

Membership in the EU: Membership requirements and federal discipline in the area of liberal  
democratic principles A comparative legal analysis

By

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## **List of abbreviations**

Charter of Fundamental rights of the European Union	CFR
European Communities	EC
European Convention on Human Rights	ECHR
Court of Justice of the European Union	CJEU
European Parliament	EP
European Union	EU
(German) Federal Constitutional Court	FCC
International Court of Justice	ICJ
Treaty on the European Union	TEU
Treaty on the Functioning of the European Union	TFEU
United Nations	UN
United Nations General Assembly	UNGA
United Nations Security Council	UNSC

## 1) Introduction

Ever since the creation of the European Economic Community in 1958 with the entry into force of the Treaty of Rome questions regarding the finality of the project of European Integration and the nature of the European Project as a political system have informed political debates and have been at the heart of scholarly research.

After the devastations of World War 2 that left most of the European Continent politically, economically and morally bankrupt the question of how to bring peace and welfare to the war torn continent was pivotal.

The creation of a common market for Coal and Steel in 1952 upon the entry into force of the Treaty of Paris, under the supervision of a supranational European High Authority was designed as a step not only to make war between Germany and France on the continent difficult but materially impossible.

In the following decades the EU expanded from 6 to 28 member states and was conferred upon ever more competences for dealing with political issues not only directly related to the common market but also for such areas as diverse as Security and Defense policies, Asylum and Migration policies and Monetary policies.

Both the accession of states that had previously been governed by autocratic regimes such as Spain, Portugal and the states of Central and Eastern Europe, as well as the expanding scope of EU competences put the question of the protection of fundamental rights in the European context on the agenda.

The different European nation states have had a long tradition of limiting the competences of their respective political institutions by endowing their citizens with unalienable rights that would provide them with protection should the state want to violate those fundamental rights.

Since the European project started as a market rather than a state or a human rights organisation, fundamental rights have not always been at the core of the project of European integration.

Yet with ever more integration the question of a bill of rights for the EU came on the agenda. In its preamble the Treaty of Rome stated the resolve of the founding members of the EU to preserve and strengthen peace and liberty just as it called upon the other peoples of Europe who shared the ideals of peace and liberty to join in their efforts. In the preamble of The Single European Act, which entered into force in 1987 the EU member states declared to work together to promote democracy on the basis of the fundamental rights

recognised in the constitutions and the laws of the member states, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter. In the preamble of the Treaty of Maastricht EU member states confirmed their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law. The preambles of these various treaties signify the rising importance attached to liberal democratic principles in the objectives of the EU. Hence it is with little surprise that In June 1993 after the possibility of an Eastern Enlargement appeared on the horizon, the European Council in Copenhagen defined the stability of institutions, meaning guaranteed democracy, rule of law, human rights as well as the protection of minorities as some of the key criteria for joining the EU.

In December 2000 the Charter of Fundamental rights of the EU was solemnly proclaimed by the EP, the Council of the EU and the European Commission. In December 2009 together with the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the EU entered into force and it became part of EU primary law on par with the Treaty on the European Union and The Treaty on the Functioning of the European Union. Besides the Treaty of Lisbon required the EU to accede to the European Convention for the protection of Human Rights and Fundamental Freedoms, the bill of rights of the Council of Europe.

While these changes brought about by the Lisbon Treaty were clear signs of the willingness to pledge the EU to fundamental rights, the rule of law and democracy, the states who remained the Masters of the Treaties also acknowledged that in order to guarantee those fundamental principles it was insufficient to merely bind the institutions of the EU in the execution of their competences and the prospective member states of the EU in their process of joining the EU to the liberal democratic values underpinning the EU. Moreover it was regarded as necessary by the EU member states to provide the EU with a mechanism by which it could ensure the adherence of its member states to the liberal democratic principles of the EU.

In fact the masters of the Treaties when reformulating Art.7 Treaty on the European Union had situations in mind in which member states rather than the Union by violating fundamental principles could pose a threat for the very functioning of the EU.

Art.7 (1) TEU allows the Council acting with four fifths of its members after obtaining the consent of the EP, on the basis of a reasoned proposal by one third of the member states, the EP or the European Commission to determine that there is a clear risk of a serious breach by a member state of the values referred to in Art.2 TEU.

Art.7 (2) TEU allows the European Council acting by unanimity on a proposal by one third of the member states or by the European Commission after obtaining the consent of the EP to determine the existence of a serious and persistent breach of the values referred to in Art.2 TEU.

Art.7 (3) TEU allows the Council acting by a qualified majority, where a determination on the basis of Art.7 (2) TEU has been made to decide to suspend certain of the rights deriving from the application of the Treaties to the member state in question, including the voting rights of the representative of the government in the Council. Equally by acting on the basis of a qualified majority according to Art.7 (4) TEU the Council may decide to vary or to revoke measures taken under Art.7 (3).

Neither of the provisions of Art.7 TEU have ever been used in practice, yet the analysis of the functioning of Art.7 TEU can provide important insights into how the EU safeguards its fundamental principles against its member states. Accordingly this thesis intends to deepen the understanding of the functioning of Art.7 TEU.

In order to get an understanding of Art.7 TEU I have chosen to work with a comparative method. I have formulated my research question as follows: **What does a comparison of the Art.7 TEU procedure with equivalent provisions in the German Basic Law and the international law of the United Nations tell us about the state of protection of liberal democratic principles in the EU against its constituent parts?**

At the core of this research question lies the ambition to describe and explain the nature of the legal mechanisms of Art.7 TEU and how Art.7 TEU functions in safeguarding the fundamental values of the EU as they are formulated in Art.2 TEU.

In order to be better able to pursue this research I have broken down the main research question into the following sub-questions that I intend to find an answer to in the following chapters:

Firstly: **What are the conditions for states joining the EU in comparison with the conditions for Lander joining the Federal Republic of Germany and for states joining the UN?**

Secondly: **What is the constitutional significance of Art.7 TEU in the legal order of the EU in comparison with equivalent provisions in Germany and the UN?**

Thirdly: **What are the material and procedural requirements for invoking Art.7 TEU in comparison with equivalent provisions in Germany and the UN?**

Fourthly: **What measures are permissible against constituent parts in the context of invoking Art.7 TEU respectively its equivalent provisions in Germany and the UN?**

Fifthly: **What is the role of courts in the Art.7 TEU procedure and its equivalents in the German and the UN system?**

The idea of the comparative approach is based on the understanding that the EU is a legal-political system sui generis, while remaining an international organisation from a legal point of view it has assumed certain state like functions by the use of the Community Method, meaning supranational decision making, including voting on the basis of qualified majority and the ordinary legislative procedure. This apparent hybrid nature of the EU raises some important theoretical considerations.

While legal scholars such as Walter<sup>1</sup> recognise inter alia international organisations and states as subjects of international law it must be noted that this distinction, as useful as it may be to the conduct of international legal studies fails to account for how legal relationships in environments of multi level governance or federal contexts are regulated specifically.

For me it is therefore interesting to analyse the system of protection of liberal democratic principles of the EU in the context of the protection of liberal democratic principles in legal entities such as the United Nations which is an international organisation and Germany which is a (federal) state.

A comparison to the system of Germany seems to be useful in so far as Germany is considered to be a federal state by legal scholars with a strong tradition of governance divided between a federal entity and 16 constituent state entities.

This comparative analysis will shed some light upon this hybrid character of the EU and whether in some aspects the EU resembles more a federal state or an international organisation. By means of comparing the EU system of protecting its fundamental values against its member states, with the corresponding systems available in the state of Germany and the UN the EU system of protection of liberal democratic principles will be put into perspective.

This comparative legal analysis will have its methodological limits in the fact that the sample of this research will be rather small with only three systems of multi-level governance

<sup>1</sup> Walter, C. (2007). Subjects of international law. *Max Planck Encyclopedia of Public International Law*, 9, 634-643. Page 1

being analysed. This prevents the drawing of definitive exhaustive conclusions as to the original nature of membership in the EU and membership requirements in the area of liberal democratic principles. Yet this research remains valuable since it will add to the understanding of Art.7 TEU by the comparative approach. This will enable a better understanding of some of the driving factors that have lead the EU to become the kind of international organisation it has become.

Reitz<sup>2</sup> argued that in order to be able to do a comparative law analysis for any problem that one might be confronted with, it is necessary to first introduce the different legal orders in order to demonstrate what it is that will be compared. For this research this implies that first in each substantive section the German respectively the UN legal system will be described concisely.

Reitz<sup>3</sup> found that in order to be able to do a comparative analysis it is important to find the functional equivalents that one intends to compare. Yet Reitz<sup>4</sup> sees that legal systems are by their nature very different from one another and that every norm needs to be seen in its respective context. In this sense even though legal norms might be relatively similar they are never completely the same, meaning that somehow always apples will be compared with oranges.

Acknowledging this lack of congruity that is constitutive for comparative legal research, Reitz<sup>5</sup> attached importance to the question of how a given legal system works as a whole and not just in the specificities that are to be compared.

Building on that insight the thesis intends to start by a more macro perspective and then to gradually zoom in on the details of the different procedures that are to be compared.

The University of Cologne<sup>6</sup> distinguishes four main purposes of a comparative legal analysis namely to provide help for legislators, to provide an instrument for the interpretation of law, to use it as an epistemological tool in teaching and to provide a tool for the harmonisation of law. Against this backdrop the purpose of this research is to have comparative legal research with the purpose of it being an epistemological tool in order to better understand EU law.

<sup>2</sup> Reitz, J. C. (1998). How to do comparative law. *The American journal of comparative law*, 46(4), 617-636. Page 620

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.* Page 621

<sup>5</sup> *ibid.* Page 621

<sup>6</sup> [http://www.uni-koeln.de/jur-fak/eurecht/htdocs/bin/lehre/rechtsvergleichung\\_einfuehrung.pdf](http://www.uni-koeln.de/jur-fak/eurecht/htdocs/bin/lehre/rechtsvergleichung_einfuehrung.pdf)



Since Art.7 TEU is basically about the Union-Member state relationship it seems useful first to look at the requirements a state has to fulfill in order to join the EU. How the process of joining the EU or respectively the process of joining the UN of the Federal Republic of Germany is regulated could be very telling for the purpose of understanding how Art.7 TEU and its functional equivalents in Germany and the UN function.

The degree of inclusiveness and openness of a given legal political system, its ambitions and institutions do say a lot about the nature of a legal political system. Usually the admittance to a political system depends on accepting the common *acquis* meaning the rules the system has given itself.

Before starting however with a detailed legal analysis of how the different legal systems operate in protecting liberal democratic principles it seems useful first to provide some theoretical overview of how the EU as a legal system has been understood in scholarly circles.

At their beginning the European Communities have been understood as international organisations just as any other. European Communities law in the 1950s and early 1960s has been treated by national legal systems just as another form of international law. The precise position of European Communities law in the different national legal systems was determined by whether that state had a monist or a dualist national legal tradition.

According to Kelsen<sup>7</sup>, in states with a strong monist tradition, international law by its own virtue was regarded as belonging to the same legal body as national law meaning that international law without having been transposed into national law could be given effect by national courts and could even set aside conflicting national legal rules where necessary.

In dualist states however international law was not seen to form one legal body together with national law. This meant that for any international law to enjoy domestic legal effect in dualist states the international law had to be transposed into national law. Thus contrarily to states with a monist system, in states with a dualist system rights conferred upon individuals by international treaties could not be given direct effect before national courts. With respect to EU Law however the differentiation between monist and dualist states became irrelevant in 1963 when in its famous *Van Gend & Loos* judgment<sup>8</sup> the CJEU stipulated the doctrine of direct effect of European Law which made it possible for natural and legal persons to invoke European Law before national courts.

<sup>7</sup> Spaak, T. (2013). Kelsen on Monism and Dualism. *Basic Concepts of Public International Law: Monism & Dualism*, Page 1

<sup>8</sup> CJEU Case 26-62. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*.

The doctrine of direct effect immediately gave rise to the question of how, now that European law and national law both enjoyed legal effect before national courts by their own virtue, conflicts arising from colliding national and European legal norms were to be settled. This question was answered by the CJEU in 1964 in its *Costa vs. Enel*<sup>9</sup> judgment when it declared that European law enjoyed primacy over all national law including national constitutional law.

In 1974 in its *Solange I*<sup>10</sup> judgment the German Federal Constitutional Court declared that as long as there was no adequate fundamental rights protection in the European legal order, equivalent to the one granted by the Basic Law, the Constitutional Court would reserve for itself the right to disapply European law in Germany and by doing this it contested the view of the CJEU that saw itself as the ultimate arbiter when national and EU norms were conflicting.

Later in 1986 in its *Solange II*<sup>11</sup> judgment the FCC acknowledged that the European Communities had developed a system of fundamental rights protection that was equivalent to the German one. The Court argued that as long as this was the case it would refrain from its right to disapply European law though it stopped short of ceasing its prerogative altogether and did not subjugate itself totally to the CJEU. Accordingly the question of who will be the ultimate arbiter in cases of conflicts between national and European law currently necessarily remains open. Recognising that the question of who is the ultimate arbiter in the EU remains unsettled for now, is crucial for understanding also the discussions about Art.7 TEU. As will be discussed in more detail later in this work Art.7 TEU seems to give the EU a competence to set standards for its member states in the conduct of their internal affairs in the area of fundamental rights and liberal democratic principles. However from Art. 3-6 TFEU it is not obvious of what kind (exclusive, shared etc) this competence would be. It is unclear as for now how broad the competence of the EU respectively the member states is to set standards in this field. Currently with the absence of an ultimate arbiter both views that the EU is in charge of governing the liberal democratic principles in its member states as well as the view that the member states remain in charge with regards to the actual governance of fundamental rights and liberal democratic principles. Thus in the EU with the area of liberal democratic principles in the absence of both an ultimate arbiter in general and a clear division of competences in this field in particular there is an especially interesting field that deserves a closer look.

<sup>9</sup> CJEU Case 6-64. *Flaminio Costa v E.N.E.L.*

<sup>10</sup> BVerfG, 29.05.1974 - 2 BvL 52/71

<sup>11</sup> BVerfG, 22.10.1986 - 2 BvR 197/83

The German Basic Law in Art. 31 states that federal law breaks state law. Thus within the German legal system the question of who is the ultimate arbiter in cases of conflict between the FCC and state constitutional courts has been solved and is acknowledged both by the Länder and the federal level.

Yet some scholars such as Koskenniemi<sup>12</sup> argue that the idea of a federal system wherein sovereignty lies at the federal level can not actually be a federation but a decentralised unitary state. Were sovereignty to lie at the state level the thing would be an international organisation rather than a federation which conceptually can not exist.

The core of this argument is that where in a (federal) state sovereignty rests with the federal level the federal level is competent to interpret the range of federal competences. Wherever sovereignty rests with one level of government it can not rest with the other level of government implying that in interpreting the scope of its competences the federal level also makes statements about the scope of competences of its constituent states. Where this is the case the federal level in interpreting the scope of its competences could go as far as to preempt the state level of any meaningful competences.

Other scholars more in the American federal tradition such as Tocqueville<sup>13</sup> held that for a federal state it remains constitutive to have sovereignty shared between the federal level and the states. The core of this argument is that in a federal state different from a unitary decentralised state, states not by virtue of federal decisions enjoy autonomous competences but by virtue of their own constituent power meaning that states are not subordinate to the federal level but on par with it.

Strict defendants of sovereignty such as Koskenniemi<sup>14</sup> however claim that the concept of sovereignty resists the possibility of its divisibility since ultimate decision making can only lie with one level. Yet in order to understand the European legal system a focus on sovereignty and primacy can be delusional. It seems to me that continuously revolving around those issues belies the reality and complexity of the EU legal system since my idea of sovereignty is about 'the degree of being able to exercise it ' rather than 'having or not having it'. This idea will be developed further in the progress of this work.

A view that regards as right everything that a court says, and any point of view held by a court as legally justified, overlooks the reality that courts rather than being made up by legal robots, consist of human beings who are clearly aware that in many cases where a

<sup>12</sup> Schütze, R: (2012) European Constitutional law. Cambridge University Press Page 53

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

legal conflict is highly politicised any decision made by the judges will have political consequences. Yet in making their decisions (constitutional) judges press their political considerations into the legal vessels they are supposed to only interpret and thereby sometimes by necessity have to bend them considerably.

In this sense the claim made by the CJEU and the FCC to be ultimate arbiters clearly reflects the amount of pride attached to the respective legal traditions of the nation states and the EU. A useful way to better understand the EU- member state relations in their daily workings seems to be the idea of legal pluralism as understood by Barents.

A legal system according to Barents<sup>15</sup> is a system that is self-referential meaning that the creation, validity, application and interpretation of a legal rule depends exclusively on the order of which that rule constitutes a part. The self-referential character of a legal order ensures its unity and thus its own existence. A completely self-referential legal system is autonomous meaning that the law of the legal order is exclusively a law of the legal order<sup>16</sup>. In the case of overlapping legal orders disputes arising from conflicting norms can only be resolved if and when both legal orders acknowledge the same precedence rule<sup>17</sup>.

What is (arguably though) the fact in the German legal system that both the federal and the state level legal orders recognise the precedence of federal law and what makes the German order an autonomous hierarchical order is not the case in the EU. The claim of both the EU and the nation states to the autonomy of their respective legal orders while they are overlapping provides the potential for real contradiction.

In order to circumvent the Gordian knot between neocoms, those who believe EU law to constitute an autonomous legal order and constitutionalists those who believe that precedence of EU law derives from constitutional provisions of the member states, the idea of constitutional pluralism has been developed, which starts on the assumption that both legal orders are self-referential meaning autonomous<sup>18</sup>.

While the assumption of constitutional pluralism precludes an answer to the question of normative precedence of one legal order over the other it does describe adequately the factual reality in which EU law is applied to the letter by national courts and wherever

<sup>15</sup> Barents, R. (2009). The precedence of EU law from the perspective of constitutional pluralism. *European Constitutional Law Review*, 5(03), Page 426

<sup>16</sup> *ibid.* Page 427

<sup>17</sup> *ibid.* Page 428/429

<sup>18</sup> *ibid.* Page 438

national law is to be found conflicting with EU law the national law is put aside while at the same time constitutional courts reserve for themselves the right to disapply European law.

In fact the question of which legal order ultimately takes precedence will remain empirically unsettled until one court carries out an act which is deemed contrary to the legal order of the other system and gets away with it.

For the purpose of understanding the factual workings of EU-member state relations it seems illustrative to imagine that the exact scope of the legal competences of the EU and the member state is like the possession of nuclear weapons. While this comparison may seem to be stark at first it makes sense to understand the mechanics of constitutional pluralism through this lens.

According to Powell<sup>19</sup> in nuclear crises, meaning situations involving two or more adversaries both of whom have nuclear capabilities that are sufficient to destroy the adversary must be understood through the lens of brinkmanship. Whereas neither side can credibly threaten the use of nuclear weapons deliberately this does not mean however that the risk of nuclear war is zero. According to Powell<sup>20</sup> the brink is a curved slope that gets more slippery the further one side goes toward the chasm.

Every further step of escalation in a crisis situation increases the chance of “accidents”. Accidents happen if the perceived losses of one adversary suffered from not going the nuclear step in an escalating crisis are greater than the perceived losses from not going the nuclear step.

