The Values of the European Union Legal Order

Constitutional Perspectives

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Abstract

At the heart of the European Union legal order lie values directed collectively to the idea of European integration. As a body with significant governmental and law-making powers, the Union also presents itself as an institution based upon the rule of law. The Union 'constitution' therefore expresses both regulatory powers directed towards European integration as well as rule of law principles whose scope of application is limited by the terms of the Treaties. In this article I consider how this distinctive amalgam of values operates as a constitution for the European Union, by comparison with domestic constitutional values within the Member States. I also consider how Union constitutional demands condition and inform the legal practices of the Court of Justice. Here I identify the interpretive effects of superior Union laws – the core Treaty objectives as well as rule of law principles found within the General Principles – as of particular significance in developing the legal influences of the entire Union project of integration.

Keywords: European Union, constitutional values, jurisprudence, rule of law, treaty objectives.

A. Introduction

In this article I intend to examine the landscape of the European Union constitution, offering a comparative and critical analysis of the values underlying this constitution by comparison with those of domestic legal orders. To do this, I first outline the elements of the Union 'constitution', the core Treaty articles relating to European integration and rule of law principles identified (generally) within the Treaties, and as general principles of law in the judgments of the Court of Justice. I then consider the relationship between the constitutional principles underlying legal orders generally and the values upheld as foundational by the societies to which the constitution applies. Applying this analysis in the Union setting, I suggest that the Union legal order cannot, as a result of its limited jurisdiction and lack of historical longevity, be regarded as constitutive of Member States' societies (considered collectively) in the manner of domestic constitutions. Finally, I consider the legal effects of the Union constitution, the Treaty objec-

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tives and general principles as overriding legal norms that condition all Union regulatory demands. In this regard, the interpretive effects of Union constitutional values are singled out as a method of legal judgment that promotes the broadest integrationist and rule of law objectives of the Union project by influencing the operation and development of domestic legal demands in an institutionally viable manner.

B. Domestic and Union Legal Orders: Constitutional Values

Subject to the analysis that follows, I understand constitutional values or principles[1] as generally synonymous with a broad understanding of the rule of law. Accordingly a 'rule of law' constitution includes not only procedural requirements designed to ensure that public power is not exercised arbitrarily[2] but also substantive standards of right or justice, including fundamental rights, upheld by and through the exercise of public power. This is a view that has gained currency in recent years.

The Union clearly adopts such a broad understanding of the procedural and substantive values on which it is based.[3] Accordingly, Article 2 of the TEU (as

1 Analysis of differences between principles and values is beyond the scope of this article. *See* further, R. Alexy, *A Theory of Constitutional Rights* (J. Rivers, Trans.), Oxford University Press, New York, 2002, pp. 86 *ff.*; J. Habermas, *Between Facts and Norms*, Polity Press, Cambridge, 1997, Ch. 6.

2 Expressed in Fuller's eight conditions of legality: "[...] for a legal system to exist, there must be (i) rules, and the rules must be (ii) published, (iii) prospective, (iv) intelligible, (v) free from conflict and contradiction, (vi) possible to comply with, (vii) not constantly changing, and there should be (viii) congruence between the declared rule and official action." L. Fuller, *The Morality of Law*, Harvard University Press, Harvard, 1964.

3 In this regard, compare Neil MacCormick's opinion that "It is open to question whether such purely formal virtues and process-based values are sufficient to a proper conception either of the Rule of Law or of the *Rechtsstaat*. It can be argued that requirements of substance, such as observance of basic civil and political rights or even of various economic and social guarantees are also essential." N. MacCormick, *Questioning Sovereignty*, Oxford University Press, Oxford, 1999, p. 46, with that of Lord Bingham speaking in 2006 who, when considering the possibility of a Rule of Law based simply on the meeting of formal or procedural requirements, and which therefore allowed in principle for the enactment of morally repugnant laws, commented: "On one view of the rule of law, this is enough: if clear laws, duly made and publicly promulgated, prescribe what is to be done or not done, and those rules are scrupulously observed, the rule of law is satisfied. On this view it does not matter how unfair or morally offensive the rules may be. They may, for instance, discriminate against an unpopular minority in an arbitrary and unjustifiable way, and yet – if the law is clear and unambiguous – be held to comply with the rule of law. This is not a view which commands very wide acceptance, and it is not one which I would endorse. While there is no universally accepted catalogue of rights and freedoms applicable in all countries at all times, and there is scope for local variations and development over time, there is nonetheless, I suggest, a broad measure of agreement in liberal democratic states on certain rights and freedoms regarded as fundamental to us all simply by virtue of our existence as human beings." The Right Honourable Lord Bingham of Cornhill, KG FKC, Commemoration Oration, 31 October 2007, 18.00, Great Hall, Strand Campus, at 6. *See also* F.G. Jacobs, *The Sovereignty of Law: The European Way, the Hamlyn Lectures 2006*, Cambridge University Press, Cambridge, 2007.

amended) states that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights [...]."[4] Similar values are contained within Member States' constitutions which typically affirm not only formal or procedural rule of law requirements but also a range of civil and political rights, often combined with some recognition of social and economic rights, *e.g.* in relation to health care, housing and education.[5] This close correspondence between Union rule of law values and those found within Member States', however, belies clear differences in the operative features of Union and domestic rule of law values.

