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**Administration or Federation?  
Constitutional Self-Image and the World Political Order  
in Which the EU Finds Itself**

by

Ming-Sung Kuo\*

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## Abstract

In this article, I compare constitutional and administrative models in terms of their implications for the EU legal order's interaction with other legal regimes. I aim to make a twofold argument on the implications of the EU's constitutional self-image to the world political order. First, as the CJEU adopts an identity-centred strong constitutionalist position on the Union's external relations, it implicitly frames the EU legal order's interaction with other legal regimes as in a federated order. Yet the strong political implications of federation are likely to bring about more inter-regime conflicts and provoke reactions from Member States. Second, I provide a critique of the administrative model in the light of GAL's intervention in inter-regime relations, suggesting a post-identity constitutional alternative in times of crisis. Freed from the value-laden concept of constitutional identity, but without de-constitutionalizing itself, the EU can have the benefits of both the constitutional and administrative models by moving towards a weak-form constitutional order. In the event, the debate, as to whether to conduct the EU's external relations according to the constitutional or the administrative model, is misconceived.

## Key-words

EU external relations, constitutional self-image, weak-form constitutional order, GAL approach, post-identity constitutional vision



## 1. Introduction: Two Visions of Political Ordering

Not long ago, the European Union (EU or Union) was a source of political inspiration. Students of law, international politics, and other disciplines keenly studied the European project, which was seen as the prototype of new politics: post-statist, post-national, or even post-political (Brunkhorst 2004: 103; Haltern 2003). Despite the defeat of the “Treaty establishing a Constitution for Europe” in 2005, the Lisbon Treaty of 2009 carried the constitutional flame. The EU continued to stand as the object of constitutional admiration for its transformation, from a regional body focused on the administration of coal and steel, into a constitutional polity without arousing the emotions surrounding the idea of constituent power (Kuo 2012a). Seen in this light, the EU appeared to be a constitutional compound of multilevel governance, suggesting a nascent European federation without a European federal state (Weiler 2001; Pernice 1999; Pernice 2009; Delledonne and Martinico 2016; Fossum and Jachtenfuchs 2017; Keating 2017). As the exemplar of this new federalism, the EU model seemed to stand ready to be deployed on a global scale (Cohen 2012: 48-49).

Yet the European project appears to have soured following a series of crises after the Lisbon Treaty (Sciicluna 2014). The Greek debt crisis has called the euro, the symbol of the European integration, into question since 2009. The continuous flow of refugees driven by the ongoing Syrian Civil War has crushed the semblance of solidarity among Member States. The result of the British referendum on 23 June 2016 has suddenly made the unthinkable very real, as the forthcoming Brexit belies the EU’s self-identification as “an ever closer union.” Beneath these ground-shaking events lurks the potential for a nationalist turn in Member States. In this view, the EU is no longer the solution to, but the source of, problems. Instead of being an object of admiration, the EU is blamed for economic stagnation, for lower living standards, for chronic unemployment, for strained social security networks, for higher criminality, and for government deficits. The EU is held responsible for all the woes facing its Member States. Alongside, and drawing from, popular antipathy towards the EU, populist movements continue to gain ground, threatening to bring down the European constitutional compound.<sup>1</sup> Confronted with the nationalist turn in politics, the nation-state is once again turned to as the ultimate fountain of the political (re)legitimation of the EU



(Weiler 2012). The EU appears to be regressing to its early stage of development as a transnational administrative body, entering its post-constitutional era.

The narrative above traces the trajectory of the EU, moving from a transnational administration to a constitutionalized federation and back to a transnational administration again. Seen in this light, the constitutional and administrative characterization of the EU has much to do with the identity of the EU but little to say about the world beyond. Yet administration and federation are not just the two tales of the Union. Instead, as I shall argue, the EU's seeming oscillation in its political form, between administration and federation, reveals something of the relationship that it envisages between the world and itself. My argument is that in choosing between administration and federation, the EU not only positions itself in the world but may also inadvertently define the political form of the world. Specifically, when the pendulum swings to the extreme of constitutionalized federation, the world political order conceived by the EU emerges as a federated one, that would operate based more on principles and norms, than on bargains and diplomacy. Yet the relationship between the constitutional polity of the EU, and the outside world in a federated global order, may turn out to be one of friction, even confrontation, instead of harmony, while such a constitutional self-image of the EU also sows the seeds of strife between the EU and its Member States. This does not suggest that swinging back to the extreme of administration is the way out of friction. Rather, as I shall contend, a better approach would be to recast the European project in new constitutional terms, situating the EU and its relationship with the world between administration and federation.

My argument is structured as follows. To show why the constitutional self-image of the EU is not only a matter of interpreting the EU legal order, but also bears on the envisaging of the political form of the world order, I first revisit the *Kadi* case in Section 2. Although the Court of Justice of the EU (CJEU) has been praised for its adherence to constitutionalism by upholding fundamental rights, its decision was not just about the EU's constitutional image. Yet, that it explicitly tied the stringent requirement of effective judicial remedy to the constitutional principles of the EU legal order, suggests the underlying role of constitutional identity in the rulings.<sup>11</sup> This identity-underpinned position implicitly situated the constitutionalized EU in a particular world political order: a global constitutional compound. The United Nations (UN) was treated as an incomplete constitutional order that is still in its early stage of constitutionalization. Both the EU and the UN became part of the global



constitutional compound, suggesting a federated world order. Yet, in the federated world order, not only did legal friction occur between the EU and the outside world, but the Member States also reacted against the European project. In Section 3, I take up the question of whether the EU is entering its post-constitutional era in view of proposals to revert to the administrative model as the antidote needed to the current nationalist turn. Considering the current constitutional condition of the EU, I cast critical light on the administrative turn and suggest that the EU be reconceived as what I call a weak-form constitutional order, unencumbered by the value-laden concept of constitutional identity. Although the constitutional principles underpinning the European project must guide the EU's external relations, they need not be hardened into the equivalent of identity that stands as unnegotiable terms of reference. Rather, they should be read through the lens of a revised, broader *ordre public*, which would focus on the world order in general, in administering the legal relationship between the Union and the world. Constitutional principles do not command the EU's external relations but rather take shape in the course of its interaction with the world. In this way, the future relationship between the Union and the world will be less confrontational.