Not before one side crosses the red line of the other side do the precise boundaries of what the other side is willing to tolerate before risking open conflict and retaliating in kind become visible. Moreover open conflict, the use of the nuclear option most certainly would spell disastrous consequences for the adherence to EU law, the cooperation between states or even the existence and influence of nation states.

Yet this is not to imply that where there is no open conflict there is no conflict at all. In fact just as in nuclear crises which are politics of brinkmanship, both the EU and the nation states gamble with and test the red lines of the other side in the hope not to accidentally cross them and provoke open conflict.

<sup>19</sup> Powell, R. (1988). Nuclear brinkmanship with two-sided incomplete information. *American Political Science Review*, 82(01), Page 155

<sup>20</sup> *ibid.* Page 156/157

In this sense the situation of constitutional pluralism can be interpreted as both sides having nuclear powers. The judgements made by the EU's and the national highest courts can amount to going further down the curved slope that Schelling so adequately describes.

The EU has come closest to such a scenario of open confrontation when various national constitutional courts were asked to decide on the admissibility of the European Arrest Warrant<sup>21</sup>, the Data Retention Directive<sup>22</sup> and the decisions of the German FCC on the on the admissibility of Germany in the European Stability Mechanism and the admissibility of the Bundesbank participating in OMT programs of the European Central Bank<sup>23</sup>. Consequently a solution to the question of ultimate authority would currently amount to nuclear warfare.

The EU according to Barents<sup>24</sup> at the core is not hierarchical but a heterarchical legal order meaning a system of constitutional pluralism. In this view it makes sense to regard the areas where competence has been conferred upon the EU as areas where the EU enjoys nuclear superiority whereas in other areas not mentioned as EU competences the nation states enjoy nuclear superiority.

Nuclear superiority here means that while any side may in any situation pull the nuclear trigger even where a competence rests with the other side ultimately the nuclear inferior side will back down from confrontation and give in to the other side because even though it might be capable of inflicting damage on the other side the damage for the own side would be more disastrous.

Beside nuclear superiority also the willingness to engage in politics of brinkmanship might have an effect on the outcome of nuclear crises. Perhaps a willingness to take risk in engaging in politics of brinkmanship might even be sufficient to balance nuclear superiority of the opponent who is perhaps less resolved. In this sense the doctrines of direct effect and

<sup>21</sup> van Sliedregt, E. (2007). The European Arrest Warrant: Between Trust, Democracy and the Rule of Law: Introduction. The European Arrest Warrant: Extradition in Transition. *European constitutional law review*, 3(02), Page 245

<sup>22</sup> De Simone, C. (2010). Pitting Karlsruhe against Luxembourg-German Data Protection and the Contested Implementation of the EU Data Retention Directive. *German LJ*, 11, against Luxembourg-German Data Protection and the Contested Implementation of the EU Data Retention Directive. *German LJ*, 11, 291. Page 292

<sup>23</sup> Heide, F. (2017). Quo vadis Ultra-vires?—Das abschließende Urteil des Bundesverfassungsgerichts in Sachen OMT-Programm. *ZEUS Zeitschrift für Europarechtliche Studien*, 19(4), 479-500. Page 481

<sup>24</sup> Barents, R. (2009). The precedence of EU law from the perspective of constitutional pluralism. *European Constitutional Law Review*, 5(03), Page 437

primacy of EU law as developed by the CJEU represent the point when the EU came into the possession of the figural nuclear weapon whereas the nation states have since the creation of the Westphalian international order possessed the nuclear weapon.

Wherever two sides are in the possession of nuclear weapons real or figural both sides will seek to find a stable equilibrium within which the danger of a nuclear conflict remains low. Moreover they will seek to shift the equilibrium as far as possible to their own favor though these two goals might be in conflict themselves.

With regards to fundamental rights and liberal democratic principles it is difficult to say whose task it has historically been to regulate in this field. Whether and if so how far a multi-level governance system requires the homogeneity of its constituent parts with regards to liberal democratic principles has been the subject of intense scrutiny by many legal scholars ever since the Delian League came into existence<sup>25</sup>. It has been argued that a common language and culture as well as the Athenian urge for democracy for all parts of the Delian League fostered the idea of the relevance of homogeneity<sup>26</sup>. In modern times Montesquieu argued that a confederation required the existence of republican member states<sup>27</sup>. The same idea was found in the theories of John Stuart who argued for there to be a federation there would need to be a certain level of homogeneity despite the fact that member states retained their constitutional autonomies<sup>28</sup>. The German constitutional history of the 19th century was affected by a dualism of both monarchic and democratic elements. This could be seen in the fact that the German Reich was made up of both republican member states as well as monarchies<sup>29</sup> which in fact was a direct challenge to the ideas of Montesquieu. According to the prevailing legal view in the Federal Republic of Germany the idea that the norm of legal homogeneity as formulated in Art.28.1 Basic Law constitutes a right of the federal level against its member states was dismissed<sup>30</sup>. As mentioned earlier from the foundation of the EU onwards the ideas of liberty, democracy and rule of law as foundations for membership gained ever more relevance. Now with the existence of Art.7 TEU the EU is essentially equipped with a competence designed to protect common liberal democratic values as formulated in Art.2 TEU. This kept in mind it can be said that the governance of liberal democratic principles historically has not been vested in one particular level of government, but rather saying that the governance of liberal democratic principles in

<sup>25</sup> Dreier, H. (2015) Grundgesetz Kommentar Band II Artikel 20-82 Page 663

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.* Page 664

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.* Page 665

<sup>30</sup> *ibid.* Page 673

contexts of multi-level governance has been subject to discursive processes remains a more promising approach for the purpose of this research which is essentially to compare degrees of sovereignty in the area of liberal democratic principles in multi-level governance contexts.

With regards to the UN it is thus important to analyse what actually its constitution is. While in the case of Germany the Basic Law is undoubtedly the constitution and in the EU the TEU, the TFEU and the CFR are the primary law and thus the constitution of the EU the most important document of constitutional character in the UN is actually the UN Charter. In reality there are various approaches towards understanding the concepts of constitution and constitutionalism in international law for some scholars constitutions different from treaties provide for the establishment of permanent organisations<sup>31</sup>. From the point of view of the former US president Truman the UN Charter could be likened to a constitution since he expected it to develop and expand as time went on just as a constitution would, which presupposed a notion of dynamism in the nature of constitutions that distinguished them from ordinary law.<sup>32</sup> For some scholars it is even the non-consensual character that which makes international rules international constitutional rules. According to Tomuschat from their birth states live within a legal framework of a number of basic rules which determines their basic rights with or without their will<sup>33</sup>. Similarly the idea of an *ius cogens* from which no derogation was permitted and which mainly comprises of rules with a human rights dimension such as the prohibition of slavery, aggression and genocide are said to constitute the constitution of the international community<sup>34</sup>. In Habermas' words the UN Charter gains its constitutional character through three normative innovations namely the linkage between world peace and human rights policies, the connection between the prohibition of the use of force with a realistic threat of sanctions and the inclusiveness of the UN and the universality of UN law<sup>35</sup>.

Against the backdrop of constitutional pluralism however it is important to analyse how strong the respective provisions of the UN Charter and other forms of international law are actually when being balanced against for example national law that means to analyse where nuclear superiorities in the area of upholding international peace and the observation of human rights actually lie, meaning whether in an international crisis human rights considerations can trump national sovereignty and in which circumstances and by the use of which means it can sanction violations of human rights.

<sup>31</sup> Fassbender, B. (2008) 'We the peoples of the United Nations': Constituent Power and Constitutional Form in International Law Page 270

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.* Page 277

<sup>34</sup> *ibid.* Page 278

<sup>35</sup> *ibid.* Page 282



For the purpose of this research the theoretical framework of legal pluralism will function as the underlying theory of how in each step of the analysis legal arguments will be made. In particular this will mean that despite the ongoing legalization of liberal democratic principles in the European legal order this part of the EU legal system remains underdeveloped and accordingly liberal democratic principles are not sufficiently defined so as to allow for a purely textual interpretation of Art.2 TEU.

Art.13 TEU reveals that the EU institutions including the CJEU are to promote the EU's values, advance the EU's objectives and to serve the interests of the EU, its citizens and the member states. This can be taken as evidence for the fact that the CJEU is functioning like a teleological court meaning that the purpose, the values and the overall goals of EU Law are central for how the CJEU interprets a given situation.

Since member states have never openly rejected the CJEU teleological interpretation of European law and even provide in their respective national constitutions for the possibility of European Integration it is fair to assume that teleological interpretation is a broadly accepted way of interpreting EU law. The FCC has in its various judgments concerning the compatibility of European Treaties with the Basic Law referred to Art.23 Basic Law which provides for the constitutional openness of the Basic Law to European Integration and interpreted it in a broad way.

Thus the teleological interpretation of European law is an accepted fact both by the EU and the nation states. There is no reason to assume that a teleological interpretation of Art.2 TEU would not be possible. This is clear from both the way Art.2 TEU has been written and the general way European Law is interpreted by the CJEU.

## **2) Membership criteria of the EU and of its equivalents in Germany and the UN**

This section will examine the requirements formulated for potential member states (Länder) to become a constituent part of the Federal Republic of Germany, the EU and the UN. Having understood what it is that is required of potential member states (Länder) is important for seeing what lies at the heart of a given legal-political system. In the context of liberal democratic principles as requirements for membership in a multi-level governance system this section will provide an overview about the priority for liberal democratic principles in the processes of accession. This section will assess the first sub-question of my research question **What are the conditions for states joining the EU in comparison with the**

## **conditions for Lander joining the Federal Republic of Germany and for states joining the UN?**

### **2.1) Material conditions for acceding to the Federal Republic of Germany**

The preamble of the German Constitution (the Basic Law) in its current form claims that the unity and freedom of Germany has been completed and that the Basic Law is in force for the entire German People. This implies that accessions of new Länder are not foreseen and that in the future there will be no accessions of Länder to the Basic Law.

Yet the preamble of 1949 which remained in force until 1990 stated that the German People by virtue of its constituent power had enacted the Basic Law to give a new order to political life for a transitional period. The preamble of 1949 also claimed that the German People of ten states also acted on behalf of those Germans to whom participation was denied. Moreover the preamble called upon the entire German People to accomplish by free self-determination the unity and freedom of Germany.

The reunification of Germany which happened on 03.10.1990 provided an instructive example of how accession to the Federal Republic of Germany, or more precisely the jurisdiction of the Basic Law was done in practice.

The Basic Law before reunification had left open two main ways for achieving national unity. According to the 1949 version of Art.23 Basic Law, the Basic Law should enter into force for other parts of Germany upon their accession to the Federal Republic of Germany. According to Art.146 Basic Law, the Basic Law should become invalid on the day when a constitution adopted in a free decision by the German People enters into force.

Faced with the prospect of national unity in 1989 what had hitherto been a more theoretical question suddenly gained practical relevance, namely according to which article of the Basic Law German unity was to be achieved. It was finally decided to reach unification on the basis of Art.23 Basic Law meaning what had hitherto been the German Democratic Republic became five new Länder that acceded to the jurisdiction of the Basic Law.

The material condition for the new states acceding to the jurisdiction of the Basic Law basically were the acceptance of the rules formulated in the Basic Law including the basic rights and the precedence of federal law over state law.

The legal documents that provided for this were the Unification Treaty party to which were The Federal Republic of Germany and the German Democratic Republic. Moreover The Treaty on the Final Settlement with Respect to Germany, party to which were the two German states and the four allied powers: the Soviet Union, The United States, The United

Kingdom and France paved the way for the accession of the new Länder to the Basic Law. The accession of the five newly created Länder, to the jurisdiction of the Basic Law in 1990, which had emerged from the demise of the German Democratic Republic differed notably from the accession of the Saarland to the jurisdiction of the Basic Law in 1957 with regards to its effects on the federal system as a whole. The State establishing act adopted by the Volkskammer of the German Democratic Republic in July 1990 provided for the establishment of Länder in the German Democratic Republic which was set to enter into force on the day of reunification. Art.5 of the Unification Treaty asked the Federal German legislators to consider the inclusion of specific national policy objectives into the Basic Law. The background of Art.5 Unification Treaty was that the Constitution of the German Democratic Republic included various national policy objectives particularly with regards to the welfare state such as a 'right' to work in Art.24, a 'right' to health care in Art.35, the right to a 'housing space' and the right to protection of maternity in Art.38 of the Constitution of the German Democratic Republic. On the other side the Basic Law included only very few vague national policy objectives such as macroeconomic balance in Art.109 and the welfare state in Art.20 Basic Law. Following the accession of the new Länder to the jurisdiction of the Basic Law based on the mandate of Art.5 Unification Treaty the inclusion of European Integration in Art.23, the actual implementation of equal rights for men and women in Art.3 and the protection of the natural foundations of life and animals in Art.20a as national policy objectives were written into the Basic Law. In terms of procedural and material criminal law important changes were also made. The largest part of criminal law from the Federal Republic of Germany was kept for the unified state yet some exceptions were made. §175 of the German Criminal Code which penalised homosexual acts between males was deleted in 1994 and did not enter into force in the new Länder in 1990 upon their accession to the jurisdiction of the Basic Law. §218 of the German Criminal Code which penalised abortions was also heavily disputed in the Federal Republic of Germany. In the German Democratic Republic abortion was exempt from punishment. For the time being both regulations remained in force until 1992 when a new rule for the whole of Germany entered into force which exempted abortions from punishment when they were conducted during the first twelve weeks of a pregnancy after a mandatory interview was done. Thus it can be said that while the bulk of the Basic Law and the Criminal Law of the Federal Republic of Germany continued unamended in the unified state some important changes to these laws were made in order to do justice to societal developments in general and to continue those bits of law of the former German Democratic Republic that were deemed to be desirable for the German society at large.

While the first treaty settled the German question internally the second treaty, which was actually a Peace treaty settled the German Question externally. With respect to liberal democratic principles the German Basic law defines human rights in its first 20 articles. According to article 93 Basic law the interpretation and protection of these fundamental rights is the responsibility of the FCC which allows anyone by means of a constitutional complaint to seek for the protection of her fundamental rights.

## **2.2) Material Conditions for acceding to the UN**

According to Art.4 of the UN Charter, membership in the UN is open to all peace-loving states which accept the obligations contained in the UN Charter and which in the judgment of the organisation are able and willing to carry out these obligations. Upon the recommendation of the United Nations Security Council, the United Nations General Assembly may decide to admit a state to membership in the UN.

Admittance to membership is thus dependent on only fulfilling a few unspecific criteria that allow most states simply to pass the threshold by their very existence which makes it very different from a political system like Germany which is effectively closed to membership applications. In order to understand what it really is that membership in the UN requires it is worth looking at the states that have had most difficulties in joining the organisation. Whereas the requirement for a state to be peace-loving seems to concern the behaviour and actions taken by that state the requirement that the organisation shall judge a state to be able and willing to carry out its obligations flowing from membership point at the necessary agreement of the members of the organisation.

The requirement for a state to be peaceful can be traced back to the Declaration by United Nations from 01.01.1942 which stated that complete victory over the enemies was essential to defend life, liberty, independence and religious freedom and to preserve human rights and justice in the states signatory to the charter and in other states and therefore commits all signatories to pledge all resources available to it against the members of the Tripartite Pact and not to make separate armistice or peace with those states.

The admittance of Bulgaria, Finland, Hungary, Italy and Romania to the UN was contingent on their respective negotiation of peace treaties that would in accordance with the Declaration by United Nations enable them to be admitted to membership in the UN.

The Paris Peace Treaties signed in 1947 laid the basis for the admission of the states mentioned above to the UN<sup>36</sup>. In 1955 Bulgaria, Finland, Hungary, Italy and Romania officially became member states of the United Nations.

With respect to fundamental rights it required those states to take all measures necessary to secure to all persons under its jurisdiction without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting. The states mentioned above agreed to these conditions in their respective peace treaties.

The fact that these states were required to take measures in order to ensure fundamental freedoms in the framework of a peace treaty whereas other states that wanted to join the UN did not have to sign up to such an obligation speaks to the fact that basically any state was assumed to be peace-loving whereas some of the former enemy states had to prove by means of inter alia guaranteeing fundamental freedoms that they were in fact peace-loving. It is worthwhile to note that the concept of admission to membership of a new state to the UN is not the right concept to understand the role of China, Russia, Germany and some other states in the UN.

In 1971 the UNGA adopted resolution 2758 which recognised the People's Republic of China as the only legitimate representative of China to the United Nations. Simultaneously the resolution rescinded the recognition of Chiang Kai Shek who led a government in Taiwan. From a legal point of view the People's Republic of China was not admitted to the UN, rather the state of China can be regarded as having been a member of the UN since the beginning of the UN, merely another set of rulers has been identified as belonging to and representing that state.

In 1991 the Soviet Union started to disintegrate and in December Russia declared its independence from the Soviet Union. Having formally left the Soviet Union hence some scholars held the opinion that Russia could not be regarded as the legitimate successor of the Soviet Union with its international rights and obligations<sup>37</sup>. Yet in a letter to the UN most of the new states stated their support for Russia taking over the rights and responsibilities in the UN including the permanent seat in the UNSC. Thus the admission of new states into the UN is also not to be confused with state secession where the rump state might look quite different from the original state but this would not raise the need for the rump state to again seek membership in the UN. Equally the incorporation of Eastern Germany into the Federal

<sup>36</sup> Italy' accession to the United Nations Organization Page 4

<sup>37</sup> Dumberry, P. (2007). *State succession to international responsibility*. Brill. Page 150/151

Republic did not raise the necessity for Germany to renew its membership in the UN merely the membership of the GDR ceased. Yet the dismembering of Czechoslovakia represents a case where state succession in the UN was not automatic. In fact UNSC resolution 800 and UNSC resolution 801 paved the way for membership of both the Czech Republic and Slovakia in the UN.

As this work focuses on liberal democratic values it is useful to also provide a short outline of the legal bases of liberal democratic principles in the UN. The 'International Bill of Human Rights' encompasses UNGA resolution 3/217<sup>38</sup> and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Cultural and Social Rights. The Universal declaration of Human Rights was proclaimed by the UNGA Resolution 3/217. It set out for the first time fundamental human rights to be universally protected. The two other covenants that make up the International Bill of Human Rights are multilateral treaties that have undergone ratifications by UN member states and entered into force in 1976.

Even though they are not binding on all UN member states, notably not on the People's Republic of China, Saudi Arabia and Malaysia which are not a party to the Covenant and to the United States which has only ratified the Covenant with reservations, the Covenant on Civil and Political Rights is monitored by the UN Human Rights Committee which reviews the implementation of rights formulated in the International Covenant on Civil and Political Rights.

The UN Human Rights Committee consists of experts who examine reports submitted by the state parties on the status of implementation of rights as they derive from the Covenant in their jurisdiction.

### **2.3) Material Conditions for acceding to the EU**

According to Art. 49 TEU any European state respecting the values referred to in Art.2 TEU and which is committed to promoting them may apply to become a member of the EU. Any application shall be addressed to the Council which shall act unanimously after consulting the Commission and having obtained the assent of the EP, which shall act by an absolute majority of its constituent members.

The specific conditions for admission and the adjustments of the Treaties upon which the Union is founded shall be the subject of an admission agreement between the acceding

<sup>38</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 27 February 2017]

member state and the member states. The requirement that any European state is eligible to apply for membership in the Union in terms of inclusiveness and openness seems to be between the current statement of the German Basic Law that declares German enlargement to be finished and the UN rule that any state may apply for membership.

