



**Stanford – Vienna  
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# **European Union Law Working Papers**

**No. 20**

**Judicial Interpretation at the European  
Court of Justice as a Feature of  
Supranational Law**

**Duncan Pickard**

**2017**

# European Union Law Working Papers

edited by Siegfried Fina and Roland Vogl

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### **Suggested Citation**

This European Union Law Working Paper should be cited as:  
Duncan Pickard, Judicial Interpretation at the European Court of Justice as a Feature of Supranational Law, Stanford-Vienna European Union Law Working Paper No. 20, <http://ttlf.stanford.edu>.

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## **Abstract**

Through an analysis of the discovery of the doctrine of direct effect by the European Court of Justice, this paper argues that judicial interpretation of the EU constitutional treaties constitutes an underexplored aspect of EU supranationalism. The paper distinguishes between two standards of judicial interpretation: a teleological approach called for in the Vienna Convention on the Law of Treaties and applied by international courts and tribunals, and the doctrine of *effet utile*, which was developed by national courts in Europe. These approaches are not inconsistent with each other, but the latter represents a more muscular exercise of judicial interpretation that the ECJ has used to develop substantive areas of EU law. The paper draws on language from the ECJ rulings in *Van Gend* and *Van Duyn* to argue that the Court's use of both teleology and the *effet utile* standard reflects a mixed approach to judicial interpretation that, at least in the context of direct effect, reflects the supranational nature of EU law.

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## Judicial Interpretation as a Feature of EU Supranational Law

Supranationalism is a defining feature of European Union law. The EU constitutional treaties — most importantly the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) — govern an institution with a blended legal character that is unique in international law. The EU has features of an international organization, including the fact that it is constituted through unanimous consent of sovereign states and that it does not have independent sovereignty; it can only make law insofar as the Member States have delegated authority to it according to specified procedures. On this understanding, and consistent with the view that the state is the principal subject of international law, the EU is not sovereign because it is not the source of its own authority.

And yet the EU has many characteristics of states. The EU institutions make laws that are binding as such on EU Member States under both domestic and international law. The EU makes most of these laws not through amendment of a treaty, which would require unanimous consent, but rather through qualified-majority-voting procedures provided for by the treaties. EU laws

also supersede inconsistent domestic legislation, regardless of whether the Member State has adopted a monist or dualist legal system.

Scholars and practitioners have long referred to the EU's hybrid of international and domestic law as "supranational."<sup>1</sup> The EU is the first union of states that has been run under this logic. Elucidation of the meaning and nature of supranational law is thus important in understanding the functioning of the European Union and how supranationalism works in general.

In this paper, I will take on an underexplored feature of EU supranational law: the method that the European Court of Justice (ECJ) uses in interpreting EU law. I argue that a comparison of two early cases in the Court's development of the doctrine of direct effect reveals a feature of EU supranationalism: a distinct form of judicial interpretation that mixes the teleological approach of public international law with the *effet utile* standard used by many European national courts. This observation from the case study of the doctrine of direct effect raises further questions about judicial interpretation of supranational law that could be the subject of further study.

The paper proceeds in four parts. Part I discusses the relationship between sovereignty and judicial review from a theoretical perspective, and contrasts national standards of judicial review from the approach of international law under Article 31 of the Vienna Convention on the Law of Treaties (VCLT). Part II discusses the ECJ's approach to judicial interpretation in the development of the doctrine of direct effect, which mixes the teleological approach of the Vienna Convention with the national standard of *effet utile*. Part III argues that this mix of approaches to judicial interpretation constitutes a distinct feature of supranationalism and identifies areas for further research. Part IV concludes.

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<sup>1</sup> See, e.g., Josef L. Kunz, *Supra-National Organs*, 46 AM. J. INT'L L. 690 (1952).