## 2. Not Just About the Union: The EU's Constitutional Self-Image and the Federated World Order

With the CJEU's *Kadi II* judgment of 18 July 2013, the much-discussed legal saga, that began with the flight ban on Yassin Abdullah Kadi and the freezing of his financial resources imposed by the European Commission (Commission) in 2001, finally came to an end.<sup>III</sup> Holding that the Commission regulation implementing the UN Security Council (UNSC)-mandated sanctions regime, in response to its *Kadi I* judgment of 2008, still fell short of the standard of the fundamental rights stipulated in EU law, the CJEU affirmed the ruling of the General Court that annulled the impugned Commission regulation.<sup>IV</sup> This result shows the CJEU's adherence to the fundamental principles of the EU and the rule of law prevails over other concerns.

Seen through this European legal lens, the harm inflicted on Mr Kadi seemed to end with the closing of the protracted saga. Yet the fact of the matter is that he had already been removed from the UN sanctions list before *Kadi II*, but only thanks to the Office of the



Ombudsperson and other mechanisms created by the UNSC in response to *Kadi I* (Hovell 2016: 20). This discrepancy suggests that the protection of fundamental rights was not the CJEU's only concern in its *Kadi* rulings. Essentially, alongside its praised stance on the normative values underpinning the Union, the CJEU had placed the autonomy of the EU legal order in the limelight in the rulings, suggesting something else other than the protection of fundamental rights.<sup>V</sup> Then, what lies at the heart of the CJEU's *Kadi* decisions? What does it tell us about the relationship between the Union and the world? Do the CJEU's *Kadi* rulings suggest a more complex relationship between the EU and the international legal order than the traditional international vs. municipal divide suggests? To find out, let us rewind the saga for a moment.<sup>VI</sup>

In *Kadi I*, the CJEU struck down Council Regulation 881/2002, which was adopted to implement the UNSC resolutions regarding counterterrorism sanctions under Chapter VII of the UN Charter, on the grounds that the regulation constituted an unjustified restriction of Mr Kadi's, and other targeted persons', right to be heard, right to an effective legal remedy, and right to property.<sup>VII</sup> Notably, the CJEU considered the fundamental rights established in its jurisprudence, including the abovementioned “an *integral* part of the general principles of law.”<sup>VIII</sup> In the face of the obligations imposed by an international agreement, the CJEU considered its role to be to ensure that the constitutional principles of the EU legal order are not prejudiced. In other words, when the implementation of international obligations is in conflict with the protection of fundamental rights, the CJEU must uphold the latter against the former as fundamental rights constitute the fundamental principles of the EU constitutionalized legal order. In failing this obligation, the CJEU would undercut an integral part of the general principles of law of the EU legal order in the EU's implementation of international agreements (Kuo 2015: 170). Seen in this light, “constitutional integrity” lies at the heart of the CJEU's approach to the conflict between the UNSC resolutions and EU law (Halberstam and Stein 2009: 62; see also Kuo 2015: 170-171).

To understand the full meaning of constitutional integrity and see the implications of the CJEU's insistence on the fundamental principles of the EU legal order to the relationship between the Union and the world, a closer look at the possible options before the CJEU in situations like *Kadi* will help. Cass Sunstein (1999) suggested that judges have four options in terms of scope of decision and depth of reasoning when facing controversies concerning fundamental rights. Specifically, to resolve a case, judges can control the “meaning” of their



rulings by formulating the decision narrowly as the judgment on a concrete individual dispute or widely as the settlement of a fundamental constitutional issue. Apart from appealing to the narrowness vs. width distinction in the scope of decision, judges can manage the implications of their rulings through their style of reasoning: a ruling can be accompanied either by a shallow argument or by a deep reasoning about basic principles. Taken together, judicial rulings on issues concerning fundamental rights fall in one of four categories: narrow-shallow, narrow-deep, wide-shallow, and wide-deep (Sunstein 1999: 10-19). In this light, the CJEU could uphold Mr Kadi's rights without bringing up fundamental principles. Instead of adopting "judicial minimalism," which Sunstein advocated on the grounds of democratic deliberation (1999: 4-6), the CJEU rested its ruling in *Kadi I* on its "deep" reasoning, conceptualizing the protection of fundamental rights as the constitutional principles of EU law. Moreover, though the CJEU noted that not all the provisions of the EU treaties are non-derogable, it made it clear that no derogation was permissible on "the principles of liberty, democracy and respect for human rights and fundamental freedom" of EU law as they had been enshrined "as [the] foundation of the Union."<sup>IX</sup> In this view, fundamental rights occupy a higher echelon than other derogable principles in the EU legal order. Fundamental rights are foundational to the EU legal order, constituting the Union's "constitutional identity" (Śledzińska-Simon 2015: 126; Reestman 2009: 382-384; Polzin 2016).<sup>X</sup> In sum, the CJEU went deep in its reasoning in *Kadi I* as it not only concerned the protection of fundamental rights, but also aimed to build up a constitutional identity for the EU legal order (Besselink 2010: 41; Tuori 2015: 339; see also Ziegler 2009; Martinico 2014; Martinico 2016). What grounded the CJEU's insistence on fundamental principles and constitutional integrity in the *Kadi* rulings was the idea of constitutional identity.