In some respect Art.49 TEU resembles the former preamble of the German Basic law which was open to the admission of other German Länder. In fact even though the EU remains open for new member states the requirement for any state to be European defines the limits to membership with the EU retaining an exclusive membership.

In fact the requirement for any state to be European to be eligible to apply for membership made the Council reject the membership application of Morocco in 1987 due to the fact that it was not considered to be a European state. In practice there have been seven successive rounds of EU enlargement which provided for the accession of 22 states to the EU. Each of these accessions have been sealed by different accession treaties.

Once a country has been acknowledged as European the fulfillment of the Copenhagen Criteria including the stability of institutions and a functioning market economy as well as the ability to take on and effectively implement the obligations of membership including adherence to the aims of political, economic and monetary union marks the decisive material threshold for a state to join.

Whereas the accession to the Basic Law in theory and in practice required in the first place to enter a strictly hierarchical system of government within which precedence of the federal law over state law is secured according to Art.31 Basic Law, the political system of the EU is governed by the principle of conferral according to Art.4 TEU, where ultimate authority (arguably) rests with the member states. Thus in fact the accession to the EU means to join a project of sovereign states which have decided to share sovereignty in particular policy areas.

Yet despite the principle of conferral the CJEU in its legendary Van Gend en Loos judgment (1963) and Costa vs. Enel (1964) has developed the doctrines of Direct Effect respectively Primacy of EU law on the assumption the EU law constitutes an autonomous legal order independent of the law of its constituent members.

The comparison between the EU and the German legal system revealed that Germany is both a more exclusive club than the EU as well as a more strict one in terms of its requirements for new Länder to join. However compared with the UN the EU is the more exclusive club and much more strict in its conditions for membership.

## 2.4) Post-accession evaluation: have lessons been learned?

In order to assess whether the lessons of previous accessions to the EU have been learned it seems useful to look if and how the process of former accessions has differed from more recent accessions. According to Braniff<sup>39</sup> the 'lessons learned' from EU enlargement have led to what she calls an innovative policy adaptation and incremental change in candidate states. This is brought about by the use of benchmarking mechanisms, balancing carrots and sticks as well as policy flexibility.

In Braniff's<sup>40</sup> terms lesson learning can best be understood as institutional reflexivity or social learning by which institutions are facilitated by previous failure to get better, meaning learning through failure rather than learning through successes.

Van Bogdandy<sup>41</sup> mentions that following the EU enlargement of 2007 Bulgaria and Romania were subjected to a new surveillance mechanism called 'Cooperation and Verification Mechanism' in the fields of judicial reform, corruption and organised crime. Yet the strongest incentive for compliance with EU standards, membership itself had already been granted prior to successful implementation of reforms in those areas. However admission into the Schengen Area conditional upon meeting the standards outlined before remains a strong incentive for reform.

According to the European Parliament<sup>42</sup> 'the bar for accession has been set higher': Negotiations now start first by dealing with the rule of law chapters of negotiation largely because the European parliament believed the 2007 enlargement round with post-accession monitoring to have been a failure. Among the priorities of enlargement negotiations are now also the state of democracy and fundamental rights. Thus certainly 'lessons' have been learned.

## 2.5) Analysis and conclusions

39 Braniff, M. (2009). Transforming the Balkans? Lesson learning and institutional reflexivity in the EU enlargement approach. *European Foreign Affairs Review*, 14, Page 548

40 *ibid.* Page 550/551

41 Bogdandy, A. V., & Ioannidis, M. (2014). Systemic deficiency in the rule of law: what it is, what has been done, what can be done. *Common Market Law Review*, 51(1), Page 85

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[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/589791/EPRS\\_BRI\(2016\)589791\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/589791/EPRS_BRI(2016)589791_EN.pdf)



Looking at all the material conditions for acceding to the Federal Republic of Germany, the EU and the UN revealed that these three legal-political systems greatly differ in their 'openness' to new members. The UN is most open to new member states followed by the EU, whereas the Federal Republic of Germany is effectively closed for new Länder.

What seems interesting to me is the idea that both the Federal Republic of Germany and the UN both do not follow an enlargement agenda though for very different reasons. The Federal Republic of Germany is a closed political system therefore an enlargement agenda would be an inherent contradiction. The UN however as open as it may be simply is in a situation where most areas of the world are governed by states that are member states of the UN.

However some notable exceptions remain. The state of Palestine which is a sovereign state and recognised by 136 UN member states seeks admission to the UN and in 2012 following the approval of UNGA resolution 67/19 has been granted non-member observer state status. In the future also the Republic of Kosovo could become a member state of the UN. As of 2017 110 UN member states recognise Kosovo as a sovereign state. However the possible future admission of these states into the UN can hardly qualify as an enlargement agenda of the UN since it is not the common position of the UNSC (and the UNGA in the case of Kosovo) that these states should actually become member states of the UN at one point in the future. What concerns the state of Palestine strong reservations remain on part of the United States which in the UNSC does not approve of admission of Palestine to the UN. Equally there are strong reservations on part of Russia and China in the UNSC which do not approve of admission of Kosovo into the UN.

In this sense the EU is notably different from the Federal Republic of Germany and the UN. The EU actively pursues an agenda of enlargement. Currently there are five states that have been recognised by the EU as candidates for future membership among them Albania, Macedonia, Montenegro, Serbia and Turkey. Moreover there is an application from Bosnia-Herzegovina pending approval of candidate status by the EU.

Whether the former Soviet republics such as Georgia, Moldova and Ukraine will become candidates to join the EU in the future remains unclear. The Association Agreements agreed upon between the EU and each of these states clearly mention a European Perspective for each of these countries. The agreement with Ukraine explicitly mentions 'Ukraine's gradual integration in the EU internal market' as key objective in the

setting up of a Deep and Comprehensive Free Trade Area (DCFTA). According to Van der Loo et al.<sup>43</sup> the agreements of the EU reached with the three former Soviet republics are 'integration-oriented agreements'.

While ambitiously deepening the integration of the three former Soviet Republics with the EU these association agreements differ from the Stabilisation and Association Agreements with the states of the Western Balkans in so far as the states of the Western Balkan are on their way to acceding to the EU whereas the former Soviet republics are not regarded as potential candidates for the EU.

It is with this enlargement and integration agenda in mind that it makes sense for the EU to have the means to enforce its founding values against the member states that belong to it. Keeping in mind that the EU is not merely a community of interests but also a community of values Art.7 TEU looks like a very helpful tool to uphold the values on which the EU is based. It might be the case that an ever growing EU, if it is willing to keep up its fundamental liberal democratic principles, requires strong and perhaps increased monitoring of the member states than would be the case was EU enlargement already completed or membership covered only a few (relatively similar) countries.

The following chapter is intended to analyse the specific nature of the enforcement of liberal democratic principles in the UN, the EU and the Federal Republic of Germany for upholding those foundational liberal democratic principles.

In a nutshell it can be said that there is an inverse relationship between the inclusiveness of an organisation and the depth of requirements that need to be fulfilled in order to join that organisation. For the EU that means that with regard to the fulfillment of liberal democratic principles that is required in order to join the EU the EU occupies a middle ground between the Federal Republic of Germany which is most strict in terms of its requirements and the UN which is most lenient. Moreover it seems to me that since the EU is an enlargement driven organisation the diversity of its member states with regards to their respective governance of liberal democratic principles necessitates a deepening of the EU governance in this area. In fact for any organisation to remain cohesive with regards to liberal democratic principles under the conditions of a growing variety in this field as automatically comes along with enlargement requires more sharing of responsibilities if the level of cohesiveness prior to enlargement is to be kept at that level.

<sup>43</sup> van der Loo, G. Van Elsuwege, P., & Petrov, R. (2014). The EU-Ukraine Association Agreement: assessment of an innovative legal instrument. Page 1/2

### **3) The constitutional significance of Art.7 TEU and its equivalents in Germany and the UN**

This section is intended to provide an overview of the constitutional structure of the Federal Republic of Germany, the EU and the UN. It is useful to provide an overview and an analysis of the different legal procedures designed to uphold the liberal democratic principles in order to be able to understand the specific procedures in place for the politically higher level to uphold liberal democratic principles against the lower level of government particularly where there is a tension between the competences of a member state (Land) and the aspiration to keep intact a community of values of the higher level. This chapter will analyse the second sub-question of my research question which is **What is the constitutional significance of Art.7 TEU in the legal order of the EU in comparison with equivalent provisions in Germany and the UN?**

#### **3.1) How Germany safeguards liberal democratic principles against its constituent parts**

The Constitution of Germany is the Basic Law which entered into force in 1949. The first 20 articles of the basic law contain the fundamental rights and democratic principles. The FCC has the function of interpreting the Basic Law.

Article 93 of the Basic Law formulates the various judicial proceedings that can be brought before the FCC. According to Art.93 (1) 4 a Basic Law a constitutional complaint is available to anyone person who feels violated in her basic rights by acts of the legislative, the executive or the judiciary. The constitutional complaint requires direct and individual concern. Moreover the constitutional complaint is only applicable if a decision has been made by a lower court against which no other remedy is possible. According to Art.93 (1) 2 Basic Law the abstract norm control allows for the reviewal of any legal norm with regards to its compatibility with the basic law or other federal law. The federal government, a state government or a quarter of the members of the Federal Diet are entitled to ask for an abstract norm control. According to Art.93 (1) 3 Basic Law a federal-state conflict can be taken before the FCC wherever the federation and a state are clashing with regards to the question of which party has the competence to regulate specific policy fields.

According to Art. 100 Basic Law a court that deems a law, that is relevant for deciding a case, to be contrary to the Basic Law has to make a request for a concrete norm control to the FCC. Where it considers a law to be contrary to state constitutional law it has to make a request for a concrete norm control to the FCC.

Besides these judicial enforcement actions Art.37 of the Basic Law provides for the possibility of Federal Execution. According to Art.37 (1) if a land fails to comply with its obligations under the Basic Law or another federal law the Federal Government with consent of the Federal Council may take the necessary steps to compel the land to comply with its duties.

The idea of Federal Execution can be traced back to the Reich Execution. Already the Constitution of the German Empire from 1871 provided for the possibility of Reich Execution. Art.19 of the 1871 constitution provided for military execution against states of the confederation if these states failed to fulfill their constitutional duties. The Federal Council was tasked with ordaining the execution and the Emperor was tasked with enforcing it.

In the Weimar Republic Art.48 of the Weimar Constitution empowered the President to use armed force if a state did not fulfill the obligations conferred upon it by the Weimar Constitution. Where public safety was seriously threatened or disturbed the Reich President was allowed to take the measures necessary to reestablish law and order and if necessary to use armed force. Moreover the Reich president was entitled to suspend certain civil rights such as the inviolability of the home, freedom of expression, the right to assemble peacefully and the privacy of correspondence. Different from the provision under the Reich Constitution of 1871, Art.48 of the Weimar Constitution was frequently applied in practice against states of the Reich inter alia against Saxony in 1923 and against Prussia in 1932<sup>44</sup>.

In its present day form which remains unchanged since the entry into force of the Basic Law, federal execution deviates significantly from its predecessors. According to Stettner Federal Execution is a typical rule of federal states and usually remains without functional equivalent<sup>45</sup>. Yet Dreier acknowledges that Art.7 TEU provides for specific executive rights for the EU<sup>46</sup>. Dreier also acknowledges that while in some federal states such as in Germany and Switzerland the constitution provides for the possibilities of Federal Execution a similar mechanism is unknown to the US constitution<sup>47</sup>.

<sup>44</sup> Dreier, H. (2015) Grundgesetz Kommentar Band II Artikel 20-82 Page 1042

<sup>45</sup> *ibid.* Page 1043

<sup>46</sup> *ibid.* Page 1043/1044

<sup>47</sup> *ibid.* Page 1044

Under the German Basic Law Art.37 has never been invoked to this day. The marked difference to its predecessor in the Weimar Constitution is the focus of Art.37 Basic Law. Whereas the Weimar Constitution conferred upon the Reich President the competence to use Reich execution the Basic Law has made it more difficult for Federal Execution to be invoked because it now requires the consent of the Federal Council.

Moreover the Basic Law does not by its spirit provide for the suspension of fundamental rights as a tool of federal execution. Rather since fundamental rights are at the heart of the Basic Law which Art.37 is designed to protect it seems that suspensions of basic rights is not the way to go when invoking Federal Execution. This distinguishes the Basic Law from the Weimar Constitution which expressly endowed the Reich president with a competence to suspend basic rights in order to force states in line with the Weimar Constitution.

Despite never having been used Art.37 Basic Law has an important reserve function in the case of a breakdown of the general federal-state consensus. Moreover Art.37 Basic Law is the figural 'nuclear' bombshell at the disposal of the federal level and thereby develops its leverage over the states.

In considering whether an action according to Art.37 Basic Law is the right way to go it needs to be examined how Art.37 Basic law relates to other judicial enforcement actions provided for in the Basic Law. There seems to be no exclusivity between a constitutional complaint and federal execution however there might be an intersection of both. Situations in which states violate the fundamental rights provisions of the Basic Law both constitutional complaints by individuals and federal execution are imaginable.

With regards to choosing either a federal-state dispute or federal execution in cases of a state violating its duty flowing from the Basic law or another Federal Law the federal level according to Beck has the discretion to choose which way to go. According to a FCC judgment from 1953 the federal level might also choose to simultaneously take both routes. According to Maunz et al.<sup>48</sup> a pending federal-state dispute does not allow for suspensive effect to be given against measures taken under federal execution. Merely an interim order which provisionally regulates a state of dispute on the basis of Art.32 of the Law on the FCC is an admissible remedy<sup>49</sup> if this is deemed necessary in order to avert grave disadvantages, to prevent the risk of violence or if another significant ground such as public welfare requires so as Art.32 of the Law on the FCC requires.

<sup>48</sup> Rn.105-110 (Maunz/Dürig/Klein GG Art.37 Rn.105-110, beck-online)

<sup>49</sup> *ibid.*

How the relationship of Art.37 Basic Law to other types of judicial enforcement actions has been understood seems to point at the political sensibility shown both by legal scholars and the Constitutional Court. In fact since concrete situations when federal execution might be applied seem quite theoretical and constructed and the precise ways of how such a major crisis would actually play out remain unclear it has been wise to allow for two different routes to be taken in the event of a crisis.

The provisions of the Basic Law however ensure the federal level has the upper hand when it comes to a conflict. Yet it does have to remain within the limits set by Art.37 Basic Law since judicial review of Federal Execution remains a distinct possibility. The fact that Federal Execution up to this day has never been used can in principle speak to the fact that never to this day a state has acted contrarily to its federal obligations or that federal-state disputes have unfolded sufficient effect to bring into compliance formerly noncompliant states, which would speak to the fact that the way Art.37 Basic Law has been constructed in the framework of judicial enforcement actions provided for in the Basic Law has been extremely effective in reaching its aspired goal.

However it could also mean that the federal order has broken down so far that the consent of the Federal Council which is necessary for Federal Execution is out of reach because a sufficiently large number of Länder has defected from the federal consensus.

Yet since there is wide ranging legal certainty in Germany and no institutional breakdown, let alone civil war speaks to the fact that Federal Execution without ever having been applied is in fact largely an effective deterrent.

### **3.2) How the UN safeguard liberal democratic principles against its constituent parts**

The UN disposes of a number of UN Treaty bodies with different functions. A basic feature of the UN system is its far reaching absence of any hierarchical order. The UN are based upon the idea that all states are equal and that no arbiter above the nation state exists. The UN's overarching function is to preserve world peace. The UN has originally shown little interest in the internal affairs of a state since they were deemed to be beyond the competences of the UN.

The UNSC is however entitled according to Art.39 UN Charter to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to make recommendations or decide measures in accordance with Art.41 and 42 UN Charter to

restore international peace and security. According to Art.41 UN Charter the UNSC may decide which nonviolent measures it wants to be employed to give effect to its decisions and call upon UN member states to apply such measures. These measures include economic sanctions, severance of diplomatic relations and the interruption of railway, sea, air, postal, telegraphic and other means of communication. In the case measures based on Art.41 UN Charter have proven to be or would prove to be inadequate Art.42 UN Charter allows for action to be taken by air, sea or land forces.

According to Art.93 UN Charter The International Court of Justice, based in the Hague, forms the principal judicial branch of the UN legal system. According to Art.93 UN Charter the UNGA or the UNSC may request the Court of Justice to give an advisory opinion on any legal question. According to Art.93 b UN Charter also other organs of the UN and specialised agencies provided they have been authorised by the UNGA may also request advisory opinions from the Court of Justice within the scope of their activities.

The principal deliberative body of the UN is the UNGA. According to Art.10 UN Charter the UNGA may discuss any questions or any matters within the scope of the UN Charter and it may make recommendations to the members of the UN or to the UNSC on any questions or matters except for the limitations defined in Art.12 UN Charter where the UNSC is exercising in respect of any dispute or situation the functions assigned to it. According to Art.13 UN Charter the UNGA shall initiate studies and make recommendations for the purpose of promoting international cooperation and assisting in the realisation of human rights and fundamental freedoms for all people without distinction as to race, sex, language or religion.

Most striking when it comes to the UN institutions is the fact that the UN Charter keeps most of its institutions particularly the UNGA and the ICJ without decisive competences. Competences remain advisory and deliberative and only recommendations, studies and questions are possible. Clearly the UN is not a human rights organisation in the first place but security and peace oriented. Yet human rights remain important throughout all institutions of the UN.

The ICJ can only hear cases between states. Individuals can not bring cases before the court. This reflects the state-centered view of international law dominant in the early decades of the UN and its predecessor The League of Nations. However the ICJ is not banned from providing advisory opinions in cases with relevance for human rights.

According to Crook the ICJ has slowly started to increase the weight of human rights in its considerations for advisory opinions yet it falls short of giving human rights clear primacy over other principles of international law<sup>50</sup>.

What further complicates the adjudication of the ICJ is the necessary consent of all state parties involved in the dispute. Accordingly it only seems logical that state parties call upon the ICJ to act if they see a high likelihood that their point of view will ultimately be reflected in the Court's advisory opinion.

In its sessions the UNGA regularly votes on human rights resolutions particularly where human rights seem to be gravely endangered and thereby provides a fever chart of the human rights situation in different thematic areas as well as in individual countries in general.

The UNSC also did not ignore the issue of human rights and in fact especially after the end of the Cold War the UNSC authorised interventions on humanitarian grounds. Moreover in the cases of Yugoslavia and Rwanda the UNSC set up ad hoc tribunals dealing with breaches of the Geneva Convention, violations of the laws or customs of war, genocide and crimes against humanity. These tribunals have the authority to announce prison sentences up to life imprisonment. Yet the UNSC is perceived to suffer from political deadlock in current conflicts such as the one in Syria which is mainly due to the opposing sides Russia and the Western permanent UNSC members take.

### **3.3) How the EU safeguards liberal democratic principles against its constituent parts**

Art.7 TEU as an instrument for upholding EU law must be understood against the backdrop of a broader system of instruments and mechanisms that ensure the compliance of citizens, member states and EU institutions with EU law.

In the EU context according to Art.258 respectively Art.259 TFEU the European Commission the EP and any member state are entitled to bring a member state which is deemed not to fulfill its obligations under the Treaties before the CJEU. This procedure is known as the infringement procedure.