Within Member States, the political and moral ideals contained within the constitution are generally regarded as synonymous with the 'deep' identity of the society, in which it (the constitution) forms the governing or supreme legal authority. In the Union setting, by contrast, the legal authority conferred under the Treaties is directed to the achievement of specified objectives allied to deeper political, social and economic integration among the Member States. This ideal of integration, which itself may be regarded as a constitutional value, is however expressed within the limited or conferred domain of Union governance under the Treaties.[6] The Union constitution is therefore wholly distinctive by comparison with the comprehensive charter for rule of law governance found within domestic constitutions. First, as a result of the Union's status as an as yet 'unrealised' political project of integration, and second as a result of the limited powers conferred under the Treaties directed towards achieving this objective. These factors suggest that the Union represents an opportunity to rethink received notions of the relationship between legal orders and the values on which they are based, premised on the relationship between State constitutions and the societies for which they provide an inclusive governmental institutional structure. This possibility is explored in the following section.

C. The Relationship between the Values of Society and the Constitution in Domestic and Union Settings

I. Member States

Within Member States a vital relationship exists between the interpreted constitution and the wider value concerns of their respective societies. Writing on the practices of the German Federal Constitutional Court, Komers describes this relationship as follows:

> An important interpretive canon postulates the interdependence of the constitutional order and the broader community. The nature of the community

4 Art. 2 TEU.

5 For analysis of the composition and normative underpinning of modern constitutions, *see* C.R. Sunstein, *Designing Democracy: What Constitutions Do*, Oxford University Press, Oxford, 2001.

6 Art. 5 TEU.

> – i.e. the German people – defines and refines the constitutional order, just as the latter defines and refines the existential reality of the community.[7]

The importance of a wider normative context within which constitutional standards find expression and of which they are an expression, has also been highlighted by Barak, a former president of the Supreme Court of Israel:

> A constitution does not operate in a normative vacuum. Outside and around the constitution are values and principles that the constitution must actualise. These are not a judge's personal values but rather the national values of the country.[8]

MacCormick makes a similar point, highlighting the interdependence of constitutional values and the wider social context in which they operate: "[l]aw has the function of regulating social coexistence in the service of certain aims and values that are independent of the activity of regulation."[9] The value perspectives present within society then act as an *interpretive guide* to constitutional meanings and thereby as constitutive elements of the fundamental values or purposes that the constitution expresses.

These views all consider the constitution, as interpreted by the courts, to be a *direct* expression of the wider evaluative perspectives of the state or society to which it applies, notwithstanding the plurality of legal and cultural values present at any given time within most modern societies. The constitution remains a core and fundamental statement of the norms and values on which a society's identity and manner of government rests.[10] How then do these observations play out in the Union setting? To address this question we need to consider each arm of the Union constitution in turn.

II. Union Constitutional Values (Rule of Law Values)

The rule of law values affirmed as foundational to the Union legal order within the Treaties are similar to those found within domestic constitutions. A crucial distinction in their operation lies, as noted above, in the fact that the Union is a developing political, legal and constitutional project whose limits are continuously developed, contested, denied and challenged by the Member States. By contrast, Member States' societies represent complex political and cultural associations, with deep historical roots. This fact does not, of itself, mean that the

7 D.P. Kommers, 'Germany: Balancing Rights and Duties', *in* J. Goldsworthy (Ed.), *Interpreting Constitutions*, Oxford University Press, Oxford, 2006, at 178.

8 A. Barak, *Purposive Interpretation in Law*, Princeton University Press, Princeton, 2007, at 237.

9 N. MacCormick, *Rhetoric and the Rule of Law*, Oxford University Press, Oxford, 2005, at 252, citing F. Atria, *On Law and Legal Reasoning*, Hart Publishing, Oxford, 2001, and R.H.S. Tur, 'Defeasibilism', 21 *OJLS* 2001, p. 355.

10 "Fundamental values and conceptions surrounding the constitution constitute the objective purpose of the constitution itself. These are the nation's basic conceptions of its values and principles. They express society's basic positions about human rights, separation of powers and democracy." Barak, 2007, at 153.

Member States represent or even aspire to more 'ideal' forms of political association than the Union. However their historical and political roots run far deeper and as such represent far more entrenched forms of social association. Such forms have attracted the emergence of inclusive constitutional charters of government, and Member States' constitutions therefore tend to actualise a body of culturally and historically grounded values of political morality, to which their respective societies aspire.

It might be said in response that any suggested tendency of constitutions to reflect or give effect to values of political morality that are expressive of the 'core' world views of the societies to which they apply is simply not realised in practice. Examples abound of constitutions that either impose narrow political ideologies upon the governed or, even worse, enable tyrannical forms of government that leave citizens open to arbitrary abuses of state authority. This historical observation where the Member States are concerned is not of course fatal to the argument that constitutions will *tend* to reproduce the broad sweep of rule of law values that promote beneficial and inclusive forms of social ordering.[11] We can also recognise in the present day that the constitutions of the various Member States broadly express universal rule of law values whose legitimacy is not seriously disputed.[12] It may therefore be reasonably affirmed that Member States' constitutions 'in fact' offer a justified and legitimate expression of the underlying value concerns of the societies in which they apply.[13]

This inclusive role is lacking where the operation of the general principles is concerned. The Union remains for the time being a limited project whose parameters of political and legal activity are defined by the Treaties. This means that the Union constitution cannot, even in a potential sense, express an inclusive body of politico-moral values in the manner of Member States whose supreme political authority to realise such values within the domestic constitution is assured. As a result, the rule of law values set out in Article 2 TEU, whilst affirmed as 'foundational'[14] within the Treaties in the manner of domestic constitutions, are far from universal in application. They operate in fact to legitimise a limited programme for Union action while providing a 'declaratory' platform for further European integration.

