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# CLEER

## Shaping the international order as a Union objective and the dynamic internationalisation of constitutional law

Joris Larik



# CLEER

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**SHAPING THE INTERNATIONAL ORDER AS A UNION  
OBJECTIVE AND THE DYNAMIC INTERNATIONALISATION  
OF CONSTITUTIONAL LAW**

**JORIS LARIK\***

**CLEER WORKING PAPERS 2011/5**

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## ABSTRACT

Shaping the international order according to the Union's values is not just a political ambition, but is also enshrined in EU primary law in the form of the *external objectives of the Union*. These have been streamlined and expanded significantly with the Lisbon reform (above all Arts. 3(5) and 21 TEU). However, scholarship has not given these objectives an altogether warm welcome, often dismissing them as strange, superfluous or mere wishful thinking. The aim of this paper is to put these external objectives into the wider context of the 'dynamic internationalisation' of constitutional law around the world and approach them as part of a constitutional norm category. It is argued that in contemporary constitutional law, externally-oriented objectives are not unusual, but indeed increasingly commonplace. Moreover, at least in German and French legal scholarship, constitutional objectives have received considerable attention and are acknowledged as legally binding, in principle justiciable norms of constitutional rank, setting objectives apart from mere 'soft law'. This also applies to externally-oriented objectives, even though a wider margin of discretion pertains to the executive branch as the main actor in the area of foreign affairs. Applying these findings to the EU, it can be concluded that the Union's external objectives are indeed legal norms in the vanguard of a global trend in constitutional law.



## TABLE OF CONTENTS

1.	Introduction .....	7
2.	Dynamic internationalisation in comparative constitutional law .....	9
3.	Doctrinal approaches: <i>Staatsziele, objectifs de valeur constitutionnelle</i> and 'soft law' .....	15
3.1.	German <i>Staatszielbestimmungen</i> .....	15
3.2.	French <i>objectifs de valeur constitutionnelle</i> .....	21
3.3.	Soft Law .....	26
4.	External objectives as EU primary law norms .....	27
5.	Conclusion .....	36



## 1. INTRODUCTION

While views may differ on the success, effectiveness or power of the European Union as an international actor, it can hardly be denied that at least the EU is ambitious. If there was an international award for ‘enthusiasm’, the EU would stand good chances for winning it: it endeavours to be a leader in climate change, international trade, development cooperation, reform of the financial system, the fight against piracy, human rights, etc. These ambitions to shape the international order in ways consistent with the Union’s own values and interests have been made explicit in numerous policy documents, above all the European Security Strategy,<sup>1</sup> a continuous string of Council Conclusions and solemn declarations by the European Council.<sup>2</sup> With the entry into force of the Lisbon Treaty in December 2009, the EU has gone even further to exhibit its ambition. It has introduced more streamlined and extensive language into its primary law on what can be called the ‘externally-oriented objectives of the Union’ or, as a shorthand, the Union’s ‘external objectives’. In these provisions, the Union pledges ‘to uphold and promote its values and interests and contribute to the protection of its citizens’<sup>3</sup> while being ‘guided by the principles which have inspired its own creation’.<sup>4</sup> Numerous expressions of these values, principles and objectives are specified in the Treaties, such as, among many others, democracy, sustainable development, free and fair trade, the eradication of poverty, the rights of the child and respect for the United Nations Charter.<sup>5</sup>

To date, these provisions have received a rather mixed welcome in EU law scholarship. Some commentators heralded the bundling together of these principles and objectives as a ‘major innovation’ forming the ‘spinal column’ of EU external action.<sup>6</sup> Others, however, dismissed them as a mere ‘wish list for

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<sup>1</sup> *A Secure Europe in a Better World, European Security Strategy*, 12 December 2003; see also *Report on the Implementation of the European Security Strategy: Providing Security in a Changing World*, Brussels, S407/08, 11 December 2008.

<sup>2</sup> See among the most prominent European Council, *Laeken Declaration on the future of the European Union*, 14-15 December 2001; and *Declaration on the occasion of the fiftieth anniversary of the signature of the Treaties of Rome*, Berlin, 25 March 2007, available at: <[http://europa.eu/50/docs/berlin\\_declaration\\_en.pdf](http://europa.eu/50/docs/berlin_declaration_en.pdf)>. For a more recent specific example see Council of the European Union, *Council conclusions on conflict prevention*, 3101st Foreign Affairs Council meeting, Luxembourg, 20 June 2011.

<sup>3</sup> Art. 3(5) TEU.

<sup>4</sup> Art. 21(1) TEU.

<sup>5</sup> The overarching, general objectives can be found among the ‘Common Provisions’ of the TEU in Art. 3 TEU, with its para. 5 defining the general objectives of the Union ‘[i]n its relations with the wider world’. These are elaborated upon in Art. 21 TEU, which is part of Title V, Chapter One entitled ‘General Provisions on the Union’s External Action’. Subsequently, there are policy-specific objectives, e.g. Art. 206 TFEU on the Common Commercial Policy (CCP) and Art. 208 TFEU on development cooperation, which have to be pursued in the context of the general principles.

<sup>6</sup> C. Kaddous, ‘External Action under the Lisbon Treaty’, in I. Pernice and E. Tanchev (eds.), *Ceci n’est pas une Constitution – Constitutionalisation without a Constitution?* (Baden-Baden:

a better world',<sup>7</sup> observe 'an almost epidemic proliferation of objectives of the Union'<sup>8</sup> and ridicule them as 'redolent of motherhood and apple pie'.<sup>9</sup> Even worse, external relations-related objectives were seen as indicating 'the intention to promote EU standards outside Europe'<sup>10</sup> and reflective of 'a Union which is self-sufficient and which does not expect to be significantly influenced from the outside'.<sup>11</sup> Generally, these remarks would fit into the criticism by De Witte of what he sees as the 'relentless accumulation of constitutional law',<sup>12</sup> which has led to 'too much confusing and unhelpful constitutional law of foreign relations in the EU'.<sup>13</sup> Would these broadly formulated external objectives then qualify as particularly 'confusing and unhelpful'? After all, these provisions do not lay down procedures, nor do they establish as such either competences or individual rights.

The aim of this paper is to put these assessments of the EU's externally-oriented objectives into perspective. This will be done by contextualising the Union's external objectives with the general trends in comparative constitutional law and scholarly approaches that have dealt with constitutional objectives as a norm category, particularly the German and French legal discourse. As a preliminary disclaimer, this paper does by no means claim to be exhaustive. The examples selected here, both of an empirical and doctrinal nature, serve to demonstrate that these criticisms tend to be too harsh, given that the Union's

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Nomos 2009), 173-189, at 178; also rather approvingly A. Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy', 15 *European Foreign Affairs Review* (2010) 153, at 161; regarding the Constitutional Treaty, see already M. Cremona, 'The Draft Constitutional Treaty: External Relations and External Action', 40 *Common Market Law Review* (2003) 1347.

<sup>7</sup> (In the original: 'Wunschzettel für eine bessere Welt'.) W. Drescher, 'Ziele und Zuständigkeiten' in A. Marchetti and C. Demesmay (eds.), *Der Vertrag von Lissabon: Analyse und Bewertung* (Baden-Baden: Nomos 2010), 59-71, at 68; see on the failed Constitutional Treaty, A. von Bogdandy, 'The European constitution and the European identity: Text and subtext of the Treaty establishing a Constitution for Europe', 3 *International Journal of Constitutional Law* (2005) 295, at 315, where he speaks in general of a 'hodgepodge of objectives'; see also F.-X. Priollaund and D. Siritzky, *Le Traité de Lisbonne: Texte et commentaire article par article des nouveaux traités Européens (TUE-TFUE)* (Paris: La Documentation Française 2008), at 35-36, alleging that the British delegation at the Constitutional Convention baptised the provision on Union objectives the 'Christmas Tree'. Those criticisms would essentially apply also to the Lisbon Treaty.

<sup>8</sup> (In the original: 'eine geradezu epidemische Ausbreitung von Unionszielen'.) J. Terhechte, 'Kommentierung zum Art. 3 EUV (Ziele der Union)', in E. Grabitz, M. Hilf and M. Nettesheim (eds.), *Das Recht der Europäischen Union*, loose-leaf, forty-first supplement, updated July 2010 (Munich: C.H. Beck 2010), marginal no. 63, arguing in the context of objectives of the Common Foreign and Security Policy.

<sup>9</sup> A. Dashwood et al., *Wyatt & Dashwood's European Union Law*, sixth edition (Oxford: Hart 2011), at 903, referring to Art. 21(1) TEU (there mistakenly indicated as Art. 21(1) TFEU).

<sup>10</sup> R. Uerpmann-Witzack, 'The Constitutional Role of International Law', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, second edition (Oxford: Hart/Munich: C.H. Beck 2010), 131-167, at 167 on Art. 21 TEU.

<sup>11</sup> *Ibid.*; similarly U. Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union* (Cambridge: Cambridge University Press 2008), at 53.

<sup>12</sup> B. De Witte, 'Too Much Constitutional Law in the European Union's Foreign Relations', in M. Cremona and B. De Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart 2008), 3-15, at 10.

<sup>13</sup> *Ibid.*, at 12.

constitutional law in this regard is not at all that unusual, and that indeed at least from a German and French perspective constitutional objectives – also in the field of foreign policy – are legally binding norms performing important functions within a given legal order.

To this end, section 2 will present evidence of an overall ‘dynamic internationalisation’ in constitutional law around the world, showing that the inclusion of external objectives into national constitutions is indeed rather commonplace. Section 3 will subsequently show that both German and French scholarly approaches predominantly consider such objectives as a justiciable, legally binding norm category of constitutional law which serves to oblige, forbid and authorise certain kinds of behaviour of organs of public authority. It is argued here that there are no cogent reasons to exclude foreign policy-related objectives from this category and consider those instead as a form of ‘soft law’. Section 4 will return to EU primary law, apply these same findings to the EU and also situate codified objectives, including the external ones, as a norm category of the Union’s constitutional law. The paper concludes in section 5 that both the empirical evidence and related doctrinal debates should caution us to dismiss the external objectives codified in the EU Treaties and rather develop more sophisticated legal approaches to grasp them as an increasingly important part of constitutional law.

## 2. DYNAMIC INTERNATIONALISATION IN COMPARATIVE CONSTITUTIONAL LAW

Before embarking on any theoretical debates and transfer exercises from national to supranational law, it is worthwhile to take stock of the general trends in comparative constitutional law that are of relevance for the assessment of the Union’s external objectives. De Witte observed that, generally, ‘values and objectives that must inspire the country’s foreign policy’ are a common feature in contemporary European constitutions.<sup>14</sup> This section not only confirms this observation, but also shows that this is not merely a European phenomenon, but indeed one of a global scale. However, De Witte admonished the tendency in EU primary law to deal with foreign policy issues ‘in a much more detailed way than national constitutions’.<sup>15</sup> This statement is to be qualified with respect to foreign policy objectives. It is true that after the Lisbon Treaty reform, the EU Treaties certainly are amongst the most verbose constitutional documents when it comes to external objectives. But it does not appear excessive or unusual when compared with many of today’s national constitutions.

Generally, recent decades have seen a considerable amount of constitution drafting. As Sartori observed, writing in 1997, ‘[o]f the 170 or so written documents called constitutions in today’s world, more than half have been written since 1974.’<sup>16</sup> This includes ‘the cascade of constitution-making that took place

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<sup>14</sup> Ibid., at 12.

<sup>15</sup> Ibid., at 10.

<sup>16</sup> G. Sartori, *Comparative Constitutional Engineering*, second edition (London: Macmillan Press 1997), at 197.

in post-Communist Eastern Europe'.<sup>17</sup> This constitutional innovation was marked by two important trends, on the one hand the 'internationalisation' of constitutional law,<sup>18</sup> and on the other the inclusion of objectives the state was mandated to pursue, which has been termed the 'dynamisation of constitutional law'.<sup>19</sup>

As to internationalisation, this primarily and traditionally concerns the reception of international law into the domestic legal system, with a particular emphasis on international human rights. De Visscher, writing back in 1952, dubbed this 'the internationalist fever of the immediate post-war period'.<sup>20</sup> As Wilson formulated it a decade later, 'after each World War of the present century there was a wave of effort to include in national constitutions provisions whereby the law of nations would be made a part of municipal law'.<sup>21</sup> This trend has continued also and especially after the end of the Cold War in constitutional drafting processes in the formerly Eastern bloc countries, now also including other aspects such as universal value statements and guiding principles on foreign policy.<sup>22</sup> In this context, Kotzur, as a proponent of 'global law' (*Weltrecht*), sees a trend that 'the more modern a constitution is and the more intensely it breathes the spirit of worldwide interconnectedness and the globalisation of law, the more naturally it dares to make reference to a world beyond the nation state'.<sup>23</sup>

As to 'dynamisation', provisions that mandate the state to pursue certain objectives have equally proliferated in constitutional documents around the

<sup>17</sup> D. Kammers, 'Comparative Constitutional Law: Its Increasing Relevance', in V. Jackson and M. Tushnet (eds.), *Defining the Field of Comparative Constitutional Law* (Westport, Conn.: Praeger 2002), 61-70, at 63; see further R. Müllerson, M. Fitzmaurice, M. Andenas (eds.), *Constitutional reforms and International Law in Central and Eastern Europe* (The Hague: Kluwer Law International 1998).