According to Art.263 TFEU the legality of legislative acts of the EU shall be reviewed by the CJEU where a member state, the European Commission, the EP or the Council of

<sup>50</sup> Crook, J. R. (2003). The International Court of Justice and Human Rights. *Nw. Univ. J. Int'l Hum. Rts.*, 1, 2. Page 5



Ministers asks for it on the grounds of lack of competence, infringement of an essential procedural requirement of the Treaties or of any rule of law relating to their application, or a misuse of powers. In order to be able to decide whether a procedure on the basis of Art.7 TEU is the right way to go in the case of ensuring the continuity and unity of EU law it is important to say what makes the use of Art.7 TEU different from other ways of judicial enforcement.

Whereas Art.263 TFEU can only be invoked in cases of the EU acting against EU rules Art.7 TEU is designed for situations where member states do not comply with EU rules. Accordingly there is no possible intersection between Art.7 TEU and Art.263 TFEU.

Just as Art.258 TFEU, Art.7 TEU has been designed in order to provide for means of enforcement against member states who act contrarily to EU rules. Thus it is important to analyse where an Art.7 TEU procedure is warranted and where not in the case of member states not complying with EU rules.

First it seems important to analyse whether in the case where a violation of Art.2 TEU is suspected the EU is obliged to follow the Art.7 TEU procedure in order to determine the (risk of a) serious breach of the fundamental values of Art.2 TEU by a member state or whether the EU has the discretion to use either Art.7 TEU as a tool of enforcement or whether it can choose to bring the member state before the CJEU according to Art.258 or Art.259 TFEU. It seems to me that Art.7 TEU functions as a *lex specialis* to the general system which prescribes the infringement procedure.

Scheppele however argues in favour of a mechanism that he calls systemic infringement. Scheppele regards the current system of the Commission and member states filing individual enforcement actions against a member state as rather ineffective in upholding the compliance of member states with EU rules where the values of Art.2 TEU are (at risk of being) violated.

In particular Scheppele<sup>51</sup> argues that various individual enforcement actions should be filed together as a systemic enforcement action where Art.2 TEU values (are at risk of being) violated such as in the case of the lowering of the retirement age for Hungarian judges from 70 to 62 years from one day to the next.

<sup>51</sup> Scheppele, K. L. (2013). What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions. *Princeton University, November*. Page 4/5

Instead of bringing in an enforcement action on grounds of Art.2 TEU the European Commission has decided to bring in an enforcement action on grounds of the purported discrimination against elderly judges. Had it instead chosen to bring in an enforcement action on grounds of Art.2 TEU this in Scheppele's view would have done more justice to the real problem, a violation of Art.2 TEU.

Moreover Scheppele<sup>52</sup> also argues against the use of Art.7 TEU where the question is whether an EU member state has acted contrarily to its treaty obligations. Where political sanctions are to be decided upon Scheppele<sup>53</sup> finds that an Art.7 (3) TEU procedure is the adequate way to go. Scheppele's view seems to literally contradict Art.7 (1) and Art.7 (2) TEU which allow the Council and the EP in a (political) process to determine whether there is a (risk of) a serious breach of the values of Art.2 TEU by a member state.

Yet Bard et al.<sup>54</sup> argue that there is indeed a path by which violations of Art.2 TEU become justiciable. By interpreting Art.2 TEU in conjunction with Art. 4 (3) TEU, which formulates the duty of all member states to adhere to the principle of sincere cooperation meaning to act in full mutual respect and assisting each other in carrying out tasks which flow from the Treaties, would expand the scope of infringement procedures to not merely cover the *acquis* but also fundamental liberal democratic principles. To me however it seems that just as in the case of Germany, Art.7 TEU really has a reserve function in the context of EU law. Bearing in mind that in the constitutional history of states competences in the area of liberal democratic principles have not been clearly and solely assigned to one level of government it makes sense to understand Art.4 TEU just as Art.2 TEU as a homogeneity clause. Whereas Art.2 TEU is about the homogeneity of liberal democratic values throughout the EU Art.4 TEU can be understood as the logical consequence flowing from this requirement. Where a multi-level governance system is characterised by homogeneity respectively formulates the goal of homogeneity with regards to liberal democratic principles a difficult balance between the constitutional autonomy of the member states and the constitutional autonomy of the EU is struck. Since law is the result of deliberative processes in general and in particular in multi-level governance systems with little concrete codification of the liberal democratic principles to be adhered to by the member states it is particularly important to set the goal of constant deliberation as Art.4.3 TEU seems to mandate<sup>55</sup>. The

<sup>52</sup> *ibid.* Page 10

<sup>53</sup> *ibid.* Page 10

<sup>54</sup> Bard, P., Carrera, S., Guild, E., & Kochenov, D. (2016). An EU Mechanism on Democracy, the Rule of Law, and Fundamental Rights: Assessing the Need and Possibilities for the Establishment of an EU Scoreboard on Democracy, the Rule of Law and Fundamental Rights. *European Parliament, Research Paper PE, 579328*. Page 30

<sup>55</sup> Schwarze, J. (2012) EU-Kommentar Page 98/99

CJEU judged that Art.4.3 TEU included the duty of loyal cooperation between EU member states something that had hitherto often been called union or community loyalty<sup>56</sup>. It is also argued that whilst obliging the EU to a federal system of government Art.4 TEU does not prescribe a particular model of federalism<sup>57</sup> as Art.28 Basic Law in conjunction with Art.31 Basic Law do in the Federal Republic of Germany. Whilst there is a requirement for homogeneity in Art.2 TEU Art.4 TEU is no perfect equivalent in the EU Treaties to Art.31 Basic Law which states that Federal Law breaks state law. The very assessment that no particular model of federalism is specified in Art.4 TEU speaks to the fact that the federal nature of the EU remains subject to deliberative processes between the EU and its member states and between the member states. With regards to Art.7 TEU this means that a strong case can be made for the idea that deliberative processes should precede the triggering of Art.7 TEU. This seems to do justice to the very fact that a common sufficiently broad understanding about the nature, the purpose and the objectives of the EU between the member states has not been reached and perhaps will never be reached. In this sense Art.4 TEU in conjunction with Art.2 TEU and Art.7 TEU can be understood as a call upon the EU and its member states to work towards the development of customary law which could perhaps later be codified. In this sense the development of standards for liberal democratic principles can be understood as an evolutive process with an open ending rather than a planned undertaking.

It seems to me that where violations of Art.2 TEU are claimed both a systemic infringement action and an Art.7 TEU procedure have their own legal merits but also risks.

A procedure on the basis of Art.7 TEU requires broad political consensus by asking for the assent of supermajorities in both the Council and the EP. Broad political consensus can be key to gaining leverage in situations where a state is deemed to be (at risk of) violating the fundamental EU principles of Art.2 TEU.

Yet the requirement of a broad political consensus can also be detrimental to the protection of fundamental EU principles. By lobbying other states, the member state at question might be able to avoid a four fifths majority against it thus allowing for a risk of a breach of fundamental principles to remain untackled by the EU.

A successful systemic infringement action on the other hand might lack acceptance in the EU because of what member states might perceive as an omnipotent court interfering with the core of member states' competences. However reaching such a judgement might be easier than forming a super-broad political consensus as Art.7 TEU requires.

<sup>56</sup>        *ibid.* Page 81/82

<sup>57</sup>        *ibid.* Page 77

In the end this comes down to a choice between credibility gained through political supermajorities however with difficulty forming such supermajorities and the ability to actually do something without much credibility. It seems that the EU has decided to opt for the way of taking the route prescribed by Art.7 TEU which it is considering to take in the case of the Polish Constitutional Court Reforms if it acts in any legal way at all<sup>58</sup>.

Compared to the German legal system the main difference that is striking is the fact that the FCC can declare legislation made by the states void wherever these are contrary to the Basic Law whereas the CJEU can not do such a move. Moreover there is no judicial enforcement action in the EU comparable to the federal-state dispute. Lastly Federal Execution does enable the Federal Level to use any measures necessary to bring back a member state in compliance with its federal duties. Art.7 (3) TEU merely provides for the right of the EU to suspend rights member states enjoy flowing from their membership.

In comparison with the UN system the EU system of enforcement of liberal democratic values formulates much higher standards. Whereas the purpose of the UN is to only act wherever international security is in jeopardy and limits its competence for the question of how to deal with human rights enforcement mainly to situations wherein genocide, breaches of the Geneva Convention or crimes against humanity are apparent Art.2 TEU much more directly formulates the values of the EU.

For the EU, serious and persistent violations of democratic standards, the rule of law and human rights are sufficient in order to allow for invoking Art.7 TEU. Yet in the UN system the legal consequences flowing from decisions of the UNSC reacting to crises in which human catastrophes are apparent can at times be more intrusive than the sanctions the EU disposes of according to Art.7 (3) TEU. Whereas the UN Charter according to Art.42 even provides for the possibility of military intervention EU sanctions due to Art.7 (3) TEU necessarily have to remain peaceful.

### **3.4.) Analysis and Conclusion**

Having described the context in which the sanctioning mechanisms of each the EU, the UN and the Federal Republic of Germany operate it can be seen that the EU exhibits similarities and differences that distinguish it from both the UN and the Federal Republic of Germany.

In the Federal Republic of Germany federal execution (respectively Reich Execution) has a long constitutional tradition. In fact ever since the creation of the German state there

<sup>58</sup> [http://europa.eu/rapid/press-release\\_IP-16-4476\\_en.htm](http://europa.eu/rapid/press-release_IP-16-4476_en.htm)

has been Federal (Reich) execution. This fact distinguishes it from the EU where only since the treaty revision of Lisbon in 2009 Art.7 TEU has been functioning as a basis for protecting the liberal democratic principles common to all member states as Art.2 TEU proclaims.

Hence it can be said that the state of Germany since its inception has had the instruments of enforcing the constitution. Notably though the Reich Constitution of 1871 did not include a fundamental rights catalogue and was designed rather as a confederation of monarchs rather than a union of the people of Germany or of the constituent states thereof. Therefore in its origins the state of Germany has created a legal system in which the law of the Empire took precedence over the law of the constituent states before the implementation of fundamental rights which only happened in the Weimar constitution from 1919.

Similarly the origins of the EU can be traced back not to the idea of the people of Europe or the member states thereof founding on the basis of fundamental rights and liberal democratic principles in general a political union but to an international agreement between the heads of states of six European countries in order to create freedom of movement for goods, services, capital and labour.

Both the UN and its predecessor the League of Nations had the stated objective of promoting international co-operation and the achievement of international peace and security. Fundamental rights and liberal democratic principles in general were not the basis of both organisations.

Thus in fact in none of the three legal systems or its predecessors did fundamental rights play a role from the beginning. Yet this does not imply that today fundamental rights and liberal democratic principles in general still play a minor or no role in these legal political systems. In Germany new constitutions following the radical breaks brought about by the two World Wars substantially elevated the role of fundamental rights and liberal democratic principles. Equally the League of Nations and the UN were only brought about by the radical breaks of the two World Wars. Compared with the state of Germany and the UN, the EU evolved more gradually as did the role of fundamental rights in it.

In terms of their current legal contexts the mechanisms of enforcement in the area of liberal democratic principles in both the EU and the Federal Republic of Germany mainly rely on legal recourse before the courts and the FCC respectively the CJEU in particular and not so much on political processes.

According to Muir though there has been a new generation of fundamental rights cases before the CJEU which have been characterised as expansionist. Together with the changes brought about by the Treaty of Lisbon (including the Art.7 TEU procedure) the EU has purportedly moved from being a passive actor with regards to human rights, respecting them but not proactively shaping them the EU has become more proactive<sup>59</sup>.

With this in mind Muir distinguishes between passive and active fundamental rights protection. Passive fundamental rights protection is happening whenever a state, an individual or an EU organ seeks to invoke fundamental rights before the CJEU<sup>60</sup>. Active fundamental rights protection refers to the EU adopting legislation affecting, creating or making more precise fundamental rights formulated elsewhere<sup>61</sup>. The Art.7 TEU procedure can also be regarded as a mechanism of active fundamental rights protection. Yet it seems that passive protection of fundamental rights might not be completely easily delineated from active protection of fundamental rights. This can be seen very well with regards to the argument for the systemic infringement procedures instead of an Art.7 TEU procedure as argued for by Scheppele. In the logic of Scheppele there seems to be an opportunity for choosing between active and passive fundamental rights protection in some cases.

In a sense Spaventa continued the analysis of what legal instruments to use in cases where EU law had been violated. Spaventa acknowledges that fundamental rights have been understood as general principles of EU law (Stauder case) as common constitutional traditions of the member states (Internationale Handelsgesellschaft) and understood as flowing from the application of the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union<sup>62</sup>. Spaventa analysed when the CFR, the EU's fundamental rights document, has been applied to national measures as well. Spaventa found that to be the case where either there was a strong interest of the EU at stake, where member states acted on the basis of coordination the CFR would be applied only in extreme cases. All other national measures would remain beyond the scope of the CFR<sup>63</sup>.

In both the EU and the Federal Republic of Germany dealing with violations of federal respectively EU general principles, which are not clearly codified, by the EU member

<sup>59</sup> Muir, E. (2014). *Fundamental rights: an unsettling EU competence*. *Human Rights Review*, 15(1), Page 26

<sup>60</sup> *ibid.* Page 30/31

<sup>61</sup> *ibid.* Page 32/33

<sup>62</sup> Spaventa, E: (2016). The Interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures Page 5

<sup>63</sup> *ibid.*

states respectively the German Länder a seemingly more political process is mandated to solve those issues.

With regards to the second sub-question it can be said that just as its equivalent in Germany Art.7 TEU provides the EU with a reserve mechanism or 'nuclear option' which is designed not to be used in order to strengthen the credibility of alternative mechanisms of enforcement of liberal democratic principles in particular before the CJEU. For the UN it can be said that possibly the referral of a human rights issue to the UNSC could perhaps be regarded as the reserve function of enforcing liberal democratic principles. However the clear difference from the EU system is the codified immunity for five of the UN member states, namely the UNSC members that wield veto power. Thus crucially in contrast to the German and the EU system the UN is not formally a level playing field when it comes to the protection of liberal democratic principles. However this does not mean that power imbalances might not also lead to an uneven playing field in the EU when it comes to the protection of liberal democratic principles. If formulated cynically it could indeed be said that the constitutional significance of referring an issue to the UNSC and to a lesser extent the Art.7 TEU procedure lies in protecting the interests and ideas of the great powers and imposing those on the less powerful players. This view can be backed up by the finding that in Germany a federal-state dispute can be chosen as a nearly fully valid alternative to Federal Execution that can be used in the same situations where Federal Execution can be chosen. With the presence of an FCC which is not primarily reflective of the power and interest structures of the Federal Council the influence of power and interest is reduced in favour of judicial interpretation.

It will be the aspiration of the following chapter to more clearly describe the material and procedural requirements that condition the triggering of the mechanisms of Federal Execution, the Art.7 TEU procedure and the functional equivalents in the UN context.

#### **4) Requirements to take action against constituent parts**

The following section is intended to focus on the procedural and material requirements that precede the imposition of sanctions by the higher level of government against an entity belonging to the lower level of government. The analysis of the material requirements sheds a light on the scope of protected principles whereas the analysis of the procedural requirements can say something about the height of thresholds when it comes to the decision of whether to take action against a constituent part. With these considerations in mind this chapter intends to try to give an answer to the third sub-question of my research question which has been formulated as follows: **What are the material and procedural requirements for invoking Art.7 TEU in comparison with equivalent provisions in Germany and the UN?**

#### 4.1) Legal requirements to take action against constituent states in Germany

According to Dreier<sup>64</sup> Art.37 of the Basic law requires for the decision to invoke Federal Execution that a land has not acted in compliance with its obligations flowing from the Basic Law or another federal law. Moreover the consent of the Federal Council is required.

The limitation on the possibility of Federal Execution towards Länder implies that other legal entities do not fall under Federal Execution<sup>65</sup>.The violation of federal duties of a land can be caused by a Land's action as well as by a failure of that land to act<sup>66</sup>.Federal Duties for the Länder stem from the federal-state relationship meaning that duties a Land might have vis a vis the citizens or a third state do not fall under the scope of Art.37 Basic Law<sup>67</sup>.

Federal Execution according to dreier can not be invoked on the basis of a violation of federal executive orders, federal customary law or other unwritten federal law<sup>68</sup>. Yet v. Mangoldt et al. argue that judgments of the FCC and federal framework laws can also fall under the scope of federal obligations for a land<sup>69</sup>.

However a federal obligation upon a land does not just cover the federal-state relationship but does also include state-state relationships<sup>70</sup>. In particular it is argued that federal obligations do not stem merely from codified federal law but also from obligations that require interpretation such as the duty of federal loyalty.

The non-fulfillment of federal duties by a state flowing from the Basic Law and/or other federal law encompasses complete non-fulfillment, only partial fulfillment, defective fulfillment as well as cases of untimely fulfillment<sup>71</sup>. Irrelevant in this context seems to be whether the land can be blamed for the non-fulfillment of federal obligations or what the consequences of non-fulfillment might be<sup>72</sup>.

<sup>64</sup> Dreier, H. (2015) Grundgesetz Kommentar Band II Artikel 20-82 Page 1045/1046

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid.* Page 1046

<sup>67</sup> *ibid.* Page 1046

<sup>68</sup> *ibid.* Page 1047

<sup>69</sup> *ibid.* Page 1009

<sup>70</sup> *ibid.* Page 1009

<sup>71</sup> *ibid.* Page 1010

<sup>72</sup> *ibid.* Page 1010



However it is argued that only executable obligations fall under the scope of Art.37 Basic Law. The mere risk of a violation of federal obligations is not deemed to be sufficient to justify federal execution.

In terms of its procedural requirements federal execution according to Art.37 Basic Law requires the decision of the federal government which needs to be backed up by the consent of the Federal Council<sup>73</sup>. The Federal Council decides by the majority of its constituent votes. Abstentions will be counted as negative votes. The necessity of the consent of the Federal Council for determining a violation of federal obligations marks a decisive break with the Weimar Constitution which enabled the Reich president to act against a state on its own<sup>74</sup>.

The Federal Diet is not formally an indispensable player in the Art.37 Basic Law procedure. However since the Federal Government is accountable to the Federal Diet and the Federal Diet by means of a constructive vote of no confidence the Federal Diet can replace an existing government by a new one the Federal Diet seems to have an informal route of influencing the decision of whether Federal Execution will be made possible. The decision on part of the Federal Government to invoke Federal Execution is a four-step approach<sup>75</sup> including the determination of a violation of federal obligations by a land, the decision to enact federal execution, the decision about the necessary measures and the consent of the Federal Council.

The basic federal obligations of the Länder as they flow from the Basic Law are spelled out in Art. 28.1 Basic Law which provides that the constitutional order of the Länder needs to conform to republican, democratic and social standards. Besides Art.28.1 Basic Law provides for universal, direct, free, equal and secret elections in municipalities, counties and the Land itself. Moreover Art.28.3 Basic Law claims the federal level to be the guarantor of basic rights in the constitutional orders of the Länder.

In case of a determination of a violation of federal obligations by a land through the Federal Government the Federal Government may decide to initiate Federal execution<sup>76</sup>. Partly this decision is at the discretion of the Federal Government however Mangoldt et al. mention<sup>77</sup> that in case of a violation by a land of its obligations flowing from Art.28.3 Basic Law the Federal Government enjoys no discretion and is legally obliged to order Federal Execution.