## I. Sovereignty and Judicial Review

### A. Judicial Interpretation as Inherent in Sovereignty

States are the principal subjects of international law. Although movements in international criminal, humanitarian, and human rights law have brought the rise of individuals as subjects of international law, states remain primary. The sovereignty of states the “basic constitutional doctrine” of international law, “which governs a community consisting primarily of states having, in principle, a uniform legal personality.”<sup>2</sup> Sovereignty is no doubt a complicated and contested subject, and I will not attempt to provide a consensus definition here. For my purposes, it is sufficient to distinguish, as the International Court of Justice has,<sup>3</sup> between states and international organizations on the basis of a fundamental characteristic of sovereignty: the ability to manifest consent to co-equal sovereigns, including in such a way that delegates authority to an international organization that comprises co-equal sovereigns. International organizations and the supranational EU can be distinguished from states on the ground that they are not independent sovereigns under international law. In other words, international organizations are not the source of their own jurisdiction as a matter of public international law.

Sovereignty entitles states to, among other powers, make law that applies on the territory of the state to the exclusion of the national laws of other states. As a matter of international law, states are free to make whatever laws they choose according to whatever procedure they choose, unless of course they have consented to the commitments of various treaties on political rights that prescribe minimum obligations for states in lawmaking, such as Article 25 of the International Covenant on Civil and Political Rights.

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<sup>2</sup> JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 447 (8th ed. 2012).

<sup>3</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, 177–78.

Implied in the discretion of states to make their own laws is the power to determine the method by which they interpret and apply those laws. States, through their constitutions, have adopted a wide range of practices for making and interpreting laws. A classic feature of constitutions adopted since World War II, particularly among Member States of the European Union, is a constitutional court endowed with the power of judicial review.<sup>4</sup> Judicial review can take many forms, but the basic principle is that courts are able to scrutinize legislation for its compliance with national constitutional law.<sup>5</sup> Legal systems have adopted forms of judicial review from strong (striking a statute from the statute book altogether, declining to apply a particular law) to weak (declaring a law's incompatibility with the constitution).<sup>6</sup>

Regardless of form, courts have to come up with a method for interpreting statutes and constitutions when exercising judicial review. Rarely, written constitutions will provide meta-rules of interpretation for courts to apply. For example, Article 19 of the German Constitution provides that restrictions on fundamental rights not affect the "essence of a basic right."<sup>7</sup> Article 19, therefore, provides a global rule for courts to apply when interpreting the coverage of a fundamental right. It is far more common, however, for courts to determine their own limiting principles and modes of constitutional interpretation without written guidance from the constitution. The German Federal Constitutional Court, even though armed with Article 19, has read a proportionality requirement into the derogation regime of the German constitution, and has created a method of deriving "subjective" and "objective" effects of constitutional rights.<sup>8</sup> The situation is far hazier in the United States, where a debate rages over the standards that the

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<sup>4</sup> Andrew Harding et al., *Constitutional Courts: Forms, Functions and Practice in Comparative Perspective*, in *CONSTITUTIONAL COURTS: A COMPARATIVE STUDY* (Andrew Harding & Peter Leyland eds. 2009).

<sup>5</sup> See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008).

<sup>6</sup> JEREMY WALDRON, *POLITICAL POLITICAL THEORY* 199–200 (2016).

<sup>7</sup> GRUNDGESETZ [CONSTITUTION] art. 19 (Ger.).

<sup>8</sup> See generally DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (3d ed. 2012).



Supreme Court should apply in interpreting the U.S. constitution, ranging from “originalism,” which seeks to adopt the meaning of words at the time of the adoption of the constitution, to a form of “living constitutionalism” that accounts for a normative vision of the constitutional order.<sup>9</sup> The series of widely accepted presumptions that the Supreme Court applies in reading statutes, such as the presumption against unconstitutionality, is not found in the text of the constitution. A comprehensive taxonomy of the modes of constitutional interpretation used in Europe would reveal widely disparate practices, underscoring the point that the method of judicial review is decidedly an issue that international law leaves to states, and that, in turn, most national constitutions leave to judges.

