Judicial cosmopolitan authority

Claudio Corradetti

To cite this article: Claudio Corradetti (2016): Judicial cosmopolitan authority, Transnational Legal Theory, DOI: 10.1080/20414005.2016.1192356

To link to this article: http://dx.doi.org/10.1080/20414005.2016.1192356

Published online: 16 Jun 2016.

Submit your article to this journal

Article views: 8

View related articles

View Crossmark data
Judicial cosmopolitan authority
Claudio Corradetti
Lecturer and Research Fellow, Pluricourts, Centre of Excellence, Faculty of Law, University of Oslo, Oslo, Norway

ABSTRACT
In this article, I conceptualise the notion of cosmopolitan authority as a form of legitimate exercise of judicial power. I take as my starting point Raz’s paradox of autonomy versus authority and consider that its solution depends on the formulation of a ‘cosmopolitan justification condition’. Next, I consider how this standard is reflected in recent judicial practice and conclude that ‘judicial cosmopolitan authority’ is both a theoretically desirable and practically feasible ideal. Finally, I examine instances of judicial cosmopolitan authority against the backdrop of the construction of global constitutional trajectories and highlight the progressive consolidation of the notion of ‘cosmopolitan constitutionalism’. I submit that this is the result of ‘transitional’ progressions and approximations, something different from the idea of ‘constitutional moments’ or ‘constitutional revolutions’.

KEYWORDS Cosmopolitan law; authority; courts; constitutionalism

Introduction
When questioned about his country of origin or place of provenance, Diogenes replied: ‘I am a citizen of the world’. The cosmopolitan ideal has charmed Western philosophy since its inception. Both the Cynics and the Stoics believed in the primacy of cosmopolitan civic affiliations as expressions of ethical virtue and human brotherhood. For Seneca, there were two communities: ‘the one, which is great and truly common, embracing gods and men; the other, that which we have been assigned by the accident of our birth’. How do we reconcile the divide? Were the cosmopolitan order to take complete pre-eminence, it would wipe away all other laws, while laying down a uniform standard for human beings. In the long term, it would also favour the creation of a single constitution as a source of law for the cosmopolis. It is not clear whether the Stoics envisioned this scenario as in the case of Zeno’s ideal city, but it is certainly possible to draw a conceptual distinction

CONTACT Claudio Corradetti Claudio.Corradetti@jus.uio.no

between the **scope of application** and the **source of validity** of cosmopolitan law as with domestic and international institutions together establishing conditions of human equal worth.\(^3\)

I believe the historical asymmetry between the universal validity of cosmopolitan law and the dispersed singularity of its institutional counterpart is what informs also the Kantian project of *Perpetual Peace*.\(^4\) Kant’s cosmopolitanism, as I argue, does not contemplate a domestic analogy for the structuring of the transnational domain.\(^5\)

In this article, I conceptualise the notion of cosmopolitan law and judicial authority, as well as investigate how they are reflected in case-law. I begin with Raz’s paradox of authority, according to which there is an apparent incompatibility between autonomy and authority; I suggest that the cosmopolitan determinant of justification of authority helps overcome the paradox. In support of my argument, I address the following questions:

(a) On what grounds is the notion of cosmopolitan authority justified?
(b) How does cosmopolitan authority provide a standard for the legitimate exercise of power in a condition of pluralism?
(c) How does cosmopolitan authority intersect with constitutionalism?

I defend the view that the solution of the paradox depends on the recognition of a cosmopolitan standard of justification. I then consider how such a standard has been incorporated into significant case-law rulings. As an illustration, I discuss three examples relating to the German Constitutional Court (GCC), the Court of Justice of the European Union (CJEU), and the European Court of Human Rights (ECtHR). In connection with the CJEU and the ECtHR, I analyse the judicial reasoning with regard to the recent UNSC Resolutions on the so-called ‘sanction list’. I maintain that each regime, while complying with its own standards, has succeeded in providing an interpretation of human rights by presupposing, counterfactually, an ideal of unity for international law.

In the final section of the article, I bring together the central features of cosmopolitan authority with another area of judicial activity: the ‘transitional justice’ jurisprudence of the ECtHR. Transitional justice case-law is related

---


\(^5\) For the term ‘transnational’ and its connection to pluralism, I follow the definition of Peer Zumbansen for which ‘the term *transnational* is meant...to identify a methodological space in which to make sense of the conditions that shape references to law or non-law in functionally highly differentiated contexts’, accepting the author’s move forward from Philip Jessup’s classical definition: Peer Zumbansen, ‘Transnational Legal Pluralism’ (2010) Comparative Research in Law & Political Economy, Research Report No 1/2010 9, online: http://digitalcommons.sgoode.yorku.ca/clpe/70
to the grand picture of cosmopolitan constitutionalism outlined here. It accounts for systemic incorporation of cosmopolitan standards as well as for the achievement of states’ democratic thresholds.6 This does not necessarily lead to a commitment to the idea that democracy is the only political form compatible with the judicial exercise of (and state compliance with) forms of cosmopolitan authority. On the contrary, I consider that even not fully democratic states should be included within a ‘thin’ view of cosmopolitan justice.7 However, in the present discussion, I limit my account, on the one hand, to explaining the relevant cosmopolitan interactions within European judicial institutions, and on the other, to casting light on the relations between European transnational organisations and the UN on the international level.

**Conceptualising cosmopolitan authority**

In this section, I conceptualise the normative determinants of authority and particularly of cosmopolitan adjudicative authority. Authority, political or legal, has been defined in various ways: either a claim to power, a right to rule, expertise or epistemic competence. However, some of these theories have underplayed the justificatory aspect of authority, namely, that authority is legitimate if it provides a justification. It is certainly the case that different reasons connect to competing forms of justification. What I argue here is that adjudicative authority is ultimately justified on the basis of a cosmopolitan standard. Accordingly, for the purposes of this article, I define authority as an illocutionary speech-act advancing social coordination on the basis of justified reasons.8 I maintain that demands from a second-person perspective are justified if they are non-rejectable from a cosmopolitan point of view, and conclude that adjudicative authority is legitimate if it fulfils cosmopolitan constraints.

**Raz’s paradox and the idea of judicial cosmopolitan authority**

According to Raz, there is a paradox between autonomy and authority in the following terms: ‘[t]o be subjected to authority . . . is incompatible with reason, for reason requires that one should always act on the balance of reasons of which one is aware’.9 If we agree with Raz’s definitions of autonomy as

---

6 On this point, see also the contribution by Andreas Føllesdal in this symposium (‘Building democracy at the Bar: the European Court of Human Rights as an agent of transitional cosmopolitanism’ *Transnational Legal Theory* <http://dx.doi.org/10.1080/20414005.2016.1171561>).

7 On the defence of ‘equal sovereignty’ to include also non-democracies as part of a ‘thin’ notion of international justice, see Steve Ratner, *The Thin Justice of International Law* (Oxford University Press, 2015) 192 ff.

8 On the relation between illocutionary statements and weak natural law theory, see Mark Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2009).

‘a power to act in accordance with the reasons that are given to oneself’ and authority as ‘a normative power to change those reasons that apply to others’,10 it follows that authority counteracts autonomy only when it helps to better comply with reasons that already apply. Raz calls this a ‘service conception’ of authority.11 According to Raz’s service conception, claims to authority are legitimate if they accomplish a service, that is, if they make it possible to conform better to reasons than one otherwise would. For Raz, there are two aspects connected to this proposition: one theoretical and the other practical. Authority, in its theoretical dimension, raises a legitimacy question since it asks who is entitled to exercise the right to rule. How do authority claims establish a duty of compliance? Here, Raz’s argument is constructed upon an analogy. Demands of legitimate authority, from a theoretical perspective, are comparable to promises.12 Similar conditions of legitimacy apply to both a promisor and a subject of authority. However, the theoretical dimension is not sufficient to dissolve the paradox. Justification of authority also requires satisfying a practical/moral aspect.

Why is there a duty to subject one’s will to that of another? The service conception is not just a matter of subordination, something that power can achieve alone, but subordination in accordance with a reason that is legitimately binding. However, this requires the satisfaction of two other conditions:

1) The normal justification condition. Authority is legitimate if complying with its commands would help the subject to better conform ‘to reasons that apply to him anyway’.13

2) The independence condition. Acting for the right reasons is more important than acting autonomously.