<sup>73</sup>        *ibid.* Page 1011

<sup>74</sup>        *ibid.* Page 1011

<sup>75</sup>        *ibid.* Page 1012

<sup>76</sup>        *ibid.* Page 1012

<sup>77</sup>        *ibid.* Page 1013

The question thus arises how Art.28 Basic Law in general and Art.28.3 Basic Law in particular need to be interpreted in order to decide whether Federal Execution is possible respectively necessary.

Art.28.3 Basic Law has the character of both a right as well as a duty incumbent on the Federal Level to ensure the effectiveness of the constitutional requirements made in the Basic Law. What is disputed is whether Art.28.3 does encompass subjective rights for the other Länder, municipalities or even ordinary citizens.

The requirement of Art.28.1 Basic Law for all Länder to be republican precludes the possibilities of any form of monarchy be they parliamentary or absolute. Maunz et al. argue that for a Land to be democratic requires a system of government that is based on the separation of powers and periodical free elections that give expression to the will of the political majorities. Not compatible with the Basic Law would be Länder constitutions mandating aristocracies, oligarchies or one party states<sup>78</sup>.

In fact in 2008 the FCC ruled on the constitutionality of a 5% hurdle for municipal parliaments<sup>79</sup>. The FCC annulled the relevant provision in the state law of Schleswig-Holstein on grounds of it violating the principle of equality in elections. The FCC did not consider the ability of the municipal parliaments to work as sufficient reason to justify a deviation from the principle of equality in voting. This judgement made clear that the homogeneity of the Länder constitutions is real and will if necessary be protected by the FCC.

With regards to the conduct of elections Art.28 Basic Law leaves discretion to the Länder. The länder are free to have proportional or majoritarian electoral systems or to regulate the voting age as long as this does not lead to exclusions of certain parts of the population that are not traditionally acceptable<sup>80</sup>.

The requirement for Länder constitutions to be based on the rule of law according to Maunz et al. requires the Länder to have a judicial system in place before which basic rights can be invoked and fair trials are secured<sup>81</sup>. The basic rights upon which Länder constitutions have to be based as spelled out in Art.28.3 does according to Maunz et al. mean inter alia that legal equality between men and women, freedom of movement etc. are to be fundamental and must not be obstructed by the Länder. Curiously irrespective of the wording of Art.28.3 Art.1.3 Basic Law in conjunction with Art.1.1 Basic Law already states

<sup>78</sup> Maunz/Dürig/Klein GG Art.28 Rn.23-24, beck-online RN 23-24

<sup>79</sup> 2 BvK 1/07

<sup>80</sup> *ibid.* Rn. 29

<sup>81</sup> *ibid.* Rn. 26

that the basic rights are binding upon all branches of government be they federal or state institutions. On Art.28 Basic Law alone there has been comprehensive jurisdiction by the FCC.

#### **4.2) Legal requirements to take action against member states of the UN**

In the UN system monitoring of human rights and basic freedoms is performed by different UN Treaty Bodies such as for example the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, the Committee against Torture and the Committee on the Rights of the Child to name but a few. The idea behind the human rights monitoring system of the UN is to ensure compliance of states with the conventions to which they are parties and their other international obligations.

States in the UN system are obliged to regularly submit reports to the relevant monitoring committees after which the members of the committee raise questions on specific aspects of the report. However the committees regularly do not rely solely on information provided by the member state governments. Additionally the committees usually ask national human rights organisations and civil society organisations to provide extra informational input<sup>82</sup>. In a phase that is called 'constructive dialogue', the committees after having discussed their findings with the state parties formulate 'concluding observations' including points of concern, suggestions and recommendations<sup>83</sup>.

#### **4.3) Legal requirements for invoking Art.7 TEU**

Art.7.1 TEU requires for its invocation the clear risk of a serious breach by a member state of the values referred to in Art.2 TEU. Alternatively Art.7.2 TEU requires the existence of a serious and persistent breach by a member state of the values referred to in Art.2 TEU. The question arising from this requirement is how to press legal realities in the EU member states into the vessels provided for in Art.7.1 and Art7.2 TEU.

What seems apparent in the first place is that Art.7 TEU distinguishes between two legal realities in the member states. The two different facts of the case requirements laid out

<sup>82</sup> Bard, P., Carrera, S., Guild, E., & Kochenov, D. (2016). An EU Mechanism on Democracy, the Rule of Law, and Fundamental Rights: Assessing the Need and Possibilities for the Establishment of an EU Scoreboard on Democracy, the Rule of Law and Fundamental Rights. *European Parliament, Research Paper PE, 579328*.Page 41

<sup>83</sup> *ibid.* Page 42

in Art.7.1 and Art.7.2 TEU grade the legal realities in the member states and provide for two different intensities of conflict between legal reality and the requirements of Art.2 TEU. While there are these legal provisions the state of legal reality in a member state with regards to liberal democracy and rule of law seems to be more difficult to assess than for example acts the adherence of individuals to criminal law.

Whereas in criminal law often times acts can easily be qualified as criminal or not the qualification is much more difficult to make when it comes to the inner functioning of a state as a whole. Whereas in criminal and most of administrative law it is up to the judge to qualify a behaviour, Art.7 TEU assigns the responsibility for this qualification to the member states, the European Parliament and the European Commission.

The marked difference between Art.7 TEU and other law as for example criminal law is that while criminal law is either densely codified as in civil law systems or built upon existing case law as in legal systems based on common law an activation of Art.7 TEU is neither made more precise by existing statutory legislation nor is there case law since Art.7 TEU has until this day never been activated.

Acknowledging this lack of clear legal routes Bard et al. have undertaken to tackle this challenge and to suggest comprehensive standards for assessing violations of Art.2 TEU. By first mapping out the main rule of law methods and actors Bard et al. give an instructive overview of how the EU protects liberal democracy and the rule of law. The rule of law methods used by the EU fall on a spectrum ranging from soft law instruments such as discussion and dialogue which do not have direct legal and only very uncertain indirect effects on law over monitoring, benchmarking, evaluation and supervision the last of which is a form of hard law meaning it can have direct legal consequences. It seems to me that those instruments which are more soft law in nature feature more often in international than in national law and consequently the EU rule of law methods are without equivalent in the national arena.

It is with this knowledge that the EU commission has developed its own rule of law mechanism. In practice where there is the suspicion of a violation of Art.2 TEU in the form of a systemic threat to the rule of law, which can not be addressed by an infringement procedure the Commission, The EP, the member states and other stakeholders such as national court networks may demand a commission assessment.

At that stage the member state in question may either enter into a dialogue with the Venice Commission which might end in a successful resolution to the systemic threat to the

rule of law or failing that the member state in question may face a diplomatic escalation by the Commission calling upon the Fundamental Rights Agency and the judicial networks to provide their opinion for a Commission rule of law opinion. However also after this stage the member state in question may still opt for dialogue with the Venice Commission that can result in a successful resolution.

If the Commission rule of law opinion fails to bring about progress in the resolution of the systemic threat the Commission may deliver a Rule of law recommendation after which the member state in question may again enter into talks with the Venice Commission. Alternatively the European Commission might bring in a proposal according to Art.7.1 or Art.7.2 TEU.

Meanwhile the member states and the EP according to Art.7.1 TEU and the member states according to Art.7.2 retain the discretion not to follow the procedural path which the European Commission has given itself and define their own standards for invoking Art.7.1 and Art.7.2 TEU. It is important to stress that while the European Commission has developed a procedure for invoking Art.7.1 respectively Art.7.2 TEU, in legal terms according to Art.7 TEU the European Commission is an actor with the competence to bring in motions yet ultimately it is dispensable. Art.7.1 and Art.7.2 merely require the majority of four fifths of the council respectively the unanimity of the European Council plus the consent of the EP to determine a clear risk of a serious breach by a member state of the values referred to in Art.2 TEU or respectively a serious and persistent breach by a member state of the values referred to in Art.2 TEU.

Yet the Commission plays an important role in the rule of law mechanism. Since it is the only institution that has given itself a clear and transparent procedure in deciding its involvement in the Art.7 procedure it is also the only player which regularly receives input by such non-partisan actors as the Venice Commission, the fundamental rights agency and the judicial networks.

While the opinions and recommendations made by the Commission are based upon recommendations of these third players which are of a soft law character they can provide the necessary underbelly for the Art.7 TEU procedure and make it waterproof against possible interference by the CJEU which at a point may have to decide on an annulment action brought in by the member state in question a certainty that can not be that credibly brought in by the other key players namely the member states, the council or the European Parliament. The question of CJEU involvement will be dealt with at a later stage of this work.

It makes sense to look at the workings of the Venice Commission, the fundamental rights agency and the judicial networks more closely in order to figure out the added benefit of these institutions to the fundamental rights protection in the EU member states.

The European Commission for Democracy through Law, better known as Venice Commission which is institutionally bound to the Council of Europe comprises all member states of the Council of Europe plus a number of non-European states. According to Hoffmann-Riem<sup>84</sup> the Commission has provided effective guidance where politics and law converge.

The Venice Commission exerts its influence via the issuing of opinions which are soft law from a legal perspective. Via identifying best practices<sup>85</sup> by a comparison of the law in different states and developing benchmarking systems the Commission exerts its influence. The Commission draws its inspiration from the ECHR the human rights document of the Council of Europe. The members of the Commission are appointees seconded to it by the member states<sup>86</sup>.

Yet they function as individuals and are not accountable to the member states that second them. The European Union Agency for Fundamental Rights was established in 2007 following the second round of EU Eastern enlargement. Its mandate is to provide the EU its institutions and the member states with expertise relating to fundamental rights in order for them to respect those very rights<sup>87</sup>.

With this mandate the agency is not unique but has been emulated by more than 40 countries across the world<sup>88</sup>. This has been done due to the insight that protection of fundamental rights by national courts alone would fall short of full and effective implementation of those rights. Moreover the UNGA has called upon its member states to establish independent human rights organisations which function as counterparts to national authorities<sup>89</sup>. Van Bogdandy also rightly notes that the agency is designed to protect fundamental rights not human rights which seems to hint at the connection of the agency with the CFR the EU Charter of Fundamental Rights.

<sup>84</sup> Hoffmann-Riem, W. (2014). The Venice Commission of the Council of Europe—Standards and Impact. *European Journal of International Law*, 25(2), Page 579

<sup>85</sup> *ibid.* Page 581

<sup>86</sup> *Ibid.* Page 582

<sup>87</sup> Von Bogdandy, A., & Von Bernstorff, J. (2009). The EU Fundamental Rights Agency within the European and International Human Rights Architecture: the legal framework and some unsettled issues in a new field of administrative law. *Common Market Law Review*, 46(4), Page 1035

<sup>88</sup> *ibid.* Page 1036

<sup>89</sup> *ibid.* Page 1036

The involvement of both the agency and the Venice Commission in the European Commission's assessment of the degree of violation of Art.2 TEU values in the EU member states re-enforces the idea that human and fundamental rights protection in the EU draws upon a multitude of human rights documents and legal traditions. This again underlines the nature of the EU as a heterarchical judicial system wherein competences are vested with different institutions and governmental levels without being clearly delineated.

Acknowledging this institutional meshwork it seems useful to look at how the agency and the Venice Commission practically assess the state of fundamental rights, democracy and the rule of law in their respective member states.

The consent of the EP is *conditio sine qua non* if any action under Art.7 TEU is to have success. It is therefore worthwhile to focus on the standpoints the EP has published whenever it deemed a rule of law crisis to be present in a member state of the EU. In its resolutions 2015/2700 and 2015/2935 the EP suspected a systemic deterioration in the rule of law and fundamental rights to be taking place in Hungary. In particular a deterioration of the freedom of expression and academic freedom, deteriorations of the rights of migrants, asylum seekers and refugees the rights of people belonging to the Roma, Jewish and LGBTI communities, decreased independence of the judiciary and the debate about the reintroduction of capital punishment in the Hungarian criminal code were decried.

In decriing as it (EP) calls it the overall trends of the deterioration of the rule of law and fundamental rights in Hungary the EP also calls upon the Commission to do more and in particular to activate the first stage of its rule of law mechanism and start an in depth monitoring process of the rule of law, democracy and fundamental rights in Hungary. The EP does not preclude the possibility of an activation of Art.7.1 TEU. Yet the EP fell short of drafting a reasoned proposal which would have triggered an Art.7 TEU procedure.

In its resolution 2016/2774 the EP decried the non-publication of judgments handed down by the Constitutional Tribunal and the dispute concerning the composition and functioning of the Tribunal in Poland. Moreover the EP decried the changed public media law in Poland which in the eyes of the EP gave rise to concerns as to whether freedom of expression and media freedom were respected.

Whereas the EP has taken nuanced positions on the situation of rule of law and fundamental rights in Hungary and Poland and has been calling for escalatory steps in the rule of law mechanism by the Commission, the European Commission has officially started its informal rule of law mechanism in the case of the situation of rule of law in Poland which

could ultimately result in actions being taken under Art.7 TEU the Council's 'position' can be described as roaring silence.

On the 27th of July the European Commission adopted a rule of law recommendation on the situation in Poland in which it set out its concerns and how these could be addressed. The European Commission explicitly invited the Polish government to implement the judgements rendered by the Constitutional Tribunal on the matter of the shortened mandates of the President and Vice-President of the Constitutional Tribunal. Part of the judgement was also the decision by the Constitutional Tribunal that those three judges nominated for vacant seats by the previous government were entitled to their seats in the Constitutional Tribunal. The European Commission set Poland a time limit of three months to comply with the Art.2 TEU values. Failing this the European Commission explicitly hinted at the possibility of having resort to the Art.7 TEU procedure.

On the 21st of December 2016 the European Commission discussed the latest developments taking place in Poland. While the European Commission acknowledged some progress on the issue debated in July it also concluded that some issues had not been addressed and some new issues had arisen between July and December. The European Commission again invited Poland to act upon these issues and set a new time limit of two months. The European Commission once again hinted at the possibility of an Art.7 TEU procedure this time also mentioning that the EP or one third of the member states could also initiate an Art.7 TEU procedure.

#### **4.4) Scope of Art.2 TEU**

Apart from the question of what Art.7 TEU has been designed for and where it stands in the EU legal system it is equally important to look at what the Art.7 TEU mechanism has been designed to protect. Art.7 TEU makes explicit mention of the values referred to in Art.2 TEU. So what do the values of democracy, rule of law and fundamental rights actually mean beyond what they say what they mean?

The legal mechanism of Art.7 TEU has been identified as a tool of a militant democracy situated at the supranational level that has been supposed to guarantee those principles where national institutions fail to do so<sup>90</sup>. Yet in this approach lies the inherent danger that the EU as a supranational organisation is highly politicised and might seek to impose upon unpleasant countries its ideas of what the values of Art.2 TEU actually mean<sup>91</sup>.

<sup>90</sup>        ibid. Page 73

<sup>91</sup>        ibid. Page 73



It follows that in order to forgo this danger techniques that very much ensure objectivity and impartiality need to be developed.

An idea that has been suggested but also discarded very quickly was to benchmark the performance of the different EU member states in the areas of democracy, rule of law and fundamental rights. Benchmarking does define ideal standards and measures performance of member states by how far these states approach the ideal model<sup>92</sup>. This is however not meant to imply that there can be no criteria for evaluating whether a state lives up to the values defined in Art.2 TEU.

Contrarily to statements made by the Hungarian government that EU enforcement of its foundational values is by necessity ideologically preoccupied by the willingness to protect liberalism, is an unjustified commingling of liberalism as a political ideology and liberal democracy as a system of government<sup>93</sup>.

Moreover a claim that has been made to delegitimize the control of liberal democratic principles by the EU in its member states has been to blur the line between normal deviations that result from the different constitutions of the member states and political systems that are no longer compatible with the values referred to in Art.2 TEU.

Referring to the difference developed in the German Basic Law between the concepts of homogeneity and congruity implies that for the EU as well the challenge is to set standards that allow for homogeneity despite continuing differences between the member states.

In fact there is not a lack of information regarding the state of implementation of liberal democratic principles in the EU member states as international organisations including the Council of Europe and non-governmental organisations provide for a plethora of information<sup>94</sup>. Reliance on Council of Europe information meaning the Venice Commission however seems increasingly unavailable since the CJEU in opinion 2/13 argued that the autonomy of EU law requires the EU to pursue its objectives in the EU framework<sup>95</sup>. Beard et al. attach high importance to the accessibility, the intelligibility, the clarity, the predictability of the law as the foundations of the rule of law<sup>96</sup>. Yet of the three democracy, fundamental rights and the rule of law the last seems to be the most vague of the notions.

<sup>92</sup>       ibid. Page 74

<sup>93</sup>       ibid. Page 74

<sup>94</sup>       ibid. Page 76

<sup>95</sup>       ibid. Page 77

<sup>96</sup>       ibid. Page 82

In terms of measuring non-compliance with the liberal democratic principles several core difficulties exist. While it is important to screen the laws of a country in order to detect deviations from the core liberal democratic principles the factual reality in a country may speak a language different from the letter of the law<sup>97</sup>.

Yet monitoring of a state and the judgments made by its courts can be sluggish and fail to detect illiberal or undemocratic developments in due time and therefore make it impossible to oppose a trend. This could lead to 'fait accompli' undermining the protection of Art.2 TEU values<sup>98</sup>.

Despite these difficulties of assessing the 'true' degree of non-compliance of a member state with the values of Art.2 TEU and the inherent dilemmas and trade-offs of any one approach, it remains to be said that the triggering of Art.7 TEU and thus accordingly the protection of Art.2 TEU is ultimately up to the member states and the EP which are highly politicised institutions and may choose to exert their Art.7 TEU rights regardless of what an assessment of compliance with Art.2 TEU values would actually result in.

It needs to be stressed that invoking Art.7 TEU is not a task of the CJEU which decides in matters of infringement and annulment procedures. Yet it would be premature to dismiss the relevance of structured approaches towards the protection of liberal democratic principles in the EU member states altogether. If not the legal coherence then still the political solidarity does hinge on a sense of neutrality in the conduct of the Art.7 TEU procedure.

While in the German legal-political system there seems to be a rather stable consensus of what homogeneity of Länder constitutions actually implies and this has resulted in high stability of liberal democratic principles in the Länder of Germany, the EU approach seems to lack a coherent understanding of what the homogeneity of its member states in terms of liberal democratic principles means even though Art.2 TEU seems to formulate a goal of political homogeneity. The conflicting positions of the national level and some of the statements made by the EU level institutions serve to demonstrate the disagreement between the EU institutions and some of the nation states. In the UN the 'bill of rights' is not even binding on all its member states whereas in the EU Art.2 TEU binds all member states.

<sup>97</sup>        ibid. Page 86

<sup>98</sup>        ibid. Page 88

#### **4.5) Risk of violation of Art.2 TEU**

According to Schwarze Art.7.1 was added to enable the EU to make a separate determination of the risk of a clear breach by a member state of the values referred to in Art.2 TEU. Schwarze argued that with the FPÖ having become a part of the Austrian government the existing mechanism for sanctions had become inadequate to react appropriately to the new situation. In 2000 the EU-14 adopted 'sanctions' against the Austrian government.

The suspicion of the EU-14 was that the Austrian government while having committed no serious breaches of the values of Art.2 TEU the fear was that at some point in the future that might be the case. Core of the 'sanctions' was that "the governments of the fourteen member states will not promote or accept any official bilateral contacts at political level with an Austrian government integrating the FPÖ" and that there would "be no support for Austrian candidates seeking positions in international organisations".