<sup>18</sup> E.g. J. Kokott, 'From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization – With Particular Reference to the German Basic Law', in C. Starck (ed.), *Constitutionalism, Universalism and Democracy – a Comparative Analysis: The German Contributions to the Fifth World Congress of the International Association of Constitutional Law* (Baden-Baden: Nomos 1999), 71-134; see also T. Ginsburg, S. Chernykh and Z. Elkins, 'Commitment and Diffusion: How and why national constitutions incorporate international law', *University of Illinois Law Review* (2008) 201; and H. Tourard, *L'internationalisation des constitutions nationales* (Paris: L.D.G.J. 2000).

<sup>19</sup> (In the original: 'Dynamisierung des Verfassungsrechts'.) K.-P. Sommermann, *Staatsziele und Staatszielbestimmungen* (Tübingen: Mohr Siebeck 1997), at 374; similarly, De Montalivet speaks of 'une conception dynamique du droit', P. De Montalivet, *Les objectifs de valeur constitutionnelle* (Paris: Dalloz 2006), at 67. These two works can be said to represent the seminal treatises within their respective national legal discourse on the subject of constitutional objectives.

<sup>20</sup> (In the original: 'la fièvre internationaliste de l'immédiat après-guerre'.) P. De Visscher, 'Les tendances internationales des constitutions modernes', 80 *Recueil des Cours* (1952) 511, at 573.

<sup>21</sup> R. Wilson, 'International Law in New National Constitutions', 58 *American Journal of International Law* (1964) 432, at 432.

<sup>22</sup> See V. Vereshchetin, 'New Constitutions and the Old Problem of the Relationship between International Law and National Law', 7 *European Journal of International Law* (1996) 1.

<sup>23</sup> (In the original: 'Je modernier eine Verfassung ist, je intensiver sie den Geist weltweiter Vernetzung und einer Globalisierung des Rechts atmet, umso selbstverständlicher wagt sie die Bezugnahme auf eine Welt jenseits des Nationalstaates.'). M. Kotzur, 'Weltrechtliche Bezüge in nationalen Verfassungstexten: Die Rezeption verfassungsrechtlicher Normen durch das Völkerrecht', 39 *Rechtstheorie* (2008) 191, at 213.

world. In doing so, the constitution, in addition to its traditional function of establishing the rules and limits of government for a political community, also sketches out a certain future which is to be strived for through this very constitutional framework. Already in the 1970s, Scheuner described constitutional objectives as indicative of a ‘trend of this age towards the socially active polity as well as – also this is not unimportant – towards transnational integration’.<sup>24</sup> According to De Montalivet, these provisions are nothing less than the expression of ‘a post-modernity characterised by complexity, disorder, indetermination and uncertainty’.<sup>25</sup> In view of such uncertainties, Sommermann sees constitutional objectives as a way of allaying a political community’s need for orientation and ‘hunger for values’ (*Wertehunger*).<sup>26</sup>

Both these trends can be detected today in almost all modern constitutions and represent the constitutional reflection of the provident social welfare state (note also the French term *l’État providence*)<sup>27</sup> in a globalised and interdependent world. There is also a certain degree of convergence between those two trends, the most visible expression of which is the codification of internationally-oriented state objectives into a constitution. As Röben points out, constitutional law in the area of foreign relations is a means of the modern, open state (the German concept of *offene Staatlichkeit*) and its legal order to adapt to the pressures created by globalisation and global law-making processes. Constitutional law, in reaction to these pressures, turns to and embraces the external, aiming to extend fundamental principles such as the rule of law, democracy, the separation of powers or the protection of fundamental rights to a state’s conduct of its external relations.<sup>28</sup> On the one hand, we see from this that ‘internationalisation’ is not only about the role of international law in the domestic legal order, but also about the substantive constitutional framework for the exercise of foreign policy. On the other, we see that constitutional objectives are not to be pursued exclusively internally, but also, and increasingly, through a state’s foreign policy. Externally-oriented constitutional objectives thus indicate that constitutional law not only regulates how external influences are to be received internally, but also provide normative guidance for a state’s own input into shaping these influences.<sup>29</sup>

Even though spatial constraints will not allow here a comprehensive and in-depth analysis of all such constitutional provisions, a selection of pertinent

<sup>24</sup> (In the original: ‘Trend des Zeitalters zum sozial aktiv tätigen Gemeinwesen, wie übrigens auch – auch das ist nicht unwichtig – zu transnationalen Zusammenschlüssen’.) U. Scheuner, *Staatstheorie und Staatsrecht – Gesammelte Schriften* (Berlin: Duncker & Humblot 1978), at 242.

<sup>25</sup> (In the original: ‘une post-modernité marquée par la complexité, le désordre, l’indétermination et l’incertitude’.) De Montalivet, *Les objectifs de valeur constitutionnelle*, at 571.

<sup>26</sup> Sommermann, *Staatsziele und Staatszielbestimmungen*, at 1.

<sup>27</sup> De Montalivet, *Les objectifs de valeur constitutionnelle*, at 68.

<sup>28</sup> V. Röben, *Außenverfassungsrecht* (Tübingen: Mohr Siebeck 2007), foreword.

<sup>29</sup> In this context, it is important to note that ‘values’ in foreign policy are by no means static, but can indeed be both incorporated from the outside (as international norms with universal appeal), promoted externally and evolve over time through iterative processes, see M. Cremona, ‘Values in EU Foreign Policy’, in M. Evans and P. Koutrakos (eds.), *Beyond the Established Legal Order: Policy Interconnections Between the EU and the Rest of the World* (Oxford: Hart 2011), 275-315.

examples will be provided from around the world.<sup>30</sup> Starting in Europe, the Portuguese constitution is the most explicit and extensive in this regard. It contains an article with seven paragraphs devoted to the substantive principles guiding its external relations. These principles include national independence, human rights, sovereign equality, the peaceful settlement of international disputes, non-interference in internal affairs, 'cooperation with all other peoples for the emancipation and progress of humanity',<sup>31</sup> the abolition of imperialism, colonialism, aggression, domination and exploitation, as well as disarmament, the dissolution of political-military blocs, and collective security.<sup>32</sup> Furthermore, it commits Portugal to 'the right to self-determination and insurrection against oppression'.<sup>33</sup> The maintenance of a bond of friendship with other Portuguese-speaking countries can also be found there,<sup>34</sup> as well as European integration based on democracy, peace, economic progress and justice.<sup>35</sup> Finally, the transfer of powers to the EU<sup>36</sup> and acceptance of the jurisdiction of the International Criminal Court (ICC) are referred to and conditioned with similar normative caveats such as the promotion of democracy and human rights.<sup>37</sup> Altogether, these provisions give a rather detailed picture of the desired international (legal) order the Portuguese constitution would like to see and to which it mandates the state to contribute.<sup>38</sup>

The German Basic Law also devotes various provisions to the guidance of its foreign policy, even though in a more scattered and often implicit way.<sup>39</sup> A very strong normative statement with a clear external dimension is made already in the first article following the famous evocation of the inviolability of human dignity,<sup>40</sup> according to which 'the German people therefore acknowledge inviolable and inalienable human rights as the foundation of every community, of peace and justice *in the world*'.<sup>41</sup> Human rights are thus asserted as univer-

<sup>30</sup> For English language translations of national constitutions (in force in November 2011), the Oceana Law<sup>®</sup> database 'Constitutions of Countries of the World' has been used ([www.oceana.com](http://www.oceana.com)). Other translations are by the author. The original quotes are provided in the footnotes. An interesting overview of other universal or 'global law' elements (*Weltrecht*) in national constitutions can be found in Kotzur, 'Weltrechtliche Bezüge in nationalen Verfassungstexten'; for internationally-related elements in the post-Cold War constitutions of Eastern Europe and Central Asia, see Vereshchetin, 'New Constitutions'.

<sup>31</sup> Art. 7(1) Portuguese constitution.

<sup>32</sup> Art. 7(2) Portuguese constitution.

<sup>33</sup> Art. 7(3) Portuguese constitution.

<sup>34</sup> Art. 7(4) Portuguese constitution.

<sup>35</sup> Art. 7(5) Portuguese constitution.

<sup>36</sup> Art. 7(6) Portuguese constitution.

<sup>37</sup> Art. 7(7) Portuguese constitution.

<sup>38</sup> See in detail P. Canelas de Castro, 'Portugal's World Outlook in the Constitution of 1976', 71 *Boletim da Faculdade de Direito da Universidade de Coimbra* (1995), 489. The author thanks Bruno Reynaud de Sousa for providing this reference.

<sup>39</sup> See for a categorisation according to content Röben, *Außenverfassungsrecht*, at 192-199.

<sup>40</sup> Art. 1(1) German Basic Law (emphases added). The formulation is reproduced in Art. 1 Charter of Fundamental Rights of the European Union (CFR). See further P. Häberle, 'Das "Weltbild" des Verfassungsstaates – eine Textstufenanalyse zur Menschheit als verfassungsstaatlichem und "letztem" Geltungsgrund des Völkerrechts', in B. Ziemeke, T. Langheid, H. Wilmans and G. Haverkate (eds.), *Staatsphilosophie und Rechtspolitik, Festschrift für Martin Kriele* (Munich: C.H. Beck 1997), 1277-1306, at 1281.

<sup>41</sup> Art. 1(2) German Basic Law (emphases added). This part is not reproduced in the CFR.

sally valid norms and an explicit nexus with international peace and justice is established. In addition, one can derive foreign policy objectives from the permissions granted by the Basic Law for the Federal Republic to participate in the European Union,<sup>42</sup> to transfer powers to international organisations,<sup>43</sup> accede to a system of collective defence<sup>44</sup> and compulsory international dispute settlement.<sup>45</sup> These put a clear emphasis on the objectives of international cooperation, security and the international rule of law, especially when read in conjunction with the clause in the preamble that invokes ‘the will to promote world peace as an equal partner in a united Europe’.<sup>46</sup> Also the later provision declaring as unconstitutional and punishable ‘acts tending to and undertaken with the intent of disturbing the peaceful relations between nations, especially to prepare for a war of aggression’<sup>47</sup> can be seen as a specific domestic implementing measure in the pursuit of the objective of international peace and security.

In a less extensive manner, the constitution of Bulgaria also devotes an article to foreign policy. First, it posits international law as the guideline of Bulgaria’s foreign policy, which shows again that the promotion of international law is not simply a matter of internal incorporation and compliance.<sup>48</sup> Secondly, it stipulates as the ‘highest objective’ of Bulgarian foreign policy the country’s security, independence and the protection of its citizens’ well-being and rights, as well as ‘the promotion of a just international order’.<sup>49</sup> This language combines both national interests and more cosmopolitan objectives.

The proliferation of such provisions is by no means confined to Europe. Two examples for this are the constitutions of the rising powers Brazil and China. In the case of Brazil, its constitution shows a similar propensity to verbose formulations as its former *métropole* in Europe. The Brazilian constitution lists principles that are to govern the country’s international relations, those being national independence, prevalence of human rights, self-determination of peoples, non-intervention, sovereign equality, the defence of peace, peaceful resolution of conflicts, repudiation of terrorism and racism, cooperation among people for the progress of humanity, as well as recognition of political asylum.<sup>50</sup> In addition, the sole paragraph of the article to which these principles are attached also states the objective of ‘economic, political, social and cultural integration of the people of Latin America, with a view toward forming a Latin-American community of nations’.<sup>51</sup> This shows that regional integration

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<sup>42</sup> Art. 23 German Basic Law.

<sup>43</sup> Art. 24(1) German Basic Law.

<sup>44</sup> Art. 24(2) German Basic Law; see also Scheuner, *Staatstheorie und Staatsrecht*, at 226.

<sup>45</sup> Art. 24(3) German Basic Law. See for a similar wording, Art. 29 Irish constitution.

<sup>46</sup> Preamble, German Basic Law.

<sup>47</sup> Art. 26(1) German Basic Law.

<sup>48</sup> Art. 24(1) Bulgarian constitution.

<sup>49</sup> Art. 24(2) Bulgarian constitution. See for a very similar formulation, Art. 135(1) Lithuanian constitution.

<sup>50</sup> Art. 4 Brazilian constitution. See for a similar list of principles Art. 51 of the Indian constitution.

<sup>51</sup> Art. 4 Brazilian constitution.

as a subject for constitutional law is not a European monopoly anymore either.<sup>52</sup>

The most grandiose and extensive language on foreign affairs in a constitution can arguably be found in the preamble of the constitution of the People's Republic of China adopted in 1982.<sup>53</sup> The preamble starts out with a summary of the country's history from a feudal system to what is today 'in essence the dictatorship of the proletariat' and points towards future efforts 'to turn China into a powerful and prosperous socialist country with a high level of culture and democracy.' In this context the importance of global interdependence is highlighted, as the preamble acknowledges that '[t]he future of China is closely linked with that of the whole world.' This is followed by an enumeration of the principles that are to guide Chinese foreign policy. Those are mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries. This reflects a rather traditional understanding of the international (legal) order. In addition, the constitution expresses opposition to 'imperialism, hegemonism and colonialism', and mandates the state

'to strengthen unity with the people of other countries, supports the oppressed nations and the developing countries in their just struggle to win and preserve national independence and develop their national economies, and strives to safeguard world peace and promote the cause of human progress'.