The normal justification condition is satisfied only if the independence condition is also met. For instance, I might have a reason to comply with a law regulating the use of cars on the public highway because failing to do so would endanger both my life and the lives of others. In this case, it is better to comply with the authority of the law than to reason autonomously.

For Raz, legitimate authority not only helps to improve our compliance with independently justified reasons, but it also provides exclusionary reasons of action when they conflict with a legitimate rule. Legitimate authoritative directives establish pre-empting reasons, which are held as sufficient grounds to account for practical authority. Raz also asks whether consent is

---

10 Ibid.
12 Raz (n 9).
13 Raz (n 11) 1014.
a necessary component for the justification of legitimate authority. Some might object that there can be no obligation without consent, but this would seem to be implausible from a Razian perspective. In fact, consent presupposes what it has to demonstrate. It works only in the presence of an existing motivating reason for which consent is given. If this is the case, it appears redundant.

Raz provides us with an example: if I have a reason to want to cook the best Chinese food, and someone (‘John’ in the example) is an expert on Chinese cuisine, then what the expert says provides me with pre-emptive reasons to comply with his instructions.14 Does this, alone, establish a relation of authority? For Darwall it does not.15 If one takes Raz’s explanation as aiming to account for the essence of authority, then Darwall is right: what Raz manages to establish is the ‘authority of the experts’. But since this is not practical authority, being only epistemic, it does not provide exclusionary reasons.16

My aim here is to show that Raz’s service conception is helpful for justifying the legitimacy of authority transfer but not for justifying authority as a whole. Limited to the explanation of authority transfers, Raz’s service conception provides an account of the determinants of the legitimacy processes involved in the delegation of authority.17 I reject the ‘one-size-fits-all’ approach and consider, rather, that Raz’s service conception, unintentionally, helps to understand the legitimacy of the processes of constitutional adjudicative transfer that have occurred from the post-Cold War period until now. As Arendt once observed: ‘The authority we have lost in the modern world is no such “authority in general,” but rather a very specific form which had been valid throughout the Western World over a long period of time’.18

As a general overview of the idea, I consider that the transfer of state authority proceeds in regulatory and conditional terms, that is, with the aim of improving domestic epistemic standards. However, delegation of authority can be legitimately withdrawn if transnational bodies do not comply with thresholds (of cosmopolitan sorts) conferred by lower jurisdictions. That is, authority is legitimately clawed back by states if upper adjudicative levels do not provide a ‘service’ to make a community of member states conforming to the reasons that already apply to them from a cosmopolitan perspective. A reformulated version of the service conception in this respect would take the view that authority should be transferred ‘as long as’ the addressee does not lower the state’s constitutional guarantees and ‘as if’ obligations and

16 Ibid 274.
competences to rule were to be shared within a *cosmopolis*. However, for states, an effective transfer of competences means that, given certain conditions, they renounce the temporary exercise of their sovereignty on limited areas. I see this process as non-irreversible and, therefore, conditionally granted. If this were not the case, the principle of state sovereignty would be contradicted. As a result, the partial delegation of state competences is always conditional on the maintenance of certain (cosmopolitan) legitimacy standards and is always open to being reclaimed domestically.

The interplay between the domestic and the international level raises questions concerning the unity of the system of law as conceived by Kelsen. To argue that state sovereignty is always delegated conditionally does not contradict Kelsen’s idea of the unity of domestic and international law (as well as of cosmopolitan law, as I consider). However, unity at the normative level is also not in contradiction with an institutionally asymmetrical form of its realisation, that is, with diffused realisation. Unlike Kelsen, though, I do not see the logical necessity of coupling the unity of the law with a progressive institutional centralisation of authority. On the contrary, I argue that no domestic analogy holds at the institutional level. The unity of the law is perfectly compatible with a decentralised system for its realisation, and this should be thought to be necessarily so. I shall return to this point in the next section.

As noted, the service conception fails to deliver a justification of authority. What it does establish, though, is that if authority is justified, then the normal justification and the independence condition apply. To achieve justification, another more fundamental criterion must be satisfied. I consider that a justification of authority lies primarily in:

3) The cosmopolitan justification condition. Authority is justified if it provides cosmopolitan reasons for compliance that cannot be reasonably rejected.

Unlike autonomy, reasons for compliance with cosmopolitan authority incorporate an intersubjective standpoint. These reasons are public.

---

19 Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford Clarendon Press, 2002) 125. As Kelsen affirms: ‘it might be said that The Pure Theory of Law, because it secures the cognitive unity of all law by relativizing the concept of the state, creates a presupposition not without significance for the organizational unity of a centralized system of world law’. The same idea reappears later, when Kelsen sees the centralised coercive adjudication of an international court as still an intermediate step towards a tighter form of centralisation by analogy with the development of national law where ‘the obligation to submit to the decision of the courts long precedes legislation, the conscious creation of law by a central organ’. See Hans Kelsen, *Peace through Law* (University of North Carolina Press, 2008) 22–23. The possibility of progression in stages and therefore the ‘transition’ of international law into a world state is clearly admitted as a possibility at the very beginning when Kelsen writes: ‘It is quite possible that the idea of a universal World Federal State will be realized, but only after a long and slow development’ (Hans Kelsen, *Peace through Law* (University of North Carolina Press, 2008) 12).

20 Ibid 111.
Accordingly, they require a shift to the perspective of a ‘generalized other’. In other words, they transform the merely subjective character of motivations into arguments constructed upon shareable standards of reason. In this respect, they are not independent reasons in a Razian sense, but follow Darwall’s ‘second-person standpoint’. According to this alternative conception, practical authority is a relational concept where an individual is an authority if she advances a moral second-personal demand.\footnote{Stephen Darwall, *The Second-Person Standpoint* (Harvard University Press, 2006) 4 ff.} In this case, there is a dynamic of mutual accountability that holds among subjects. Compliance with second-personal authority is satisfied if it does not violate a general standard of cosmopolitan non-rejectability.\footnote{On the above-mentioned standards of justification, see Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Columbia University Press, 2014).} However, this is compatible with a plurality of *prima facie* non-rejectable reasons. With regard to a plurality of potentially non-rejectable prescriptive claims, adjudicative authority aims at advancing ultimate and exclusionary reasons. A cosmopolitan standard of justification of authority considers that coercion is legitimate if it treats individuals as equal subjects, that is, if it considers them in accordance with principles of (a) moral equality, (b) communicative freedom, and (c) political/legal inclusiveness. To be treated as an equal subject does not mean that each individual has to enjoy the same amount of rights regardless of the situational context. Cosmopolitan law is limited to protecting a general requirement of equal consideration from the internal perspective regardless of the jurisdiction in the case at hand. Despite the diversified constitutional affiliations of individuals, cosmopolitan law allows for an ‘interconnection’ of self-standing jurisdictions through overlapping practices and norms.

The three conditions mentioned above frame the values embedded in the notion of ‘cosmopolitan law’. Cosmopolitan law values are constituted by the bulk of customary practices, principles and norms that are not reducible to either natural or positive law.\footnote{My definition above expands on the Kantian view of cosmopolitan law. Similarly, Waldron considers that ‘norms [cosmopolitan norms] emerge in the world in the circumstances of dense interaction that occur *all over the place*.’ See Jeremy Waldron ‘Cosmopolitan Norms’ in Seyla Benhabib, *Another Cosmopolitanism* (Oxford University Press, 2006) 98.} This notion represents, rather, a variable system of laws and judicial actions recognising that individuals have an equal right to a place on earth.

Elaborating on Kant, it can be argued that cosmopolitan law unmasks a deeper concept as ‘the inappropriability of the earth’ (*inappropriabilité de la Terre*).\footnote{Yves C. Zarka, *L’inappropriabilité de la Terre* (Armand Colin, 2013) 47.} Kant’s legal cosmopolitanism establishes an ultimate normative level where any legally definable form of appropriation is to be subordinated to a notion of cosmopolitan ‘belonging’.\footnote{Ibid.} This means that there can be no ‘ultimate’, legally irreversible, appropriation of earth, one that would leave
the cosmopolitan citizen deprived of her right to ‘offering to engage in commerce with any other.’ If this is the case, then, equal worth amounts to recognising ‘earth citizens’ as subjects of equal rights, regardless of their legal or geographical provenance. In so far as cosmopolitan citizenship allows for the request of legal consideration, it also lays down an obligation, on the part of the receiving states, for them to be deemed to be subjects worthy of legal consideration.