These measures were from a legal point of view not EU 'sanctions' but bilateral sanctions agreed upon by the EU-14 which some other states also joined. After a few months following an expert review of the human rights situation in Austria. In the first place Art.7.1 TEU has been intended to have a warning function for states that might be about to seriously violate the values of Art.2 TEU.

In this sense Art.7.1 is deemed to be of preventive nature even though its activation is not a necessary precondition for determinations made on the basis of Art.7.2 TEU. The key risk of this provision is that it is essentially about the future. This requires the relevant EU institutions to make predictions of the future of liberal democratic values in a member state. Therefore it must be unambiguous that a continuation of a present situation would result in the state breaching the values of Art.2 TEU.

#### **4.6) Analysis and conclusions**

The material and procedural requirements necessary to allow for the triggering of Federal Execution respectively the Art.7 TEU procedure seem to be very similar in that both require the involvement of the legislative and executive branches of government. This implies that in both the Federal Republic of Germany and the EU a decidedly political process is foreseen when acting against a constituent part of the legal system.

In terms of the procedural requirements the EU has higher thresholds than the Federal Republic of Germany. In particular Art.7 TEU requires the consent of the EP whereas the federal parliament is not required for exercising Federal Execution in the German system. Also in the organs of the governments of the Länder respectively the EU member states namely the Federal Council respectively the EU council the voting thresholds are higher in the EU system where unanimity is required as opposed to the Federal Council where merely an absolute majority is required.

In this context it seems useful to me to broaden the strictly legal perspective and allow for the consideration of some third factors that might seem irrelevant for explaining the requirements for a triggering of the sanctioning mechanisms but might actually shed some light on the real requirements. As has been shown previously within the EU system Art.2 TEU is sufficiently vague to allow for various interpretations of it. Moreover there are no precedents and the reference back to the Austrian situation from 2000 is also very vague in its reasoning.

Sedelmeier undertook to analyse possible factors that might influence a member state's inclination to support the use of sanctions under the Art.7 TEU procedure<sup>99</sup>. Since the Art.7 TEU procedure has never been triggered Sedelmeier had to rely on the positions taken by the EP in its resolution concerning the situation in Hungary and in particular its new constitution<sup>100</sup>. The government of Hungary at that time was a conservative government whose party was and continues to be organised in the EPP.

Sedelmeier found that ALDE, Greens, S&D and the United Left supported the possibility of sanctions whereas EPP and ECR were against and EFP abstained. In the case of the situation in Romania which had a left-wing government the EP fractions of EPP, ALDE, Greens and S&D considered the possibility of sanctions<sup>101</sup>. For Sedelmeier these findings are proof of the fact that a combination of partisan politics and weak normative consensus constrain the use of the Art.7 TEU sanctioning mechanism<sup>102</sup>. Those fractions which had a strong preference for European Integration would support the use of sanctions irrespective of ideological closeness to the party in government in the state which is to be sanctioned. Those fractions which did not have a strong preference for European Integration

<sup>99</sup> Sedelmeier, U. (2014). Anchoring democracy from above? The European Union and democratic backsliding in Hungary and Romania after accession. *JCMS: Journal of Common Market Studies*, 52(1), p.110

<sup>100</sup> *ibid.* Page 110

<sup>101</sup> *ibid.* Page 111

<sup>102</sup> *ibid.* Page 112

sanctions if at all would only be supported against states with a government that is ideologically relatively distant to itself.

To me Sedelmeier's findings resonate well with the current handling of the situation in Poland. In fact in a more recent study from 2016 Sedelmeier found that the EPP supported resolution 2015/3031 which expressed its concerns about democracy and the rule of law in Poland<sup>103</sup>. The current Polish government's party is part of the AEER.

With regards to the UN it can be said that different from the EU and the Federal Republic of Germany, the UN whilst it has monitoring institutions such as the Human Rights Committee these institutions are not integrated into a legal framework that would enable sanctions for member states that act contrarily to the UN 'bill of rights'. Later in this work it will be shown that while the Human Rights Committee and its likes are not integrated into a human rights or rule of law enforcement mechanism, this does not mean that human rights and liberal democratic principles play no role in the exercising of UN institutions. However the ways by which violations of the UN Charter and the UN 'bill of rights' become applicable are manifold. The dispute settlement mechanism, seeking a ruling by the ICJ or other specialised courts, referring an issue to the UNSC and self help are but a few ways of how violations of liberal democratic principles can be remedied. Ultimately those international organisations will make considerations about whether liberal democratic principles might have been violated by the UN member states wherefore they will need to have ideas about what constitutes violations of liberal democratic principles and what does not constitute violations of liberal democratic principles. Yet since this thesis is based on the legal scheme of the EU treaties functional equivalents were to be found for each of the steps of the legal scheme of Art.7 TEU. The legal requirements (material and procedural) to take action against constituent parts against EU member states are codified in detail as they are in Germany, in the UN however the absence of clearly codified requirements for enforcing liberal democratic principles against the member states has led me to decide not to include more about how the actual enforcement mechanisms in the UN work in this chapter.

To me it seems that more important for assessing the nature of Art.7 TEU than the material requirements for enforcing liberal democratic principles against member states respectively Länder in the UN and Germany are the procedural requirements. Whereas an extensively codified catalogue of liberal democratic principles might for some legal scholars

<sup>103</sup> Sedelmeier, U. (2016). Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure. *Journal of European Public Policy*, Page 7

point to the broad scope of protected rights and values it seems to me that an extensively codified catalogue of liberal democratic principles to me this could be rather a sign of a weak legal community in which a common understanding of basic rights and principles is rather shallow and requires to be remedied by means of extensive legal provisions. Through this lens Art.28 Basic Law and Art.2 TEU seem to hint at high trust between the members of the two legal communities. This does however not imply that an absence of an equivalent to Art.2 TEU is a sign for a legal community with blind trust between the members with regards to liberal democratic principles. In fact it could make more sense to understand the lack of a homogeneity clause as a sign for there being no integrated legal community with regards to liberal democratic principles at least in the case of the UN.

The presence of clear cut procedural requirements for enforcing liberal democratic principles different from the presence of material requirements indicates that a multi-level legal community has moved from the common proclamation of liberal democratic principles to a 'living' understanding of those principles. Yet since a minimal material definition of liberal democratic principles is necessary for there to be procedural requirements to protect them the UN can not be regarded as having a 'living' integrated understanding of liberal democratic principles. However as could be seen before, a set of more loose principles and considerations guide the governance of liberal democratic principles in the UN hence it makes sense to further analyse UN governance of liberal democratic principles in this work. In fact also in the EU a homogeneity clause has not always been part of the Treaties. For the EU's beginnings it can be said that while there were references to human rights these were also loose. Thus looking at the UN as a legal system for the governance of liberal democratic principles, which is only in the early phases of its evolution it can be useful to understand the origins of EU enforcement of liberal democratic principles.

With regards to the third sub-question of this research it can be said that the more inclusive an organisation is the higher will be the material requirements in order to enforce liberal democratic principles against a constituent part of the system. Accordingly the EU occupies a middle ground between Germany and the UN when it comes to the strictness of the material requirements posed by a homogeneity clause be it explicit as in Germany or the EU or more implicit as in the UN. However in terms of the procedural requirements the EU is the strictest when it comes to the enforcing the liberal democratic principles by the use of the 'nuclear option'. This might seem at first to be a bit counterintuitive since it could be reasoned that the actual requirements for using Art.7 TEU are a function of both the strictness of the material and the procedural requirements. Particularly telling is thus the comparison with the UN. Whereas the EU has high ambitions with regards to liberal

democratic principles it is a dwarf in actual enforcement. Another way of putting it might be to say that the EU functions more like a fair weather project in the area of liberal democratic principles whereas the UN unambitious as it may look like needs to be reckoned with if the UNSC which is made up of less than 10% of the UN member states decides to act on an issue.

## **5) Measures permissible against constituent parts**

This section will deal with the measures foreseen in the context of taking action against the constituent parts of the legal-political system. An analysis of the measures permissible against the entities of the lower level of government can be useful in order to gain insights on the rigidity with which fundamental liberal democratic principles are defended in the different legal-political systems. Thus this chapter will concentrate on analysing the fifth sub-question of my research question which has been formulated as follows: **What measures are permissible against constituent parts in the context of invoking Art.7 TEU respectively its equivalent provisions in Germany and the UN?**

### **5.1) Measures permissible when exercising Federal Execution**

Maunz et al. state that the measures that can be taken by the German federal government in cases of federal execution are not generalisable<sup>104</sup>. The basic idea is that the federal government freely chooses the measures it regards as appropriate meaning that the federal government enjoys considerable discretion in the choice of the measures<sup>105</sup>. However according to Jarass and Pierot punitive measures are not available to the federal government as are measures that would not be in line with the constitution<sup>106</sup>. Moreover measures taken by the federal government must not go beyond what is necessary. Excessive measures including the dissolution of the land which violated federal obligations are not permissible<sup>107</sup>.

What is typically considered as admissible intervention by the federal government is execution by substitution meaning that the federal government or a third party, commissioned by the federal government executes the federal obligations of a land that has

<sup>104</sup> Maunz/Dürig/Klein GG Art.37 Rn.9, beck-online Rn.9.1

<sup>105</sup> *ibid.*

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid.*

failed to act in accordance with them<sup>108</sup>. Alternatively a federal commissioner may also temporarily take over state powers in place of the land including a temporary right to legislate for that state. The use of federal police in the concerned land is also seen as legitimate means of making a land comply with its federal obligations<sup>109</sup>. Beyond and below the threshold of the use of force or execution by substitution financial and economic pressure also qualify as permissible measures for federal execution<sup>110</sup>. What is not permissible however are shutdowns of länder borders limiting the free movement of people and goods in the country. Additionally a takeover of the judicial branch of government in the land would be unconstitutional as it would conflict with Art.97 Basic Law. A suspension of a Land's voting right in the Federal Council is also not permissible<sup>111</sup>.

## 5.2) Measures in the UN permissible against the member states

In the United Nations and its predecessor the League of Nations there have been extensive debates about the question of how to hold states accountable to international law. A common way of distinguishing measures targeted at states which are deemed to act in violation of international law are peace respectively war measures. According to Vitzthum and Proelss the basis for assessing whether a state is acting contrarily to its obligations is to test whether that violation can be attributed to the state<sup>112</sup>. In particular state responsibility in 2001 has been codified in the draft about Responsibility of States for Internationally Wrongful Acts.

This draft was adopted by UNGA resolution 56/83<sup>113</sup>. The essential elements for a state to act wrongfully internationally according to Art.2 of Responsibility of States for Internationally Wrongful Acts are attributability and breach of an international obligation of the state.

Since the act does not have the legal character of a multilateral convention it merely codifies international customary law. Stakeholders in this legal relationship are both the state to whom an act of violation of international law can be attributed as well as the state party on whom the violation of international law inflicts a damage. Alternatively the legal obligations of

<sup>108</sup> ibid.

<sup>109</sup> ibid. Rn.9.2

<sup>110</sup> ibid. Rn.9.2

<sup>111</sup> ibid. Rn.9.4

<sup>112</sup> Vitzthum, W., & Proelß, A. (Eds.). (2016). *Völkerrecht*. Walter de Gruyter GmbH & Co KG. Page 528

<sup>113</sup> UN General Assembly, *Responsibility of States for internationally wrongful acts: Resolution adopted by the General Assembly, 28 January 2002, A/RES/56/83*, available at: <http://www.refworld.org/docid/3da44ad10.html> [accessed 27 February 2017]



a state may also exist against the international community as a whole. State responsibility need not necessarily result from a state's violation of another state's rights but might also result from a violation of the rights individuals may enjoy under international law<sup>114</sup>.

Under international customary law violations of international law are attributable to a state always when any organ of that state acts contrarily to international law. However violations of international law committed by individuals are beyond the scope of state responsibility<sup>115</sup>.

The legal consequences for a state acting contrarily to international law are the obligation to repair the damage it has inflicted and in case of impossibility of restoration financial compensation<sup>116</sup>. In case a damage has been inflicted upon individuals the claims for compensation can only be made by the state to whom the affected individuals belong<sup>117</sup>.

Apart from reparation and compensation the legal consequences of state responsibility encompass the possibility of holding individuals accountable to international criminal law. In order for this to happen criminal liability needs to be based upon a violation of internationally protected legal goods, individual accountability needs to be clearly determined and there needs to be broad consensus about the crimes in the international community<sup>118</sup>.

In principle the UN charter does not in detail prescribe how states are to solve their disputes arising from their different perceptions of what international law provides for in their situation. Art.33 of the UN Charter however does mention a number of alternative means to deal with disputes such as negotiation, enquiry, mediation, arbitration and judicial settlement. Moreover Art.34 UN Charter does give the UNSC the right to investigate any dispute for the purpose of maintaining international peace and security. Art.35 UN Charter gives any member state to refer a situation or a dispute to the UNGA or to the UNSC. Art.37 UN Charter asks parties to a dispute to refer to the UNSC if all other alternatives from Art.33 UN Charter are exhausted.

The international dispute settlement can be traced back to Art.2.3 UNCH which calls upon member states to peacefully resolve international disputes. In fact the international dispute settlement is a specification of Art.33 UN Charter. In 1982 the UNGA adopted resolution 37/10 also known as the Manila Declaration which spells out the obligation of all

114      ibid. Page 529

115      ibid. Page 534

116      ibid. Page 537

117      ibid. Page 537

118      ibid. Page 541

states to resolve disputes peacefully. Ever since peaceful settlement of disputes constitutes a basic principle of international relations. Peaceful settlement may thus be reached via diplomatic consultations, proceedings involving third parties, settlement of disputes before courts of arbitration and dispute settlement before the ICJ.

A heavily disputed instrument of dispute settlement is the use of sanctions under international law. Sanctions are typically such means that have been designed in order to impose upon states, costs of various kinds be they financial, economic, diplomatic or something different. The idea behind sanctions is to change the calculus of a state and make them reassess the benefits it might have as a result from a violation of international law and the costs it faces for this violation. In legal terms the character of sanctions is difficult to determine.

Some international relationship experts argue that sanctions are primarily an instrument of self help and the effectiveness of sanctions hinges upon the relative power of the sanctioning state or group of states. The problem with sanctions as a means of self help is that there is no independent third party who may impose sanctions. Consequently it has been noted that sanctions and the sanctionable acts are difficult to delineate since there are no criteria for the imposition of sanctions and sanctions themselves might constitute unlawful behaviour under international law.

Membership sanctions meaning sanctions limiting or annulling the rights of a state that result from its membership in an International organisation constitute a special part of international law. The United Nations Charter regulates the suspension of membership rights in two ways. According to Art.19 of the Charter states which are deemed to be in delay of their financial contributions for two annual fees can be denied the voting right in the UNGA. Moreover in cases in which the UNSC approves measures against a member state it may be losing its voting rights.

As opposed to other types of sanctions membership sanctions seem to be less a means of self help but rather of ensuring legal principles that are deemed to be foundational for an international organisation or indeed any political system.

In fact I understand membership sanctions as any sanctions that are applied to a state acting in violation of its international obligations for which it is responsible and for which it will lose rights that flow from its membership in that (international) club after a decision has been made in accordance with the rules of that organisation to suspend the rights of the responsible member state.

As of 21st February six UN member states were in arrear with their payment contributions namely Cape Verde, Libya, Papua New Guinea, Sudan, Vanuatu and Venezuela. In line with Art.19 UN Charter the UNGA in resolution 71/2 decided to suspend the voting rights of these states until the end of the 71st session<sup>119</sup>. Back in 1974 the UNGA in resolution 29/3207 called upon the UNSC to review the relationship between the UN and South Africa on grounds of violations of the Charter and the Universal Declaration of Human Rights with the implicit goal of excluding South Africa from the UN. However the UNSC did not adopt a number of draft resolutions cast in subsequent sessions due to the negative votes of three permanent members of the UNSC namely the UK, the UK and France. Other than the case of South Africa no question of possible membership suspension on grounds other than arrears in payments have reached the voting stage in the UNSC. However in 2005 Israel called for the expulsion of Iran from the UN which however was not successful<sup>120</sup>.

### 5.3) Measures under Art.7 TEU

According to Besselink the question of what kind of sanctions Art.7.3 TEU mandates has received little attention so far. In general Art.7.3 TEU talks about the suspension of rights of a member state as they derive from the application of the treaties to that member state. This is first to imply that any measure which would have irrevocable effects on the state in question are not permissible. Otherwise Art.7.3 TEU might just have talked about an annulment of rights rather than a suspension.

Yet the rights of natural or legal persons do not form an absolute barrier to the imposition of sanctions<sup>121</sup>. Art.7.3 TEU merely obliges the council to take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. Moreover Art.7.3 TEU explicitly does not limit the availability of sanctions *ex ante*, but expressly allows for sanctions that suspend rights as they derive from the application of the Treaties to the member state. Since natural and legal persons derive their EU rights from the membership of their home state in the EU those rights would not be off limits for sanctions under Art.7.3 TEU<sup>122</sup>.

<sup>119</sup> UN General Assembly resolution 71/2, Scale of assessments for the apportionment of the expenses of the United Nations: requests under Art.19 of the Charter (7 October 2016)

<sup>120</sup> BBC News (27 October 2005) available on [http://news.bbc.co.uk/2/hi/middle\\_east/4382594.stm](http://news.bbc.co.uk/2/hi/middle_east/4382594.stm)

<sup>121</sup> Besselink, L. F. (2016). The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives. Page 9

<sup>122</sup> *ibid.*

In its Bosphorus judgment the CJEU also argued that sanctions with the objective of ending massive violations of human rights justified substantial interference with fundamental rights of persons who are not responsible for the violations<sup>123</sup>. Accordingly fundamental rights violations justify fundamental rights violations. In some respect this is only consequential as the competence of for example national police forces is to hold up respect for the law. For this mission it has a monopoly of violence.

Besselink finds a suspension of a member state from the application of the European Arrest Warrant to be a permissible sanction under Art.7.3 TEU. Moreover Besselink makes express mention of the possibility of suspending EU funding to the member state in question<sup>124</sup>. Most significant however is the suspension of voting rights in the council. Actually the suspension of voting rights in the council is the only sanction explicitly provided for in Art.7.3 TEU. In this respect the TEU notably differs from the Basic Law which prohibits the suspension of voting rights of Länder in the Federal Council. However Art.19 of the UN Charter also provides for the suspension of membership rights such as voting in the UNGA provided that a state is in arrears in the payment of its financial contributions to the UN. However a suspension of voting rights is not foreseen for other violations of international law.

It seems to me that this difference marks a fundamental difference between the way the EU system is operating and the German federal context. Whereas the EU represents a community of sovereign states that have pledged to follow the path towards an ever closer union, they still retain an exit card which is even officially spelled out in Art.50 TEU. The German system however is one that has been designed more or less for eternity and binds the Länder irrevocably towards one another.

It seems to be against the principle of democracy to suspend the voting rights of an EU member state in the council but the idea may just have been to change the calculus of that state and make it assess the possibility of leaving the EU altogether. In that sense a suspension of voting rights may just be a broad hint that the member state is no longer desired in the club unless it changes its illegal behaviour. In the German federal context however federal execution in the first place has not been designed to express whether a land is 'liked' as a part of the federal system or not but to ensure that federal obligations are fulfilled to the letter of the law. Whereas a suspension of voting rights in the Federal Council would undoubtedly increase pressure on that land this measure might yet fail to make the

<sup>123</sup>        *ibid.* Page 9/10

<sup>124</sup>        *ibid.* Page 8/9

land reassess its calculus as to whether it should go on violating its federal obligations in the case of a state being really determined to have its way.

