (1996). In Gunther Teubner (ed.) *Global Law Without A State* (Dartmouth, 1997) 3-28. See also Gunther Teubner, ‘Legal Regimes of Global Non-State Actors,’ in the same volume.

<sup>49</sup> This is not to introduce a hierarchical element, which would of course be antithetical to systems theory, but rather to help convey the idea of separate areas within the overarching function system.

<sup>50</sup> Anton Schütz, *supra* note 35.

therefore, also a system-internal one, thus avoiding any discussion of structural coupling<sup>51</sup> or cross-systemic irritation.

Systems theory consequently offers the opportunity of considering the issue in relation to the legal system and the legal system alone. Following the reasoning above, it can be asserted that the EU legal order is, by means of legal system-internal differentiation, an internal construct that operates according to the system's secondary programmes, which is to say, according to its own rules of operation. This situation is one created by the Treaties, binding undertakings on the part of the signatory Member States that constitute structural couplings between the legal and the political. Moreover, the particular nature of EU law in relation to that of its Member States – which is to say, its penetrative quality resulting from the doctrine of direct effect – means that this internal construct also includes many Member State legal operations, and broadly symmetrical ones at that. Legal-systemic unity is untroubled by this arrangement, which is conflict-averse in nature. Things are complicated, however, by the inclusion of UN norms within the system – and I use the term norms specifically here – not least by the issues of procedure, legitimacy, efficacy, enforceability and practicality engendered by the struggle to determine competence. The solution, such as there is one, may be located in the recognition that while UNSC Resolutions are certainly normative, they lack the requisite robust legality in order validly to countermand EU-related systemic operations.

This widespread weakness of law at the international level is in sharp contrast to that of law at EU level; nevertheless, law is not the only function system show in town, so to speak. Instead of viewing the UN from the perspective of the legal system, therefore, it follows that it is rather the political system that is kinder to the UN, which is, after all, a regime of 'institutionalized politics'.<sup>52</sup> In contrast to the legal system, where the EU legal order occupies a position of strength and the UN 'legal' order is comparatively weak, a shift in focus to the political system and, indeed, its interaction with and irritation of the legal system, and the UN's political power comes to the fore. What can be observed here is a general asymmetry in terms of the legal and the political on the global scale, to the extent that law finds itself directly subordinated to power.<sup>53</sup> This asymmetry was hinted at earlier in the section on rights, where constitutional and human rights were cited as buffers against the excesses of systemic over-reach and processes of de-differentiation.<sup>54</sup>

In this sense it is not difficult to see the task law faces, not only to maintain its position at the international level but also to avoid any further erosion. One could query at this point whether or not such dangers can be understood as giving rise to a systemic crisis,<sup>55</sup> which can be said to occur when a systems' operations and

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<sup>51</sup> 'Function systems can enter into "structural coupling" with each other so that their autopoiesis – though still operationally closed – is in contact with that of another systems. [...] Structural coupling does not violate the operational closure of systems, rather it establishes specific relations between different autopoietic processes.' See Hans-Georg Moellers, *Luhmann Explained: From Souls to Systems* (Open Court 2006) 37

<sup>52</sup> Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Hart: 2012) 50.

<sup>53</sup> Marcelo Neves, *supra* note 47, 62).

<sup>54</sup> De-differentiation can be described as the encroachment by one system onto the territory of another; an overstepping of a system's own systemic bounds.

<sup>55</sup> Poul Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *supra* note 25.

procedures are disturbed, but it would be overblown to jump automatically to this conclusion. Indeed, while there is an asymmetry of politics and law at the international level, with politics the ascendant, the reverse is arguably true at the EU level.<sup>56</sup> This is an uncomfortable situation under a societal horizontal order premised upon the condition that ‘no system possesses a structural primacy vis-à-vis other systems’.<sup>57</sup> However, rather than shout ‘crisis’, it would more likely be a better idea to look beyond the trials of a single function system to the dual asymmetry that the Kadi case sheds light upon, and to query whether this is in fact symptomatic of a broader malaise.

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<sup>56</sup> For an in-depth discussion of the EU as a polity created by and through law, see Daniel Augenstein (ed.) *‘Integration Through Law’ Revisited: The Making of the European Polity* (Ashgate 2012)

<sup>57</sup> *Ibid*, specifically the Introduction, xvi.