**Cosmopolitan authority under conditions of constitutional pluralism**

So far, I have referred to the justificatory aspect of the reasons advanced by judicial claims of cosmopolitan authority. However, as noted, judicial authority also raises a question of legitimacy with regard to the actor or subject entitled to make authoritative claims. The justificatory and the legitimacy standard complement each other. Whereas a standard of justification lays down the reasons why judicial authority must be obeyed, a legitimacy criterion identifies the relevant judicial actors or subjects. Being a legitimate subject of authority does not provide exemption from meeting standards of justification.

In order to illustrate this point, I reconstruct a criterion of identification for legitimate authority and for its transfer from a cosmopolitan perspective. To this end, I submit that the principle of subsidiarity in international law should be reinterpreted in accordance with a ‘reverse’ use. The reverse use of the subsidiarity principle derives from a substantive account of authority, one based on a cosmopolitan type of justification. The ‘reverse’ use of subsidiarity presumes that there holds a legitimate expectation to a centralised authority ‘as if’ there were degrees of progressively inclusive constitutional levels. Delegation of authority, however, is legitimate only ‘as long as’ higher jurisdictions respect the same level of protection as within delegating institutions (states, regional bodies) and ‘unless’ decentralised authorities would fare better in carrying out the requested task. These standards of legitimacy for the transfer of authority presuppose a concept of unity between domestic and international law. As a result, they are incompatible with theories that defend an idea of ‘relative authority’. Whereas the conception of authority delineated here does not contest the idea purported by the defenders of ‘relative authority’ for whom states should ‘cooperate with, tolerate, or even subject themselves to other authorities’, as a cosmopolitan conception, it qualifies the conditions under which this is allowed. The principle of ‘reverse subsidiarity’ is indeed compatible with a plurality of *prima facie* legitimate claims to

---


28 Ibid, 178.
authority. Nevertheless, it implies that the ‘relativity’ aspect of authority is dissolved by obligations of compliance to countervailing cosmopolitan reasons. Whereas theories of relative authority do not conceive that the relative plurality of competing authorities allows for exclusionary reasons, the theory of cosmopolitan authority admits that reasons for compliance are of an exclusionary kind. 29 However, it allows them to be reasons arising from a background of persistent pluralism.

Cosmopolitan authority, though, differentiates itself from those accounts of authority based on forms of exclusionary institutional monism. Kelsen’s theory of the unity of domestic and international law rightly considers that the legitimacy of authority should be defined by an a priori basic norm (Grundnorm).30 However, the view of a unity between domestic and international law, despite Kelsen, should be considered compatible with a diffused institutional realisation and should reject, accordingly, the hypothesis of an ‘evolution’ of the system towards ‘a world state’.31

Furthermore, Kelsen’s understanding of the relation between ultimate authority and a positive system of law is open to two strands of criticisms: on the one hand, to the charge of an infinite regress, on the other hand, to the postulation of an ultimate factual – not normative – relation between a basic norm and a system of law.32 Indeed, if the basic norm were a law by itself, it would require a further source of authority in order to be legitimate; if it were an original authority-conferring act, it would misplace normativity with factual-constitutive relations.33 Kelsen attempts to explain what an “ought”-statement is in order to clarify what the basic norm is.34 One of the examples he provides is that of a father telling his child, ‘you ought to go to school’.35 To the question of the child asking, ‘why ought I go to school?’36 the father should not reply, ‘because your father commands you to do so’.37 Rather, the father should say, ‘because you ought to obey the commands of your father’.38 The child would again interrogate his father and ask,

29 For a theory of ‘relative authority’ centred on radical pluralism, see ibid, 169.
31 Kelsen draws this parallel in the following passage: ‘[e]volution in terms of legal technique, alluded to here, tends in the end to blur the distinction between international law and the state legal system. The result is that actual development of the law, directed as it is to increasing centralization, appears to have as its ultimate goal the organizational unity of a universal legal community – that is, the development of a world state’. See Kelsen (n 19) 111.
32 Kelsen refers to this point when he says that ‘[t]he Pure Theory of Law works with this basic norm as a hypothetical foundation. Given the presupposition that the basic norm is valid, the legal system resting on it is also valid. The basic norm confers on the act of the first legislator – and thus on all other acts of the legal system resting on this first act – the sense of “ought” …’ See Kelsen (n 19) 58.
33 Kelsen tries to avoid this problem by saying that the basic norm ‘is valid not as a positive legal norm – since it is not created in a legal process …’ ibid.
35 Ibid.
36 Ibid.
37 Ibid.
38 Ibid.
‘which authority confers legitimacy to the command “you ought to obey your father’s commands” and so on.’ Following Kelsen, the argument would move upwardly, and ultimately direct all chains of authorities to God, as an instance of the highest source of authority in analogy to the basic norm. Kelsen affirms:

we refuse to search for a reason of its validity [God’s norm], we take it for granted, we consider it as self-evident. Since God is considered to be the highest norm-creating authority, this norm – which is the normative foundation of God’s authority to issue norms – cannot be a norm created by an act of will, which could only be the will of an authority superior to God [emphasis added].

In my view, Kelsen’s reasoning leads to a conflation between the normative and the factual strand of justification of authority, one which is presumably motivated by the attempt to avoid infinite regress. So when it reaches the point where no further regressive account is available, the ultimate authority of a basic norm would coincide with a de facto authority. For Kelsen, indeed, God’s commanding will is authoritative ‘because we ought to obey the commands of God’, but then, contra Kelsen, the reason why we ought to obey the commands of God is ultimately because he is the supreme authority. Similarly, I suppose that a conflation of normative and factual elements occurs when Kelsen refers to the principle of ‘pacta sunt servanda’ as an instance of basic norm for customary international law.

In arguing for an a priori basic norm, Kelsen endorses a Kantian perspective. But Kant, notwithstanding the interpretation that Kelsen provides, had a distinct notion of the ultimate source of legal validity when he referred to a ‘general united will’, that is, to an ultimate cosmopolitan authority-conferring source. This is not a natural kind of authority, that is, an authority determining the content of positive law, as Kelsen correctly observed. However, different from Kelsen’s transcendental conception of the basic norm, Kant speaks of a transcendental will, one that would establish a regulative relation with a man-made system of positive laws. As Kant considers,

---

39 Ibid.
40 In the words of Kelsen: ‘The reason of the validity of this norm [father’s norm] may be considered to be a norm laid down in the Ten Commandments issued by God on the Mount Sinai. If we ask for the reason of the validity of the Ten Commandments, that is to say, why we ought to obey the Ten Commandments, the usual answer is: because God issued the Ten Commandments; but this answer, referring to a fact, is not correct. The correct answer, referring to a norm, is: because we ought to obey the commands of God’. Ibid.
41 Ibid.
42 Ibid.
43 As Kelsen puts this point: ‘The basic norm of international law, therefore, must be a norm which contains custom as a norm-creating fact, and might be formulated as follows. The states ought to behave as they have customarily behaved.’ See Hans Kelsen, Principles of International Law (Rinehart & Company Inc., 1952) 417–18.
45 Kelsen (n 34) 109.
such ‘general united will’ is the reason for which men have a reason to abandon an original condition of ‘absence of justice’ (status iustitia vacuus) – as in the state of nature – in view of entering into a system of legitimate positive law-making. This different understanding of Kant allows for a departure from Kelsen’s conception of the basic law, and accordingly, of the normative relation that subsists between a ‘general united will’ and a positive system of law. It also avoids Kelsen’s conflation of normative and factual elements in the justification of authority, since, following this view, the ‘general united will’ represents a counterfactual paradigm: ‘as if’ it were the case that positive valid norms had to be acceptable from the cosmopolitan perspective of a ‘general united will’. It also follows that, as a transcendental concept, the ‘general united will’, notwithstanding Kelsen, would require a differentiation between ‘valid’ and ‘non-valid’ laws. It would indeed provide an ultimate regulative standard of cosmopolitan kind.