It seems to me then that the German system is fully fledged meaning it does provide for all sorts of sanctions in order to ensure federal obligations by the länder are fulfilled which finds its best expression in Art.37 Basic Law that mandates the federal government to do what is necessary whereas Art.7.3 TEU avoids such a statement and limits sanctions to suspensions of rights as they derive from the application of the treaties to the member state. In the EU system a state seriously determined to have its way may then have its way. However the German and the EU system also have in common the idea that sanctions should be without irreversible consequences. This speaks to the fact that both the German and the EU system have been designed for loyal cooperation and the protection of common fundamental values in the first place and not for the assertion of parochial national interests.

#### **5.4) Proportionality**

According to Schwarze in deciding upon sanctions against member states on the basis of Art.7.3 TEU the EU institutions are obliged to adhere to the principle of proportionality<sup>125</sup>. This is the case despite the clear vagueness of Art.7.3 TEU when it comes to deciding upon sanctions. Surely it is within the discretion of deciding upon whether and if so which sanctions to impose upon the state in question. Yet this discretion must not be abused<sup>126</sup>.

For a sanction to be proportionate it must first of all be necessary<sup>127</sup>. Logically a sanction is not necessary whenever a state in question addresses the assessments, opinions, recommendations issued by the European Commission or the reasons that have led the EU institutions to activate Art.7.1 TEU to the satisfaction of the EU and returns to a path that is fully in coherence with the values formulated in Art.2 TEU.

Only where a state continues to go down the path that has been criticised by the EU institutions are sanctions regarding the suspension of rights as they derive from the Treaties of the EU justifiable.

<sup>125</sup> Schwarze, J. (2012) EU-Kommentar Page 142

<sup>126</sup> *ibid.*

<sup>127</sup> *ibid.*

Moreover the principle of proportionality implies that more severe breaches of EU law warrant more severe sanctions<sup>128</sup>. Thus it would amount to a breach of the principle of proportionality if breaches of Art.2 TEU values of different severity were lumped together and all punished by the suspension of voting rights of the member state in the Council. Furthermore the intentions and efforts made by the state in question in order to correct their path need to be taken into account by the EU institutions<sup>129</sup>.

Looking at proportionality with a broader perspective reveals that in fact proportionality is in fact one of the key principles of EU law. According to Sauter in any legal order where no law is absolute, proportionality meaning the weighing of different rights and principles against one another is the gold standard of constitutional adjudication<sup>130</sup>. For Sauter in particular the interference of the individual interest the value of satisfying the public interest and thirdly whether the importance of satisfying the public interest can justify the detriment of the individual's right<sup>131</sup>.

In the context of this research thus the decision by the Council and the EP to impose sanctions on a member state will have to be guided by an assessment of the member state's right to have its choice of the ordering of constitutional principles, by the EU's legitimate interest to uphold the community of values claimed in Art.2 TEU and the assessment of if and how an interference with the member state's individual right to its own constitution could help restoring the cohesiveness of EU member states' liberal democratic principles.

Other than the doctrines of direct effect and primacy of EU law the principle of proportionality stems from national legal traditions. Originally associated with the constitutional review of public acts in a time of an ever increasing public power of the social state, proportionality in the context of the EU came alongside the constitutionalisation of EU law whose authority came to include ever wider policy areas.

Sauter argued that in fact proportionality should be understood as a counterpart to the doctrines of direct effect and primacy of EU law<sup>132</sup>. Different from those principles the function of proportionality would be not to widen EU level competences but to put limits on the application of EU law and to provide a basis for balancing an increasing density of EU rights and principles.

<sup>128</sup> *ibid.*

<sup>129</sup> *ibid.*

<sup>130</sup> Sauter, W. (2013). Proportionality in EU law: a balancing act?. Page 3

<sup>131</sup> *ibid.* Page 3

<sup>132</sup> *ibid.* Page 6

Thus particularly with the emergence of fundamental rights as a sort of EU competence as a reading of Art.7 TEU in conjunction with Art.2 TEU could suggest, the principle of proportionality serves as a useful counterweight to a possibly too encroaching EU.

### **5.5) Analysis and conclusions**

Having looked at the measures permissible under each Federal Execution, the Art.7 TEU procedure and the sanctions regime of the UN it is striking that the Art.7 TEU procedure from my point of view actually mandates much more intrusive sanctions than does Federal Execution.

In the same manner it is surprising that in the UN the sanctions regime allows for measures to be taken that are even more intrusive into the national sovereignty of its member states than is the case in the UN.

In particular this finding seems to contrast with the letter of the law of Art.37 Basic Law and Art.7 TEU. Whereas the Basic Law mandates the Federal Government to do what is necessary in order to restore compliance of a member state with its federal obligations Art.7 TEU merely provides for the opportunity to suspend rights of a member states flowing from the EU Treaties.

A closer look at the legal commentary and academic literature however revealed that the reality is a little more complex. Whereas Art.7 TEU explicitly allows for the suspension of voting rights in the council of ministers the legal commentary on Federal Execution rejects equivalent measures taken against a Land.

For me this supports the idea that the EU in the first place remains an international organisation founded primarily on its member states and not so much on the citizens of Europe or the states thereof. According to Koh international law is never law<sup>133</sup>. From a realist perspective 'EU law' is actually about 'international law' and therefore not actually law in the original sense of the word.

With the EU understood as an international organisation and not as a federal system the idea of self-help which features so prominently in the realist tradition of international relations theory becomes relevant. Self-help, in the absence of a central authority which would be capable of enforcing the EU law and in particular Art.2 TEU thereof, is left as the only option for states to secure their interests in an international organisation.

<sup>133</sup> Koh, H. H., Chayes, A., Chayes, A. H., & Franck, T. M. (1997). Why do nations obey international law?. Page 2602

Thus where there is no central authority that could be called upon to act wherever a member state acts contrarily to the values enshrined in Art.2 TEU equally there is no central authority that a member state accused of violating Art.2 TEU principles could call upon to prevent action from being taken by the EU institutions against itself.

There would be either one central authority that both parties to a conflict could call upon to act or there would be no such central authority. Thus where there is no ultimate arbiter membership rights are subject to power plays between the different states and the EP in part.

In the federal system of Germany however measures suspending the voting rights of a Land in the Federal Council are ruled out by the legal commentary. However in the German federal context execution by substitution and the temporary takeover of the state powers in place of the land by a Federal Commissioner are permissible. This goes strongly against the logic of the nature of sanctions in the EU context where these measures are not foreseen by Art.7 TEU.

This points to the fact that under international law states enjoy almost unlimited sovereignty and therefore execution by substitution or the deployment of an EU commissioner would be a grave violation of that principle. To me it seems that just as the nature of 'law' the nature of 'rights' in the Federal German and the EU context is markedly different.

In the EU system the term of 'rights' of member states is closely connected to their right of sovereignty and right for non-interference of outside actors. On the other hand their right of participation in the EU system does not weigh that heavily and accordingly this is the area where sanctions can unfold their effect.

In the German system however while there is a clear division of competences between the federal and the state level, the right of sovereignty and right for non-interference of actors outside the land will have to accept intrusions by the federal government in case of a violation of federal duties.

However the lack of a mandate to suspend voting rights of a Land in the Federal Council speaks to the fact that in the German system participation and democracy are given higher priority than the right not to have anyone interfere with a state's policies.

It seems for me that any legal-political system has to make a choice via which means it intends to uphold its basic principles. Were that not the case and were sanctions off the table anyway there would be no means for a political system to uphold its values.



According to Stein there is a trilemma in the compatibility of globalisation, democracy and sovereignty. Stein claims that no more than two out of these three are feasible for any one state<sup>134</sup>.

While Stein has made his case arguing this trilemma in the sphere of economic integration it seems to me that a similar case can also be made with regards to liberal democratic principles.

Stein argued that in a world of growing economic interdependence and integration with a simultaneous expansion of the number of (electoral) democracies within a system of sovereign states that are each organised as (electoral) democracies soon irreconcilable tensions between the three principles of globalisation, democracy and sovereignty would emerge<sup>135</sup>.

Within a globalised system of sovereign states not organised according to the principles of democracy the aggregate created welfare resulting from a division of labour between countries would create win-win situations with aggregate welfare rising for all nation states.

Yet where sovereign states are organised on the basis of democracy the preferences of the median voter rather than the aggregate extra welfare for nation states decides whether economic integration is in the interest of a particular country. Thus rather than merely engaging in economic integration which by definition increases aggregate national welfare economic integration between a group of countries requires the preference of the median voter in each country to be in favor of economic integration which is a very high hurdle. In fact the height of the hurdle from my point of view depends on the number of states engaging in economic integration and the difference of the preferences of the median voters between the countries with more countries (*ceteris paribus*) and more diverse preferences (*ceteris paribus*) reducing the chances of mutually agreeable integration.

For the purposes of my research this trilemma needs to be modified a little. Firstly there could be a political system where there is a genuine fundamental rights regime in both the higher and the lower political level. In this case however there could be no democracy meaning that the policy area of fundamental rights protection is insulated from politics.

Secondly there could be a political system where there is a fundamental rights regime at the lower level of government and this fundamental rights regime is not insulated

<sup>134</sup> Stein, A. A. (2016). The great trilemma: are globalization, democracy, and sovereignty compatible?. *International Theory*, 8(02), Page 299

<sup>135</sup> *ibid.* Page 298

from politics. However in this case there could be no genuine fundamental rights regime at the higher political level.

Thirdly there could be a fundamental rights regime at the higher political level which is not insulated from politics. Yet in this case the lower level could not have its own fundamental rights regime.

It is important here to stress that for Stein in the situation of the great trilemma the three basic alternatives in reality political systems need not be perfectly match the three ideal types. More importantly Stein argued that there could not be a continued simultaneous increase of all three basic characteristics of a political system. This means that where two of the three qualities are (improved) increased there would necessarily be a trade-off in the third quality.

In the EU both in the member state constitutions as well as the EU primary law the foundations of a fundamental rights regime can be found. In deciding how to apply its fundamental rights as formulated in Art.2 TEU against its member states the EU according to Art.7 TEU requires an involvement of the Council and the EP two of the EU's principle legislators and democratic institutions.

Accordingly it looks as if the EU actually managed to square the circle of globalisation, sovereignty and democracy. Here it needs to be remembered however that a political system need not necessarily be one of the three ideal types in the sense of Stein. Rather it makes sense to look at the possible trade-offs.

Was there instead of a unanimous vote required in the Council, merely a requirement for an absolute majority the procedure of Art.7 TEU would become much more 'democratic'. Yet then there would most likely be many more determinations of violations of liberal democratic principles committed by the member states simply because the hurdle for such a determination was lower. Moreover this would contribute to a substantial Europeanisation of fundamental rights regime politics. However in that case the capacity of member states to autonomously decide on their fundamental rights regime would markedly shrink. In other words their sovereignty would shrink.

If however a determination pursuant to Art.7.2 TEU was incumbent on some third actor like the Fundamental Rights Agency whose purpose it is to remain insulated from politics this would either shrink the democratic element of the EU or the sovereignty of the nation state depending on whether the nation states remained sovereign with regards to fundamental rights or whether the EU continued to be a fundamental rights organisation. If

Art.7 TEU was abolished this would shrink the EU's identity as a human rights organisation. Yet this would allow sovereign member states to democratically choose their fundamental rights regime.

With regards to sanctions that brings me back to the initial findings of my comparative analysis.

Where there is a system with a relative lack of sovereignty of member states (Länder) there are most likely to be sanctions targeting the inner functioning of that state (Land). These states are likely to experience substantial interference by the higher level in their internal affairs.

This seems to be the case for Germany. Where there is a relative lack of democracy in a political system sanctions are most likely to affect the external functioning of a state in that particular system. Where there are sovereign states with competences to regulate fundamental rights sanctions are unlikely to occur.

With regards to the fourth sub-question it can thus be said that it generally makes sense to distinguish between two dimensions of measures that can be taken to enforce liberal democratic principles against a constituent part of a multi-level governance system namely those that target the internal functioning of that part and those that target the functioning of that part in the legal community that which it is a member of. The EU different from the UN and Germany has chosen to target the functioning of that state in the community that it is a member of. For me this points to the fact that the EU puts a particular emphasis on the sovereignty of its member states and the 'Europeanisation' of the liberal democratic principles laid down in Art.2 TEU. On the other hand this points to the fact that the EU is not democratic in governing liberal democratic principles.

## **6) Judicial Review**

This section will deal with the possibilities for judicial review against measures taken by the higher level of government against the lower level of government. Especially the possibilities for judicial review on both procedural and material grounds will be the focus of this chapter. Analysing and comparing the different possibilities for judicial review available in the different legal-political systems can be helpful in making statements about the degree of legalisation of the legal-political systems of this research. Thus this chapter will revolve

around the sixth sub-question of my research question namely: **What is the role of courts in the Art.7 TEU procedure and its equivalents in the German and the UN system?**

### **6.1) The possibilities of judicial review in the context of Federal Execution in Germany**

Federal Execution can be remedied before the FCC by the Land against which Federal Execution is used. On the basis of Art.93.1.3 Basic Law the Land may initiate a federal-state dispute before the FCC. Only after the Federal Government has received the consent of the Federal Council may Federal Execution pose a danger to rights of a land and hence only then becomes justiciable<sup>136</sup>. Judicial review can be initiated both on procedural and material grounds<sup>137</sup>.

This means that the concerned Land may go before the FCC if the Federal Government did for example initiate Federal Execution before it got the consent of the Federal Council which would constitute a breach of the essential procedural requirements. Moreover the Land may remedy the decision by the Federal Government to use Federal Execution if it thinks it did not act contrarily to its federal obligations.

Yet the measures that the federal Government chooses to use in Federal Execution are beyond remedy<sup>138</sup> since it is the discretion of the Federal Government to choose which means it applies. Merely in the case of grave mistakes in using its discretion may the measures become justiciable<sup>139</sup>. Federal Execution may only last as long as there is the consent of the Federal Council. As soon as the consent of the Federal Council is revoked Federal Execution must end<sup>140</sup>.

### **6.2) The possibilities of judicial review in the UN**

Beginning after the end of the cold war in the 1990s the UNSC which had hitherto remained deadlocked over key issues of international security because of the ongoing bloc confrontation became more active in adopting resolutions aimed at upholding respectively restoring international peace.

<sup>136</sup> BeckOK GG/Hellermann GG Art. 37 Rn. 13

<sup>137</sup> Von Mangoldt, H., Klein, F., & Starck, C. (2010). *Kommentar zum Grundgesetz*, Bd. 2. *Aufl.* München. Page 1018

<sup>138</sup> *ibid.*

<sup>139</sup> *ibid.*

<sup>140</sup> *ibid.* Art. 37 Rn. 8-8.4

The increased UNSC activities had serious repercussions for the constitutional nature of the United Nations. The question arose as to who would be the ultimate guardian of UN 'law'<sup>141</sup>. According to Akande the question as to whether the ICJ is entitled to declare not applicable acts adopted by the UNSC is of utmost relevance. Judicial review into the substance of UNSC acts would be tantamount to a far reaching constitutionalization and legalization of the international system<sup>142</sup>.

The UN Charter does not provide for an explicit hierarchy of the two principal organs of the UN. Famously in the Nicaragua Case the ICJ opined that different from the relationship between the UNSC and the UNGA the relationship between the UNSC and the ICJ does not provide for a clear demarcation of competences. Particularly the UNSC would exercise political functions whereas the ICJ would remain limited to judicial questions<sup>143</sup>.

Whereas this assertion of the ICJ remained without real conflict between itself and the UNSC the Lockerbie case gave real substance to the potential clash of the two UN organs<sup>144</sup>. The competences of the UNSC find their legal limits in the UN Charter. In accordance with the prevailing legal view the principle of interpreting international treaties on the basis of the original intent of the parties provides some clarity on what the UNSC was mandated to do.

At Dumbarton Oaks several states which were to become signatories to the UN Charter expressed their concerns with the lack of codified legal limits to the powers of the UNSC. However the UNSC finds some legal limits to its competences in Art.24 UN Charter which mandates it to act in accordance with the principles of the Charter<sup>145</sup>.

A more realist approach towards the competences of the UNSC has been suggested by Kelsen who argued that the supreme mandate of the UNSC would be to uphold international peace as opposed to international law which he does not regard as identical. In fact rather than being subject to law the UNSC could be considered a maker of law though only in limited situations<sup>146</sup>. Beside being bound by the UN Charter the UNSC also seems to be bound by other sources of international law.

International jus cogens are those norms of the international order that are found on top of the hierarchy of international norms hence UNSC decisions violating jus cogens would be without effect<sup>147</sup>. In particular Bosnia argued in the Bosnia Genocide Convention case that the UNSC decision to impose an arms-embargo on Bosnia would be tantamount to the UNSC assisting in the commission of genocide in Bosnia<sup>148</sup>. This line of reasoning resonated with some of the judges as the ICJ as well as The Organization of Islamic States and a few other countries. Consequently those states which regarded the arms embargo as illegal continued their deliveries of arms to Bosnia.

141 Akande, The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?. Page 309/310

142 *ibid.* Page 312

143 *ibid.* Page 313

144 *ibid.* Page 314

145 *ibid.* Page 315/316

146 *ibid.* Page 318

147 *ibid.* Page 322

148 *ibid.* Page 322

Another limitation to the UNSC competences may be found in international human rights law the most important source of which being the international bill of human rights<sup>149</sup>. Indeed the UNSC has for example refrained from taking such measures to uphold international peace that would grossly violate human rights such as starving people of particular countries to death<sup>150</sup>.

Having found out that indeed the UNSC is subject to international law and in its actions is bound by a variety of sources of international law and that clear demarcation lines between the powers of the UNSC and the ICJ have not been codified leads me to believe that the United Nations very much is a heterarchical legal system where both ICJ and UNSC refrain from ceding to the other the ultimate competence of who is to act in which situations. Much as in the EU system 'sovereignty' seems to be legally vested with both the UNSC and the ICJ.

Importantly the ICJ never acts on its own initiative but always is called upon to act. Wherever states disagree on the interpretation or applicability of international law including UNSC resolutions as in the Lockerbie and Bosnia cases the ICJ will give an advisory ruling. Given the ICJ reserves a right to declare not applicable decisions made by the UNSC raises the question of what legal consequences such a declaration of no applicability would actually have.

Accordingly Art.59 of the statute of the court provides for binding force only in the states party to the dispute and only for the case in question. An act adopted by the UNSC can not be declared void<sup>151</sup>.

Over the recent years the UNSC has been challenged ever more not only by the ICJ but notably also the Court of Justice of the European Union. In the Kadi case the CJEU was asked in a legal procedure brought forward by Mr. Kadi to annul Council Regulation (EC) No 881/2002 which was designed to implement UNSC Resolution 1267 which provided for the freeze of assets of Mr. Kadi. The CJEU overruled the General Court and declared Council Regulation (EC) No 881/2002 to be incompatible with the constitutional foundation of the EU part of which are human rights. Explicitly the CJEU argued that even though UNSC resolutions enjoy supremacy in the EU legal order this supremacy is only of a relative nature and finds its limits in the constitutional principles of the EU.