This role appears in principle to be at odds with the 'constitutional' supremacy of Union laws within the domestic setting, and particularly in regard to the foundational and inclusive requirements of political morality found within the constitution. While the operation of domestic constitutional demands associates the supremacy of these demands with the universality, actual or potential, of the constitution's jurisdiction, this association is not available as a justification of

11 In this regard we may say that constitutions are chameleon like, expressing universal values that also represent a particular cultural identity.

12 Although the precise scope of constitutional rights is contested.

13 Subject of course to the social and political tensions that are an endemic feature of any society and that the constitution must allow for. This, according to Cass Sunstein, is in fact a key role of the constitution – to enable an openness within civil society to disagreements of principle (Sunstein, 2001).

14 Art. 2 TEU.

Union law (supremacy). A principled distinction therefore exists between Union law supremacy that operates to discharge Member States' Treaty obligations as a matter of international law[15] and the supremacy accorded to domestic constitutions based on their role as an inclusive charter for government.

III. Union Constitutional Values (Treaty Objectives)

The Court is faced with the task of ensuring the *positive* development of the Treaty objectives. Any other view would beg the question of what purpose the Union actually serves. Clearly, this is not to address or resolve prior constitutional or political crises within the Member States given that no such elemental instabilities exist(ed) within these societies prior to the creation of the Union or during its existence.[16] Nor is this purpose to establish an *enhanced* order of rule-of-law governance by comparison with that already present within the Member States.[17] The aim of the Union project is rather the progressive development of European integration, an 'ever closer Union'.[18] This objective is unsurprisingly bound up with recognition of the requirements of Member States' constitutions.

The Court of Justice, when applying constitutional standards of Union law expresses, in common with domestic constitutional courts, what Barak has called 'purposive presumptions' in relation to the entire legal order. These presumptions

> [r]eflect the fundamental values of the system. They are a mirror image of these values. They express the constitutional perspectives at the core of the legal system. I noted as much in a case before me: "At the core of 'presumptions of general applicability' are constitutional assumptions about the essence of the democratic regime, separation of powers, rule of law and human rights".[19]

The fundamental values of the Union system include, in addition to the rule of law values Barak cites, the ideal of European integration. The interpretation of this 'constitutional value' is guided, in circular fashion, by the terms of the value itself as set out in the Treaties. In relation to this branch of the Union constitution we find that the interpretative practices of the Court contrast with those of

15 T. Moorhead, 'European Union Law as International Law', *EJLS*, Vol. 5, No. 1, 2012, p. 126.

16 Although the first Treaty creating the European Coal and Steel Community was undoubtedly a response to the upheaval caused by World War II aimed at preventing German re-armament by placing the administration of the coal and steel industries in the hands of a supranational institutional framework.

17 Although the requirement for a State to be a signatory to the European Convention on Human Rights as a precondition to accession to the Union may be noted in this regard. In addition, compatibility with fundamental rights/rule of law requirements is presented as a condition the meeting of which is necessary for *participation in* the Union project. Art. 7 TEU. *See* for a critical analysis of this provision, A. Williams, *The Ethos of Europe*, Cambridge University Press, Cambridge, 2010, at 147 *ff*.

18 Preamble to the TFEU.

19 Barak, 2007, at 172, citing the Israeli Supreme Court case, HC 953/87, *Poraz v. Mayor of Tel-Aviv-Yafo*, 42 (2) PD 309, at 329.

domestic constitutional courts that draw on the ethical and moral values of a particular society to guide constitutional interpretation. For the Court, it is rather a purposive or teleological method of interpretation, directing legal meanings to the achievement of the Treaty objectives that is supreme.[20] The Court's interpretation of Treaty requirements is *not* therefore based upon a historically grounded and inclusive resource of social values. The Treaties indeed do not purport to offer an authoritative expression of the values present within Member State societies except perhaps in the weak sense that the Treaty objectives are seen as politically desirable objectives by the governmental institutions of the Member States and minimally tolerated as such by the citizenry.[21]

This suggests that the underlying value basis of the Union constitution is in fact self-referential. Inquiry by the Court of Justice into the value-basis of the Treaties is not, as with domestic constitutions, driven conclusively by the value concerns of Member State societies. Instead, it is the Treaties themselves combined with the institutional practices of the Union in giving effect to their demands that form the 'final' evaluative backdrop to Treaty interpretation. The values underlying the Union project are finally located as a juridical expression of the Treaty objectives.