**Constitutional hierarchy versus constitutional heterarchy**

Arguing for the ultimate nature of judicial cosmopolitan authority gives rise to a need for the courts to endorse a ‘constitutional mindset’. In the next section, I present the salient features of the constitutional texture that are compatible with the judicial constraints of authority reconstructed here. In particular, I discuss whether they have to be considered in terms of either pluralist or monist normative sources, as well as in terms of a hierarchical or heterarchical institutional ordering. Legitimate rulings based upon judicial cosmopolitan authority do not take place in a vacuum. To begin with, rulings are part of historically given jurisdictions, states, courts or transnational legal regimes. Each of these spheres adds levels of complexity, as in the case of the coupling of domestic sovereignty and transnational hierarchy. In the following, I outline some of the core features demonstrating the type of constitutionalism required by cosmopolitan authority. The argument I present moves from a particular interpretation of Kant’s political philosophy. It maintains that the legitimacy of state sovereignty depends partially on the internalisation of the cosmopolitan point of view. According to this insight, states do not face an ‘either/or’ alternative when engaging in transnational politics. They are not required to choose, as some scholars have suggested, between a ‘league of states’ (Völkerbund) and a ‘multistate confederation’ (Völkerstaat). The point Kant makes is a different one. What he says is that

---

46 Kant (n 44) 455.
47 Kelsen (n 19) 109–110.
50 See Kant (n 4) 328.
cosmopolitan law justifies a ‘transitional’ process of constitutional integration, one which compels states to consider themselves counterfactually ‘as if’ members of a multistate confederation. Kant traces a functional connection between the all-pervasive character of the ‘cosmopolitan constitution’ (Weltbürgerliche Verfassung), on the one hand, and a resilient pluralist perspective in which states ‘enter peaceably into relations with one another’, on the other. As a result, he assigns a regulatory function to the Völkerstaat. Note that the Völkerstaat is not equivalent to a positive instantiation of a world state, and certainly not to a world monarchy. In Perpetual Peace, Kant claims that ‘a universal monarchy’ would lead to ‘a soulless despotism [which] finally deteriorates into anarchy’. Kant also excludes the ‘positive idea of a world republic’; only the ‘negative surrogate’ of a ‘league’ of states remains as a feasible starting point. Kant’s conundrum consists, then, in reconciling the idea of universal legislation with the autonomy of state sovereignty.

Even if today’s world has changed and international courts are now the subjects of a compulsory form of jurisdiction, Kant’s modernity persists as he fleshed out some of the basic conditions that account for both the legitimacy of international law as well as state sovereignty. For Kant, in a cosmopolitan perspective, compliance with the law allows for a plurality of sovereign states and regimes. Absent a global hierarchical order culminating in one single institutional guarantor, views on cosmopolitan law couple the notion of a plurality of decentralised authorities with the idea of a ‘cosmopolitan constitution’. These two fundamental components represent the salient traits of the Kantian-inspired model of cosmopolitan constitutionalism that is also envisioned in the notion of judicial cosmopolitan authority. Its features concern not only the normative relevance of possibly dualistic forms of sovereignty, ie state and EU citizenship, but also the historical recognition of inceptive practices of judicial reasoning coupled with transnationally delegated state authority. These elements identify a peculiar ideal-type of global constitutionalism. The proposition concerning double sovereignty maintains that under a concept of unity of law, the institutional hierarchy of states is compatible with external institutional heterarchy. Here, the normative monism guiding a conceptual unity of domestic and international law is not of a

---

51 Ibid, 329.
52 Ibid.
53 Ibid, 336.
54 Ibid.
55 Ibid, 328.
56 Ibid.
57 Kant (n 4) 329.
58 On a different understanding of the ‘dualist structure’ position, see Jean Cohen, Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism (Cambridge University Press, 2012) 69. Unlike Cohen, I do not think that the UN Charter assigns sovereignty and citizenship. On the other hand, duality of sovereignty is clearly part of the EU project.
constitutive nature, as with the Kelsian Grundnorm, but rather of a regulatory kind, according to my interpretation of Kant’s cosmopolitanism.

For this reason, pluralist pretences of claims to cosmopolitan authority are compatible with the idea of ultimate standards of justification. While compliant with an ultimate regulatory standard (the cosmopolitan ‘as if’ condition), claims of authority advanced by public bodies aim to acquire legitimacy in the absence of a hierarchically superior institutional arbiter. Compared to the domestic level, this institutional asymmetry motivates the transferring of authority ‘from’ and ‘towards’ a plurality of institutions. Cosmopolitan authority aims to maintain institutional pluralism and the ultimate nature of authority at the same time – it is as said ultimately opposed to any conception of ‘relative authority’. In particular, instances of cosmopolitan judicial authority consider cooperative forms constructed on the notion of ‘relative authority’ to be only an intermediate approximation to ultimately non-rejectable claims of cosmopolitan authority. Non-rejectability here follows from a regulatory use of public reason where competing claims of authority are non-rejectable ‘as if’ from the perspective of a ‘multistate confederation’ – the Kantian Völkerstaat.

There is an important point to be noted here, one which accounts for the transfer of judicial powers to the transnational level. It concerns the way in which adjudicative bodies can assert the ultimate nature of their authority according to a cosmopolitan regulatory standard. At the domestic level, this ultimate nature is pre-assigned by procedural clauses of the constitution. This can be conditionally waived to supraordinate levels and fulfil the requirements of unity of law. Yet, when it is not waived, constitutionalism remains captured within a pre-set institutional hierarchy.

To illustrate this difference, I refer to two central cases which show that authority differs quite substantially depending on whether it is asserted at the state-federal or at the global-federal level. In Marbury v Madison, the United States Supreme Court asserted powers of judicial review through a constitutional struggle with the legislature. In the domestic arena, the constitutional battle between the judiciary and the legislature was expected to be resolved within the federal constitutional framework, such that the Supreme Court could have presumed it had such power. In contrast, in Kadi and Al

---

59 As Sasha Mudd observes with regard to the practical and cognitive implications of Kant’s Reason’s principle: ‘If the command to seek systematic unity is a categorical imperative, it will be a necessary requirement on our cognitive practice. This means that “seeking unity” will accurately describe what we do when we successfully cognize nature, and will also specify what we ought to do when we aim to cognize it’. See Sasha Mudd, ‘Rethinking the Priority of Practical Reason in Kant’ (2013) European Journal of Philosophy 16.

60 For more on this position, see Roughan (n 27) 204 ff.

Barakaat International Foundation v Council and Commission,\textsuperscript{62} the affirmation of authority by the Court of Justice of the European Union (CJEU, formerly the European Court of Justice, ECJ) and the consequent supremacy of EU law occurred \textit{in the absence} of the presumption of an already defined constitutional framework. The CJEU acquired legitimate authority to rule over the EU as a result of a partial delegation of powers by member states. Legitimate exercises of authority, in these two cases, originated from opposing assumptions: in the first case, it derived from the expectation that ultimate authority and power-competences are procedures defined by an internal order defined hierarchically – such that any competitions among powers are pathologies of the system rather than the rule; in the second case, it followed from the idea that judicial authority is justified \textit{against} a plurality of legal constitutional orders each advancing a \textit{prima facie} legitimate claim to authority. This asymmetry does not step away from Kelsen’s legal monism, but it contrasts it with the idea that power-conferring rules transform the internal hierarchy of states’ institutions into cosmopolitan heterarchy.\textsuperscript{63} In the latter case, in fact, no \textit{a priori} guarantee is given on which institution has ultimate authority. This results from judicial deliberations following non-rejectable standards of cosmopolitan authority. The ultimate nature of authority, in the first case, occurs within a \textit{hierarchical} order; in the second case, instead, it moves from the presumption of constitutional \textit{heterarchy}.