In sum, we could observe that externally-oriented objectives, as the expression of the dynamic internationalisation of constitutional law, exist in many jurisdictions of today's world. Constitutional provisions setting out normative guidelines – in some cases in rather extensive language – on how the international order is to be shaped through a country's foreign policy are therefore nothing unusual. At least in terms of prevalence and verbosity, the post-Lisbon EU Treaties consequently appear less objectionable, and also somewhat less original. Therefore, the alleged 'almost epidemic proliferation'<sup>54</sup> of external objectives in EU primary law turns out to be rather a 'pandemic' in view of the global scale of this trend. Disproving the uniqueness of these provisions of course does not in itself entail a judgement as to their value and function from a legal point of view. In order to tackle these issues, it will be necessary to look beyond the constitutional texts as such and draw on scholarly approaches and debates aimed at situating constitutional objectives in the area of foreign policy as a norm (sub-)category in a given legal order.

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<sup>52</sup> On the European dimension, see C. Grabenwarter, 'National Constitutional Law Relating to the European Union', in A. von Bogdandy and J. Bast (eds.), *Principles of Constitutional Law*, second edition (Oxford: Hart / Munich: C.H. Beck 2010), 83-129.

<sup>53</sup> Preamble, Constitution of the People's Republic of China. The parts cited here have not been amended since the adoption of the constitution.

<sup>54</sup> Terhechte, 'Kommentierung zum Art. 3 EUV (Ziele der Union)', marginal no. 63.

### 3. DOCTRINAL APPROACHES: *STAATSZIELE*, *OBJECTIFS DE VALEUR CONSTITUTIONNELLE* AND 'SOFT LAW'

We have seen that externally-oriented objectives can be found in many constitutional documents today. By comparison, post-Lisbon EU primary law cannot be considered as very unusual. But beyond the empirical, the criticisms of these provisions would still be justified normatively if courts and legal scholarship were to qualify them as legally insignificant. There are at least two important legal traditions in which constitutional objectives as a norm category have received considerable attention. These are the German debate on *Staatszielbestimmungen* and its French counterpart on *objectifs de valeur constitutionnelle*. In both jurisdictions, constitutional objectives are recognised as a category of binding norms of constitutional value committing all state organs and performing the traditional legal functions of obliging, permitting and prohibiting.<sup>55</sup> On the contrary, the common denominator of these debates militates against associating (external) constitutional objectives with 'soft law' in the international or European law sense.

#### 3.1. German *Staatszielbestimmungen*

The legal tradition showing the keenest interest in constitutional objectives is arguably the German(-speaking) one. The academic appraisal of so-called *Staatsziele* and *Staatszielbestimmungen* follows a long history of theorising the state and the ultimate reasons for its existence (the so-called *Staatszweck*).<sup>56</sup> *Staatsziele* (state objectives) consequently constitute more concrete, subject-matter-related objectives that the state sets itself in the pursuit of the common good.<sup>57</sup> German scholarship speaks of *Staatszielbestimmungen* (constitutional provisions on state objectives) where those are codified.

The academic interest in state objectives in German scholarship is coupled with the claim that the concept has its very origin in Germany. Accordingly, the notion of 'state objective' was coined by Hans Peter Ipsen in 1949 by defining the concept of the 'soziale Rechtsstaat'<sup>58</sup> (a compound of the rule of law and

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<sup>55</sup> For a discussion of these three functions as the fundamental functions of any norm, see De Montalivet, *Les objectifs de valeur constitutionnelle*, at 323-331. This paper will not engage in the more theoretical discussions on the necessary and sufficient definitional criteria of 'legal norms'. The framework of these three functions serves here rather to point out similarities in the legal operation of constitutional objectives in the German(-speaking), French and EU legal orders.

<sup>56</sup> See e.g. J. Isensee, 'Staatsaufgaben', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. IV: *Aufgaben des Staates*, third edition (Heidelberg: C.F. Müller 2010), 117-160; and R. Herzog, 'Ziele, Vorbehalte und Grenzen der Staatlichkeit' in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. IV: *Aufgaben des Staates*, third edition (Heidelberg: C.F. Müller 2010), 81-116. However, this debate has changed to the extent that the state is now viewed rather as a given and constitutional objectives as empirical evidence from which by way of comparison the general tasks of the contemporary state can be gleaned, not the very *raison d'être* of the state as such, see already Scheuner, *Staatstheorie und Staatsrecht*, at 237-242.

<sup>57</sup> See e.g. Isensee, 'Staatsaufgaben', at 121; and Sommermann, *Staatsziele und Staatszielbestimmungen*, at 3-4.

<sup>58</sup> The term is used in Arts. 20 and 28 German Basic Law.

the social state) as a *Staatsziel*.<sup>59</sup> Decades later, this debate has experienced a revival following Germany's reunification, which prompted both the amendment of the Basic Law itself as well as the elaboration of constitutions for the new *Länder* that were constituted on the territory of the former German Democratic Republic. In both cases, the introduction or addition of explicit state objectives was a prominent topic of discussion.<sup>60</sup>

Tellingly, within the German discourse constitutional objectives have also been criticised for reasons very similar to those now voiced against the (external) objectives of the EU mentioned in the introduction, which in many cases emanate also from EU law scholars of German origin. The gist of these criticisms is mostly that the rather vague, soft character of constitutional objectives is alien to the 'original style that is characteristic for the Basic Law',<sup>61</sup> which is said to owe its success to its rigid structure and 'dependable legal guarantees that can be invoked in court'<sup>62</sup> and not to the kind of provisions that serve as 'a table of ethical values, political utopias, as a people's catechism or credo of a civic religion'.<sup>63</sup> Thus, it has been admonished that through such objectives the constitution raises expectations that will be difficult if not impossible to satisfy, which challenges ultimately the 'effectiveness of constitutional law' as such.<sup>64</sup>

Generally, however, these norms are well-received and are regarded as legally binding norms of constitutional law which commit the entirety of state organs (i.e. all vertical and horizontal branches, if not otherwise specified), without establishing individual rights as such.<sup>65</sup> Some authors, however, stress

<sup>59</sup> According to Sommermann, *Staatsziele und Staatszielbestimmungen*, at 5; and Scheuner, *Staatstheorie und Staatsrecht*, at 226.

<sup>60</sup> See K.-P. Sommermann, 'Die Diskussion über die Normierung von Staatszielen', 32 *Der Staat* (1993) 430; and in detail for the new *Länder* P.C. Fischer, *Staatszielbestimmungen in den Verfassungen und Verfassungsentwürfen der neuen Bundesländer* (Munich: VVF 1994). In the meantime, in 1983 there was an expert report commissioned on state objectives by the (West) German Ministers for the interior and justice: Bundesministerium des Innern und der Justiz, *Staatszielbestimmungen/Gesetzgebungsaufträge, Bericht der Sachverständigenkommission "Staatszielbestimmungen/Gesetzgebungsaufträge"*, Bonn, 1983.

<sup>61</sup> (In the original: 'Gleichwohl fügen sich die neuen Staatsziele nur schlecht in den ursprünglichen Duktus des Grundgesetzes [...]') Isensee, 'Staatsaufgaben', at 144.

<sup>62</sup> (In the original: '[...] durch gerichtlich einlösbare, verlässliche Rechtsgarantien'.) Isensee, 'Staatsaufgaben', at 144.

<sup>63</sup> (In the original: '[...] die als Tafel ethischer Werte, politischer Utopien, als Volkskatechismus und zivilreligiöses Glaubensbekenntnis dient.'). Isensee, 'Staatsaufgaben', at 144; also D. Merten, 'Über Staatsziele', *Die Öffentliche Verwaltung* (May 1993) 368, at 373.

<sup>64</sup> (In the original: 'Leistungsfähigkeit des Verfassungsrechts'.) P. Badura, 'Arten der Verfassungsrechtssätze', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VII (Heidelberg: C.-F. Müller 1992), 33-55, at 41.

<sup>65</sup> B. Plecher-Hochstraßer, *Zielbestimmungen im Mehrebenensystem: Die Verzahnung der Staatszielbestimmungen im GG mit den Zielbestimmungen im EUV, EGV, EuratomV und EUVV* (Munich: Meidenbauer 2006), at 23, who draws on the definition of the 1983 expert commission: 'Verfassungsnormen mit rechtlich bindender Wirkung, die der Staatstätigkeit die fortdauernde Beachtung oder Erfüllung bestimmter Aufgaben – sachlich umschriebener Ziele – vorschreiben.' ('constitutional norms with legally binding effect, which enjoin on public policy/state activity [Staatstätigkeit] the continuous observance of, or compliance with certain tasks [Aufgaben] – objectively delineated objectives') Bundesministerium des Innern und der Justiz (eds.), *Bericht der Sachverständigenkommission*, at 21; see also Sommermann, *Staatsziele und Staatszielbestimmungen*, at 5.

that objectives are usually or primarily addressed to the legislator.<sup>66</sup> It is possible to discern from this discourse, based on and interpreting the case law of the German Federal Constitutional Court (*Bundesverfassungsgericht*), the three functions of obliging, authorising and forbidding with regard to *Staatszielbestimmungen*, albeit to varying degrees.

As to obligation, the German Constitutional Court has referred many times to the principle of social justice as a goal (without however calling it explicitly a *Staatsziel*) which establishes ‘the obligation of the state to provide for a just social order’.<sup>67</sup> Even though this principle/goal was broadly-defined and left the legislator with a wide margin of manoeuvre, the Court ruled that the duty to provide for ‘minimum conditions for a dignified life’ was ‘compelling’ (*zwingend*).<sup>68</sup> Concerning European integration and participation in the European Union, the Court stated in its famous judgement on the Lisbon Treaty of 2009 that this objective (the Court speaks of a ‘constitutional mandate’, *Verfassungsauftrag*), ‘signifies in particular for the German constitutional organs that it is not within their political discretion whether to take part in European integration or not’.<sup>69</sup> This underlines that even though discretion may be wide, it is not unlimited.

However, it should be stressed that apart from such core duties, usually not the attainment of the objective is required, but only its active ‘pursuit’.<sup>70</sup> This is made explicit in the constitution of the German *Land Sachsen-Anhalt*, which obliges it ‘to pursue [the objectives] to its best endeavours and to orientate its actions accordingly’.<sup>71</sup> The qualification of the scope of the obligation to its active pursuit is well captured in the German literature by the term *Vorbehalt des Möglichen*, i.e. the caveat of what is feasible – the bounds of possibility.<sup>72</sup> The

<sup>66</sup> Plecher-Hochstraßer, *Zielbestimmungen im Mehrebenensystem*, at 26; and Badura, ‘Arten der Verfassungsrechtssätze’, at 41.

<sup>67</sup> (In the original: ‘die Pflicht des Staates, für eine gerechte Sozialordnung zu sorgen’.) *Bundesverfassungsgericht*, BVerfGE 59, 231 (decision of 13 January 1982 concerning freelancers), para. 68 and the case law cited there (emphasis added). See also De Montalivet, *Les objectifs de valeur constitutionnelle*, at 377.

<sup>68</sup> (In the original: ‘Mindestvoraussetzungen für ein menschenwürdiges Dasein’.) *Bundesverfassungsgericht*, BVerfGE 82, 60 (decision of 29 May 1990 concerning tax-free minimum living wage), para. 88.

<sup>69</sup> (In the original: ‘[...] bedeutet insbesondere für die deutschen Verfassungsorgane, dass es nicht in ihrem politischen Belieben steht, sich an der europäischen Integration zu beteiligen oder nicht’.) *Bundesverfassungsgericht*, BVerfGE 123, 267 (decision of 30 June 2009 concerning approval of the Lisbon Treaty), para. 225; see for a similar statement in the context of German reunification, *Bundesverfassungsgericht*, BVerfGE 36, 1 (decision of 31 July 1973 concerning the Basic Treaty (*Grundlagenvertrag*) between the Federal Republic and the German Democratic Republic), para. 81.

<sup>70</sup> Isensee, ‘Staatsaufgaben’, at 121; also Plecher-Hochstraßer, *Zielbestimmungen im Mehrebenensystem*, at 32-33.