Moreover, the way that the CJEU thought about the Union's constitutional identity suggests far-reaching implications, from the CJEU's identity-based defence of fundamental rights, to the relationship between the Union and the world. To attribute an "identity" to the EU legal order, the CJEU does not look into whether the Union and its law have evolved into something with which EU citizens can identify themselves.<sup>XI</sup> Instead, it looks to its own case law.<sup>XII</sup> In this way, the CJEU demonstrates that the constitutionalization process it has helped to set off gives birth to the Union's constitutional identity. Read together with Miguel Maduro's Opinion of the Advocate General (AG), the importance of ascribing constitutional identity to the CJEU-driven constitutionalization process becomes clearer (Kuo 2015: 171-



174). As far as the relationship between the Union and the international legal system is concerned, AG Maduro goes all the way back to the *Van Gend en Loos* moment. Postulating *Van Gend en Loos* as “[t]he logical starting point of ... discussion,” he further infers “the autonomy of the Community legal order” from that landmark ruling.<sup>xiii</sup> In other words, constitutional identity pivots on the autonomy of the EU legal system, which governs the relationship between EU law and the international legal order (ibid: 171). Alluding to the internal/external distinction at the core of the traditional relationship between national legal orders and international law (Grimm 2005: 453; Kuo 2010b: 345-351), the CJEU regards the autonomy of the EU legal system vis-à-vis the international legal order as integral to the protection of the Union’s constitutional identity.<sup>xiv</sup> As Daniel Halberstam and Eric Stein observed, the CJEU’s allusion to the internal/external distinction reveals its intent to “complete the original promise of the Court to define the [Union] as an ‘autonomous legal order’” (Halberstam and Stein 2009: 46-47; Krisch 2010b: 169-170; but cf Isiksel 2010, 567-568). Viewed thus, the CJEU’s stance towards the Union’s international obligations mandated by the UNSC resolutions was simply the logical conclusion of *Van Gend en Loos*, by virtue of which the EU legal order began to take on the autonomous and constitutional character (Kuo 2015: 172). As part of this ongoing constitutionalization process, *Kadi I* fulfilled the “promise first delivered in . . . *Van Gend en Loos* . . . in 1964” by substantiating the Union’s constitutional identity (cf. de Búrca 2010: 44).

Notably, the CJEU’s pivoting of the idea of constitutional identity on the autonomy of EU law conforms with its continuing efforts to establish the autonomous and constitutional character of the EU legal order, vis-à-vis national legal orders of Member States, in its case law (Kuo 2015: 172). Since its inception in *Van Gend en Loos*, the main goal of the constitutionalization process has been to establish the autonomy of the EU legal system vis-à-vis Member States (Halberstam and Stein 2009: 62; Mayer 2010: 20-21). To that end, the CJEU has endeavoured to build the EU legal order into a fully-fledged constitutional value system. More important, it is on the condition of the EU legal order providing a fully-fledged system of fundamental rights that national courts have suspended their constitutional jurisdiction concerning the compatibility of EU law with the fundamental rights of the constitutions of Member States (Claes 2006: 417-423). Failure to defend fundamental rights would open the hard-won CJEU jurisdiction to potential interventions from national courts, calling the autonomy of the EU legal order into question. Thus, mindful of its role in



guarding the autonomy of the EU legal order, the CJEU holds that “an international agreement cannot affect the allocation of powers fixed by the [EU law]” and considers this principle to be the core of “the autonomy of the [Union] legal system.”<sup>xv</sup> Moreover, underlying this allocation of powers is the CJEU’s role in ensuring that “the obligations imposed by an international agreement cannot have the effect of prejudicing the [non-derogable] constitutional principles” of the EU legal order, namely, the Union’s constitutional identity.<sup>xvi</sup> Seen in this light, the ultimate goal of the CJEU-initiated process of constitutionalization cannot be fully achieved without extending further to the external dimension of the EU legal order vis-à-vis the international legal system (Besson 2009: 255; Eckes 2012).<sup>xvii</sup> This line of reasoning shows that there was much more at stake in *Kadi I* than the protection of fundamental rights. With the protection of fundamental rights understood within the framework of constitutional identity, the CJEU has defended fundamental rights to preserve the autonomy of the EU legal order and its own jurisdiction.

The more recent *Kadi II* of 2013 further illuminated the CJEU’s identity-based approach to the legal issues resulting from the EU’s implementation of the UNSC resolutions. Though the CJEU focused its attention on the procedures stipulated in the impugned regulation, which were aimed at accommodating both *Kadi I* and the corresponding procedural reforms at the UN level, it reiterated the identity-centred gist of *Kadi I*, that “the fundamental rights...are an integral part of the general principles of European Union law.”<sup>xviii</sup> Proceeding from constitutional identity, the CJEU further indirectly disputed the Ombudsperson mechanism, part of the UNSC-instituted procedural reforms in response to the requirement of effective legal remedy set out in *Kadi I*, in its discussion about the substance of rights concerned.<sup>xix</sup> In contrast to its attitude in *Kadi I* that essentially subscribed to AG Maduro’s proposal, the CJEU rejected AG Yves Bot’s recommendation for limited judicial review, which was proposed in the light of the procedural reforms concerning the UN targeted sanctions regime.<sup>xx</sup> As the Sanction Committee’s sanctions list, which was transposed to the impugned regulation, was not subject to the “judgment” of “a court” at the UN level, the CJEU decided that there were insufficient guarantees for EU institutions to presume that decisions on the content of the sanctions list were justified. Thus, the CJEU insisted that the requirement of effective legal remedy in EU law could not be satisfied if the impugned regulation did not include a full judicial review of the factual and evidentiary grounds of the sanctions list it was meant to adopt and implement. On this view, despite providing for