If the underlying rationale informing the Court's interpretation of the Union constitution is found within the Treaties themselves as opposed to deriving from a wider consensus of values within Member States' societies, this raises an important question: on what ultimate basis do the legal claims of the Union order rest? Generally, legal orders provide formalised methods of achieving and developing valuable social objectives, objectives that are both constituted by and consistent with the ethical and moral world-views of the societies concerned.[22] Judicial articulation of constitutional standards therefore generally stands at a juncture of the 'deep' values endorsed by society at large and the expression of these values as legal demands.

This *direct* link that exists between domestic constitutions and the wider value concerns of the societies they address is not present where the Union legal order is concerned. The Treaties represent a positive commitment to the achievement of *particular* objectives and are not as such simply the assumption of a rule

20 J. Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Clarendon Press, Oxford, 1993, at 233.

21 The fact that the Union constitution is based on Treaties underlines the fact for Mueller that "[...] from its inception it has been a confederalist structure. Its institutions have been created through negotiations between representatives of the member governments [...]." D.C. Mueller, 'Federalism and the European Union: A Constitutional Perspective', 90 *PC* 1997, p. 255, at 275, citing N. Nugent, *The Government and Politics of the European Community*, Duke University Press, Durham, 1991, at 42.

22 In the sense identified by Barak as follows: "Judges should operate within society's established central framework, not the occasional temporary structures it may build. They need not give expression to the passing trends of a society that is not being true to itself. Judges should resist those trends and give expression to the social consensus that reflects the basic principles, 'deep' values and national credo of their society." Barak, 2007, at 167. These ideas can be traced to J. Locke, *The Second Treatise of Government*, first published 1689, Dover Publications, New York, 2002.

of law jurisdiction in these areas. This suggests at best a weak connection between the ethical/moral world-views of Member State societies and the underlying values of the Union legal order.

It follows that the link between Union and the body politic represented by the Member States is primarily a juridical construct that expresses a relationship between legal jurisdictions under the supremacy doctrine. This 'systemic'[23] principle does not operate in the name of the values existentially present within the collectivity of Member State societies. Rather the doctrine is concerned with the maintenance and development of a hierarchical relationship of norms as between Union (superior) and domestic (inferior) legal rules. With these features of the Union constitution identified, we can now turn to consider how the Court expresses the legal effects of the general principles and Treaty objectives.

D. The Legal Effects of the Union Constitution

Several of the Treaty articles possess fundamental or foundational status. The opening Articles setting out the overall vision of the Union project, its commitment to fundamental rights and the establishment and functioning of the single market may be singled out as of particular significance, operating as governing principles that influence the entirety of Union legal demands. It is, however, the economic freedoms that are the central legal mechanism for developing the project of European integration. As Everling notes:

> The Common Market constitutes the starting point for the entire integration process and all attempts at more far reaching economic and political progress stem from it. Running like a red thread through the whole of the Court's case law is the idea that this core of the Community must remain sacrosanct.[24]

In other areas, competence is conferred on the Union to *develop* and enact regulatory policy, *e.g.* in relation to consumer rights or environmental protection.[25] Secondary legislation in these areas imposes Union regulatory controls irrespective of the existence of a cross-border element. This arguably results in a more intrusive form of intervention within Member States.[26] In relation to the legal effects taken by the Treaty articles and General Principles, they both act as interpretive

23 T. Tridimas, *The General Principles of EU Law*, 2nd edn, Oxford University Press, Oxford, 2006, at 4.

24 U. Everling, 'The Court of Justice as a Decision Making Authority', 82 *Mich. L. Rev.* 1983-1984, p. 1294, at 1305.

25 Titles XV and XX TFEU.

26 So the Court in *Centrosteel* stated in relation to the effects taken by a Directive harmonising the requirements of commercial agency contracts: "[...] it must be noted that the Directive is intended to harmonise the laws of the Member States governing the legal relationship between the parties to a commercial agency contract, irrespective of any cross-border elements. Its scope is therefore *broader* than the fundamental freedoms laid down by the EC Treaty." *Case C-456/98, Centrosteel Srl v. Adipol GmbH*, [2000] ECR I-6007, at para. 13 (emphasis added).

influences[27] and legality review standards[28] over secondary Union laws[29] and domestic laws connected with Union law.[30] They also act as interpretive influences over one another.[31] The Treaty articles[32] and secondary Union legislative provisions may also give rise to positive, freestanding rights, enforceable at the suit of individuals before domestic courts where the conditions for direct effect are met.[33]

In what follows I will argue that the interpretive effects of superior Union laws are the key legal mechanism for developing the authority of the Union constitution within domestic jurisdictions.

I. The Interpretive Effects of the Treaty Objectives and General Principles

The Court has consistently adopted a teleological or purposive approach to the interpretation of all Union laws, aligning primary and secondary legislative meanings to the integrationist objectives found in Articles 1 and 3 TEU. This rationale is described in an early judgment as follows:

> Under Article 2 [Art. 3 TEU] of the Treaty, which is placed at the *head* of the general principles which *govern* it, the Community has as its task to *promote* throughout the Community a harmonious development of economic activities by establishing a common market and progressively approximating the economic policies of Member States.[34]

The Court therefore exhibits a *preference* for a purposive and dynamic style of interpretation allied to the active promotion of the Treaty objectives, an approach

27 *See* Tridimas, 2006, at 3.