<sup>71</sup> (In the original: ‘Die nachfolgenden Staatsziele verpflichten das Land, sie nach Kräften anzustreben und sein Handeln danach auszurichten.’ (emphasis added)) Art. 3(3) Constitution of Sachsen-Anhalt. Incidentally, the same idea appears in Art. 38(1) of the Indian constitution, according to which ‘[t]he State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.’ (emphasis added)

<sup>72</sup> Sommermann, *Staatsziele und Staatszielbestimmungen*, at 224, also 415; H. Maurer, *Staatsrecht I: Grundlagen, Verfassungsorgane, Staatsfunktionen*, third edition (Munich: C.H. Beck 2002), at 179.

necessity of this caveat becomes apparent in the context of so-called 'social rights', which have been considered as a hybrid of both rights and objectives. German scholars point to the unclear nature of, for instance, the right to work or housing. These provisions, even though called 'rights', cannot be invoked unconditionally, and therefore often rather show the characteristics of state objectives.<sup>73</sup> A notion that is used by a number of German scholars to capture the legal nature of state objectives as well as social rights is that of Alexy's optimisation requirement (*Optimierungsgebot*),<sup>74</sup> i.e. 'norms that require that something be realised to the greatest extent possible given the legal and factual possibilities'.<sup>75</sup>

In terms of prohibition, it is forbidden to disregard the pursuit of constitutional objectives. In that sense this function can also be viewed as the mirror-image of obligation. However, this is the weakest manifestation of their legal functions, as obviously not every instance where an objective is not pursued by any given measure of the a state organ could be considered a violation. In view of the earlier-mentioned caveat of possibility and the usually rather broad wording of objectives, a wide freedom of scope and discretion of the addressees of such objectives is recognised. Therefore, only in extreme cases where the objective had been disregarded in a manifest way the constitutional court could find in review proceedings that an organ of the state had engaged in prohibited conduct vis-à-vis an objective.<sup>76</sup> For example, the German Constitutional Court ruled in the context of the objective of reunification (*Wiedervereinigungsgebot*) that given the wide discretion of the legislature, the judiciary will only step in once the former 'has overstepped the limits of this discretion in a manifest way, i.e. once its action is obviously opposed to reunification in freedom from a legal or factual point of view'.<sup>77</sup> This rather weak force of the prohibition function is further illustrated by the other above-mentioned cases of the German Federal Constitutional Court, in which it did not find actual violations through manifest disregard of social justice. However, the Court has made concrete suggestions of what would constitute situations falling short of the requirement of social justice.<sup>78</sup>

<sup>73</sup> Isensee, 'Staatsaufgaben', at 122; Maurer, *Staatsrecht I*, at 181; and Sommermann, *Staatsziele und Staatszielbestimmungen*, at 223-229.

<sup>74</sup> Sommermann, *Staatsziele und Staatszielbestimmungen*, at 360-361, who calls state objectives optimization requirements '*par excellence*' (at 361); also Isensee, 'Staatsaufgaben', at 126.

<sup>75</sup> R. Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press 2010), at 47.

<sup>76</sup> Sommermann, *Staatsziele und Staatszielbestimmungen*, at 362 and 429-436; and Scheuner, *Staatstheorie und Staatsrecht*, at 236.

<sup>77</sup> (In the original '[...] wenn er die Grenzen dieses Ermessens eindeutig überschreitet, wenn seine Maßnahme also rechtlich oder tatsächlich einer Wiedervereinigung in Freiheit offensichtlich entgegensteht'.) *Bundesverfassungsgericht*, BVerfGE 36, 1 (decision of 31 July 1973 concerning the Basic Treaty (*Grundlagenvertrag*) between the Federal Republic and the German Democratic Republic), para. 80.

<sup>78</sup> *Bundesverfassungsgericht*, BVerfGE 40, 121 (decision of 18 June 1975 concerning orphan's pension), para. 45. These instances, it should be noted, were also coupled with the principle of equality (Art. 3 German Basic Law).

Lastly, in terms of authorisation, an intricate relationship exists between constitutional objectives and the question of competence.<sup>79</sup> Wherever in the constitution a particular branch or level of government, as opposed to the entirety of state organs, is mandated to act in a policy field, particularly when worded in terms of ‘promoting’ or ‘contributing to’ a certain end, competence questions are merged with objectives.<sup>80</sup> This has been captured in the Swiss constitutional law concept of ‘goal-oriented competence allocation’ (*zielgerichtete Kompetenzzuweisung*),<sup>81</sup> which was developed with reference to the introduction of environmental protection as a competence of the confederation in the Swiss constitution.<sup>82</sup> On the surface of it, this looks like a federal competence to pass legislation in the area of environmental protection. However, environmental protection then appears as the underlying state objective, the effective pursuit of which justifies the competence to be elevated to the federal level.<sup>83</sup>

However, the converse argument is more controversial, i.e. to which extent competence can or should be inferred from objectives, as this may upset the power balance between the constitutional levels and branches.<sup>84</sup> More generally, the pursuit of objectives is only permitted within the confines set by the structural principles (*Strukturprinzipien* or *verfassungsrechtliche Grundentscheidungen*, such as democracy federalism and republicanism)<sup>85</sup> enshrined in the constitution, including the respect for fundamental rights.<sup>86</sup> In the decision on the Lisbon Treaty, the *Bundesverfassungsgericht* recalled that such structural limits also apply to the pursuit of the objective of European integration.<sup>87</sup>

With particular regard to externally-oriented objectives, German scholarship provides a number of additional features to be taken into account. As *Staatsziele*

<sup>79</sup> It can also be possible to infer an objective from the existence of competence, see Isensee, ‘Staatsaufgaben’, at 128.

<sup>80</sup> Scheuner, *Staatstheorie und Staatspraxis*, at 234-235.

<sup>81</sup> U. Breiter, *Staatszielbestimmungen als Problem des schweizerischen Bundesverfassungsrechts* (Zurich: Schulthess 1980), at 97; also Sommermann, *Staatsziele und Staatszielbestimmungen*, at 247-248 and 366.

<sup>82</sup> In the current version, Art. 74(1) Swiss constitution.

<sup>83</sup> It should be noted that the 1971 version of the Swiss constitution, which introduced this provision and which prompted the commentary, also contained a second sentence: ‘It [the Confederation] fights in particular air pollution and noise.’ (‘Er bekämpft insbesondere die Luftverunreinigung und den Lärm.’) This part is formulated more clearly in terms of an objective.

<sup>84</sup> Merten, ‘Über Staatsziele’, at 376; also Isensee, ‘Staatsaufgaben’, at 144; and Maurer, *Staatsrecht I*, at 180.

<sup>85</sup> Unlike state objectives, they establish the basic characteristics of the state, i.e. of what it *is*, not what it should *strive for*. See Sommermann, *Staatsziele und Staatszielbestimmungen*, at 373; and Merten, ‘Über Staatsziele’, at 370.

<sup>86</sup> This relates to the broader question to which extent the interest of the individual can be trumped by the ‘common good’, see J. Isensee, ‘Gemeinwohl im Verfassungsstaat’, in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. IV: *Aufgaben des Staates*, third edition (Heidelberg: C.F. Müller 2010), 3-79, at 8 and 19-22. See in detail on the historical aspects of this Sommermann, *Staatsziele und Staatszielbestimmungen*, at 116-159; also P. Häberle, *Europäische Verfassungslehre*, third edition (Baden-Baden: Nomos 2005), at 372.

<sup>87</sup> *Bundesverfassungsgericht*, BVerfGE 123, 267 (decision of 30 June 2009 concerning approval of the Lisbon Treaty), esp. para. 340.

can be seen as specific manifestations of the pursuit of the common good by the state, viewing a political community's common good in a wider, global context necessitates a rethinking of the concept of the state objective. Whereas the idea of a common good within a state operates as an amalgamation and reconciliation of individual interests, 'externally, it presents itself towards other states and international and supranational organisations as national egoism.'<sup>88</sup> However, while this may have been the classic view, Isensee stresses that today these national egoisms are 'increasingly integrated into duties of supranational [*übernational*] solidarity and are relayed to the common good of supranational [*übernational*] communities.'<sup>89</sup> Therefore, the national common good becomes intertwined with regional and even global notions of the common good (a 'bonum commune humanitatis').<sup>90</sup> Moreover, while the legislator is usually primarily concerned with the pursuit of state objectives, in foreign affairs the emphasis is rather on the executive,<sup>91</sup> which consequently also becomes the protagonist in the pursuit of external objectives.<sup>92</sup>

Importantly, the caveat of possibility is widened significantly in the foreign affairs domain, as in addition to the legal constraints, political willingness and material resources within a state, one has to take into account the legal requirements of the international system, those within other states, the political willingness present in other states, as well as the allocation of resources outside one's own borders. Concerning the legal requirements, in the pursuit of a state's external constitutional objectives, it needs to play according to the rules not only of its own legal order (above all its structural principles), but also according to those of the international legal order. In addition, the legal traditions of other countries have to be respected or at least accounted for when trying to export internal norms abroad. As a global phenomenon, also other countries will pursue the external objectives their respective constitutions assign to their governments, which might differ (or be interpreted differently) from one's own. Next to the purely legal, gaps in terms of material possibilities as well as strategic interests tend to widen once the context shifts from a purely national or regional one to the global level. As a result, finding common denominators of interests and fashioning practical compromises becomes a more difficult and burdensome enterprise. In short, it emerges that external objectives have to be pursued through playing according to the manifold rules of a multilevel legal

<sup>88</sup> (In the original: '[...] so stellt sie sich nach außen gegenüber anderen Staaten und supranationalen wie internationalen Organisationen als nationaler Egoismus dar'.) Isensee, 'Gemeinwohl', at 9, also 20-21.

<sup>89</sup> (In the original: '[...] zunehmend eingebunden in übernationale Solidarpflichten und auf das Gemeinwohl übernationaler Gemeinschaften ausgerichtet'.) Isensee, 'Gemeinwohl', at 9.

<sup>90</sup> Isensee, 'Gemeinwohl', at 21, who refers to the earlier work of Alfred Verdross; Häberle, 'Das "Weltbild" des Verfassungsstaates', at 1305, dates the idea back even further to the School of Salamanca and de Vitoria.

<sup>91</sup> See C. Calliess, 'Auswärtige Gewalt', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. IV: *Aufgaben des Staates*, third edition (Heidelberg: C.F. Müller 2010), 589-632, at 590.

<sup>92</sup> Sommermann, *Staatsziele und Staatszielbestimmungen*, at 387.

system and the volatile political opportunities of a multilevel game.<sup>93</sup> An important consequence of this is that the already limited role of the judiciary in monitoring objectives is further restrained. While the German judiciary, as Franck pointed out, has refused to abdicate its jurisdiction over foreign affairs offhand,<sup>94</sup> it has acknowledged at the same time the enhanced limitations of the government in pursuing external objectives and thus grants it an even wider margin of discretion than it usually has internally. For instance, in an early judgement, the German Constitutional Court underlined that in reviewing the constitutionality of an international agreement, the Court concedes to 'the treaty-making organs of the Federal Republic of Germany a large measure of political discretion, especially since the circle of solutions theoretically available to draw up the agreement is in practice narrowed down to what is politically achievable vis-à-vis the respective contractual partner.'<sup>95</sup> With this reasoning, the Court is applying multilevel logic par excellence. Nevertheless, the *Bundesverfassungsgericht* has still at times played a clarifying role, for instance, by ruling on whether collective security as mentioned in the German Basic Law<sup>96</sup> also covered collective defence arrangements, which the court answered in the affirmative.<sup>97</sup>

### 3.2. French *objectifs de valeur constitutionnelle*

French doctrine has also devoted particular attention to constitutional objectives, which are known as *objectifs de valeur constitutionnelle*. This debate, however, has a shorter history and markedly different starting point compared to its German counterpart. While German scholarship claims authorship of the concept based on scholarly interpretation of the Basic Law, the French doctrine emanated directly from the case law of the *Conseil constitutionnel*. The notion of *objectif de valeur constitutionnelle* was introduced explicitly by a decision of the *Conseil* in 1982 on a law on the freedom of audiovisual communication.

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<sup>93</sup> For the concepts respectively, on the one hand, I. Pernice, 'The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation', in P.-M. Dupuy, B. Fassbender, M. Shaw and K.-P. Sommermann (eds.), *Völkerrecht als Wertordnung / Common Values in International Law, Festschrift für / Essays in Honour of Christian Tomuschat* (Kehl: N.P. Engel 2006), 973-1005; and for a more sceptical view towards the 'constitutional' elements of this system and instead stressing its 'pluralist' quality, see N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press 2010), esp. at 69-105; and on the other hand R. Putnam, 'Diplomacy and Domestic Politics: The logic of Two-Level Games', 42 *International Organization* (1988) 427.

<sup>94</sup> T. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton, N.J.: Princeton University Press 1992), 107-125 and the further cases cited there. He uses this as a contrast to the 'political questions doctrine' in the U.S.

<sup>95</sup> (In the original: '[...] für die vertragschließenden Organe der Bundesrepublik Deutschland ein breiter Bereich politischen Ermessens bestehen muß, zumal der Kreis der an sich zur Wahl stehenden vertraglichen Lösungen sich praktisch auf das dem jeweiligen Vertragspartner gegenüber politisch Erreichbare verengt'.) *Bundesverfassungsgericht*, BVerfGE 4, 157 (decision of 4 May 1955 concerning the Status of the Saar Agreement), para. 37.

<sup>96</sup> Art. 24(2) German Basic Law.

<sup>97</sup> *Bundesverfassungsgericht*, BVerfGE 90, 286 (decision of 12 July 1994 concerning 'out of area' operations), para. 236.