#### B. Treaty Interpretation in the Absence of Sovereignty

The interpretation of treaties — the fundamental and substantive rules of international law — by international courts and tribunals follows precisely the opposite pattern. States have cabined judicial discretion to determine the method they will use to interpret treaties. VCLT Article 31 states that treaties are interpreted according to their “object and purpose,” a teleological standard that has been applied in countless decisions by international courts and tribunals, including the International Court of Justice, investor-state tribunals, regional human rights courts, and more. The debate in international law, then, is over the proper application of the VCLT standard, not which standard to apply.

#### C. Sovereignty and Judicial Interpretation

What accounts for the difference between the practice of treaties and national constitutions in supplying a standard of interpretation for courts and tribunals? The answer is not

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<sup>9</sup> See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2006).

chronological. The VCLT was adopted in 1969, but the UN's International Law Commission began drafting it in 1949, around the same time that the future Member States of the European Union were crafting new postwar constitutions. States then, or those that emerged after the collapse of the Soviet Union, could have included a global rule of interpretation in their constitutions.

I would like to argue that the reason that international law provides a meta-rule of judicial interpretation, even though national constitutions largely lack one, stems from states' collective understanding of the limited function of international law. National courts are agents of the sovereign state, and judges selected through constitutional procedures are entrusted with the responsibility of constitutional interpretation through their ability to make binding decisions. National court judges are free to make their own interpretive rules because they are constitutional decision makers in a co-equal branch of government. Judges are within the state and exercise a share of its sovereignty. Constitutions also provide a set of procedures that determines the method by which judges are chosen, the scope of their authority *vis-à-vis* other branches of government, and the substantive rules that they must apply. National law thus creates the framework in which national judges exercise their official functions.

International courts, by contrast, operate on borrowed sovereignty. They have authority only insofar as states have both consented to their creation and to their jurisdiction. Indeed, the jurisdictional phase of a case before the ICJ can be as, if not more, contentious than the proceeding on the merits given the great flexibility that states have in consenting to or rejecting the ICJ's jurisdiction. And because international courts do not exercise independent sovereignty, states want to be clear about the methods that they will be using in applying international law.

But more to the point, it would seem inappropriate and inconsistent with the role of international courts to grant their members broad discretion to determine their method of interpretation. International organizations are not sovereign, and they cannot create law that is binding on their members. Methods of interpretation can determine the binding effect of a law on the parties to a dispute, and judges in the international system cannot make interpretive choices for themselves absent guidance from states. Simply put, choosing a method of interpretation is the exclusive purview of a sovereign.

I think this point is clearer when compared to an undisputed competence of international courts: the authority to determine their own jurisdiction, known as competence-competence. This should not be confused with sovereignty, or the power of states to make their own laws. Rather, competence-competence is (in its purest form, as developed by the German Federal Constitutional Court) an implied power of courts to determine whether their jurisdiction is proper. In that sense, it is a purely judicial function; it does not affect the scope of the application of a statute, but rather determines the justiciability of a question before the court. The rationale for such an implied power is more functional than theoretical: if a court does not have the power to determine its own jurisdiction, then how can it ever get a case off the ground? The ICJ, and the Permanent Court of International Justice before it, have long recognized their competence-competence even without a textual basis in their founding charters.

The comparison between competence-competence and the mode of statutory interpretation reveals to me what is the key difference between international and national courts: international courts do not derive their power from an independent sovereign, so their jurisdiction is strictly limited to implied judicial functions; national courts do derive their power from independent sovereigns, so they have implied judicial powers plus those interpretive

powers, such as the determination of a method of judicial review, that they need to exercise their mandate. We might, then, consider the ability of judges to define their methods of judicial interpretation as a way of distinguishing between national law (largely provided by judges themselves) and international law (provided by sovereign states).