28 *Ibid.*, at 36.

29 The legality review of the Treaty Articles (primary Union legislation) is not possible either by reference to other Treaty articles or the general principles.

30 Tridimas, 2006, at 31.

31 *Case C-112/00, Schmidberger Intewrnationale Transporte und Planzuge v. Austria*, [2003] ECR I-5659.

32 *Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1; *Case 93/71, Leonesio v. Italian Ministry for Agriculture and Forestry*, [1972] ECR 287 (Regulations); *Case 41/71, Van Duyn v. Home Office*, [1974] ECR 1337 (Directives); *Case 9/70, Grad v. Finanzamt Traunstein*, [1970] ECR 825 (Decisions).

33 *Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1 (Treaty articles); *Case 93/71, Leonesio v. Italian Ministry for Agriculture and Forestry*, [1972] ECR 287 (Regulations); *Case 41/71, Van Duyn v. Home Office*, [1974] ECR 1337 (Directives); *Case 9/70, Grad v. Finanzamt Traunstein*, [1970] ECR 825 (Decisions). The General Principles cannot operate as freestanding directly effective rights and require instead a connection with Union law, or domestic laws with a Union law element, in order to give rise to interpretive or legality review effects.

34 *Case 167/73, Commission v. French Republic*, [1974] ECR 359, at para. 18 (emphases added). *See also* the *Fenando Roberto* Case, where the Court stated that "[a]rticle 2 of the Treaty describes the task of the European Economic Community. The aims laid down in that provision are concerned with the existence and functioning of the Community; they are to be achieved through the establishment of the common market and the progressive approximation of the economic policies of Member States, which are also aims whose implementation is the essential object of the Treaty." *Case 126/86, Fenando Roberto Gimenez Zaera v. Institut de la Seguridad Social and Tesorer4ia General de la Seguridad Social*, [1987] ECR 2321, at para. 10.

which may modify otherwise clear meanings so that, according to Bengoetxea, "[...] even if the wording used seems to be clear, it is still necessary to refer to the spirit, general scheme and context of the provision; *a fortiori* if the wording is unclear."[35]

Crucially for present purposes the Court of Justice has presented the overall objective of European integration as an interpretive (indirect) influence over all Union and associated domestic legal demands. Ulrich Everling, a former judge of the Court of Justice, explains the Court's approach as follows:

> It is common to refer to 'teleological' interpretation, and that presents relatively few problems if it is understood as meaning the purpose-oriented application of technical provisions. However, the word means more than this; the Greek term 'telos' in this context signifies the ultimate objective and the deeper purpose of the entire process of European integration.[36]

The Court affirmed this rationale in its *Continental Cans*[37] judgment, which considered the interpretive effects of Article 3(f) EEC [Article 3(b) TEU],[38] which sets out the foundational Treaty objective of ensuring undistorted conditions of competition to be 'decisive' regarding the meanings of other Treaty rules relating to its implementation. The Court stated at paragraph 23 that:

> The applicant's argument that this provision merely contains a general programme devoid of legal effect, ignores the fact that Article 3 considers the pursuit of the objectives which it lays down to be indispensable for the achievement of the Community's tasks. As regards in particular the aim men-

35 Bengoetxea, 1993, at 233, referring to D. Vaughan (Ed.), *Law of the European Communities*, Vol. 1, Butterworths, London, 1986, Ch. 2, point 266. Bengoetxea identified these possibilities which he terms 'first order' criteria of interpretation into: "(i) semiotic or linguistic arguments, (ii) systemic and context-establishing arguments and (iii) teleological or consequentialist arguments" (*ibid.*, at 233). 'Semiotic or linguistic' "[...] draw arguments from semantic and syntactical features of legal language and from a comparison of the different language versions in which Community law is authentic" (*ibid.*, at 234). Systemic/contextual criteria provide that: "[...] a legal provision (*materia*) is properly understood only when it is placed in a wider context (*sedes*)" (*ibid.*, at 240). Dynamic criteria concern "[...] functional, teleological and consequentialist arguments" (*ibid.*, at 251-252). What Bengoetxea terms a second-level criterion privileges the teleological/contextual method of interpretation above semiotic or linguistic approaches. As a result, "[t]he second-level criteria for the use of first-level criteria are those of extensive interpretation: the Community Treaties, as the constitution of the Community are to be interpreted broadly using methods of constitutional interpretation [...] [p]reference is usually given to systemic-functional criteria. There is a second-degree directive of preference in favour of systemic-cum-dynamic interpretation" (*ibid.*, at 233-234).

36 Everling, 1983-1984.

37 *Case 6/72, Europemballage and Continental Can v. Commission*, [1973] ECR 215.

38 Art. 3(b) TFEU states that "[t]he Union shall have exclusive competence in the following areas [...] (b) the establishing of the competition rules necessary for the functioning of the internal market." This provision needs to be read in conjunction with Art. 3 (3) TEU, which states that "[t]he Union shall establish an internal market".