There, the *Conseil* referred to '*objectifs de valeur constitutionnelle*', in particular safeguarding public order, respect for the freedoms of others and the preservation of sociocultural pluralism.<sup>98</sup>

De Montalivet submits that the *Conseil* was likely influenced in its interpretation by the previous case law of none other than the European Court of Justice (ECJ),<sup>99</sup> in particular the *Nold* judgement of 1974, in terms of restrictions of fundamental rights 'justified by the overall objectives pursued by the Community'.<sup>100</sup> Even though the *Conseil* never made explicit reference in its case law to having been inspired by the ECJ, De Montalivet concludes that there is at least a strong assumption to be made that the ECJ exerted a certain influence in shaping the *Conseil*'s interpretative creation of the *objectifs*. First, he points to the similar features of the two categories (such as the term 'objective', the reference to the general interest and their function to justify/frame restrictions of rights), and secondly, to certain personal connections between the two courts, above all the fact that Robert Lecourt had been President of the ECJ at the time of *Nold* and later was a member of the *Conseil* at the time of the 1982 decision.<sup>101</sup>

Also the *objectifs* have received criticisms in French scholarship comparable to those in Germany and the EU. It has been argued that the vague concept of an objective is 'unheard of' (*inédite*) and 'foreign' (*étrangère*) to the French legal tradition,<sup>102</sup> potentially even risking the 'desecration' (*désacralisation*) of the French constitution.<sup>103</sup> Furthermore, the creation of the category of *objectifs* is discussed in terms of institutional balance and in particular the judicialisation of politics, which is captured by the French term 'gouvernement des juges'.<sup>104</sup> Moreover, their function of serving as justifications for restricting fundamental rights is seen as particularly problematic. However, akin to the Alexyian notion of optimisation, it is stressed that *objectifs* also help to improve the effectiveness of rights by helping to reconcile different rights and marking their limits vis-à-vis the public common good.<sup>105</sup>

<sup>98</sup> *Conseil constitutionnel*, décision n° 82-141 DC du 27 juillet 1982, *Loi sur la communication audiovisuelle*, Recueil, p. 48, para. 5. More objectives have been added in later judgements, see for a list with references to the corresponding case law F. Luchaire, 'Brèves remarques sur une création du Conseil constitutionnel : l'objectif de valeur constitutionnelle', No. 64 *Revue française de Droit Constitutionnel* (2005) 675, at 676-677.

<sup>99</sup> De Montalivet, *Les objectifs de valeur constitutionnelle*, at 7 ; also Luchaire, 'Brèves remarques', at 675.

<sup>100</sup> European Court of Justice, Case 4/79 *Nold v Commission* [1975] ECR 00491, para. 14.

<sup>101</sup> De Montalivet, *Les objectifs de valeur constitutionnelle*, at 47-53.

<sup>102</sup> C. Vimbert, 'L'ordre public dans la jurisprudence du Conseil constitutionnel', No. 3 *Revue du droit public et de la science politique en France et à l'étranger* (1994) 693, at 712.

<sup>103</sup> P. Pactet, 'La désacralisation progressive de la Constitution de 1958', in *La République : Mélanges en l'honneur de Pierre Avril* (Paris: Montchrestien 2001), 389-399, at 389.

<sup>104</sup> See De Montalivet, *Les objectifs de valeur constitutionnelle*, at 64-69, who rejects that such a judicialisation has occurred.

<sup>105</sup> De Montalivet, *Les objectifs de valeur constitutionnelle*, at 586 ; also B. Genevois, *La jurisprudence du Conseil constitutionnel : Principes Directeurs* (Paris: STH 1988), at 342 ; and B. Faure 'Les objectifs de valeur constitutionnelle : une nouvelle catégorie juridique ?', No. 21 *Revue française de Droit Constitutionnel* (1995) 47, at 63-66.

Overall, current French scholarship deems the *objectifs* a norm category of constitutional law (i.e. they form part of the *bloc de constitutionnalité*), which have their source either in the text of the French constitution, the Preamble of the constitution of the Fourth Republic or the 1789 Declaration of the Rights of Man and of the Citizen (to both of which reference is made in the preamble of the current constitution), either by a direct or an implied link.<sup>106</sup> In that regard, the *objectifs* are similar to the German *Staatsziele*, since both the French and German constitutional documents in many cases do not mention the objective explicitly, but contain norms where the implicit objective is fairly easily discernible beneath the surface. However, the main difference remains that in France, the Court has served as the protagonist in ‘discovering’ objectives flowing from the constitutional texts, as opposed to legal academia in Germany. De Montalivet concludes that the *objectifs* are in themselves legally binding norms (*droit ‘dur’*), binding the entirety of state power, with the prime addressee being also here the legislature.<sup>107</sup> They, too, perform the three functions of prohibition, obligation and permission.

In terms of obligation, the *Conseil Constitutionnel* has used language similar to that of the *Bunderverfassungsgericht*. For instance, the *Conseil* stated that ‘it is incumbent upon the legislator’ to implement the constitutional objective of making available decent accommodation for each person.<sup>108</sup> In other cases, the *Conseil* ruled with regard to the legislature and competent regulatory authorities ‘that it is incumbent upon them’ to decide on appropriate rules aimed at the realization (*réalisation*) of the objective found in the preamble of the constitution referring to the state’s duty to provide health protection.<sup>109</sup> However, despite this strong wording (literally ‘to realise’ the objective), also here the scope of the obligation is limited, as objectives cannot be invoked directly by individuals in court, impose only a ‘best endeavours’ obligation (*obligation de moyens*) as opposed to one of result (*obligation de résultat*) and are generally less well protected than individual rights.<sup>110</sup>

Closely related to the obligation is the function of prohibition, where the German and French approaches converge as well, as in French doctrine a law that manifestly disregards a constitutional objective (*erreur manifeste d’appréciation*)<sup>111</sup> is forbidden, which *in extremis* can lead to declaring that law uncon-

<sup>106</sup> Luchaire, ‘Brèves remarques’, at 677-678 ; Faure ‘Les objectifs de valeur constitutionnelle’, at 56; in detail De Montalivet, *Les objectifs de valeur constitutionnelle*, at 72-105.

<sup>107</sup> De Montalivet, *Les objectifs de valeur constitutionnelle*, at 459: ‘Il ne fait aucun doute que les objectifs de valeur constitutionnelle s’adressent en priorité au législateur.’ (‘There is no doubt that constitutional objectives are addressed primarily to the legislator.’)

<sup>108</sup> (In the original: ‘il appartient au législateur’.) *Conseil constitutionnel*, décision n° 98-403 DC du 29 juillet 1998, *Loi d’orientation relative à la lutte contre les exclusions*, Recueil, p. 276, para. 7 (emphasis added).

<sup>109</sup> (In the original: ‘qu’il leur appartient’.) *Conseil constitutionnel*, décision n° 89-269 DC du 22 janvier 1990, *Loi portant diverses dispositions relatives à la sécurité sociale et à la santé*, Recueil, p. 33, para. 26 (emphases added). For further case law, see De Montalivet, *Les objectifs de valeur constitutionnelle*, at 357-364.

<sup>110</sup> De Montalivet, *Les objectifs de valeur constitutionnelle*, at 561 and, in detail, *Seconde Partie*, Titre second.

<sup>111</sup> De Montalivet, *Les objectifs de valeur constitutionnelle*, at 528.

stitutional through judicial review. Akin to the usually rather general formulations of the *Bundesverfassungsgericht* with regard to social justice or reunification, the *Conseil* also uses language which points to a prohibition to manifestly disregard an objective. For instance, concerning the constitutionality of joining the Schengen Agreement, it ruled that the law approving the agreement 'could not be seen as disregarding the constitutional objective of safeguarding public order'.<sup>112</sup> Moreover, concerning a contested law on residence requirements for foreigners, the *Conseil* ruled that the provisions of that law 'are not contrary to the objectives of safeguarding public order'.<sup>113</sup> While in those (as in most) cases the *Conseil* concludes that such a violation has not occurred,<sup>114</sup> the *Conseil* has ruled in one decision that a contested provision of a law was contrary to, *inter alia*, 'the objective of the intelligibility and accessibility of the law and to the principle'.<sup>115</sup> The prohibition function of *objectifs* is thus not merely a theoretical construct.

Lastly, as to the permissive function of the *objectifs*, the focus in the French debate seems to be focussed rather on extent to which they can justify limitations of individual rights,<sup>116</sup> and not so much the question of competence allocation. However, the *Conseil* has been prudent to point to the limits of competence that apply in the pursuit of constitutional objectives. For example, in a case mentioned earlier on, the court made explicit that the modalities in the pursuit of public health are to be determined by the state organs 'according to their respective competences'.<sup>117</sup>

In terms of restricting individual rights, in the decision on the objective to provide decent housing (which in Germany would be called a 'social right'), the *Conseil* ruled that the legislator 'is allowed, to this end, to apply the limitations to the right of property that it deems necessary',<sup>118</sup> as long as it does not undermine the core of that right. Similarly, concerning the objective of public health enshrined in the preamble of the 1946 constitution, the *Conseil* underlined the possibilities for 'limitations to the exercise [of property rights] necessary in the

<sup>112</sup> (In the original: 'ne saurait être regardé comme *méconnaissant* l'objectif de valeur constitutionnelle de sauvegarde de l'ordre public'.) *Conseil constitutionnel*, décision n° 91-294 DC du 25 juillet 1991, *Loi autorisant l'approbation de la convention d'application de l'accord de Schengen*, Recueil, p. 91, para. 17 (emphasis added).

<sup>113</sup> (In the original: "ne sont pas contraires à l'objectif de sauvegarde de l'ordre public'.) *Conseil constitutionnel*, décision n° 89-261 DC du 28 juillet 1989, *Loi relative aux conditions de séjour et d'entrée des étrangers en France*, Recueil, p. 81, para. 13. For further case law, see De Montalivet, *Les objectifs de valeur constitutionnelle*, at 334-340.

<sup>114</sup> See Luchaire, 'Brèves remarques', at 678, who concludes that the *Conseil* has in fact never used a constitutional objective in order to declare a law unconstitutional.

<sup>115</sup> (In the original: 'contraire tant à l'objectif d'intelligibilité et d'accessibilité de la loi qu'au principe de loyauté du suffrage'.) *Conseil constitutionnel*, décision n° 2003-475 DC du 24 juillet 2003, *Loi portant réforme de l'élection des sénateurs*, Recueil, p. 397, para. 26.

<sup>116</sup> Faure 'Les objectifs de valeur constitutionnelle', at 63; and De Montalivet, *Les objectifs de valeur constitutionnelle*, at 399.

<sup>117</sup> (In the original: 'selon leurs compétences respectives'.) *Conseil constitutionnel*, Décision n° 89-269 DC du 22 janvier 1990, *Loi portant diverses dispositions relatives à la sécurité sociale et à la santé*, Recueil, p. 33, para. 26.

<sup>118</sup> (In the original: 'il lui est loisible, à cette fin, d'apporter au droit de propriété les limitations qu'il estime nécessaires'.) *Conseil constitutionnel*, Décision n° 98-403 DC du 29 juillet 1998, *Loi d'orientation relative à la lutte contre les exclusions*, Recueil, p. 276, para. 7.

name of the general interest'.<sup>119</sup> The obligation to pursue this objective thus permits the legislator to limit certain individual rights. However, in a number of cases, the *Conseil* prefers to speak of the need to reconcile individual rights with the pursuit of constitutional objectives, such as between constitutionally guaranteed individual freedoms and the objective of maintaining public order.<sup>120</sup> Furthermore, that individual rights and constitutional objectives pursued by the state are also mutually-reinforcing is stressed by the *Conseil*. In the previous example, the court adds in its decision that in the absence of public order 'the exercise of individual freedoms could not be guaranteed'.<sup>121</sup> De Montalivet in fact concludes that the most important function, and indeed the very normativity, of the *objectifs* resides in their contribution to the effectiveness of individual rights.<sup>122</sup>

With regard to the external dimension of constitutional objectives, however, French scholarship does not appear to provide much insight. The most probable reason for this is that French scholarship focuses on the *objectifs* as established in the case law of the *Conseil constitutionnel*, some of which are rather specific, e.g. combatting fiscal fraud (*la lutte contre la fraude fiscale*). To date, the *Conseil* has not pronounced an explicitly externally-oriented *objectif*, which may be seen either as a denial of their existence, or simply as reflective of the fact that the *Conseil* did not yet have the opportunity to rule on them. It should be recalled here that the *Bundesverfassungsgericht* has never adopted the notion of *Staatsziel* itself, and speaks generally of 'principles' (*Prinzipien*) or simple 'goals' (*Ziele*).<sup>123</sup> Therefore, it was left to academic commentators to theorise about (external) objectives, with German scholars having readily accepted the existence of a wide range of constitutional objectives including typically external ones.

To conclude that the French legal order and doctrine meant to reject the existence of external objectives as such seems unwarranted. In fact, the *Conseil* has produced decisions in cases with a foreign policy dimension, from which we can discern at least an external dimension to the existing *objectifs*. It ruled, as we have seen, that the law approving the conclusion of the Schengen agreement by France was not unconstitutional, as approving that treaty did not disregard the objective of public order.<sup>124</sup> This means that the pursuit

<sup>119</sup> (In the original: 'des limitations à son exercice exigées au nom de l'intérêt général'.) *Conseil constitutionnel*, Décision n° 90-283 DC du 08 janvier 1991, *Loi relative à la lutte contre le tabagisme et l'alcoolisme*, Recueil, p. 11, para. 8. See further De Montalivet, *Les objectifs de valeur constitutionnelle*, at 401-407.

<sup>120</sup> *Conseil constitutionnel*, Décision n° 85-187 DC du 25 janvier 1985, *Loi relative à l'état d'urgence en Nouvelle-Calédonie et dépendances*, Recueil, p. 43, para. 3.

<sup>121</sup> (In the original: 'l'exercice des libertés ne saurait être assuré'.) *Id.* For further case law, see De Montalivet, *Les objectifs de valeur constitutionnelle*, at 400 *et seq.*

<sup>122</sup> De Montalivet, *Les objectifs de valeur constitutionnelle*, at 454.