As a result of these different constitutional trajectories, states position themselves in the midst of external heterarchical relations (with regard to their interconnections with other regional and international institutions), and internal hierarchical ordering – whenever they refuse to engage with demands of cosmopolitan constitutionalism. As a result, problems of legitimacy relating to claims of authority differ in significant ways depending on whether hierarchically structured (non-authority transferring states) or, alternatively, heterarchical cosmopolitan authorities are at stake. As anticipated, the result is that legal reasoning to the effect of the domestic analogy does not apply in the transnational cosmopolitan realm.\textsuperscript{65}

This is the conceptual axis along which I see instances of judicial authority advancing a cosmopolitan-constitutional project. The view I defend reconsiders, along more pluralist lines, the long-discussed view of whether it is possible to speak of consolidating practices leading towards a global

\textsuperscript{63} Later in this article, I shall further examine this point with reference to the \textit{Solange} cases, see (n 97).
\textsuperscript{64} On the role of heterarchy in federal constitutionalism, see (n 61) 326–355.
\textsuperscript{65} On the cosmopolitan character of domestic constitutional law, see the contribution by Patrick Glenn in this symposium (‘Differential cosmopolitanism’ \textit{Transnational Legal Theory} <http://dx.doi.org/10.1080/20414005.2016.1171551>.)
constitution. As noted, the view modifies Kelsen’s monism of Grundnorm towards a principled regulative standard, and it suggests a position more sympathetic with a Kantian-like defence of Republican ideals. Finally, it aims to bring together the unity of international law and the plurality of authorities as defining features of a distinct type of cosmopolitan constitutionalism.

**Framing international law with a ‘constitutional mindset’**

How does cosmopolitan authority reflect a ‘constitutional mindset’ for reasoning about international law? How does a ‘constitutional mindset’ provide an anti-fragmentation thesis? These are two of the most fundamental questions which can be answered by reference to Kant’s Appendix I of Perpetual Peace, where he explains why there is a connection between morality and politics, and why morality as such should constrain meaningful projects for action. Kant claims that if there were an irreconcilable conflict between theory and practice, between what we are required to do by the moral imperative and what we are in fact capable of doing in practice, this would amount ‘to deny[ing] that there is a [doctrine of] morals at all’. If we could not act in accordance with moral demands, any use of politics would become a legitimate means for advancing expediency and self-interest. This point is captured by the distinction Kant draws between the moral politician, ie ‘one who takes the principles of political prudence in such a way that they can coexist with morals’ and the political moralist, ie one ‘who frames a morals to suit the statesman’s advantage’.

On the one hand, the moral politician sees the subordination of political action and legal reforms to the duties of morality, on the other hand, the political moralist disguises his personal advantage in moral terms and ‘on the pretext that human nature is not capable of what is good in accord with that idea’. Unlike the moral politician, the political moralist sees the

---

66 Following Doyle’s understanding, the only way to accommodate the constitutional reading of the UN Charter with my notion of cosmopolitan pluralism is by recognising that the UN Charter represents a constitution *sui generis* in so far as it shows only one of three properties of states’ constitutions as we know them. Indeed, while the UN Charter embeds the property of supremacy, it does not ground *per se* the unity of neither international law nor does it provide ‘the legal source of all international law’. See Michael Doyle, ‘The UN Charter – a Global Constitution?’ in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009) 114. On a different definition of pluralism compatible with the notion of pluralism presented here, see Miguel Poiares Maduro, ‘Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism’ Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009) 356–357. The question is whether and to what extent Poiares Maduro is advancing a standard form of pluralism rather than a mild version of global constitutional monism.


68 Ibid, 338–347.

69 Ibid, 338.

70 Ibid.

71 Ibid, 341.
cosmopolitan project in terms of a ‘technical problem’ and perpetual peace as simply the result of the adaptation of morality to political advantage. According to the latter perspective, it is on the basis of states’ interests and in view of a cost/benefit analysis that solutions to international problems are to be sought. Kant rejects this possibility, and in the concluding paragraphs of Appendix I of Perpetual Peace, he declares that ‘The right of human beings must be held sacred, however great a sacrifice this may cost the ruling power,’ alluding to a non-managerial interpretation of the significance of the law in view of its non-instrumental value.

It follows that when confronted with the question of how to construct the cosmopolitan project, the moral politician interprets this as a moral task. Such a task has to be realised through the expansion of the rule of law and the ordering of the sources of international law. This intellectual attitude lays down the preconditions for constructing a ‘cosmopolitan constitution.’

Constitutional thinking represents a method of practical reasoning. It concerns the process of unification of public international law by means of compliance with a cosmopolitan ideal. As Kant states in the fourth thesis of Idea: ‘nature employs in order to bring about the development of all their predispositions . . . their antagonism in society, insofar as the latter is in the end the cause of their lawful order’. The lack of sociability depicted here with the word ‘antagonism’ gives rise to the need for domestication through the enforcement of valid laws. This process should take place not only among individuals per se and within domestic borders, but also among states engaged in warfare or aggressive behaviour (ie through colonisation). A ‘cosmopolitan condition’ (weltbürgerlicher Zustand) must be instantiated, one where a global rule of law is realised through a cosmopolitan ‘right to visit’. Following this Kantian premise, I consider that the constitutional transformation of international law gives rise to the need for compliance with cosmopolitan obligations.

Even though the modern scenario is more complex, Kant’s argument in the late eighteenth century against the empirical realisation of a centralised global sovereign, a world state, still holds up well with the legal dispersion and fragmentation. Conflicts between international legal norms such as those among treaty-norms cannot be solved by resorting to establishing a hierarchy of legal sources. It is apparent that, with the sole exception of the jus cogens, there is no such a priori hierarchy that can be established in international law.

72 Ibid, 344.
73 Ibid, 347.
74 Kant (n 4).
76 Ibid, 20.
77 Kant (n 4) 329.
Furthermore, in the absence of a fixed hierarchy of legal sources for international law, it follows that there is a fundamental difficulty with regard to the processes by which customs and general principles of international law become recognised as binding standards.

There may be cases of conflict among regimes on the application of secondary rules with regard to who should be counted as a legitimate subject for the interpretation of customary international law and treaty rules (as well as on how these rules should be accounted for). As a result, the construction of a tertiary level in international law appears to be necessary for defining who is a legitimate authority. This is the level identified through the adoption of a ‘reverse’ subsidiarity principle justified on the base of a cosmopolitan account of authority.78 In the absence of a predefined hierarchical legal structure, both secondary and tertiary rules contribute to the formation of one single cosmopolitan legal space for the allocation of legitimate authority. Here, the ‘cosmopolitan turn’ of international and constitutional law accounts for what is a correlation between those who are the relevant subjects for the global legal community and the justificatory strategies that are necessary for the exercise of cosmopolitan authority.79 Variations occur with regard to which institutional subjects are most suited for the vindication of cosmopolitan claims, even when the delegation of authority to supranational levels remains normatively bound to a process of judicial legitimation.

Judicial cosmopolitan authority: global constitutional transitions

In this final section, I examine judicial decisions that illustrate the relation between cosmopolitan authority and constitutional heterarchy defined so far. In particular, I present instances of judicial reasoning emerging from some of the case-law mentioned earlier. In October 1999, the UNSC, through its Sanction Committee, adopted Resolution 126780 imposing an embargo on Afghanistan and targeting in particular the Taliban. Furthermore, it adopted restrictive measures on financial assets of suspected affiliate members of Al-Qaeda. One year later, in the absence of compliance, particularly on the part of the Taliban, the Council passed Resolution 1333, which

---

78 I consider here that the ‘reverse’ interpretation of the subsidiarity principle allows for the thesis of a ‘tertiary level’ in international law consistent with Trachtman’s notion of tertiary rules: ‘Implicit in this concept of “tertiary rules” is the non-exclusivity of constitutionalization. That is, it is possible to have multiple levels and locations at which constitutionalization takes place. The nation state holds no monopoly’. See Joel Trachtman, ‘The Constitutions of the WTO’ (2006) 17 (3) European Journal of International Law 627.


ordered the freezing of financial assets and freedom of movement for terrorist groups as well as for individuals associated with Al-Qaeda. The world of international relations and international law was changing, and it indeed changed drastically after 11 September 2001: the UNSC passed Resolution 1373 on 28 September 2001 and Resolution 1390 in January 2002. In contrast with the previous measures, Resolution 1390 aimed to be globally applicable, endowed with unlimited scope, and be territorially and temporally unconstrained. The result of Resolution 1390 was that no state was allowed to let targeted persons enter their territory or use assets that had been frozen by these UN Resolutions. The UNSC, differently from previous cases, simply ordered the suspension of certain fundamental freedoms for a blacklist of suspected terrorists. Along with Resolution 1267, Resolution 1390 became known as the ‘sanction list’ Resolution.