> tioned in 3 (f), the Treaty in several provisions contains more detailed regulations for the interpretation of which this aim is decisive.[39]

This method of judgment is also affirmed in the Court's later ruling in *CILFIT*, where it stated at paragraph 20 that:

> [...] every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, *regard being had to the objectives thereof* and to its state of evolution at the date on which the provision in question is to be applied.[40]

While the interpretive effects of the Treaty objectives and general principles are not conditional upon meeting justiciability requirements in the manner of direct effect,[41] these standards are placed at the apex of a hierarchy of Union interpretive authority permitting a discursive and rhetorical form of legal judgment.[42] This allows the Court to effectively engage with other institutional actors[43] while expressing legal demands relating to the broadest aspirations of the Treaties. In practice, dialogue between Union and domestic courts takes place through the use of the preliminary reference procedure which allows, under Article 267 TFEU, domestic courts to refer questions on the interpretation and validity of Union legislation[44] to the Court of Justice of the European Union.[45] The resulting ruling, which is binding on the question of Union law decided over all Member States' courts, allows the Court to place specific Union legal demands in the context of the wider objectives set out in the Treaties.

To explore this thesis further, it is helpful to consider two judgments in which the Court explicitly associates the interpretive effects of a fundamental Treaty right[46] and general principle(s) respectively, with an activist reconstruc-

39 At para. 23.

40 *Case 283/81, CILFIT (Srl) & Lanificio di Gavardo SpA v. Ministry of Health*, [1982] ECR 3415, at para. 20 of the judgment (emphasis added). *See* for comment on this paragraph, Bengoetxea, 1993, at 232. *See also Case C–249/96, Lisa Jacqueline Grant v. South West Trains Ltd*, [1998] ECR I-621, at para. 47.

41 As with direct effect Becker.

42 Bengoetxea has noted that "[t]he task of the Community is to achieve progressive integration (Article 2). This task amounts to a Community principle, and article 164 [Art. 19 TEU] requires an interpretation of Community law geared to the aims of the Treaty, requiring a dynamic and teleological interpretation". Bengoetxea, 1993, at 252, citing H. Kutscher, 'Methods of Interpretation as Seen by a Judge at the Court of Justice', *in Judicial and Academic Conference*, Court of Justice of the European Communities, Luxembourg, 1976, pt. 2, sect. 6(c) and R. Lecourt, *L'Europe des Juges*, Bruylant, Brussels, 1976, pt. 3, sect. 2.

43 This is commonly seen in the Court's treatment of the legal effects of Directives that when not implemented by Member States act as a non-directly applicable form of Union law capable of creating constitutional type interpretive effects over domestic legislation. *Case C-106/89, Marleasing*, [1990] ECR I-4135.

44 The Court is not, however, empowered to review the validity of the Treaty Articles but may rule on their correct interpretation.

45 This includes the Court of Justice and the General Court.

46 The free movement of workers.

tion of clearly stated Union legislative requirements. The ruling in *Hendrix*[47] illuminates the interpretive effects of a fundamental Treaty objective, that of free movement of workers, and in *Coote*, of the general principles.

1. Hendrix

In *Hendrix*, the Court was asked to rule on the compatibility with Union law of a residence condition attached to the receipt of a disability benefit under Dutch law. The Dutch claimant, Hendrix, was resident in another State but working in Holland at the relevant time. Two Union regulations governed the right in question. The first, Regulation 1408/71,[48] harmonised social security rights for persons exercising their rights of free movement between Member States. The second, Regulation 1612/68, set out equal treatment rights, including certain social benefits, for Union workers exercising rights to free movement. The Court found that the benefit in question fell within the material scope of both Regulations with contradictory outcomes concerning Hendrix's right to its receipt. In relation to Regulation 1408/71, the Court found that the benefit in question was

> [...] a special non-contributory benefit within the meaning of Article 4(2)(a) of Regulation 1408/71 with the result that only the coordinating provision of Article 10a of that regulation must be applied to persons who are in the situation of the applicant in the main proceedings and that payment of that benefit may validly be reserved to persons who reside in the territory of the Member State which provides the benefit.[49]

In relation to Regulation 1612/68, the Court found that the benefit in question was also a social advantage for the purposes of Article 7(2) and as such available on a non-discriminatory basis to all migrant workers: The Court noted, as a result, that "[...] a Member State may *not* make payment of a social advantage within the meaning of Article 7 of Regulation 1612/68 dependent on the condition that recipients are resident in the national territory of that Member State".[50] However, under Article 42(2) of Regulation 1612/68, that Regulation did not

47 *Case C-287/05, D.P.W. Hendrix v. Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen*, [2007] ECR I-6909.

48 Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community. This Regulation has been largely repealed by Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [OJ 2004 L 166].