## II. Judicial Interpretation at the ECJ: A Mixed Approach

If the distinction that I wish to draw is correct, then where does the ECJ fit in this scheme between national and international courts, and what can its methods of judicial interpretation reveal about its contribution to EU supranationalism? The ECJ is clearly a hybrid: the EU is not sovereign, so its court must rely on borrowed sovereignty just like the ICJ, but unlike an international court, its decisions are applicable as a matter of domestic law notwithstanding the status of international law within the national jurisdiction (i.e., whether the state has a monist or a dualist system). The ECJ's approach to judicial interpretation in its early cases on direct effect reflect the same duality of the Court's status between international law. In the section that follows, I build out that argument by discussing the Court's teleological approach when applying rights found in the treaty, the Court's application of the *effet utile* standard when applying rights found in an EU legislative act, and how these approaches fit together.

### A. Brief Overview of the Sources of EU Law and Their Effect

In order to set up the distinction that I wish to draw, I would like to give a brief overview of the forms of EU law that can be the source of individual rights and the effect that they can have in national jurisdictions. There are three sources of binding and generally applicable EU law: treaties, regulations, and directives. Treaties are the primary source of EU law, and they can

include individual rights, such as the fundamental freedoms of the internal European movement guaranteed by the TFEU. Regulations and directives are secondary sources of EU law, meaning that they are adopted by the EU institutions usually according to qualified-majority-voting procedures. Regulations are directly applicable in Member States, meaning that citizens may refer to them directly in national courts. Directives, however, are not directly applicable and are binding only on Member States to determine the “form and methods” that it will adopt to achieve the desired result.

The question that the subsequent cases discuss is whether EU citizens can refer directly to rights found in treaties and directives given that, unlike regulations, they are not explicitly directly applicable according to the TFEU. As we will see, the ECJ found that citizens can refer to rights in treaties and directives through the doctrine of direct effect. My argument that ECJ’s judicial interpretation reflects EU supranationalism turns on the differences in the ECJ’s approaches to discovering the doctrine of direct effect as applied to treaties and directives.

#### B. *Van Gend*: A Teleological Approach

The Court first took up the question of the effect of treaty rights in *Van Gend en Loos v. Nederlandse Administratie der Belastingen*,<sup>10</sup> which announced the doctrine of direct effect. In that case, the Court held that citizens could refer to rights secured by EU treaties in their national courts:

Independently of the legislation of the member states[,] Community law . . . not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights are granted not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon member states and the institutions of the Community.

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<sup>10</sup> Case 26/62, 1963 E.C.R. 1.

As the last sentence implies, the Court in *Van Gend* and subsequent rulings announced additional criteria that a treaty right must satisfy in order to have direct effect. The provision must be sufficiently clear and precisely stated,<sup>11</sup> and it must be unconditional or “non-dependent” on any further action, including enabling legislation, by an EU institution or Member State.<sup>12</sup> *Van Gend* left open the question of the direct effect of directives, given that directives are both conditional and require further action by Member States.<sup>13</sup>

Most importantly for our purposes, the Court applied teleological reasoning in the spirit of, though without explicit reference to, the Vienna Convention. The Court reasoned that,

[t]o ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions. The objective of the EEC Treaty, which is to establish a Common Market, . . . implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. . . . The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.

This portion of the Court’s ruling is explicitly teleological. I have underlined the words that indicate the Court’s focus on the object and purpose of the treaty to determine the extent of its legal effect. The Court looked to the object and purpose of the States-party in signing the treaty establishing the European Economic Community (now the TFEU).

### C. *Van Duyn*: Beyond Object and Purpose to Useful Effect

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<sup>11</sup> See Case 43/75, *Defrenne v. Sabena* (No. 2), 1976 E.C.R. 455.

<sup>12</sup> See *Van Gend, supra*, at 13.

<sup>13</sup> See *id.* (“The implementation of Article 12 [now TFEU Article 30] does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.”).