limited judicial review, the impugned regulation, which aimed to strike a balance between fundamental rights and international security in the light of the procedural reforms at the UN level (including the establishment of the non-judicial but independent Office of the Ombudsperson), was judged to be failing on “the guarantee of effective judicial protection” at the EU level.<sup>xxi</sup> To put it bluntly, given that effective legal remedy is understood as effective judicial protection in EU law, limiting the scope of judicial review in the Union on the grounds that non-judicial procedural safeguards have been instituted at the UN level would be tantamount to undercutting the Union’s constitutional identity and undermining the autonomy of the EU legal order.

As has been substantially discussed in the literature, the CJEU essentially subjected the UNSC resolutions to its own second-guessing in *Kadi I* when they were implemented at the EU level, suggesting a strong constitutionalist approach to the Union’s external relations.<sup>xxii</sup> Notably, some scholars saw it as the CJEU’s “act of civil disobedience” to protest the total lack of due process with the UN-backed sanctions regime at that time (Isiksel 2010: 563). Yet the insistence of *Kadi II* on judicial remedy revealed the CJEU’s assertion of autonomy and attachment to constitutional identity with little regard for the UN’s unique decision-making procedures (Hovell 2016: 27-29). This strong constitutionalist approach to the Union’s external relations has raised doubts as to whether a chauvinistic “European exceptionalism” is on the rise.<sup>xxiii</sup> In other words, a constitutionalist EU is ostensibly no less sinful than an exceptionalist America when its own status vis-à-vis the rest of the world is at stake (Goldsmith and Posner 2008). Paralleling American exceptionalism (Spiro 2000), the CJEU’s strong constitutionalist approach as suggested in its *Kadi* rulings appears to pose another threat to the international legal order in the name of sovereignty (Kuo 2015: 169-170).

As a corollary to my earlier characterization, the classical model of international relations appears to have been transposed to the relationship between the Union and the world. From this perspective, the internal/ external distinction the CJEU alluded to is redolent of the dualist international vs. municipal divide in the international legal order (Kokott and Sobotta 2012). Yet the CJEU’s emphatic distinction between EU legal instruments implementing the UNSC resolutions and the UN sanctions regime itself explains why the CJEU’s approach was constitutionalist rather than nationalist or sovereigntist despite its allusion to the internal/external distinction. Though the *Kadi* rulings inevitably undercut the UN sanctions



regime, the CJEU had emphatically confined its scrutiny to EU legal instruments without encroaching on the legality of the UNSC sanctions.<sup>xxiv</sup> Cynical commentators may view the CJEU's "narrow" decision as nothing but a disingenuous gesture; others may argue that the CJEU had no alternative as it simply lacked jurisdiction beyond EU law. Nevertheless, a close read of the CJEU's rulings in the light of the two AG Opinions will point us in another direction. AG Maduro's Opinion in particular has been praised for its *Solange*-styled dialogic approach, as it invited the UN to address the concerns about due process raised with respect to its targeted sanctions regime.<sup>xxv</sup> Seen in this light, the external UN was not so much considered to be an alien other, in the classical mode of international relations, as treaded like another unit in a pluralistic constitutional landscape, which included the UN and the EU (cf. Maduro 2009: 372-379).

It is true that the evocation of the *Solange*-styled dialogue was missing in *Kadi I*. Nevertheless, the CJEU's substitution of "internal" for AG Maduro's value-laden choice "municipal" with respect to the EU legal order<sup>xxvi</sup> suggests that the CJEU envisaged the relationship between the Union and the world as something other than the international vs. municipal divide proposed in the traditional mode of international relations (Krisch 2010b: 170-171). For this reason, the strong constitutionalist stance in *Kadi I* was not nationalist defiance against the international legal order, but rather figured as an exceptional act of civil disobedience in the quest of rule of law at the international level (Isiksel 2010: 563-569; see also Hovell 2016: 18). The political world in which the relationship between the Union and the world was conceived according to the principles of constitutional pluralism emerged as a federated order, or rather, a federation as Jean Cohen (2012) suggests (76-78).

Framed as a federation, the world of constitutional pluralism is distinct from the Westphalian order (ibid: 80-158). Institutional or jurisdictional dialogue is expected to play the principal role in steering relations between distinct constitutional units of the federation (ibid: 151-152). Yet it does not mean that relations between distinct constitutional units of the federation are always smooth. As *Kadi II* illustrated, constitutional conflicts between federal units may end up being irreconcilable. Whether this suggests that constitutional pluralism or jurisdictional dialogue is simply rhetoric is not my present concern.<sup>xxvii</sup> Yet *Kadi II* does indicate that the constitutional self-image of the Union foreshadowed the Union's external relations: the more a federal unit emphasizes its own constitutional identity, the more intense the conflict with other units becomes. The CJEU's attribution of constitutional



identity to the Union made the UN sanctions regime virtually incompatible with the provisions of fundamental rights in EU law. Clinging to the idea of constitutional identity, the CJEU took the provision of effective judicial protection at its face value, instead of adjusting the content of fundamental rights to the uniqueness of the UN regime.<sup>xxviii</sup>