<sup>123</sup> See e.g. *Bundesverfassungsgericht*, BVerfGE 40, 121 (decision of 18 June 1975 concerning orphan's pension), para. 43. With regard to reunification, it used the term 'command'/'imperative' (*Wiedervereinigungsgebot*), *Bundesverfassungsgericht*, BVerfGE 36, 1 (decision of 31 July 1973 concerning the Basic Treaty (*Grundlagenvertrag*) between the Federal Republic and the German Democratic Republic), para. 80.

<sup>124</sup> Décision n° 91-294 DC du 25 juillet 1991, *Accord de Schengen*, Recueil, para. 17. See also De Montalivet, *Les objectifs de valeur constitutionnelle*, at 460.

of internal *objectifs* cannot be undermined through international commitments, arguably in the pursuit of implicit external objectives such as international co-operation and integration. After all, the French constitution is explicit on the external objective to develop the international *Francophonie*<sup>125</sup> and participation in the European Union.<sup>126</sup> Moreover, the objective of safeguarding public order can be seen as an emanation of the general objective of security, which has a clear external dimension. Also, the *Conseil* ruled in 1999 that a revision of the French constitution was necessary in order to be able to ratify the Rome Statute on the International Criminal Court.<sup>127</sup> Consequently, the constitution was amended to include a clause stating that '[t]he Republic may recognise the jurisdiction of the International Criminal Court'.<sup>128</sup> This could be seen as establishing a permission in the pursuit of an implicit external objective of international cooperation in the field of international criminal law, which dovetails with the German-Swiss notion of a 'goal-oriented competence allocation'.

### 3.3. Soft Law

A few remarks on 'soft law' seem appropriate in view of, on the one hand, the criticism launched against constitutional objectives as being rather soft than hard law, and, on the other, the growing importance and the academic attention being devoted to the notion of 'soft law' both in international and EU law.<sup>129</sup> In view of the vagueness and imprecision that mark state/Union objectives, it would stand to reason to see them also through the lens of 'soft law'.<sup>130</sup>

Generally, soft law is defined as not legally binding (i.e. not 'law' proper) but nonetheless of such importance 'that particular attention requires to be paid to it'.<sup>131</sup> It often appears in the form of recommendations, plans, guidelines etc. that may later develop into legally binding obligations. They are marked by great flexibility and adaptability to changing circumstances, such as in environ-

<sup>125</sup> Art. 87 French constitution.

<sup>126</sup> Art. 88(1) French constitution.

<sup>127</sup> *Conseil constitutionnel*, Décision n° 98-408 DC du 22 janvier 1999, *Traité portant statut de la Cour pénale internationale*, Recueil, p. 29.

<sup>128</sup> Art. 53(2) French constitution (as amended by Loi constitutionnelle no 99-568 du 8 juillet 1999 insérant, au titre VI de la Constitution, un article 53-2 et relative à la Cour pénale internationale).

<sup>129</sup> See respectively, e.g. F. Francioni, 'International "Soft Law": A Contemporary Assessment', in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jennings* (Cambridge: Cambridge University Press 2000), 167-178; and L. Senden, *Soft law in European Community Law* (Oxford: Hart 2004).

<sup>130</sup> Isensee remarks that state objectives seem foreign to the original style of the Basic Law exactly because it tried to avoid 'norms that just contained general appeals and mere soft law' ('nur-appelative Normen und bloßes soft law'), Isensee, 'Staatsaufgaben' 144. De Montalivet rejects allegations that constitutional objectives constitute 'droit mou', De Montalivet, *Les objectifs de valeur constitutionnelle*, at 454.

<sup>131</sup> M. Shaw, *International Law*, sixth edition (Cambridge: Cambridge University Press 2008), at 117, also 117-119 and the further references there.

mental and international economic law or, for the EU, in the implementation and advancement of the European Neighbourhood Policy.<sup>132</sup>

In view of these characteristics, and in particular with regard to German and French views on constitutional objectives in general, it seems rather problematic to consider such objectives, including the externally-oriented ones, as 'soft law'. It is true that they are of broad character, leaving wide discretion to the political branches and only allow for marginal scrutiny by the courts. However, as was shown above, both German and French scholarship deem such objectives as binding law of constitutional rank fulfilling different important functions within the respective legal order. Concerning objectives that have been codified in constitutional documents, considering these as 'soft law' would amount to introducing a problematic kind of non-constitutional, non-legal element into constitutional law. Furthermore, even though constitutional objectives are dynamic, the fact that they have been entrenched in a constitution, or are based on case law of a constitutional court which derives them from the constitution, means that they are not easily adaptable, but instead hard to alter. Lastly, and related to this entrenchment, the objectives themselves are not in a process of developing into legally binding norms. Their dynamic character lies in the fact that they put a (constitutional) obligation on public power to pursue them through legislative action and other measures. Therefore, even though constitutional objectives – and especially externally-oriented ones – appear 'softer' than traditional constitutional law (concerning for instance competences or rights), they are not to be confused with 'soft law' as a non-legal category.

#### 4. EXTERNAL OBJECTIVES AS EU PRIMARY LAW NORMS

In the preceding sections we have seen that externally-oriented objectives are rather common in modern constitutions, reflecting a general trend towards 'dynamic internationalisation'. Moreover, it was shown that there are indeed largely compatible national doctrinal approaches to constitutional objectives and their functions in a given legal order. It emerges that external objectives are empirically neither unusual, nor, as integral part of the norm category of constitutional objectives, legally insignificant and negligible. Despite being rather weak norms, even among the general category of objectives, there is no reason to conclude that externally-oriented objectives would amount to soft law. On the contrary, they can be ranked among norms of constitutional value. The last bastion, so to say, for the harshest critics of EU external objectives would be then to set the EU legal order and its objectives apart from the findings presented above. In other words, while 'ordinary' national constitutional orders may well contain such objectives, a similar approach to the EU would not be called for in view of its different nature. As will be argued here, even this last line of defence does not hold. In the following, we will return to the EU legal order proper and apply, *mutatis mutandis*, the preceding findings to EU

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<sup>132</sup> See for the latter B. Van Vooren, 'The European Neighbourhood Policy as a Case-Study for Soft Law in EU External Relations', 34 *European Law Review* (2009) 696.

primary law as reformed by the Lisbon Treaty. As will be shown, many landmark judgements of the ECJ on objectives have a clearly external dimension. However, particular attention will have to be paid to the objectives of the Common Foreign and Security Policy (CFSP) due to the still special nature of this policy area.

As a preliminary observation, it should be noted that while external relations law of the EU has received considerable scholarly attention, particularly for questions of conferred powers, competence and legal basis, the external objectives of the Union, on the contrary, have led a rather shadowy existence.<sup>133</sup> There is, however, a certain amount of literature on Community/Union objectives in general.<sup>134</sup> Tellingly, at least in view of the earlier presentation of scholarly traditions, this literature, too, is mostly of German (and to a lesser degree of French) language origin.

Of course caution must be exercised with regard to the transferability of national constitutional law concepts to the supranational level.<sup>135</sup> Mere 'constitutional labeling'<sup>136</sup> without further reflection is to be avoided. Notwithstanding,

<sup>133</sup> See e.g. P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford: Oxford University Press 2004), at 142-143 (on CFSP objectives, former Art. 11 TEU) and 348-349 (on Common Commercial Policy principles); P. Koutrakos, *EU International Relations Law* (Oxford: Hart 2006), at 387-391 (on CFSP objectives) and 483-485 (on the Constitutional Treaty); and G. De Baere, *Constitutional Principles of EU External Relations* (Oxford: Oxford University Press 2008), at 101-108 (on CFSP objectives).

<sup>134</sup> See the contributions by C. Calliess, 'Kollektive Ziele und Prinzipien im Verfassungsrecht der EU – Bestandsaufnahme, Wirkungen und Perspektiven', in C. Hiebaum and P. Koller (eds.), *Politische Ziele und juristische Argumentation – Symposium der Internationalen Vereinigung für Rechts- und Sozialphilosophie 11.-12. Oktober 2002 in Graz*, 92 *ARSF-Beiheft* (2003), 85-111; F. Reimer, 'Ziele und Zuständigkeiten: Die Funktionen der Unionszielbestimmungen', *Europarecht* (2003) 992; M. Kotzur, 'Die Ziele der Union: Verfassungsidentität und Gemeinschaftsidee', 58 *Die Öffentliche Verwaltung* (2005) 313; K. Lenaerts and P. Van Nuffel, *European Union Law*, third edition (London: Sweet & Maxwell 2011), at 106-111; F. Sorrentino, 'The purposes of the European Union according to the Constitutional Treaty', in H.J. Blanke and S. Mangiameli (eds.), *Governing Europe under a Constitution: The Hard Road from the European Treaties to a European Constitutional Treaty* (Berlin: Springer 2006), 123-131; Sommermann, *Staatsziele und Staatszielbestimmungen*, at 280-296; Plecher-Hochstraßer, *Zielbestimmungen im Mehrebenensystem*, at 105-154; and J. Basedow, 'Zielkonflikte und Zielhierarchien im Vertrag über die europäische Gemeinschaft', in O. Due, M. Lutter and J. Schwarze (eds.), *Festschrift für Ulrich Everling* (Baden-Baden: Nomos 1995), 49-68; as well as commentaries on the EU Treaties such as M. Ruffert, 'Art. 3 (ex-Art. 2 EUV) [Ziele der EU]', in C. Calliess and M. Ruffert (eds.), *EUV/AEUV Kommentar*, fourth edition (Munich: C.H. Beck 2011), 41-54; P.-C. Müller-Graf, 'Verfassungsziele der EG/EU', in M. Dausen (ed.), *Handbuch des EU-Wirtschaftsrechts*, loose-leaf, twenty-seventh supplement, updated October 2010 (Munich: C.H. Beck,); L. Azoulai, 'Article I-3', in L. Burgorgue-Larsen, A. Levade and F. Picod (eds.), *Traité établissant une Constitution pour l'Europe*, Vol. I (Brussels: Bruylat 2007), 60-77; and earlier notably P. Pescatore, 'Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice', in *Miscellanea W J Ganshof van der Meersch: Studia ab discipulis amicisque in honorem egregii professoris edita* (Bruxelles: Bruylant 1972), 325-363; and H.P. Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen: Mohr Siebeck 1972), at 545-567.

<sup>135</sup> A. von Bogdandy, 'Zur Übertragbarkeit staatsrechtlicher Figuren auf die Europäische Union', in M. Brenner, P. Huber and M. Möstl (eds.), *Der Staat des Grundgesetzes – Kontinuität und Wandel. Festschrift für Peter Badura zum siebzigsten Geburtstag* (Tübingen: Mohr Siebeck 2004), 1033-1052.

<sup>136</sup> M. Avbelj, 'Questioning EU Constitutionalisms', 9 *German Law Journal* (2008) 1, at 26, who is generally critical of the constitutional approach.

there is a strong current in EU legal scholarship that considers it appropriate to approach EU primary law (and the general principles of EU law) in constitutional terms.<sup>137</sup> Whether one subscribes to all the arguments of the proponents of EU constitutionalism or not, once the existence of a constitution is decoupled from the question of statehood,<sup>138</sup> the least that can be said is that for the European Union, its founding Treaties and other primary law have come to fulfil most of the functions which the constitution would fulfil within a national setting.<sup>139</sup> It may be added here that the basic concepts encountered in the previous sections such as structural principles, competence, individual rights, principles, obligations, prohibitions and authorisations are all well-known to EU law, too.

The main difference with regard to objectives that exists between those we find in national constitutions and those of the EU results from the fact that the Union is not a state with all-encompassing competence (*Kompetenz-Kompetenz*) but remains an entity of conferred powers aimed at certain goals.<sup>140</sup> Therefore, as Ipsen already aptly observed in 1972, the Union and its predecessors have an actual *Zielbedarf* ('need for objectives').<sup>141</sup> Nevertheless, as we have seen from the developments in comparative constitutional law, states, although they do not *need* to codify objectives to justify their actions or even existence, apparently increasingly *feel* a need to do so. In German, one could thus speak of states having a *Zielbedürfnis*, i.e. the urge or desire to put objectives in their constitutional documents. A difference between *Zielbedarf* and *Zielbedürfnis* remains, but the result is the same: the codification and entrenchment of specific objectives in a foundational document, including those related to external relations. Hence, while keeping the particular features of the EU and its legal order in mind, a constitutional law approach to EU primary law

<sup>137</sup> See e.g. A. von Bogdandy and J. Bast, 'The Constitutional Approach to EU Law – From Taming Intergovernmental Relationships to Framing Political Processes', in A. von Bogdandy and J. Bast (eds.), *Principles of Constitutional Law*, second edition (Oxford: Hart / Munich: C.H. Beck 2010), 1-7; S. Griller, 'The Reform's Typology: Treaty or Constitution?', in I. Pernice and E. Tanchev (eds.), *Ceci n'est pas une Constitution – Constitutionalisation without a Constitution* (Baden-Baden: Nomos 2008), 44-55, at 52-54; P. Craig, 'Constitutions, Constitutionalism, and the European Union', 7 *European Law Journal* (2001) 125; and already E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 *American Journal of International Law* (1981) 1; see also G. Martinico, 'From the Constitution for Europe to the Reform Treaty: a literature survey on European Constitutional Law', 1 *Perspectives on Federalism* (2009) 13; with particular regard to EU external relations law as part of the EU's constitutional law, see M. Cremona and B. De Witte, 'Introduction', in M. Cremona and B. De Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart 2008), xi-xv.