The Court later took up the question of the direct effect of directives in *Van Duyn*. As we will see, the Court did not take an explicitly teleological approach, but rather built on *Van Gend* to inquire into the *effet utile*, or useful purpose, of the rights at issue. I argue that that method of judicial interpretation extends the teleological approach of *Van Gend* in a way that reveals the nature of EU supranational law.

### 1. The Doctrine of *Effet Utile*

Before discussing *Van Duyn*, I would like to introduce the doctrine of *effet utile* as a feature of European case law. *Effet utile* calls on judges to look at the useful effect of a particular right at issue and, as *Van Duyn* reveals, even create a new feature of substantive law to give effect to that right if the existing legal system does not. In that sense, *effet utile* could be said to call on judges to take a rights-based approach to judicial interpretation: to investigate the application of the right from the perspective of the rights-holder to ensure that she is able to vindicate the protected right.

*Effet utile* is a “liberal construction”<sup>14</sup> of the European treaties, but one that is familiar to European national law.<sup>15</sup> It is properly seen as distinct from the “object and purpose” standard in that it is an extension of the teleological approach of the Vienna Convention. The doctrine of *effet utile* emphasizes the useful effect that a rule will have in the pursuit of the purpose of the act. In that sense, it has provided the basis for the ECJ to discover new areas of substantive law, not simply interpret a treaty term from a teleological perspective.

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<sup>14</sup> TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 419 (2d ed. 2006).

<sup>15</sup> See ANNA VON OETTINGEN, *EFFET UTILE UND INDIVIDUELLE RECHTE IM RECHT DER EUROPÄISCHEN UNION* 25 (2010); Urška Šadl, *The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU*, 8 J. EUR. LEGAL STUD. 18, 22 (2015).

I do not mean to overstate the differences between the approaches of the Vienna Convention and the ECJ, or to imply that they are at odds with each other. Indeed, they are complementary, not contradictory. Clearly, they both call for “an ends-focused interpretation” of treaties.<sup>16</sup> But the ECJ goes beyond the duty to interpret treaty terms “in light of their object and purpose” to, in the words of one commentary, to adopt a “*directly* teleological approach.”<sup>17</sup> While always bound by the consent of the treaty parties, the approach of international courts applying these two standards have differed in the extent to which they are willing to create new rules of substantive law to give effect to the treaty.

The case law of the International Court of Justice on jurisdiction and admissibility is instructive. For example, in the judgment on admissibility in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the ICJ considered an ambiguous term in the document that was the basis for the Bahrain’s application to the Court for settlement — the minutes of a meeting between the two parties about dispute settlement. The ICJ read the term in light of “object and purpose” of the agreement.<sup>18</sup> The Court found that the application was admissible because the “object and purpose of [the meetings] were to advance the settlement of the dispute by giving effect to the formal commitment of the Parties to refer it to the Court.”<sup>19</sup> In other words, the Court inferred from the existence of mutually agreed minutes about mechanisms for dispute settlement that the parties in fact wanted to settle the disputes before the ICJ.<sup>20</sup>

## 2. The Application of *Effet Utile* in *Van Duyn*

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<sup>16</sup> THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 817 (Olivier Corten & Pierre Klein eds. 2011).

<sup>17</sup> *Id.* at 817 (emphasis added).

<sup>18</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)*, Judgment (Jurisdiction and Admissibility), 1995 I.C.J. Rep. 6, 33 (Feb. 15).

<sup>19</sup> *Id.* at 34.

<sup>20</sup> VCLT COMMENTARY, *supra*, at 818–19.



The teleology of the ICJ is more circumscribed than the muscular approach of the ECJ's *effet utile* analysis. The ECJ applied the *effet utile* standard to extend the doctrine of direct effect to directives, which is a useful parallel to the ICJ's admissibility jurisprudence in that direct effect is also a doctrine about the types of questions that the ECJ can consider. The ECJ has used *effet utile* to do more than simply interpret an ambiguous term; by holding that directives have direct effect, the Court grafted a new area of substantive law onto its existing interpretation of the treaty.