More important, reference to constitutional identity in the federated political order not only intensifies the Union's external relations, but also threatens to unsettle its internal arrangement. Whether federation is a type of political order on its own terms or merely a transitional arrangement in preparation for a fully-fledged sovereign federal state is unclear (Compare Beaud 2017 with Schmitt 2008: 381-395). Yet historical examples of federations seem to point in the direction of a federal *state* (Schmitt 2008: 388-395). Continuing to build up the Union's constitutional identity and formulating the Union's interactions with the world accordingly may well have a boomerang effect. The (in)famous Opinion 2/13 on the EU's accession to the European Convention on Human Rights (ECHR) seems to confirm suspicions about the future of the Union. Despite the ECHR having been recognized as one of the sources of inspiration for EU constitutional principles, the CJEU's insistence on its privileged status as the designated institutional guarantor and interpreter of the EU legal order reveals the centrality of the legal independence of the EU from other jurisdictions in its constitutional self-image (Eeckhout 2015; cf. Halberstam 2015). In sum, the CJEU's identity-centred constitutionalist approach to the Union's external relations threatens to deepen Member States' suspicions about whether the Union is on a path towards a federal state, intensifying constitutional conflicts with other constituents of the federated world order.

### 3. Between Federation and Administration: The Future of the EU and the World Beyond

Concerns over the destination of federalist development and identity implications of the constitutionalist approach, as discussed above, have invigorated interest in contemplating non-constitutional alternatives to the conceptualization of the EU and its external relations. Notably, calls for framing the EU in non-constitutional terms had been made before the current crises. In this view, the EU is not a polity-building project, regardless of whether it is dubbed a federation or a federal state. The legitimacy of the Union lies in its administrative



character (e.g., Majone 1996; Lindseth 2010). And, the EU still remains what it was meant to be at its origin: a transnational administration that acts as the agent of the principal, namely, the Member States (Lindseth 2010). To answer the question of legitimacy about the Union's internal affairs, reverting to the administration understanding thus emerges as the advisable way forward (cf. Weiler 2012: 268). I hasten to add that the administrative alternative must be differentiated from recent nationalist talk when it comes to the Union's external relations. As the issue here concerns the relationship between the EU legal order and the outside world instead of high international politics, the administrative alternative does not mean that the resulting issues should simply be left to Member States, or to their judicial arms for that matter. As things stand, that option is simply inconceivable. To go down that, nationalist, path not only denies the fact of the EU being a recognized entity in international law but will also lead to the dismantling of the Union. How, then, can the Union's external relations be conceived of under the paradigm of administration? The Global Administrative Law (GAL) approach<sup>xxix</sup> may cast some light on the relationship between the EU legal order and the world in the administrative turn.

GAL is an avowedly non-constitutional normative response to issues resulting from more and more regulatory competences and decision-making powers being delegated to or shared by regional or international bodies (Krisch 2010a). Given that this move towards global or transnational governance reflects the practical needs of administrative regulation, GAL maintains that its approach is pragmatic. Inspired by the development of the modern administrative state, GAL focuses attention on how to utilize traditional administrative law tools to address the legitimacy challenge facing global governance by holding transnational regulators to account (Kingsbury et al. 2005b). GAL contends that, guided by the idea of "publicness" (Kingsbury 2009: 31-33; see also Kingsbury 2008), administrative law tools (those clustered under the rubric of due process in particular) have enhanced the transparency and accountability of administration when the administrative state arose at the expense of the national legislature in the second-half of the nineteenth century. Drawing on the success story of the national administrative state, GAL argues that the legitimacy question haunting global governance can also be answered with the help of administrative law (Kuo forthcoming). Yet this is only one dimension of GAL's intervention (Kuo 2012b: 1062-1064; Kuo 2013: 444-445). GAL's take on the fragmentation of global governance bears on the relationship between the EU legal order and the world under the administrative model.



Notably, GAL's response to the legitimacy challenge facing global governance is situated in the reconfigured law-space nexus in the post-national world order (Kingsbury et al. 2005b: 18-27; see also Kuo forthcoming). A juxtaposition of GAL and its source of inspiration, national administrative law, will help us to understand the importance of the post-national law-space nexus in GAL. In essence, national administrative space (in the form of the nation-state) is to national administrative law as global administrative space is to global administrative law. Specifically, GAL conceives the post-national world as a "global administrative space" transcending the boundaries of nation-states (Kingsbury et al. 2005b: 18-20). Seen in this light, what emerges from the global administrative space is a variegated "global administration" that subsumes international organizations, national administrations, private or hybrid bodies, and other informal arrangements such as various committees or networks contributing to global governance (ibid: 20-23). The objective of the GAL approach is to rein in global administration by means of global administrative law. Notably, a characteristic of global administration is a "de-territorializ[ation]" of public authorities (Cassese 2015: 466; cf. Ruggie 1993: 171-174), levelling domestic administrators and other regulatory players in global governance.<sup>xxx</sup> Such an understanding of global governance intimates a landscape of legal pluralism (Krisch 2006).

Against the backdrop of legal pluralism, the steering of relationships between regulatory regimes in the variegated global administrative space is central to the functioning of global governance. With governance issues becoming more and more complex and diverse, and given the multiplicity of networks of sectoral governance regimes, it is not always clear which regulatory body constitutive of global administration should have jurisdiction in an individual case. More often than not, an individual case is subject to multiple jurisdictions (Kuo 2013: 444). Failure to address the issues surrounding inter-regime legal relations would plunge global governance into regime collisions or inter-jurisdictional conflicts, as the literature on the fragmentation of the international legal order suggests (Koskenniemi 2007: 4-9; Fisher-Lescano and Teubner 2004: see also Teubner 2012). Thus arises the "conflict of laws" question in global administrative law (Kuo 2013: 444). Facing the threat of inter-jurisdictional conflicts amidst the fragmentation of global governance, GAL once again appeals to the idea of publicness in conceiving "conflicts of laws arrangements" (Kingsbury 2009: 56).