Did the UNSC clearly establish its own global power and agenda by adopting exceptional powers? To some, this appeared to have been the case. Since only states could represent themselves before the UNSC, individuals were deprived of the means to defend themselves before the UNSC. However, the scenario that unfolded unexpectedly and paradoxically strengthened human rights protections and drew global constitutional trajectories among regimes. In 2006, the UN General Assembly (UNGA) set up the UN Human Rights Council (UNHRC). Then, in 2007, an individual complaint procedure was implemented. It is at this moment, I argue, that a profound and systemic shift and not just an institutional reform occurred, one which advanced the project of cosmopolitan constitutionalism.

As a reaction to the UNSC Resolutions issued in response to 11 September 2001, a transition towards a new constitutional phase followed. International law has been reshaped by an initial phase of ‘human security’ and the adoption of the ‘sanction list’ Resolutions. The adoption of the ‘sanction list’ has led to reactions by regional regimes such as the ECHR and the EU. In the ECHR and EU, claims to cosmopolitan authority favour a progression in the direction of a more mature form of constitutionalism. Judicial cosmopolitan authority in this respect has contributed

84 UNGA Res 60/251 (15 March 2006) UN Doc A/Res/60/251.
86 The notion of ‘human security’ is constructed on the basis of a convergence of International Humanitarian Law, Criminal Law and Human Rights Law. See Ruti Teitel, Humanity’s Law (Oxford University Press, 2011). See Isayeva v Russia, App no 57950/00 (ECHR, 24 February 2005).
to advancing standards of constitutionalisation of international law and promoted a transnational rule of law.

The problem arising from the UN ‘sanction list’ was that the addressees of the measures had not been treated as moral ends. Even more importantly, they had not been considered as equal subjects before the law. To illustrate this point, it is worth considering the rationale of *Kadi and Al Barakaat*. In its final judgment, the Grand Chamber of the CJEU set aside the judgments of the Court of First Instance (CFI) of the European Communities delivered on 21 September 2005 and annulled the application of Council Regulation (EC) No 881/2002 and therefore the applicability of Resolution 1267 (as well as the Resolutions that followed). The Court ruled that the measures freezing the assets of suspects did not meet human rights thresholds at a level equal to the protection offered by the European Community. The UNSC acted *ultra vires* when it requested state-parties to intervene in the implementation of such measures. In particular, Mr. Kadi’s right to be heard was infringed. The Court specified that the Sanctions Committee did not provide for the possibility that individuals could remove their name from the list by exercising their right to be heard. The right to be heard was severely restricted both by diplomatic and intergovernmental procedures adopted by the Committee and by the right to veto granted to each Committee member. As well, the Committee was under no obligation to provide a justification if it refused to remove a name from the list. The Court also found that whereas Mr Kadi’s right to property could have been legitimately restricted, the fact that the Resolutions denied him the right to defend himself before competent authorities infringed his right to property.

In addition to the leading case of *Kadi*, judicial claims to cosmopolitan authority are also incorporated into other judicial practices. I shall focus on three elements on which judicial cosmopolitan authority is grounded. These include: (a) states’ cosmopolitan demands of EU compliance to national constitutional human rights standards in view of conditional delegation of states’ powers, (b) standard claims to judicial cosmopolitan authority, as introduced with *Kadi*, and (c) judicial claims to minimum thresholds of cosmopolitan authority.

I seek to show how the relevant case-law demonstrates how legitimate judicial demands of cosmopolitan authority are grounded on the assumption of a

---

87 *Kadi and Al Barakaat* (n 62).
88 Ibid (n 62).
91 UNSC Res 1333 (n 80).
systemic unity of international law and domestic law through what I call ‘cosmopolitan law’. These arguments trace a connection between claims to cosmopolitan authority and constitutional effects on international law. In the following subsections I discuss the relation between these judicial interactions.

**Judicial claims to cosmopolitan authority and the ‘transitional’ constitutionalisation of international law**

The cases I present in the following show how judicial practices of cosmopolitan authority contrast the potential fragmentation of international law, leading to a more mature constitutional phase. I see processes of cosmopolitan consolidation of the law as ‘transitional’ advancements rather than as ‘constitutional moments’ or ‘constitutional revolutions’.92 In relation to ‘transitional’ approximations I consider that macro shifts in paradigms of international law are gradual and can be placed on a continuum. Macro-legal shifts lack a clear-cut distinction between ‘normal’ and ‘constitutional’ politics and law-making. They reveal a blend of both constitutionally significant and non-constitutionally significant events. Cosmopolitan constitutionalism, furthermore, considers that legislation results from a process of ‘de-centred legal self-reflection’ and ‘through a global community of courts’.93 The examples I discuss below illustrate four significant ‘transitions’ in cosmopolitan law. Taken together, they define a cosmopolitan constitutional trajectory for international law.94

To start, I show how certain instances of judicial reasoning reveal a pattern of ‘reverse’ endorsement of the subsidiarity principle, as I introduced before.95 The ‘reverse’ adoption of the subsidiarity principle as a cosmopolitan standard of identification of the legitimate authority reflects a constitutional mindset and the practical attitude of the moral politician towards the law. The ‘reverse’ adoption of subsidiarity also provides the criteria for a legitimate transfer of authority. In its cosmopolitan terms, it considers that the scope of adjudication should be the widest possible, unless narrower enforcements

---

92 For these two notions, see, respectively, Bruce Ackerman, *We the People*, vol 1: Foundations (Harvard University Press, 1993) and Hauke Brunkhorst, *Critical Theory of Legal Revolutions* (Bloomsbury, 2014).
93 See Jean Cohen (n 58) 52.
95 I adapt this concept from Julianne Kokott and Christoph Sobotta, ‘The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?’ (2012) 23 (4) *European Journal of International Law* 1015, 1024. In this article, I apply their concept systemically to systems-integration. On the discussion of the principle of subsidiarity as a constitutional principle and on its ‘need of substantive interpretation’, as well as the need to rethink state centrality, see Andreas Føllesdal, ‘The Principle of Subsidiarity as a Constitutional Principle in International Law’ (2013) 2 (1) *Global Constitutionalism* 39 ff.
ensure that ‘all affected’ people are included. What is distinctive about this idea is that a cosmopolitan standard is maintained also at the lower levels of constituencies. 96 One clear illustration is to be found in the Solange cases. 97 In the Solange I decision, the German Constitutional Court (GCC, or Bundesverfassungsgericht – BVerfGE) considered that human rights protection at the EU level was lower than at the national one. It therefore ruled that it had the power to review EU law ‘[a]s long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights …’. 98 In the Solange II decision, the GCC ruled that there was no need to review EU standards of human rights, since the level of protection offered by the EU had increased substantively since the Solange I decision. The GCC suspended its review ‘so long as’ (‘so lange’ in German) the EU continued to grant protection of fundamental rights at the same standard as the German domestic level. 99 One interesting point here concerns the criteria adopted by the court in justifying its decision to waive adjudicative powers. There were two interdependent criteria motivating the waiver on the basis of a ‘reverse’ use of subsidiarity: (a) the cosmopolitan doctrine of equivalent protection, and (b) the clause on sovereignty claim. 100 In both cases, it should be noticed that while ‘an inalienable core’ of state’s sovereignty remains uncompromised, cosmopolitan adjudication is delegated through the transfer of legitimate authority. 101 Even if the GCC decided to suspend the exercise of its jurisdiction for ‘secondary Community law’ in the Solange II decision, the GCC never aimed to modify the unity of the constitutional order. 102 This meant that no compromise was sought on the sovereign indivisibility of the state, namely, that the claim to sovereign autonomy by the court did not become a delegated power.

At the transnational level, Kadi illustrates the core judicial practice of cosmopolitan authority. 103 In Kadi, the CJEU reviewed the judgment of the CFI

---

96 I elaborate on the ‘all-affectable’ principle along regulatory lines. For the origin of this principle and the discussion it has generated on the confrontation between the all-affectable vs all-subjectable principle, see Nancy Fraser, Scales of Justice: Reimagining Political Space in a Globalizing World (Polity Press, 2008) 56 ff.