First in *Franz Grad v. Finanzamt Traunstein*,<sup>21</sup> and later in *Van Duyn v. Home Office*,<sup>22</sup> the ECJ confronted the question of whether citizens could refer to rights created in a directive against an action by a Member State. The Court held that they could, under certain conditions.

The Court held:

[I]t would be incompatible with the binding effect attributed to a Directive [now by TFEU Article 288] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. . . . [W]here the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration. . . . Article 177, which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts.<sup>23</sup>

In short, the ECJ held that directives had “direct effect,” meaning that citizens could rely on them in national courts even absent implementing legislation by the Member State. Note that, in the *effet utile* analysis, what matters is that the effect of the directive would be “weakened,” not that its effect would be null. Note that, unlike in *Van Gend*, the Court does not speculate as to the object and purpose of the treaty. Indeed, it would make little sense for it to have done so given that the right at issue was not found in the treaty. The Court instead turns from a

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<sup>21</sup> Case 9/70, 1971 E.C.R. 825.

<sup>22</sup> Case 41/74, 1974 E.C.R. 1337.

<sup>23</sup> *Van Duyn* ¶ 12 (emphasis added).

teleological analysis characteristic of international courts to an effects analysis often employed by European national courts.

The Court's analysis was not an unambiguously straightforward reading of TFEU Article 288. The Article distinguishes sharply between regulations, which are directly applicable, and directives, which are not. The Court could have applied the doctrine of *expressio unius est exclusio alterius* to draw the conclusion that the direct application afforded exclusively to regulations was meant to exclude the right of citizens to refer to directives in national courts. The Court's practice also differs from that of the U.S. Supreme Court, which has traditionally been reluctant to conclude that jurisdictional statutes create causes of action for individuals in federal court, regardless of whether the lack of a cause of action would undermine the useful effect of the grant of jurisdiction.<sup>24</sup>

By contrast, in *Van Duyn*, the ECJ upheld the *effet utile* of the right secured in law. The ECJ reasoned that the directive at issue in the case would be ineffective in the absence of direct effect; the directive would serve no purpose of Member States could claim their failure to implement a right as the reason for their failure to enforce it. As a comparison to the language of the holding in *Van Gend* shows, the *Van Duyn* Court applied the *effet utile* standard in a way that extended beyond the teleological approach called for in public international law. *Effet utile* enabled the ECJ to discover in the doctrine of direct effect a new area of substantive EU law that has no explicit reference in the European treaties. The ECJ has done far more than interpret an ambiguous term; it has given effect to the legal rights implied by a treaty article but that are far beyond its plain text.

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<sup>24</sup> See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (holding that the Alien Tort Statute, which recognizes federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," is jurisdictional only and does not create a cause of action).

### 3. Expansion, Response, and Criticism

*Van Duyn* was a groundbreaking decision, and since then, the ECJ has extended the doctrine of *effet utile* to other types of cases. Joxerramon Bengoetxea has called it “the most usual functional criterion” of EU treaty interpretation.<sup>25</sup> Urška Šadl has written that “*effet utile* is afforded a distinct and distinctive role as ‘*un outil indispensable*’ to the process of constructing the central doctrines of EU law such as direct effect, indirect effect, supremacy, and Member State liability in damages.”<sup>26</sup> Malcolm Ross considers it an emerging constitutional principle,<sup>27</sup> while others have called it a meta rule of interpretation by ECJ judges<sup>28</sup> and advocates-general.<sup>29</sup> More critical scholars have challenged *effet utile* as a tool for unbridled judicial policymaking,<sup>30</sup> or a way to justify divergent conclusions of law while skirting parties’ legal arguments.<sup>31</sup> In any case, *effet utile* has had “wide structural effects on the European legal space.”<sup>32</sup> These critiques of the *effet utile* standard would be a rich foundation for further research into the Court’s application of the standard since *Van Duyn*.