At the core of GAL's approach to resolve inter-jurisdictional conflicts is the balance in inter-regime relations that is to be struck in the light of the idea of publicness and its



associated principles. To resolve inter-jurisdictional conflicts, the intricate interrelationships between regulatory regimes are steered with due consideration of the underlying principles of the idea of publicness, including principles such as the limitation of power, the requirement of justification and proportionality, procedural mechanisms for deliberative decision-making, and the protection of human rights in each governance sector (ibid; Kingsbury 2008: 197). Notably, the steering of inter-regime relations is carried out on a case-by-case basis. In each instance of conflict of law arrangements, the laws of two regulatory regimes in conflict are balanced against each other to decide which one to apply in each case (Krisch 2010b: 277-278). In sum, “balancing” underpins GAL’s approach to inter-regime relations (Krisch 2006: 269-274; cf. Cassese 2005: 680).

Through GAL’s lens, the relationship between the EU legal order and the world under the administrative model figures differently from that envisaged in constitutional terms. Several points merit special mention. In contrast to the normatively progressive constitutional pluralist approach to inter-jurisdictional conflicts under the constitutional paradigm, balancing is the underlying principle that governs the Union’s external relations under the administrative model. This does not mean that balancing is reduced to a strategic practical exercise of discretion. Instead, as noted above, it only materializes in the light of the normative idea of publicness (Kuo 2012b: 1064-1067). Yet, in contrast to constitutional pluralism, which includes an implicit normative comparison of jurisdictions in terms of the degree of their constitutionalization (Cohen 2012: 69), balancing does not make, say, the EU legal order the model to which the competing UN regime is expected to progress, when the former prevails over the other in a situation like *Kadi*. Furthermore, the heterarchical relationship among jurisdictions that the administrative approach entertains suggests a different political world than the federated world order as implied in the constitutional paradigm. Global administrative space is a construct built to characterize and conceptualize the current state of affairs in the global landscape of legal pluralism. It is descriptive, if you will. In contrast, the federated world order is political in nature, having significant normative implications for how its constituents should interact with each other (ibid: 80-102; see also Kuo 2014: 287-288). The world order emerging from the intricacies of distinct legal systems is not federation but rather some semblance of administration (Somek 2010). Viewed thus, neither autonomy nor identity plays a role in the administrative approach to the Union’s external relations.



External relations, under the administrative model as discussed above, would be organized around an exercise of balancing in the light of the normative idea of publicness unencumbered by constitutional dictates. One clear positive of this non-constitutional alternative is that the EU legal order could be rendered more accommodating of other regimes; there would be less friction in the Union's external relations. Yet the administrative model also raises some important issues. First, the idea of publicness is vague, despite the support of the associated principles as noted above. It is unclear to what extent it can provide clear guidance on which regime should have jurisdiction, or whose law should apply in each instance of conflict (Kuo 2012b: 1067-1072). Second, the administrative model seems to suggest that the relationship between the EU legal order and the outside world it envisages would be framed in non-constitutional terms, corresponding to its approach to the Union's internal legitimacy. This is a misconception. And so is GAL's disavowal of constitutional ambition (Kuo 2013: 453-458). Considering the reality of irresolvable value pluralism, GAL has warned against responding to global governance from constitutional perspectives. As constitutional decisions, more likely than not, concern incompatible fundamental values, constitutionalizing the post-national world order would simply antagonize its constituents, making the issues resulting from fragmented global governance more complicated (Krisch 2006). Yet GAL is not impervious to constitutional choice. The values and principles clustered around due process are constitutional in nature. They may be only constitutional in the small-c sense, but are as contested as other fundamental decisions made in the adoption of a Big-C Constitution (Kuo 2011: 71-80). Moreover, by disavowing constitutional ambition, GAL has made its value choice as to what a constitution should look like and what deserves the noble designation of "constitution" (Kuo 2013: 453-458). GAL distances itself from the constitutional approach, in the hope that appealing to administrative law would free itself from contentious value choices confronting the post-national world and provide pragmatic answers to global governance. Yet this ostensibly apolitical position prevents GAL's underlying values from critical scrutiny, holding off genuine debate about the future of the world political order (ibid: 464-466; cf. Chimni 2005; Marks 2005). It is a misconception to make a dichotomy of the distinction between the constitutional and administrative approach.

As some GAL scholars begin to consider the constitutional question,<sup>xxxii</sup> the debate about whether to conduct the relationship between the EU legal order and the outside world



according to the constitutional or the administrative model should be reformulated, too. As the Union has taken on a constitutional character in various aspects, it will be a significant challenge to revert to the early days when the Union was merely the prototype of transnational administration. Thus, the foregoing debate should not be about a choice between constitutional and administrative models. Rather, it should be about in what kind of constitutional terms the relationship between the EU legal order and the outside world should be conceived. As discussed in Section 2, the CJEU has conceived the interaction between the EU legal order and other regimes in constitutional terms centring on the idea of constitutional identity and legal autonomy. It is the insistence on constitutional identity and legal autonomy that has pitted the EU legal order against the UN regime. Yet constitutional principles do not necessarily lead to hardened constitutional identity, not to mention a dogma of legal autonomy (cf. Cohen 2012: 75). An accommodating and balanced rendering of a fundamental right such as the right to effective judicial protection, with the variances between the EU and other regimes factored in, does not mean abandoning constitutional principles. Rather, it suggests that what matters is the integrity of the core of the rights concerned, not the autonomy of the legal order itself. To put it differently, when it comes to the relationship between the EU legal order and the outside world, we need to rethink rather than waive constitutional terms.