<sup>138</sup> See for a historical account questioning that only states can have constitutions, E. Tanchev, 'The Lisbon Treaty within and without Constitutional Orthodoxy', in I. Pernice and E. Tanchev (eds.), *Ceci n'est pas une Constitution – Constitutionalisation without a Constitution?* (Baden-Baden: Nomos 2009), 22-43; see also C. Calliess, 'Art. 1 (ex-Art. 1 EUV) [Gründung der Europäischen Union; Grundlagen]', in C. Calliess and M. Ruffert (eds.), *EUV/AEUV Kommentar*, fourth edition (Munich: C.H. Beck 2011), 3-29, at marginal no. 58.

<sup>139</sup> Calliess, 'Art. 1 (ex-Art. 1 EUV)', at marginal no. 55.

<sup>140</sup> Arts. 1(1), 3(6), and 5(1) and (2) TEU; also Ruffert, 'Art. 3 (ex-Art. 2 EUV)', at marginal nos. 2-4; and Sorrentino, 'The purposes of the European Union', at 123.

<sup>141</sup> Ipsen, *Europäisches Gemeinschaftsrecht*, at 995, also 988-991 on the distinction from state objectives.

amenable to comparison with national constitutional orders is indeed possible. As will be argued, the same is true for constitutional objectives including those with an external outlook.

Those commenting on Union (and former Community) objectives, even before the entry into force of the Lisbon Treaty, generally assert that these, too, are ‘in principle justiciable legal norms’,<sup>142</sup> even though the justiciability would be limited also here due to the discretion granted to the EU organs in pursuing these objectives.<sup>143</sup> This conclusion draws on the case law of the ECJ. Concerning the former Art. 3(f) TEC on ensuring competition as a Community task, the Court ruled that the

‘argument that this provision merely contains a general programme devoid of legal effect, ignores the fact that Article 3 considers the pursuit of the objective which it lays down to be indispensable for the achievement of the Community’s tasks.’<sup>144</sup>

In terms of the addressees of these obligations, these include *a priori* all Union organs, just as it was established earlier that all state power is *a priori* addressed by objectives in national constitutions. Thanks to the Lisbon Treaty, the distinction between the Community and the Union disappeared,<sup>145</sup> a differentiation between Union and Community objectives has become obsolete. The Treaties now provide only for general and more specific *Union* objectives. These reforms make the EU more easily comparable to national constitutional approaches to codified objectives, especially in the external sphere. Just as there are guiding principles for Portugal, Brazil and China as international actors, which are set down in their constitutions, now there are overall objectives for one European Union as an actor on the international scene.<sup>146</sup>

However, the issue of the Member States as addressees of Union objectives is more complex and controversial. With regard to Art. 2 TEC (on the tasks of the former Community), the ECJ ruled that ‘[t]hose aims, on which the establishment of the Community is based [...] cannot have the effect either of imposing legal obligations on the Member States or of conferring rights on individuals.’<sup>147</sup> Of course, Member States are bound by Union law, but they are

<sup>142</sup> (In the original: ‘im Grundsatz justiziable Rechtsnormen’.) Reimer, ‘Ziele und Zuständigkeiten’, at 1000; Basedow, ‘Zielkonflikte und Zielhierarchien’, at 49; Plecher-Hochstraßer, *Zielbestimmungen im Mehrebenensystem*, at 112; and Müller-Graf, ‘Verfassungsziele der EG/EU’, at marginal no. 176; more cautiously Lenaerts and Van Nuffel, *European Union Law*, at 111, who argue that the legal impact of Union objectives ‘is limited to guiding the interpretation of Union law’.

<sup>143</sup> Ruffert, ‘Art. 3 (ex-Art. 2 EUV)’, at marginal no. 5; and Calliess, ‘Kollektive Ziele und Prinzipien’, at 94.

<sup>144</sup> European Court of Justice, Case 6/72 *Continental Can* [1973] ECR 00215, para. 23; see also European Court of Justice, Case 126/86 *Giménez Zaera v. Institut Nacional de la Seguridad Social and Tesorería General de la Seguridad Social* [1987] ECR 03697, para. 10; and Calliess, ‘Kollektive Ziele und Prinzipien’, at 88.

<sup>145</sup> Art. 1(3) TEU.

<sup>146</sup> Even though generally critical of the amount of objectives, von Bogdandy underlines how bundling together and elaborating the external objectives may contribute to defining a ‘European identity’, von Bogdandy, ‘The European constitution and the European identity’, at 311-312.

<sup>147</sup> European Court of Justice, Case C-339/89 *Alsthom Atlantique* [1991] ECR 1991 I-00107, para. 9; see also Lenaerts and Van Nuffel, *European Union Law*, 111. Also concluding that Union

more than mere 'Union organs', especially in the field of foreign policy.<sup>148</sup> The link is made via the so-called 'duty of sincere cooperation', which states that '[t]he Member States shall facilitate the achievement of the Union's *tasks* and refrain from any measure which could jeopardise the attainment of the Union's *objectives*.'<sup>149</sup>

As to the legal functions of Union objectives, in analogy to German and French doctrine, we can also distinguish instances where they either oblige, forbid and authorise. As to the first function, the Court has explicitly pointed out the 'obligatory force of these objectives'.<sup>150</sup> Moreover, it ruled that the stipulation of objectives in the TEC 'requires the Community to take account of the objective of respect for human rights when it adopts measures in the field of development cooperation.'<sup>151</sup> Regarding the scope of such an obligation, it is again the pursuit of the objective that is binding, not its actual realisation. In the words of the ECJ, 'those are broad objectives in the sense that it must be possible for the measures required for their pursuit to concern a variety of specific matters.'<sup>152</sup> In this vein, Kotzur's (otherwise rather complex) definition of Union objectives draws also on the Alexyian notion of 'optimisation'.<sup>153</sup>

Union objectives also entail certain prohibitions. In conjunction with the principle of conferral, acting outside of the boundaries of its constitutional objectives would constitute acts *ultra vires* of the Union. However, given the wideness of the current objectives (and the use of implied powers, see *infra*) this question has become increasingly hypothetical.<sup>154</sup> Especially where several objectives are at stake, the ECJ has awarded wide discretion to the institutions. For instance, with regard to Common Commercial Policy (CCP) objectives, the Court ruled that the "'aim to contribute, in the common interest, to the harmonious development of world trade [...]" cannot be interpreted as prohibiting the Community from enacting, upon pain of committing an infringement of the

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objectives do not establish individual rights, Plecher-Hochstraßer, *Zielbestimmungen im Mehrebenensystem*, at 112.

<sup>148</sup> Note in this context Declarations Nos. 13 and 14 on 13 concerning the common foreign and security policy that were annexed to the Lisbon Treaty.

<sup>149</sup> Art. 4(3) TEU (emphases added). See also Müller-Graf, 'Verfassungsziele der EG/EU', at marginal no. 177; Ruffert, 'Art. 3 (ex-Art. 2 EUV)', at marginal no. 4; and Plecher-Hochstraßer, *Zielbestimmungen im Mehrebenensystem*, at 114-119.

<sup>150</sup> European Court of Justice, Case 6/72 *Continental Can* [1973] ECR 00215, para. 25.

<sup>151</sup> European Court of Justice, Case C-268/94 *Portugal v. Council* [1996] ECR I-06177, para. 2 (emphasis added).

<sup>152</sup> *Id.*, para. 37; see also Lenaerts and Van Nuffel, *European Union Law*, at 111; and Azoulai, 'Article I-3', at 75-76.

<sup>153</sup> Kotzur defines Union objectives as 'the general, superior mandates for action, appeals for action or constitutional expectations, to which common action [*Gemeinschaftshandeln*], which is structurally framed by the common values [*Gemeinschaftswerte*] [...], has to live up through optimizing approximation.' (In the original: 'Ziele sind die allgemeinen, übergeordneten Handlungsaufträge, Handlungsappelle oder Verfassungserwartungen, denen das durch die Gemeinschaftswerte [...] strukturell eingebundene Gemeinschaftshandeln im Sinne optimierender Annäherung gerecht werden soll'.). Kotzur, 'Die Ziele der Union', at 315.

<sup>154</sup> Müller-Graf, 'Verfassungsziele der EG/EU', at marginal no. 178; similarly Reimer, 'Ziele und Zuständigkeiten', at 992-93.

Treaty, any measure liable to affect trade [...]'.<sup>155</sup> This means that the measures at stake in this case would have a restrictive effect on trade and thus counter-act CCP objectives. Nevertheless, they could be enacted as they further the objectives of the Common Agricultural Policy (CAP). However, the notion of prohibition appears more rigid and judicially enforceable when coupled with the duty of cooperation. Even though sincere cooperation according to Art. 4(3) TEU requires both 'special duties of action and abstention',<sup>156</sup> the case law of the Court of Justice reveals that it is often Member States that are condemned for having acted when this duty obliged them to 'refrain from any measure which could jeopardise the attainment of the Union's objectives',<sup>157</sup> not least in the area of external relations.<sup>158</sup>

In term of authorisation, there is an intricate connection to an EU law issue of fundamental importance (a structural principle, as the German discourse would call it), i.e. the conferral of powers and the lack of a *Kompetenz-Kompetenz*. As was already pointed out, due to its nature, the Union indeed has an existential 'need for objectives' (*Zielbedarf*).<sup>159</sup> However, it is important to stress that as such, objectives cannot establish competence for the Union.<sup>160</sup> Nevertheless, objectives served an important function in framing competence as well as in shaping the exercise thereof.<sup>161</sup> The link between competence and objectives is established in the principle of conferral itself, as the TEU provides that 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the *objectives* set out therein'.<sup>162</sup>

This link is also made with regard to implied powers, which require both action 'within the framework of policies defined by the Treaties' as well as the pursuit of at least 'one of the objectives set out in the Treaties'.<sup>163</sup> A pre-Lisbon example for the prominent role of objectives in that regard, also with a clear external dimension, would be the issue of the legal basis for cross-pillar sanctions against individuals in *Kadi*. There, the ECJ concluded that the Union had

<sup>155</sup> European Court of Justice, Case 112/80 *Dürbeck* [1981] ECR 01095, para 44.

<sup>156</sup> European Court of Justice, Case C-246/07 *Commission v. Sweden (PFOS)*, judgement of 20 April 2010, *nyr*, para. 74, and the further cases cited there.

<sup>157</sup> Art. 4(3), third subpara. TEU.

<sup>158</sup> See e.g. European Court of Justice, C-246/07 *Commission v Sweden (PFOS)*, judgement of 20 April 2010, *nyr*; see further A. Delgado Castelleiro and J. Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?', 36 *European Law Review* (2011) 522.

<sup>159</sup> Ipsen, *Europäisches Gemeinschaftsrecht*, at 995.

<sup>160</sup> Art. 3(6) TEU; also Calliess, 'Kollektive Ziele und Prinzipien', at 89; Ruffert, 'Art. 3 (ex-Art. 2 EUV)', at marginal no. 12.

<sup>161</sup> Müller-Graf, 'Verfassungsziele der EG/EU', at marginal nos. 180-18; Calliess, 'Kollektive Ziele und Prinzipien', at 89-90; Azoulai, 'Article I-3', at 73-75; also Reimer, 'Ziele und Zuständigkeiten', at 1001-1002, who posits that objectives can also establish competence, an opinion that is generally seen as problematic.

<sup>162</sup> Art. 5(2) TEU (emphasis added). This is also important with regard to the Union's competence to conclude international agreements, see Art. 216(1) TFEU which states that '[t]he Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, *one of the objectives referred to in the Treaties*, [...]' (emphasis added).

<sup>163</sup> Art. 352(1) TEU (emphasis added). But note also para. 4, which prohibits implied powers in the area of CFSP, which highlights the still 'special' character of this policy area (see *infra*).

competence because although ‘the inclusion of Article 308 EC in the legal basis of the contested regulation cannot be justified by the fact that that measure pursued an *objective covered by the CFSP*, that provision could nevertheless be held to provide a foundation for the regulation because [...] that regulation could legitimately be regarded as designed to attain an *objective of the Community* and as, furthermore, linked to the operation of the common market within the meaning of Article 308 EC.’<sup>164</sup> Moreover, this serves to illustrate the important role of the Court to be played in interpreting objectives and using them as an important element in establishing competence.

The Court’s opinion on the Community’s accession to the ECHR, however, shows that also in EU law there are structural limits to deriving competence in connection with the pursuit of objectives.<sup>165</sup> In addition, in the context of the Union, objectives are significant in determining not simply any, but the proper legal basis to establish competence. This is important in view of the institutional and procedural consequences such choices entail. As the most prominent example, the *Smalls Arms* decision of the ECJ shows that this, too, has a clear external dimension amenable to judicial review.<sup>166</sup> Once competence is established, however, the objectives still guide the way in which it is subsequently exercised. As the Court ruled already in 1969 in *Italy v. Commission*, where an organ has a measure of discretion, it is ‘to exercise its discretionary powers in accordance with the objectives of the [then] Community.’<sup>167</sup> Calliess concludes that in this manner, objectives become an essential benchmark for the ECJ’s teleological approach to interpretation.<sup>168</sup> Regarding authorisation to limit fundamental rights, which appears as the more salient issue for the role of constitutional objectives in the French doctrine, the ECJ has also made a number of important pronouncements. As was mentioned earlier, the *Conseil constitutionnel* was likely inspired by the ECJ’s rulings such as *Nold*. In this case, the Court indeed pointed out that fundamental rights may ‘be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched.’<sup>169</sup> The link to the (then) Community objectives is even clearer in the earlier decision in *Internationale Handelsgesellschaft*, in which the Court stated that the protection of fundamen-

<sup>164</sup> European Court of Justice, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat v. Council and Commission* [2008] ECR I-06351, para. 235; see also M. Cremona, ‘External Relations and External Competence of the European Union: The Emergence of an Integrated Policy’, in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law*, second edition (Oxford: Oxford University Press 2011), 217-268, at 264. Note that the current version, Art. 352(1) TEU, refers to ‘the objectives set out in the Treaties’, while the reference to ‘the operation of the Common Market’ has been dropped.