97 Solange I decision, BVerfGE [1974] 37, 271; Solange II decision, BVerfGE [1986] 73, 339 2 BvR 197/83; and for some, even if not explicitly mentioned in terms of a ‘so long’ [so lange] reasoning, Solange III decision, Case 2134/92 Brunner v European Union Treaty 1 CMLR 57 (1994). It should be noted in passing that before these cases, the Italian Constitutional Court on 16 December 1965 established that the conditional delegation of states’ powers are subjected to the equivalent respect of human rights. See Corte Cost, Sentenza N 98 (Repubblica Italiana La Corte Costituzionale, 16 December 1965), online: <http://www.giurcost.org/decisioni/1965/0098s-65.html>

98 Solange I decision, Ibid.

99 Solange II decision, Ibid.

100 In this respect, my notion of subsidiarity does not eclipse the idea of state sovereignty. It differs then from what Cohen sees as Kelsen’s substitution of sovereignty with subsidiarity. See Cohen (n 58) 49 ff.


102 Solange II decision (n 97).

103 Kadi and Al Barakaat (n 62).
and refused to apply UNSC Res 1267 which, as mentioned, restricted rights for persons allegedly connected to Al-Qaeda and the Taliban. Whereas the CFI claimed that the UNSC did not breach any principle of *jus cogens*, the CJEU rejected the applicability of Resolution 1267 ‘in the light of the fundamental rights forming an integral part of the general principles of Community law . . .’. In this way, Mr Kadi’s request for annulment due to the infringement of the right to property, the right to be heard and the right to effective judicial review, was received by the Court. It clearly emerged from the statement of Advocate General Maduro that: ‘international law can permeate that [Community] legal order only under the conditions set by the constitutional principles of the Community.’ The claim to cosmopolitan authority by the CJEU represents a further level of bottom-up constitutionalisation of international law through the adoption of human rights standards. In this case, as with the cases presented before, the general presumption of a formal unity of international law and the application of a ‘reverse’ understanding of the subsidiarity principle was made.

A final illustration reconstructing this transnational constitutional trajectory is the *Nada* case, which concerned the application of a UNSC Resolution by an ECHR member and the decision by the Court (EChHR). Here, the EChHR requested Switzerland to provide an alternative interpretation of the UN Resolution so that it would be compatible with the ECHR. As a result of the UNSC Res 1333, which expanded the security measures laid down in Resolution 1267, the Swiss Government enacted a new article prohibiting entry or transit through Switzerland for those on the sanction list. This created a problem for Mr. Nada, an Egyptian-Italian citizen who resided in Campione d’Italia, a small Italian town completely surrounded by Swiss territory. It followed that Mr. Nada was prevented from leaving Campione d’Italia for several years.

In 2008, Mr. Nada lodged an application against Switzerland for an alleged breach of the ECHR’s ‘right to liberty’ (art 5), ‘right to respect for private and family life’ (art 8), and ‘ill-treatment’ (art 3). In addition, he claimed that there was a breach of his freedom to manifest his religion or beliefs since

104 UNSC Res 1267 (n 80).
105 *Kadi and Al Barakaat* (n 62).
107 This selection of cases reflect a normatively embedded trajectory into jurisprudential case-law. Accordingly, I do not deal with other important cases as, for instance, *Al-Jedda v United Kingdom* App No 27021/08 (ECHR, 7 July 2011). In *Al-Jedda*, the ECHR found that the House of Lords did not have enough ground for the claim that Security Council Resolution 1546 implies a breach of human rights and is acceptable so that a suspected individual could be kept under ‘indefinite detention without charge’.
108 *Nada v Switzerland* App no 10593/08 (ECHR, 12 September 2012).
109 UNSC Res 1333 (n 81).
he could not leave Campione d’Italia to reach the nearest mosque (art 9). While the Swiss Government argued that it was bound to prioritise the obligations under UNSC Res 1390, concerning prohibition on member states territorial access by suspected terrorists, in virtue of the obligation to fulfil the mandates of the UN Charter (art 25) and give it priority in case of conflict with other international treaties (art 103), the ECtHR demurred. The ECtHR held that Switzerland had enough leeway to accommodate the UNSC Resolution within the articles of the ECHR; for instance, Switzerland could have urged Italy to request the removal of Mr. Nada from the ‘sanction list’. The Court concluded that Switzerland was in breach of art 8 of the Convention. The Court also held that ‘the respondent Government [had] failed to harmonize the obligations that they regarded as divergent’ and that it could not have validly confined ‘itself on the binding nature of the Security Council resolutions.’

As I discuss later, for some, it still remains an open question whether the respondent state had in reality a margin of manoeuvre for the implementation of the UNSC Resolution. For present purposes, though, I highlight how the Strasbourg Court considered that there was a space of manoeuvre that would allow Switzerland to respect both the UNSC Res 1390 and therefore art 103 of the UN Charter, as well as its obligations under the ECHR; finally, I confront the Court’s views with the concurring opinion of Judge Malinverni who raised a crucial point for global constitutionalism.

The Court claimed that its findings provided dispensation from ‘determining the question, raised by the respondent and intervening Governments, of the hierarchy between the obligations of the state-parties to the Convention under that instrument, on the one hand, and those arising from the UN Charter, on the other. In the Court’s view . . . the respondent Governments have failed . . . to harmonise the obligations that they regarded as divergent’. Judge Malinverni was not of the same opinion in his concurring judgment. According to Judge Malinverni, the UNSC Resolution was ‘mandatory’ and not ‘discretionary’, and therefore did not allow any room of manoeuvre to the Swiss state. The Strasbourg Court, instead, should

---

111 Ibid.
112 Ibid.
113 See (n 82).
114 See, respectively, United Nations, Charter of the United Nations, 24 October 1945, art 25: ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’; as well as United Nations, Charter of the United Nations, 24 October 1945, art 103: ‘in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’.
115 Nada v Switzerland (n 109) [197].
116 Ibid, [53].
117 Ibid, [197], [55].
118 Nada v Switzerland (n 109) ‘Concurrent Opinion of Judge Malinverni’.
119 Ibid, [10].
have acted more forcefully in seeking application of human rights directly at the level of a UNSC Resolution. He concluded that while it is certainly the case that member states must enforce the decisions of the UN Security Council (art 25) as well as prioritise UN obligations when in conflict with other international agreements (art 103), this does not exempt the Security Council itself from conforming to the mandates of the Charter. As Judge Malinverni observed:

> Article 25 in fine thereof stipulates that members of the world organisation are required to carry out the decisions of the Security Council “in accordance with the present Charter”. In Article 24 §2 the Charter also provides that in discharging its duties “the Security Council shall act in accordance with the Purposes and Principles of the United Nations”.

How, then, should the ECtHR have reasoned with regard to the Nada case? Judge Malinverni drew a parallel with the reasoning of the CJEU in Kadi and claimed that this same rationale should have been adopted in Nada. He emphasised that pre-eminence should have been assigned by Article 103 to ‘the obligations . . . under the present Charter’ so that ‘[it would be] appropriate to draw a distinction between the Charter itself, as the primary legislation of the United Nations, and the UNSC Resolutions, binding (Article 25)’, where this ‘may be regarded more as secondary or subordinate UN legislation’. As it was for the CJEU’s reasoning in Kadi, the ECtHR in Nada should have balanced the fight against terrorism with respect of human rights. If it did, it would have concluded, similarly to the Kadi case, that ‘Security Council resolutions did not enjoy absolute priority in the hierarchy of Community norms, especially in relation to fundamental rights’.

What is the legal theoretical gain from this argument? Following from Judge Malinverni’s reasoning, one should distinguish between the Charter as ‘primary legislation’ and the UNSC Resolutions as ‘secondary legislation’, such that hierarchy in international agreements would be seen ‘in relative terms’, especially when an international human rights treaty is at stake. In view of the above reasoning, the idea of ultimate sources of international law prevails over the idea of a fixed hierarchy of institutional legal authority. Or, to put it in different terms, the hierarchical supremacy of an ultimate cosmopolitan constitution is compatible with a plurality of heterarchical institutional settings. Any court, either at state or regional and certainly international level, could in principle aim at judicial ultimacy on the base a judicial argument grounded on cosmopolitan authority. What Judge Malinverni’s reasoning has unmasked is that in the absence of a de facto

120 See (n 115).
121 Ibid, [15].
122 Ibid, [21].
123 Ibid.
124 Ibid.
institutional hierarchy, Resolutions of the UNSC are subject to *de jure* standards of legitimacy. This is the case, for instance, with the human rights obligations set in the UN Charter, thus in conformity with the priority of the Charter as established by art 103. Seen as elements of one single constitutional trajectory, The *Solange* cases, *Kadi* and *Nada*, together define the parameters of exercises of judicial authority along a cosmopolitan constitutional trajectory. Such claims do not surrender to arbitrary measures in response to security threats when these measures are inadequately justified. On the contrary, they indicate that the Courts, by challenging the view of an interpretive hierarchy of the sources of authority, reshape the constitutional physiognomy of international law in the light of ‘cosmopolitan transitions’.