Moving away from the strong constitutional terms of identity (cf. Haltern 2003: 39-44), the Union's external relations can be recast in what I call the weak-form constitutional model, drawing lessons from GAL's proposal for a "conflicts of laws arrangement." On the one hand, in contrast to GAL's avowedly non-constitutional stance, the constitutional significance of the relationship between the EU legal order and the outside world should be brought to the fore under the weak-form constitutional model (cf. Kuo 2013: 464-468). Balancing, the process through which inter-jurisdictional conflicts are to be resolved, needs to be reconceived accordingly. On the other hand, the "conflicts of laws arrangement" that GAL alludes to can be further developed, and transposed to the weak-form constitutional model. In the situation where an exception needs to be made to a rule, one of the conflict of laws solutions is the '*ordre public*' doctrine, which allows the court to reject the application of foreign law for considerations of domestic public policy. This classical doctrine in conflict of laws suggests that rules need to be applied and adjusted in the broader context of public policy (see generally Mills 2008).<sup>xxxii</sup> Despite its vagueness, this principle is informative in



the steering of the relationship between the EU legal order and other regimes. As far as the Union's external relations is concerned, the rule that awaits application in the broader context of public policy is the fundamental rights provision of EU law. To apply the fundamental rights provision without adjustment would mean disregarding the broader context of public policy. This is just what the *Kadi* rulings had alluded to. In the light of how legal conflicts have been addressed in conflict of laws, the fundamental rights provision needs to be understood in a revised, broader *ordre public* in steering the relationship between the EU legal order and other regimes. Under the revised version, the calculation of *ordre public* would not be fixated on domestic policy concerns, but rather have to take the general world order into consideration (Cançado Trindade 2011: 205). Taken together, balancing provides the constitutional passage through which fundamental rights take shape in the course of EU law interacting with other legal orders. Through this lens, the legal relationship between the EU and other regimes is neither a fully-fledged federation nor simply an administration. Rather, it is in-between.

#### 4. Conclusion

In this article, I have compared constitutional and administrative models in terms of their implications for the EU legal order's interaction with other legal regimes. I have argued that choosing between administration and federation, the EU not only positions itself in the world, but may also inadvertently define the political form of the world. To show why the constitutional self-image of the EU is not only a matter of interpreting the EU legal order but also bears on the envisaging of the world order, I first revisited the *Kadi* case. My analysis has shown that the CJEU's constitutional approach to the relationship between the EU legal order and the outside world pivoted on constitutional identity and legal autonomy. Proceeding from this identity-underpinned strong constitutionalist position, the CJEU implicitly treated the UN as an incomplete constitutional order while both the EU and the UN became part of a federated world order. Yet a federated world order does not lead to a frictionless relationship between the EU legal order and other regimes. Rather, the politically charged implications of a federated world order have not only brought about more legal conflicts between the Union and the outside world, but also provoked more reactions from the Member States against the European project. Following the analysis of the constitutional



approach to the Union's external relations, I then shifted attention to how the relationship between the EU legal order and the outside world is conceived under the administrative model in the light of GAL's intervention in inter-regime relations. Considering the current constitutional condition of the EU, I cast critical light on the administrative turn, suggesting a post-identity constitutional alternative. Freed from the value-laden concept of constitutional identity but without de-constitutionalizing itself, the EU can have the benefits of both the constitutional and administrative models by moving towards a weak-form constitutional order. Situated between federation and administration, the legal relationship between the EU and other regimes should be resolved through constitutionalized balancing, unencumbered by the concepts of constitutional identity and legal autonomy. Instead of hardening into constitutional identity, the constitutional principles underpinning the European project would be read through the lens of a revised, broader *ordre public* focused on the world order in general. To conclude, constitutional principles do not dictate the Union's external relations but rather take shape in the course of its interaction with the world. In the event, the debate about whether to conduct the Union's external relations according to a constitutional or administrative model is beside the point. The new focus of attention, in times of crisis, should be in what kind of constitutional terms the relationship between the EU legal order and the outside world is to be conceived.

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\* University of Warwick School of Law.

<sup>I</sup> Despite a series of pushbacks against populism as evidenced by the defeat of the Freedom Party candidate Norbert Hofer in the recent Austrian presidential election and the Dutch electorate's denying Geert Wilders' PVV (Party for Freedom) the status of the largest parliamentary party with the culmination of Emmanuel Macron's election to the French presidency, the structural conditions for the thriving of populism in European politics remain unchanged (Brubaker 2017).

<sup>II</sup> **CJEU**, Joined Cases C-402/05 P & C-415/05 P, *Kadi v Council*, 2008 ECR I-6351 (Grand Chamber) (hereinafter *Kadi I*); **CJEU**, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission v Kadi*, 2013 ECR I-0000 (Grand Chamber) (hereinafter *Kadi II*).

<sup>III</sup> Mr Kadi was placed under the targeted sanctions regime established by a series of United Nations (UN) Security Council (UNSC) Resolutions when he was listed on the Sanctions Committee Consolidated List on 17 October, 2001. In terms of EU law, the restrictive measures (including the flight ban and the freezing of funds and other financial resources) did not apply to him until the adoption of the Commission Regulation (EC) No 2062/2001 of 19 October, 2001. *Kadi II*: paragraphs 16-17.

<sup>IV</sup> **CFI**, Case T-85/09, *Kadi v Commission*, 2010 ECR II-5177.