<sup>165</sup> European Court of Justice, *Opinion 2/94 on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-01759, paras. 35-36.

<sup>166</sup> European Court of Justice, Case C-91/05 *Commission v. Council (Small Arms)* [2008] ECR I-03651.

<sup>167</sup> Case 1/69 *Italy v. Commission* [1969] ECR 00277, para. 5; see also Ruffert, ‘Art. 3 (ex-Art. 2 EUV), at marginal no. 8.

<sup>168</sup> Calliess, ‘Kollektive Ziele und Prinzipien’, at 92.

<sup>169</sup> European Court of Justice, Case 4/79 *Nold v Commission* [1975] ECR 00491, para. 14.

tal rights, 'whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structures and *objectives of the Community*.'<sup>170</sup>

This issue was also raised in cases with a clear external dimension. In *Bosphorus*, the ECJ ruled that a measure restricting property rights was not disproportionate in view of 'an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina'.<sup>171</sup> Similarly, the *Kadi* judgement can be seen as an attempt to 'square the circle'<sup>172</sup> between the Union's fundamental rights protection, on the one hand, and the compliance with international law, in particular obligations within the United Nations framework, on the other. However, it is striking that the ECJ did not refer in either case to the provisions in the Treaties that actually codify these objectives. Even after the Lisbon reform, the General Court, in its latest decision concerning Mr. Kadi, made a rather obscure reference to the external objectives contained in the TEU. The General Court referred there to 'certain doubts [that] may have been voiced in legal circles as to whether the judgment of the Court of Justice in *Kadi* is wholly consistent' with requirements of international law as well as a number of provisions from EU primary law, including (but mentioned rather peripherally) Arts. 3(5) and 21(1) and (2) TEU.<sup>173</sup>

In sum, we can see that Union objectives have played an important role in the case law of the ECJ and have shown functions comparable to constitutional objectives in the German and French legal traditions. This includes important cases in the area of external relations. However, despite the merits of the Lisbon Treaty in streamlining and expanding the external objectives, an important distinction is still to be made with regard to the CFSP and its objectives on the one, and the other Union objectives on the other hand. Before the entry into force of the Lisbon Treaty, i.e. in the time of the EU/EC dichotomy and the pillar structure, there was uncertainty as to the difference between the Community and Union legal order, and consequently their respective objectives. The CFSP was *a priori* excluded from the ECJ's jurisdiction by virtue of Art. 46 TEU (pre-Lisbon). With particular regard to the external objectives of the CFSP, this lack of jurisdiction could be seen as an expression of the intergovernmental character of the 'second pillar', which, coupled with the vagueness of objectives mentioned in Art. 11 TEU (pre-Lisbon) lead to questioning their legal value altogether. According to Koskeniemi, the principles enshrined in the Maastricht Treaty laid down 'no substantive priorities for Union foreign policy'

<sup>170</sup> European Court of Justice, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 01125, para. 4 (emphasis added); see also De Montalivet, *Les objectifs de valeur constitutionnelle*, at 432-434.

<sup>171</sup> European Court of Justice, Case C-84/95 *Bosphorus* [1996] I-03953, para. 36.

<sup>172</sup> J. Larik, 'Two Ships in the Night or in the Same Boat Together? Why the European Court of Justice Made the Right Choice in the *Kadi* Case', No. 3 *College of Europe EU Diplomacy Paper* (2009), at 19.

<sup>173</sup> European Court of Justice, Case T-85/09 *Kadi v. Commission*, judgement of 30 September 2010, *nyr*, para. 115.

beyond platitudes, with the result of transferring power 'from the legislator to the executive'.<sup>174</sup> Moreover, contrary to the TEC, the TEU in the area of the CFSP did not contain detailed competence norms to which the objectives could be linked.<sup>175</sup> Therefore, a wide but weak, ill-defined competence was attributed by virtue of the objectives themselves.<sup>176</sup> To put it differently, CFSP objectives could be said to authorise virtually everything depending on the will of the Member States to act, but did not provide much in terms of normative guidance. Nevertheless, the ECJ's case law reveals indirect ways in which CFSP objectives can play a role in judicial proceedings such as *Kadi* (see *supra*) and *Small Arms*.<sup>177</sup> Similarly, even before the Lisbon Treaty, the pursuit of CFSP objectives is not to be seen in isolation from the general duty of cooperation between the institutions and Member States.<sup>178</sup> After the Lisbon reform, some of these features continue to exist, such as the ill-defined nature of CFSP competence<sup>179</sup> as well as the – albeit now somewhat less – limited jurisdiction of the ECJ in this area.<sup>180</sup> Hence, if their legal value was in doubt beforehand, the Lisbon Treaty should serve to bolster the nature of CFSP objectives as being part and parcel of the Union's constitutional law. Their pursuit, however, remains conditioned by the 'specific rules and procedures'<sup>181</sup> that set the CFSP apart from other Union policies.<sup>182</sup>

Importantly, with regard to the 'caveat of possibility', the broadened discretion of the political branches in the field of external relations could be seen as even more accentuated in the EU. On the one hand, it has to rely on the political will of its Member States to act internationally *at all* in the first place, and furthermore to act *through* the Union in areas of non-exclusive external competence. On the other hand, the Union depends also on the willingness of the

<sup>174</sup> M. Koskenniemi, 'International Law Aspects of the Common Foreign and Security Policy', in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague: Kluwer 1998), 27-44, at 28; but see R. Gosalbo Bono, 'Some Reflection on the CFSP Legal Order', 43 *Common Market Law Review* (2006) 337, at 342, who argues that the insertion of a list of CFSP objectives by the Maastricht Treaty 'underlined the conception of the CFSP as a legal instrument to create and achieve a European identity'.

<sup>175</sup> Art. 11(1) TEU (pre-Lisbon).

<sup>176</sup> See in detail De Baere, *Constitutional Principles of EU External Relations*, at 101 et seq.

<sup>177</sup> European Court of Justice, Case C-91/05 *Commission v. Council (Small Arms)* [2008] ECR I-03651, para. 226; also see Cremona, 'External Relations and External Competence of the European Union', at 264.

<sup>178</sup> C. Hillion and R. Wessel, 'Restraining External Competences of EU Member States under CFSP', in M. Cremona and B. De Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart 2008), 79-121, at 91-96 and 108-112.

<sup>179</sup> Arts. 24(1) TEU and 2(4) TFEU; see further A. Sari, 'Between Legalization and Organizational Development: Explaining the Evolution of EU Competence in the Field of Foreign Policy', in P.J. Cardwell (ed.), *EU External Relations Law and Policy in the Post-Lisbon Era* (The Hague: TMC Asser Press 2011), forthcoming.

<sup>180</sup> Arts. 24(1), second subpara. TEU and 275 TFEU which contains the important exceptions on restrictive measures and patrolling the border between CFSP and other Union policy competences.

<sup>181</sup> Art. 24(1), second subpara. TEU.

<sup>182</sup> See in detail P. Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency', 47 *Common Market Law Review* (2010) 987.

outside world to interact *with* an actor so unusual as the Union. The former problem applies particularly to the CFSP, where unanimous voting applies and, in case of the Common Security and Defence Policy (CSDP), the Union has to rely on ‘capabilities provided by the Member States’.<sup>183</sup> The latter issue becomes salient, for instance, when the Union is faced with international organisations whose founding charters do not allow it to become a member.<sup>184</sup> In all these cases, the infamous ‘capabilities-expectations gap’<sup>185</sup> is prone to be widened through raising expectations by the bravado of legally entrenching ambitious foreign policy objectives into the primary law in areas where many constraints, both internal and external, apply. As a consequence, failures to live up to its objectives might lead to political backlashes, as they can serve as a yardstick for sceptics to measure and point out the insignificance of the EU on the world stage. The Treaties boldly posit that the Union will ‘consolidate and support democracy, the rule of law, human rights and the principles of international law’.<sup>186</sup> Yet, it often appears as timid or incapable of acting, also due to diverging Member State views, as is illustrated by such high-profile instances as the 2003 Iraq War, the recognition of Kosovo or Palestine, or the Arab spring of 2011 and especially the Libyan revolution. From a legal point of view, this serves at the same time as the clearest illustration of the limits of the ‘capacity of constitutional law’ (*Leistungsfähigkeit des Verfassungsrechts*)<sup>187</sup> to deliver. Given that the inclusion of social rights in national constitutions, such as the ‘right to work’ or ‘housing’, have been criticised for making unrealistic promises, *a fortiori* the EU Treaties’ audacious commitment to ‘the reduction and, in the long term, the eradication of poverty’<sup>188</sup> should certainly not remain unquestioned.

## 5. CONCLUSION

In view of the foregoing, three general observations can be made regarding the assessment of the external objectives of the EU. First, constitutional law around the world has witnessed a significant amount of innovation in the recent past, an undeniable feature of which is its ‘dynamic internationalisation’ through the codification of externally-oriented objectives. For those who see the EU in constitutional terms, the inclusion of (more) external objectives in the primary law after the Lisbon reform is thus neither unheard of or exceptional. On the contrary, by ranking itself among the constitutions that are the most explicit in

<sup>183</sup> Art. 42(1) TEU.

<sup>184</sup> See I. Govaere, J. Capiu and A. Vermeersch, ‘In-Between Seats: the Participation of the European Union in International Organizations’, 9 *European Foreign Affairs Review* (2004) 155.

<sup>185</sup> C. Hill, ‘The Capability-Expectations Gap, or Conceptualising Europe’s International Role’, 31 *Journal of Common Market Studies* (1993) 305.

<sup>186</sup> Art. 21(2)(b) TEU.

<sup>187</sup> Badura, ‘Arten der Verfassungsrechtssätze’, at 41.

<sup>188</sup> Art. 208 TFEU; poverty eradication also appears among the general external objectives of Art. 3(5) TEU.

their global ‘mission statements’, the reformed EU Treaties are not the odd ones out, they are instead in the vanguard of a global trend.

Secondly, beyond the empirical, it is furthermore possible – and indeed necessary – to embed the analysis of external objectives of the Union into the overall appreciation of constitutional objectives as a norm category. As was sketched out here, both the German and French legal traditions have devoted considerable attention to constitutional objectives. Both conclude overall that such objectives constitute legally binding and in principle justiciable norms of constitutional value. Despite their rather vague wording and limited legal scope, which in turn entails only marginal judicial reviewability, they are not to be considered as ‘soft law’. It is within this norm category that also external objectives are at home, not somewhere outside the actual, ‘hard’ constitution. As, at the same time, they belong to the foreign relations law of the constitution, certain specific features apply to external objectives, such as the executive branch being the primary addressee and not the legislature, as well as, importantly, an even wider margin of discretion. However, these features do not justify denying to these objectives their constitutional rank and legal functions.

Thirdly, even though scholarship on EU external relations law has not devoted significant attention to external relations objectives per se, these objectives are clearly present in the primary law – especially after the Lisbon reform – and have figured in the judgements of the Court of Justice. Moreover, there is an increasing amount of scholarship addressing Union objectives in general as a constitutional norm category. This case law and the emerging scholarly discourse already point in the direction of also characterizing the EU’s external objectives as veritable constitutional objectives, performing functions similar to objectives in national constitutional orders. However, it remains to be seen how the ECJ will receive the streamlined and expanded external objectives in its post-Lisbon case law. Since these objectives now figure more prominently than ever within the Union’s ‘basic constitutional charter’,<sup>189</sup> one would hope that the Court will join those ‘legal circles’<sup>190</sup> that take the Union’s external objectives seriously.

Therefore, in conclusion and looking ahead, it seems reasonable to contend that the Lisbon reform’s bolstering of external objectives of the Union should prompt renewed efforts to close that scholarly gap rather than an offhand dismissal or further ridicule of these objectives. Having said that, already at this point a note of caution should be added lest we drift from one extreme to the other. Concluding that these norms are worth more attention and scrutiny than they have thus far received should not be confused with overstating their importance, especially since their language is prone to what could be called cosmopolitan romanticism. More unprejudiced, rigid research will be needed to come to terms with this general global trend of ‘dynamic internationalisation’, its impact on the EU’s *sui generis* legal order as well as on the Member States’

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<sup>189</sup> European Court of Justice, Case 294/83 *Parti écologiste ‘Les Verts’ v. European Parliament* [1986] ECR 01339, para. 23.

<sup>190</sup> European Court of Justice, Case T-85/09 *Kadi v. Commission*, judgement of 30 September 2010, *nyr*, para. 115.

legal orders within the 'European Constitutional Space', and also with a view to the Union's actual shaping of the international (legal) order of the future.