#### D. Explaining the Mixed Approach

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<sup>25</sup> JOXERRAMON BENGOETXEA, *THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE: TOWARDS A EUROPEAN JURISPRUDENCE* (1993).

<sup>26</sup> Šadl, *supra*, at 23 (quoting José Luís da Cruz Vilaça, *Le Principe de l’Effet Utile du Droit de l’Union dans la Jurisprudence de la Cour*, in *THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW* (Allan Rosas et al. eds. 2012)).

<sup>27</sup> Malcolm Ross, *Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality?*, 31 *Eur. L. Rev.* 476 (2006).

<sup>28</sup> Stefan Mayr, *Putting a Leash on the Court of Justice? Preconceptions in National Methodology v. Effet Utile as a Meta-Rule* 5 *EUR. J. LEGAL STUD.* 8 (2012).

<sup>29</sup> MITCHEL LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* 212 (2009); Miguel Poiarés Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 *EUR. J. LEGAL STUD.* 2 (2007).

<sup>30</sup> TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN UNION LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN UNION* 74 (7th ed. 2010); HJALTE RASMUSSEN, *THE EUROPEAN COURT OF JUSTICE* (1998).

<sup>31</sup> GERARD CONWAY, *THE LIMITS OF LEGAL REASONING AND THE EUROPEAN COURT OF JUSTICE* 117 (2012); *see also* Vassilios Skouris, *Effet Utile Versus Legal Certainty: The Case-law of the Court of Justice on the Direct Effect of Directives*, 2006 *EUR. BUS. L. REV.* 241.

<sup>32</sup> Šadl, *supra*, at 23.

What explains the difference between the reasoning of the Court in two foundational cases concerning direct effect? I believe that the answer lies in the Court's struggle with the tensions within EU supranational law. *Van Gend* reads like a straightforward, if debatable, application of international law's teleological approach to treaty interpretation. The Court inquired into the object and purpose of the treaty and the extent to which the states-party limited their sovereign rights. The Court found that the parties had intended to confer individual rights guaranteed in the treaty on citizens of the Member States.

But this purely teleological reasoning would be insufficient in *Van Duyn*. The parties had not agreed to bind themselves directly to the legal rights at issue; rather, the legal rights were found in directives promulgated according to a procedure that the parties had agreed to in the TFEU. The *Van Duyn* Court did not refer to the intent of the states-party to the TFEU because it would be difficult to argue that the parties had agreed to protect a right that was not guaranteed in the treaty itself. Instead, the Court extended the teleological approach of *Van Gend* to consider the useful effect of acts promulgated by EU institutions according to the procedures set forth in the treaty. This extends beyond the approach allowed under the Vienna Convention and has no analogue in the jurisprudence of the ICJ.

### III. The Mixed Approach as a Feature of Supranational Law

The comparison between the ECJ's approaches in *Van Gend* and *Van Duyn* reveals a telling distinction about the Court's estimation of how well methods of treaty interpretation can withstand challenges to them on the basis of national sovereignty. The two cases can be distinguished on the basis of the nature of the source of law at issue. *Van Gend* involved a question of the effect of a right found in a source of primary EU law, that is to say a multilateral

treaty that custom and the Vienna Convention dictate would be interpreted according to its object and purpose. The ECJ considered a teleological method of treaty interpretation sufficient to conclude that Member States had surrendered enough of their sovereignty to permit the direct effect of individual rights found in the EU treaties.