49 Para. 38 of the judgment.

50 Paras. 48-50 of the judgment (emphasis added), referring to *Meints*, para. 51 and *Meeusen*, para. 21. If, therefore, Hendrix fell into the category of migrant workers, he would be entitled to receipt of the benefit in question under the terms of Regulation No. 1612/68. Hendrix, although employed throughout the material time in his home state (Holland), had changed to another Dutch employer after having moved to reside in Belgium. Given that Hendrix had changed employers while resident in another Member State, the Court found that he was a migrant worker, entitled under the terms of Art. 7(2) of Reg. 1612/68 to receipt of the benefit on the same terms as his fellow nationals who were resident within their home State. Para. 48.

affect coordinating provisions adopted under Article 42 EC,[51] of which Regulation 1408/71 was an example.[52] This appeared to militate conclusively in favour of the outcome dictated by Regulation 1408/71, which permitted the imposition of a residence condition on the receipt of the benefit by Member States. However, in relation to the legal effects of Regulation 1408/71, the Court concluded that:

> [...] the provisions of Regulation No. 1408/71 enacted to give effect to Article 42 EC must be interpreted in light of the objective of that Article which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers [...] It follows that the condition of residence attached to receipt of the benefit under the Wajong can be put forward against a person in the situation of Mr Hendrix *only* if it is objectively justified and proportionate to the objective pursued.[53]

Affirming the fundamental Treaty objective of free movement of workers as interpretative authority that is determinative of the legal question to be decided, the Court qualifies the clear injunction of Article 4(2)(a) of Regulation 1408/71 as a stated exception to Article 7 of Regulation 1612/68, allowing Member States to make the benefit in question conditional upon home residence. Instead, the imposition of such a condition is possible only when objectively justified and proportionate.[54]

In the result, the Court of Justice transforms an authorised (under Union law) authority for Member States to make certain types of public welfare funding conditional upon residence, to one that is presumptively *unlawful* unless demonstrated (by Member States) as justified and proportionate to a legitimate aim as a matter of Union law.[55] The judgment rewrites clear Union and domestic regulatory requirements by reference to the interpretive effects of the fundamental Treaty objective of free movement of workers, thereby extending Union competence with a corresponding deficit in domestic legal competence.

2. *Coote*

In *Coote v. Granada Hospitality Ltd*[56] we see a similar extension of Union competences by reference to the interpretive effects taken by the second 'arm' of the Union constitution, the General Principles. The question referred to the Court[57] was whether the Equal Treatment (the Directive)[58] provided for legal redress

51 After amendment Art. 42 EC.

52 Para. 51.

53 Paras. 52-54 (emphasis added).

54 Para. 54.

55 The Court found that the domestic measure was in fact justified and proportionate, thereby asserting Union competence in an area where it had been clearly excluded.

56 *Case 185/97, Coote v. Granada Hospitality Ltd*, [1999] ICR 100.

57 From the UK Employment Appeals Tribunal.

58 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and woman as regards access to employment, vocational training and promotion and working conditions.

against Granada Hospitality, prior employers of Coote who had refused her a job reference in retaliation for her having instituted proceedings against the company under the terms of the Directive while she had been in their employ. Within the context of an ongoing employment relationship, it was clear that the implementing UK statute[59] prohibited any such retaliation. Would, however, a presumption of illegality in relation to retaliatory acts continue to operate when the employment relationship had ended? Under Article 7 of the Directive, only one form of retaliation by an employer against an employee who had previously alleged sex discrimination was prohibited, that of dismissal.

Advocate General Mischo considered that given the clear wording of the Directive, a retaliatory refusal to provide a reference for a prior employee, when not itself based upon the sex of the person concerned, would not be prohibited by the Directive, stating at paragraph 24 of his opinion that:

> It is clear from a reading of the provisions of the Directive that the Community legislature whilst perfectly aware that claims for sexual equality may irritate certain employers to the point of prompting them to engage in reprisals, intentionally took account of only one form of retaliation, the most serious but perhaps not the least common-dismissal.[60]

In its judgment the Court disagreed, holding that the Directive implicitly outlawed any retaliatory action based on a previous complaint as to discriminatory practices irrespective of whether the employer/employee relationship was current. Article 7 therefore permitted a right of redress in the instant circumstances. The Directive, according to the Court, provided a *non-exhaustive* set of criteria for redress aimed at achieving a result consistent with the General Principles on which the Directive was based, namely the right to an effective remedy and the right not to suffer discrimination.[61] However, in so ruling the Court ignored the legislative intention to give effect to these general principles in defined circumstances, an intention reflected in the Advocate General's opinion.[62] Their interpretative effects resulted in the judicial creation of a new Union right in breach of the *contra legem* limitation generally placed upon such effects.[63]

In both these cases the Court employs a functional or teleological interpretive approach, not only as a functional method for 'filling in' the open texture of the

59 Sect. 4 of the Sex Discrimination Act (1975).

60 Para. 24.

61 The Court refers to the objectives of the Directive, described in terms of the general principles of "[...] real equality of opportunity for men and woman and to the fundamental nature of the right to effective judicial protection." Para. 27 of the judgment referring to *Case C-271/91, Southampton and South West Hampshire Area Health Authority*, [1993] ECR I-4367, para. 24.

62 The Advocate General affirming the need to respect the clearly expressed intention of the Union legislator in Art. 7, stated at para. 27 that "[i]t is not, however possible, by *any* legal reasoning constructed on the basis of such a view [that the Directive should offer the protection sought] and of the regrets which may justifiably be felt as a result, to derive from the Directive obligations on the Member States which it does not contain".

63 *Case C-334/92, Wagner Miret v. Fondo de Garantia Salarial*, [1993] ECR I-6911; *Case C–105/ 03, Pupino*, [2005] ECR I-5285.