<sup>V</sup> Though the CJEU does not mention the autonomy of the EU legal order in *Kadi II*, it continues with the line of reasoning about 'constitutional integrity' that is at the centre of *Kadi I*. *Kadi II*: paragraph 67. I shall further elaborate the concepts of autonomy, constitutional integrity, and constitutional identity and their roles in both judgments later.

<sup>VI</sup> The following discussion on *Kadi I* draws on part of Kuo 2015: 169-174.

<sup>VII</sup> *Kadi I*: paragraphs 334 and 370.

<sup>VIII</sup> *Ibid*: paragraph 283 (emphasis added).

<sup>IX</sup> *Ibid*: paragraph 303.



<sup>x</sup> At the core of the concept of constitutional identity is the question of whether a changing constitutional order should be regarded as the continuation of the original one or as the replacement that is new and distinct from it. Notably, a recent wave of literature alludes to an alternative understanding of constitutional identity, suggesting that the constitution is constitutive or reflective of the political or national identity of its citizens through its provisions or interpretations (Jacobsohn 2010; Rosenfeld 2010; cf. von Arnould 2017: 312). In contrast to the former strain of scholarship on constitutional identity, the latter is more or less sociologically oriented and centres on the question of ‘identification’ (Reestman 2009: 378; Polzin 2016: 412). Specifically, to determine whether a particular constitution is constitutive of the political identity of citizens requires empirical investigations into the ‘common mental predispositions’ of citizens and sociological studies of whether and, if so, how that constitution becomes that which citizens identify themselves with (Reestman 2009: 377-379).

<sup>xi</sup> See note ix.

<sup>xii</sup> *Kadi I*: paragraphs 283, 335, and 355. See also Kuo 2015: 171.

<sup>xiii</sup> Opinion of Advocate General Poiares Maduro, Case C-402/05 P, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, delivered on 16 January 2008 (hereinafter Opinion of AG Maduro), paragraph 21.

<sup>xiv</sup> *Kadi I*: paragraphs 317 and 321.

<sup>xv</sup> *Ibid*: paragraph 282.

<sup>xvi</sup> *Ibid*: paragraph 285.

<sup>xvii</sup> Concerns over the autonomy of the EU constitutional order vis-à-vis other international legal orders have become more evident as EU law becomes the subject before the tribunals outside the EU legal order (Parish 2012: 142-143).

<sup>xviii</sup> *Kadi II*: paragraph 67.

<sup>xix</sup> *Ibid*: paragraphs 133-134.

<sup>xx</sup> Opinion of Advocate General Yves Bot, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission v Kadi*, delivered on 19 March 2013, paragraphs 81-87, 113-114.

<sup>xxi</sup> *Kadi II*: paragraphs 133-134. See also Hovell 2016: 9.

<sup>xxii</sup> “Constitutionalist” here refers to the strong constitutional claims made in the *Kadi* rulings without regard to the constitutionalist versus pluralist debate concerning the legal configuration of the world order (cf de Búrca 2010: 31; Krisch 2010b: 167-168).

<sup>xxiii</sup> For variations on the meaning of European exceptionalism, see Nolte and Aust 2013.

<sup>xxiv</sup> *Kadi I*, paragraphs 293-294, 299; *Kadi II*, paragraph 67.

<sup>xxv</sup> Opinion of AG Maduro, paragraphs 21-22, 38-39.

<sup>xxvi</sup> *Ibid*: paragraphs 21-23, 37, and 39.

<sup>xxvii</sup> For my further reflections on constitutional pluralism and jurisdictional dialogue, see Kuo 2015: 174-188; Kuo 2010a: 871-882.

<sup>xxviii</sup> *Kadi II*, paragraphs. 100-101, 133-134.

<sup>xxix</sup> Global Administrative Law (GAL) as a normative response to global governance in theory originates in a project of the same name at NYU, which has brought together scholars from both sides of the North Atlantic and beyond (Kingsbury et al. 2005a). To avoid terminological confusion, I use “GAL” to refer to the aforementioned theoretical stance towards global governance unless otherwise specified. As regards the actual regulations concerning global governance that inspire GAL, I call them “global regulatory norms” in the present article. In contrast, “global administrative law” (in small letters) refers to the legal rules and principles that GAL identifies as normatively governing global administration. Notably, not all global regulatory norms can be classed as global administrative law. For further discussion on GAL and other approaches to global governance, see Kuo forthcoming.

<sup>xxx</sup> The following discussion of GAL’s position on the conflict of law issues arising from global administration draws on part of Kuo 2013: 444-445.

<sup>xxxi</sup> Notably, in a 2015 symposium published in *International Journal of Constitutional Law* in celebration of the then ten-year-old GAL, the constitutional question was not dodged anymore. In contrast to the avowedly non-constitutional stance in the earlier development of GAL, most of the contributors to that celebratory symposium have embraced the constitutional question of global governance. Apart from the editor Joseph Weiler, there are eight contributors to this symposium, including GAL’s founding scholars Sabino Cassese, Benedict Kingsbury, and Richard Stewart among others. Only Benedict Kingsbury stops short of touching upon the relationship between GAL and Global Constitutionalism. For the differing stances towards the constitutional question among GAL scholars, see Symposium 2015.

<sup>xxxii</sup> Notably, Christian Joerges is the trailblazer of the Bremen School of Conflicts-Law Constitutionalism, which aims to respond to inter-jurisdictional conflicts in the postnational world order by aligning conflicts of



law with constitutionalism (e.g., Joerges 2011; see also Kuo 2013: 445-451).C-269/90, *Technische Universität München*, paras 25-26.

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