*Van Duyn*, by contrast, involved a right found in a directive, which is an act that is made pursuant to a constitutional treaty. The individual right at issue not found in the treaty but rather was derivative of it, much in the same way that statutes are derivative of constitutions. As argued above, it was thus impossible for the judges to inquire into the object and purpose of the treaty given that the treaty was itself silent *vis-à-vis* the right itself and the doctrine of direct effect. The Court's approach in *Van Duyn* suggests that the ECJ could have been unsatisfied with the idea that a teleological approach would have been sufficient to displace the Member State's argument in defense of its sovereignty. But instead of returning to the language of *Van Duyn*, the ECJ went beyond a purely teleological approach to inquire into the *effet utile* of the directive itself. The ECJ seems to have changed their vantage point from which to study the application of the right at issue: in *Van Gend*, the Court inquired into the intent of the states in surrendering their sovereignty — a typical approach of public international law — while in *Van Duyn* the Court considered the useful effect of the right from the perspective of the rights-holder.<sup>33</sup>

In other words, the ECJ applied different methods of interpretation to primary and secondary law. This is a feature of national courts, not international ones. In the United States, for example, the Supreme Court applies a different set of presumptions to statutes than to the

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<sup>33</sup> In this respect, the Court could be said to have adopted a rights-based approach to treaty interpretation, which is a trend in international law that has met mixed success since the rise of individuals as subjects of international law after World War II.

constitution.<sup>34</sup> When it comes to the constitution, Justice Antonin Scalia was an originalist, meaning that he interpreted the constitution according to its original public meaning and cited records of the drafting convention; in statutory interpretation, he was a textualist who decried citations to the legislative record.<sup>35</sup> The ECJ also bifurcated standards of interpretation between primary and secondary law.

The ECJ's method of interpretation begins to look more international than national in view of the standards that the judges chose to apply to each level of law. The object and purpose standard was developed precisely for the kinds of treaties that constitute the EU, while the *effet utile* standard is more common to continental national courts. The fact that the ECJ uses the object and purpose standard is not interesting; national and international courts alike use teleological approaches. What is telling, rather, is that the ECJ in *Van Gend* used only a teleological approach in a case involving treaty law. National courts typically use a mix of approaches, while international courts are instructed to use only one. I argue that the ECJ's application of different methods of interpretation to primary law and secondary law — the public international law standard of object and purpose to treaties, and *effet utile* to directives — is a consequence of supranationalism expressed in the case study of the doctrine of direct effect.

Please note the limits that I have placed on my conclusion. I wish to say only that this mixed approach is observed in the doctrine of direct effect, and not necessarily to other areas of EU law or to EU law in general. My conclusion is tentative given that it is based on a single case study, a comprehensive analysis of ECJ and national case law being beyond the scope of this paper. Even so, I believe that the distinction between the landmark cases of *Van Gend* and *Van Duyn* reveals a feature of European law that resides between the standard approaches of

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<sup>34</sup> For example, the Supreme Court will afford statutes a presumption of unconstitutionality, while it would be nonsensical for such a presumption to apply to the constitution itself.

<sup>35</sup> See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998).

international and national courts. Whether this distinction holds up in other areas of EU law is a question for further research, the answer to which could begin with a search for cases that apply *effet utile* to rights found in an EU treaty. I would also want to see whether the Court's mixed approach holds up over time. *Van Gend* was an early case decided in 1963, only eleven years after the Court was established. Perhaps the Court relied more heavily on standards of public international law as it explored the nature of supranational law, and that by *Van Duyn* in 1974 the Court was more willing to adopt standards used by national courts.

#### IV. Conclusion

This paper has made three central claims. First is that, from the perspective of international law, the choice of method of judicial interpretation inheres in sovereignty. Because international law has no source of sovereignty independent of the consent of sovereign states, states had to define the tools of judicial interpretation under international law, as they have through customary international law and VCLT Article 31. Second, in the *Van Duyn* and *Van Gend* cases, the ECJ has adopted methods of judicial interpretation reflecting the practice of both international and national courts to arrive at the fundamental principles guiding the doctrine of direct effect. Third, the mix of these methods in the context of the doctrine of direct effect, and specifically the application of a teleological approach to primary sources of EU and of *effet utile* to secondary sources, represents an underexplored aspect of EU supranational law. Further research could reveal the durability of this observation over time and across other areas of EU law.