Union legislation in question, but also as vehicle for the development of the integrationist objectives of the Union. This method of reasoning by the Court has of course been the subject of extensive academic comment.[64] Less commonly considered is that this judicial approach incorporates value positions relating to the political aspirations of the Treaty as *legal* demands. A focus upon the interpretive authority of Union measures allows the Court to maximise the rhetorical force of these demands and hence develop and control the authority of superior Union norms in relation to the Member States. The language of interpretation forms as such a crucial aspect of a broader dialogue between Union and domestic courts underlying the Court's promotion of the overall process of European integration and underlines the Court's awareness that it "[...] operates in a highly politicised milieu [...]."[65]

These judgments also illustrate that the Court's privileging of the Treaty objectives as constitutional interpretive authority may be distinguished from the approach of domestic constitutional courts. Here judicial reasoning is also contextual or functional but in a contingent as opposed to a dynamic sense. Domestic courts will take into account changing social conditions in determining constitutional demands and may as a result adopt a strongly 'activist' approach towards the scope of these demands.[66] This activism, in the domestic setting, is, however, parasitic upon the expression of 'freestanding' fundamental rights or due process requirements.[67] In the Union setting, by contrast, the Treaty objectives mandate in all cases an interpretive approach that expresses a positive dynamic relating to

64 Analysis divides into those who regard the Court's 'activist' approach to the interpretation of Union requirements as justified and those who do not. For examples of the former view, *see* T. Tridimas, 'The Court of Justice and Judicial Activism', 21 *E. L. Rev.* 1996, p. 199; M. Cappelletti, 'Is the Court of Justice "Running Wild?"', 12 *E. L. Rev.* 1987, p. 3, and of the latter, H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, Martinus Nijhoff, The Hague, 1986.

65 Bengoetxea, 1993, at 50.

66 *See* in the UK context *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30, where the House of Lords inserted a provision into a UK statute that extended rights of succession to a tenancy to the surviving partner of a homosexual couple where the legislative text in question clearly reserved the right for a surviving spouse or co-habitee in the context of a committed heterosexual relationship. *See also* the recent Data Protection ruling of the German Federal Constitutional Court, which established a new "fundamental right to confidentiality and integrity of information technology systems" 1 BvR 370/07 and 1 BvR 595/07. G. Hornung, 'Ein neues Grundrecht', 2008 *Computer und Recht*, pp. 299 *ff.*, cited in G. Hornung & C. Schnabel, 'Data Protection in Germany II: Recent Decisions on Online Searching of Computers, Automatic Number Plate Recognition and Data Retention', *Computer Law & Security Review*, Vol. 25, No. 2, 2009, p. 115.

67 Different human rights clearly impact upon one another – the affirmation of a right in one area may indirectly boost a related right, while on other occasions the strength of a given right will be in inverse proportion to that accorded to a conflicting right. For example, the right to religious freedom or to a private life will often conflict with the right to freedom of expression. *See* Arts. 8, 9 and 10 ECHR.

the advancement of European integration.[68] The values that comprise the Union constitution then express a primary jurisprudential connection, not with features of State/society as from time to time are adjudicated upon for rights compliance, but instead allegiance to single political aspiration, that of European integration.

E. Conclusions

The values underlying the Union constitution are distinctive by comparison with those associated with domestic constitutions, whose effects concern all social activity in which the law, as an instrument of supreme governmental authority, claims an interest.[69] The uncontained character of domestic constitutional values stands in marked contrast to those asserted as foundational within the Union's legal jurisdiction, which remains circumscribed by the terms of the Treaties. The Treaties represent both supreme legal authority within the Union order and the directed rationale underlying its very existence. As a result, the Union constitution, as a combination of specific aims relating to the project of European integration and rule of law principles that operate solely within the identified boundaries of this project, is wholly self-referential. It is the political vision of the Treaties themselves, as opposed to the background value concerns of Member State societies that directly informs the expression of Union constitutional requirements by the Court of Justice.

Expressing the legal demands of a constitution that at its heart embodies an aspirational and contested political project has required methods of legal reasoning by the Court of Justice tailored to the unstable political and legal environment in which these demands will take effect. Here the Court has focused upon the interpretive effects of Union constitutional values, a technique of legal judgment that has allowed highly intrusive regulatory interventions within the Member States. Judgments in cases such as *Hendrix* and *Coote* illustrate how the Court has allied the language of interpretation to a persuasive form of rhetoric, essential to the communication of a careful balancing of Union and Member State interests, while promoting the values of European integration.

68 From an institutional perspective, the interpretive techniques of the Court of Justice also represent a significant incursion into the role associated with domestic legislative and executive functions. Here, legislative and executive discretion in the administration of social and economic policy is a defining feature of the institutional division of powers albeit subject to requirements of compatibility with due process and fundamental rights standards (usually) found within the written constitution. Within the Union setting it is a legal institution, the Court of Justice that determines how the economic freedoms set out in the Treaties are to be given effect. In this regard, Carlos Ball has noted that "[t]he Treaty, as a transnational constitutional charter [...] impose(s) *positive* obligations on Community institutions and Member States with the *functional* objective of establishing and maintaining a transnational capitalist society." C. Ball, 'The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights under the European Community's Legal Order', 37 *Harv. Int'l L.J.* 1996, p. 307, at 308 (emphases in original).

69 Locke, 2002.