This has important implications. The *Solange* cases, *Kadi* and *Nada* show that human rights adjudications are developing ‘tertiary’ rules for the allocation of legitimate authority. The effects of this significant development, in so far as they extend equal protection of individuals before the law across different jurisdictions, consolidate the advancement of cosmopolitan constitutionalism.125

**The ‘transitional jurisprudence’ of the ECtHR**

In this last subsection, I examine yet another sense of the ‘transitional’ as with the reasoning of the ECtHR in cases of self-consolidating democracies. The judicial rationale from these cases establish minimum European democracy thresholds for member states of the cosmopolitan constitutional project. As anticipated at the beginning of this article, while I consider that also ‘decent’ states in a Rawlsian sense can be part of the cosmopolitan project, in the present occasion I limit my analysis to the democracies or newly emerging democratic states within the European context.

The ECtHR lays down the conditions for those states engaging, respectively, with democratic progressions and avoidance of return to despotic regimes.126 As a result of regime changes, states engage in different forms of democratisation that often require human rights restrictions as they seek to strike a balance between priorities such as security and democracy. From within the European legal context, minimum standards concerning the acceptability of human rights, rule of law and democracy, constitute the pre-requisites for legitimate cosmopolitan claims to authority.

In this respect, the ECtHR’s ‘transitional jurisprudence’ has focused primarily on states that were once part of the Soviet Union, such as the Baltic

---

125 To borrow Koskenniemi’s words: ‘choice of the frame determine(s) the decision’; that is, international law nowadays possesses resources for the definition of a ‘meta-regime, directive or rule’. See Martti Koskenniemi, ‘The Fate of Public International Law: between Technique and Politics’ (2007) 70 (1) *Modern Law Review* 1, 4.

States.\textsuperscript{127} In these instances, the integration into the regime of the European Convention has proceeded on the basis of the ECtHR acting as a court of last instance for the balancing of political freedoms and the preservation of democratic stability. This raised the question of whether the Court compromised the universality of human rights, particularly for those instances where a margin of appreciation has been granted in view of the restriction of fundamental rights.\textsuperscript{128} The ECtHR has also considered the role that the notion of the ‘passing of time’ plays in lowering the risks of a return to non-democracy. On this basis, the Court granted a margin of appreciation.

More generally, with regard to the achievement of a standard of rule of law, when rights-restrictive measures interfere with the Convention, the respondent state must show that it is acting in compliance with the law, whereas, in the case of respect for the legitimacy standard, it is not sufficient to say that a measure has been imposed by the contracting state due to the transitional context. Instead, it must show that the measure is compliant with the achievements of the general legitimate goals of the Convention.

Finally, with regard to the standard of necessity, generally the Court evaluates whether the adopted measure is necessary to perform the purported transitional task. In all these cases, the key point is that the state is acting for the purposes of democratic consolidation, either on the basis of the rule of law, and/or in view of a standard of legitimacy and necessity.\textsuperscript{129} As noted, a legal and philosophically relevant question is whether, by granting a margin of appreciation for transitional contexts, the Court compromises the universality of human rights. In response to this question, it must be recognised that the Court cannot compromise human rights standards by deferring to the \textit{de facto} circumstances of the transitional contracting parties. This would vitiate the normative thinking to which the reasoning of the Court is bound. Rather, the understanding of human rights should proceed in an inherently contextual manner as in the use by the Court of a proportionality principle in the assessment of a standard of public reason for the state’s arguments. It can be argued, then, that the Court is not meant to surrender to a form of relativism when dealing with cases of transitional justice. On the contrary, it remains capable of endorsing a doctrine ‘of ethical de-centralization or subsidiarity’.\textsuperscript{130}

\section*{Conclusion}

Throughout this article, I have argued for the notion of judicial cosmopolitan authority. I have claimed that judicial cosmopolitanism is defined by both a

\begin{itemize}
  \item \textsuperscript{127} See, for instance, Ždanoka v Latvia App no 58278/00 (ECHR, 16 March 2006).
  \item \textsuperscript{128} See James Sweeney, \textit{The European Court of Human Rights in the Post-Cold War Era: Universality in Transition} (Routledge, 2013).
  \item \textsuperscript{129} Ibid.
  \item \textsuperscript{130} See James Sweeney, ‘Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era’ (2005) 54 (2) \textit{International and Comparative Law Quarterly} 467.
\end{itemize}
standard of legitimacy and a standard of justification of authority. By reference to a number of significant case-law decisions, I have showed how judicial cosmopolitan authority provides pre-emptive reasons for action. All in all, such judicial practices illustrate a newly emerging grammar of transnational constitutionalism as with the judicial reactions to the UNSC Resolutions on the ‘sanction list’. The cases I have discussed have contributed to the emergence of a new judicial epistemic framework,\(^\text{131}\) furthering the construction of a cosmopolitan constitution.

Paradigm innovations in constitutional theory are connected to epistemic frameworks of social change as well as to the formulation, at the normative level, of yet new ideals of freedom. The proposition behind the idea of judicial cosmopolitan authority indicates the emergence of a still unexplored discourse of transnational judicial constitutionalism. Tensions among the different normative orders are noteworthy, trumping the authority of states only on certain conditions, as some of the cases discussed above demonstrate.

What I have argued, then, is that unlike a fixed hierarchical constitutional structure such as that of the liberal state, the concept of unity of the law is compatible with a diffused form of sovereignty across the transnational arena, one where a Leviathan is absent. Within this scenario, the freedoms of the bourgeoisie once safeguarded by the constitutional framework are extended to a multiplicity of functionally differentiated domains. The cosmopolitan citizen is not in a position to claim the same institutional ordering as that guaranteed by the institutional structure of the state. Rather, she is left to seek her own emancipation across a range of specialised regimes, often operating with a view to the maximisation of outcomes and dissociated from a regulatory value-system. The contemporary transformation of sovereignty certainly accepts the characterisation of the transnational as an atomised model of constitutional powers, each claiming judicial cosmopolitan authority for itself. Clearly, the partial transfer of a state’s adjudicatory competence radically transforms the Westphalian indivisibility of sovereign powers. The reconstruction of judicial practices, such as those presented above, illustrates the inception of a cosmopolitan moment along irreversible lines to what constitutional theorists call ‘ratchet effects’.\(^\text{132}\) I believe, nevertheless, that any further expansion of the cosmopolitan project will face Hegel’s famous \textit{dictum} according to which philosophical understanding arrives only ‘when the shadows of night are gathering’ as in the case of Minerva’s owl.\(^\text{133}\) Undoubtedly, the world of international law has

---

\(^{131}\) Brunkhorst (n 92) 95.

\(^{132}\) Ibid.

already turned the page but this is not a reason to abandon the cosmopolitan ideal.

**Acknowledgements**

Among the many people that have contributed with comments I thank N. Roughan, M. Saul, P. Capps, L. Pasquet and D. Augenstein. I am grateful in particular to M. Kumm both for suggestions and for my research visit at the Rule of Law Center, Wissenschaftszentrum für Sozialforschung (WZB), in Berlin as research fellow thanks to the ‘Internationalization grant’ from the Department of Public and International Law, Faculty of Law at the University of Oslo. Last but not least, I thank the two anonymous reviewers and Regina Wong, senior editor of *Transnational Legal Theory* for comments and suggestions. The usual disclaimers apply.

**Funding information**

This paper was originally prepared for the conference on ‘Debating “Transitional Cosmopolitanism” through the Courts’ held on 3–4 March 2014 under the auspices of MultiRights, European Research Council Advanced [Grant number 269841] at the University of Oslo, Norway.