This judgement also served to show that the obligation of the UNSC to abide by human rights standards is of real substance and if regional players such as the EU deem it to be acting contrarily to this principle the EU reserves for itself the right not to apply the UNSC resolution in question..

Together with the opposition to the arms embargo by The Organisation of Islamic States in the Bosnia case this might give rise to the assumption that states or regional organisations do in fact check the legality of UNSC resolutions before applying them.

For me all these instances serve to show that rather than being a fully fledged hierarchical legal system the exact competences of the UNSC and the potential for judicial review remain very much uncharted territory and subject to intense political and legal negotiations.

### **6.3) Judicial Review of acts taken on the basis of Art.7 TEU in the EU**

149                   ibid. Page 323

150                   ibid. Page 324

151                   ibid. Page 334

Having discussed the material and procedural requirements that provide for the possibility of action taken pursuant to Art.7 TEU it is worthwhile to examine the possibilities of judicial review that would allow a decision taken on the basis of Art.7 TEU to be challenged before the CJEU. According to Art.269 TFEU the CJEU has limited powers of review regarding the suspension of rights deriving from the application of the Treaties to a state.

A decision that has been taken on the basis of Art.7 TEU can be reviewed merely on grounds of a breach of the procedural requirements spelled out in Art.7 TEU. Judicial review can not cover the question of whether a member state actually has acted contrary to Art.2 TEU. This is exclusively up to the Council and the EP to decide.

According to Dreier judicial review on the ground of a breach of an essential procedural can only be conducted where such acts entail legal consequences. In particular the recommendations made by the Council to the member state do not fall within the reach of judicial review of the CJEU<sup>152</sup>. Acts taken on the basis of Art.7.1.1, Art.7.2 and Art.7.3 TEU fall within the scope of review of the CJEU<sup>153</sup>.

It seems to be logical that recommendations by the Council addressed to the member state fall outside the scope of Art.269 because rather than being a sanction in itself for the member state it gives the member state in question the right to address those recommendations.

In fact these recommendations seem to constitute an essential procedural requirement without which a challenge on the basis of Art.269 TFEU may be promising. Yet the requirements regarding the recommendations that precede determinations of (risks of) serious breaches of values as formulated in Art.2 TEU on the basis of Art.7.1 respectively Art.7.2 are not spelled out directly.

Here it seems to me that two compelling arguments can be made. The proponents of a broad reading of Art.269 TFEU would set a high threshold for recommendations in order for them to contribute to a fair procedure of assessing the use of Art.7.1 and Art.7.2 TEU. Proponents of a narrow reading of Art.269 TFEU however would find that the protection of Art.2 TEU must not be unduly prolonged. To me a narrow reading of Art.269 TFEU seems more justified.

While it seems true that Art.7 TEU provides for the chance of a member state to be heard on its charges it needs to be borne in mind that ultimately the high contracting parties have opted to restrict judicial review to procedural questions and a broad reading of Art.269 TFEU would have the potential to introduce judicial review on material grounds through the backdoor.

Such a broad reading seems to go against the spirit of Art.269 TFEU. Yet a clear line between procedural and material requirements is not always easy to draw. Schwarze argues that in fact by the nature of Art.269 TFEU some limited form of material review would be introduced through the backdoor anyway. Schwarze argues that the recommendations made by the Council should be reflected in the ultimate decision that is taken meaning that a state accused of breaching or being at risk of breaching Art.2 TEU should be sanctioned on those charges that were initially held against it in the recommendations<sup>154</sup>.

<sup>152</sup> Schwarze, J. (2012) EU-Kommentar, Page 2252

<sup>153</sup> *ibid.*

<sup>154</sup> *ibid.*

This interpretation does remove the possibilities of testing determinations made on the basis of Art.7 TEU on material grounds. It merely requires the EU institutions to be consistent in their acting thus making the EU decisions traceable. Merely the member state against which legal action is taken on the basis of Art.7 TEU is permissible as claimant before the CJEU.

Art.269 TFEU stipulates that a request for judicial review of legal acts taken on the basis of Art.7 TEU has to be made within one month from the determination. According to Art.269 TFEU the CJEU will decide on this request within one month of receiving a request for judicial review. Having taken legal action on the basis of Art.7 TEU against a member state against which either no appeal has been filed or has been filed successfully the question remains what is to happen to the determinations made on the basis of Art.7 TEU if the member state adjusts its behaviour in line with the recommendations made by the Council.

It seems that this question is partly answered in Art.7.4 TEU. Acting by a qualified majority the council may decide to vary or revoke measures taken on the basis of Art.7.3 TEU. The requirement of having a qualified majority in the council to vary or revoke sanctions taken under Art.7.3 TEU seems to suggest that there is no requirement for the EU to regularly assess whether the grounds on which it has enacted those sanctions are still persistent<sup>155</sup>.

Rather a political approach seems to have been chosen. If and when there is a qualified majority in the Council sanctions may be varied or revoked. This is a right but not an obligation of the Council. Yet Schwarze perceives this lack of obligation to reassess the necessity of enduring sanctions to be in tension with the requirement of Art.4.3 TEU which stipulates that member states act in a spirit of loyal cooperation.

For me however a duty to reassess the situation in the sanctioned member state in a certain time frame does not make sense. The Council will address a changed situation in the member state whenever it deems necessary. A legal requirement to reassess its position on sanctions would yield the same results as when there was no legal requirement. However Art.7.4 TEU remains silent on the issue of how determinations on the basis of Art.7.1 and Art.7.2 TEU would be withdrawn.

One reading would be that wherever sanctions, taken on the basis of Art.7.3 TEU, are rescinded a determination taken on the basis of Art.7.2 TEU would become void as well. This reading would regard the cancellation of sanctions as tantamount to there no longer being systemic breaches of Art.2 TEU by the sanctioned member state. This reading would presuppose that only if and when the violation of Art.2 TEU by a member state discontinued, would the member states be willing to rescind their sanctions. However a case in point can also be made against such a reading.

The contracting parties clearly distinguished between a determination of a serious and persistent breach of the values of Art.2 TEU as provided for by Art.7.2 TEU and the decision taken by qualified majority in the Council on basis of Art.7.3 TEU that sanctions are imposed against a member state. It seems that the contracting parties did not want a mandatory link between Art.7.2 and Art.7.3 TEU. Yet even if this line of argument were to be right that if sanctions were to be rescinded the determination on basis of Art.7.2 TEU would continue the question would remain how then a determination on the basis of Art.7.2 TEU could be revoked. Art.7 TEU remains silent on this question.



Undoubtedly there would have to be possibilities to revoke such a determination since otherwise there would be no way for a member state to have acknowledged by the EU that its behaviour changed. Thus it seems logical to me that neither does a cancellation of sanctions automatically warrant the discontinuation of the determination taken on basis of Art.7.2 TEU nor that such a determination can never be revoked.

In fact it seems only logical to me that a cancellation of a determination made on the basis of Art.7.2 TEU does warrant a separate determination of the Council. This seems logical to me since sanctions could be tentatively rescinded by the council to show good faith with the sanctioned member state and a willingness to go a first step much in the spirit of loyal cooperation as spelled out in Art.4.3 TEU.

A requirement to rescind the determination alongside with the sanctions would drastically reduce the chance of showing goodwill because this would preclude the possibility of sanctions snapping back if a qualified majority decision is reached in the Council.

Thus the question arises whether such a decision would have to be made on the basis of unanimity or whether qualified majority would suffice. It seems to be self evident that where a decision has been made by unanimity it would have to be rescinded also by unanimity. Yet this could be an impossibly high hurdle to clear. In fact the necessity of revoking a determination taken on the basis of Art.7.2. TEU by unanimity would leave the sanctioned member state at the mercy of any other member state. A requirement to merely have a qualified majority would prevent such a situation. Yet if that were to be the case the question would remain why then a lower threshold were to be set for the revocation of an act than the implementation of that very act. Actually such a reading would perhaps have much wider legal implications concerning all other EU acts that have been adopted by unanimity.

The same theoretical point can be made with regards to revoking a determination based on Art.7.1 TEU. Yet this question seems to be much more of theoretical importance only since it seems not to have more than a declaratory function. In the end there is no evidence that would support the idea of a lower threshold for revoking a determination made on the basis of Art.7.1 and Art.7.2 TEU.

Yet the member states could choose when invoking sanctions to put a time limit on sanctions thus allowing for discontinuation of sanctions if the deadline is not postponed by a decision made by unanimity. In fact this is proposed by Schwarze<sup>156</sup> when he argued that reasonably the Council could be asked to engage with the question of sanctions again after a certain time period. That is why it seems most coherent to assume unanimity in the council as requirement to revoke a determination made on the basis of Art.7.2 TEU.

This demonstration has shown that once legal action has been taken on the basis of Art.7 TEU there remains little leeway for judicial review. First and foremost Art.7 TEU is a tool for policy making that allows the EU institutions to act with a large scope of discretion. Judicial review does ensure a minimum of cohesion in the process of triggering Art.7 TEU but does not get in the way of decision making. In fact power of review is not merely resting with the Council but crucially with the member states who are essentially veto players.

When comparing the possibilities for judicial review in the UN, Germany and the EU in cases of conflicts between different levels of government on issues of liberal democratic principles in the constituent parts of those systems it can be seen that all three systems provide for some sort of judicial review.

<sup>156</sup> Schwarze, J. (2012) EU Kommentar Page 142

Yet it can also be seen that neither in the EU nor the German legal system Art.7 TEU respectively Art.37 Basic Law have ever been invoked. Accordingly acts adopted on those legal bases could never be subject to judicial review. The same case can be made for the UN where resolutions adopted by the UNSC in order to promote or uphold the international peace have never been overruled by the ICJ, the principal judicial organ of the UN.

Even though the CJEU overturned the Kadi case and declared void a Council Resolution (EC) to implement a UNSC resolution this can not be regarded in the strict sense as an example of judicial review since the CJEU only has a mandate to interpret EU though crucially not UN law. Explicitly the CJEU decided on the basis of EU human rights rather than the international bill of human rights.

Yet important differences between the different legal systems can be perceived. Whereas the German legal system in Art.93.1.3 Basic Law explicitly provides for judicial review of Federal Execution both on material and procedural issues, Art.269 TFEU explicitly limits judicial review to procedural matters. The United Nations Charter does not make mention of judicial review of UNSC resolutions at all yet it falls short of naming the UNSC the ultimate arbiter of UN law. Moreover several legal scholars hold that the UNSC explicitly is subject to international law the task of interpretation lying with the ICJ rather than the UNSC itself.

It seems that the more state-like a political system is the more it provides for opportunities of judicial review. The rationale would be that the clearer a legal system circumscribes the rights and obligations of states in a federal system and the more those states shift their sovereignty to the higher legal level the more they have to enjoy legal protection by a functioning legal system that provides checks and balances to the higher political level. One could argue that diminished political power in multi-level systems necessitates increased legalisation of a system in order to make it viable. How else could it be explained that short from commanding a state acting in contradiction to Art.2 TEU Art.7 TEU merely provides for some possibilities of exerting pressure. Yet Art.7 TEU largely escapes judicial review on material grounds. Anyway this must remain a (strong) hypothesis since in other federal states Federal Execution may be non-existent and therefore also its review.

#### **6.4.) Analysis and conclusions**

After a careful analysis of the judicial review mechanisms available in Germany, the EU and the UN against sanctions applied against the member states respectively Länder it seems useful to me to discuss in more depth the structural factors influencing the inclination of the courts to conduct judicial review with one outcome or another.

In legal theory there are various methods of legal interpretation. According to Savigny most common are the grammatical (or textual), the historical, the systematic and the teleological interpretation.

According to the Vienna Convention on the Law of Treaties the text of a treaty provision is instructive for deciding cases. Deviations from this approach are only foreseen under exceptional circumstances such as where this would lead to a result which is manifestly absurd or unreasonable (Art.32).

Beyond the commonly acknowledged ways of interpreting the law, which do not necessarily involve the attitudes and values of the judges in another dimension the

possibility of judges acting on the basis of their own values becomes an important means of analysing the functioning of a particular court.

Three main types of judicial decision making models can be usefully distinguished. In the legal model of judicial decision making basically assumes that judges make their decisions based on the rules of the law alone and leave out of consideration any personal convictions they might have.

In the attitudinal model of judicial decision making solely the values and convictions of judges are decisive rather than the rules of the law. In the strategic model of decision making judges do act on the basis of their personal convictions within legal constraints. Thus the strategic model is some form of middle ground between the attitudinal and the legal model of judicial decision making.

Moreover beyond methods of legal interpretation and the role of values and convictions vis a vis the role of the law the broader political and institutional context might play a role in how judicial decision making is actually made.

Segal argued that rather than acting in a vacuum the Supreme Court of the United States, if it wished to be an effective policy maker, assuming that the Supreme Court has a political agenda, meaning it is driven by the attitudes of its judges, the Supreme Court had to be concerned with the preferences of Congress<sup>157</sup>.

The separation-of-powers-model dates back to the works of Marks who made the case for understanding judicial decision making of the Supreme Court through the lens of separation-of-powers games. In particular the court is driven by both a desire to make judgements that are in its interest as well as a desire not to have its decision overturned<sup>158</sup>.

Three players are distinguished in Segal's separation-of-powers game namely the Court, the legislature and the gatekeeping committee whose task it is to decide which bills with which amendments reach the floor of one of the two houses of parliament<sup>159</sup>.

Where the court's decision falls between the preferences of the gatekeeping committee and the legislature the court's ruling will not be overturned<sup>160</sup>. Where the court's decision does not lie between the preferences of the legislature (hereinafter meaning the median member of Congress) and the gatekeeping committee and the court's decision is further away from the preferences of the legislature than are the preferences of the gatekeeping committee, the gatekeeping committee will bring in a proposal according to its preferences and the legislature will vote in its favour and overturn the court's ruling<sup>161</sup>. Where the Court's decision does not lie between the preferences of the gatekeeping committee and the legislature but the Court's decision lies closer to the legislature's position than does the gatekeeping committee's position, the gatekeeping committee will shift its position towards that of the legislature until the new proposal in the eyes of the legislature becomes preferable to the court's decision and the court's decision is overturned<sup>162</sup>.

Yet as Larsson and Naurin argue judges of international courts are uncertain of and concerned with the political reactions to their judgments. They do not know the true preferences of the agenda setters and the decision makers since both of these play their own games and try to reach an equilibrium that is as close as possible to their real position.

<sup>157</sup> Segal, J. A. (1997). Separation-of-powers games in the positive theory of congress and courts. *American Political Science Review*, 91(01), Page 29

<sup>158</sup> *ibid.* Page 29

<sup>159</sup> *ibid.* Page 29

<sup>160</sup> *ibid.* Page 29

<sup>161</sup> *ibid.* Page 29

<sup>162</sup> *ibid.* Page 29

In order to reach this the actors could have an interest in making unclear their true positions and red lines<sup>163</sup>.

In order to assess judicial decision making in the legal-political systems of Germany, the EU and the UN it is thus worthwhile to have a closer look at the most adequate models of judicial decision making models and based on that argue whether it is likely for these courts to act based on their own preferences and if this is the case in the specific institutional setting whether the courts are likely to successfully be able to have their decisions upheld.

In the case of the CJEU it needs to be stressed again that Art.269 TFEU merely provides for judicial review of acts taken under the Art.7 TEU procedure on procedural grounds.

In this sense the ability of the CJEU to exert its influence and push its position on the violation of Art.2 TEU by a member state is severely limited from the outset. Moreover since any act introduced pursuant to Art.7.2 TEU necessarily either has a positive outcome or a negative outcome and judicial review may only be initiated in the case of a unanimous vote by the Council plus the consent of the EP to determine a serious and persistent breach of the fundamental principles of Art.2 TEU, the median position of the 'legislature' meaning the council plus the EP is still in favour of determining a serious and persistent breach of the values of Art.2 TEU. In fact even the least supportive part of the 'legislature' still prefers a determination over a non-determination even if this part (one state, or parts of the EP) might not agree with the exact reasoning of the proposal brought forward by the 'agenda setters' in this case one third of the member states respectively the European Commission.

Where acts are adopted pursuant to Art.7.3 TEU this merely requires a qualified majority in the Council. Moreover there is no agenda setter or gatekeeping committee whose task it could be to table a proposal listing the sanctions against the member state.

Again it needs to be kept in mind that the CJEU only has the competence to deal with acts adopted under Art.7 TEU on procedural grounds however as has been shown before a hesitation on part of the council to set for example an expiry date for the sanctions it adopts might be regarded as a breach of the principle of proportionality and the requirement for loyal cooperation as formulated in Art.4.3 TEU.

In the case of the FCC it needs to be acknowledged first that it has the right of review in Federal Execution on both procedural and material grounds yet the measures adopted by the Federal Government almost completely remain beyond the possibilities of judicial review. Where the FCC is asked to review Federal Execution on procedural grounds it seems to me that it then will do that in a context that is in any case free of the limitations posed by a separation-of-powers game. The Federal Council and the Federal Government will take care not to breach procedural requirements anyway. A breach of procedural requirements seems to me to be usually rather a consequence of unintentional rather than intentional behaviour. Where the FCC is asked to judge on material grounds it seems to me that it has more leeway to rule unconstitutional the determination made by the Federal Council in collaboration with the Federal Government.

To me this seems to be the case because I do not see the FCC as an attitudinal court in the first place. When looking at the way judges are chosen for the FCC a remarkable difference to the system in the United States can be seen. Whereas in the United States

<sup>163</sup> Larsson, O., & Naurin, D. (2016). Judicial independence and political uncertainty: how the risk of override affects the Court of Justice of the EU. *International Organization*, 70(02), Page 378

according to Art.2 United States Constitution it is the right of the president to nominate judges to the Supreme Court and after having received the consent meaning a majority of the senate to appoint the judges in Germany according to Art.6 and Art.7 of the Law on the FCC two thirds majorities in either one of the houses are required in order to appoint a judge. This ensures that in Germany judges at the FCC can be expected to be much less partisan than at the Supreme Court in the United States.

The ICJ is composed of 15 judges who are each chosen for a nine year term. In order to be chosen judges require absolute majorities in both the UNGA and the UNSC. There is no de jure requirement for judges to come from specific countries. Yet since the founding of the ICJ the permanent members of the UNSC have always been represented by a judge from their country. Moreover there is a regional key assigning three seats to African states, two seats to Latin America and the Caribbean, three seats to Asia, two seats to Eastern Europe and five seats to Western Europe and other states.

Posner and De Figueiredo have undertaken to analyse whether there is some form of bias within the decisions of the ICJ. In fact they found there to be strong evidence that judges favor the states that appoint them and that judges favor states with a wealth level similar to their country of origin. Thus it seems that judges willingly or not do follow a certain not impartial agenda when making their decisions. Yet it seems to me that since judges tend to follow the position of the countries that appointed them this indicates that the position of the ICJ should be less distant from that of the UNSC than would be the case were there a truly balanced composition of the ICJ reflecting the actual realities of the world or if the appointment of the judges of the ICJ was not dependent on the confirmation by the UNSC.

With regards to the fifth sub-question it can be said that in Germany the FCC plays an important role in reviewing Federal Execution in the EU the CJEU plays less of an institutionalised role and in the UN the ICJ merely has advisory functions. Moreover the FCC seems to be the court with the least ambitions and least politicised court whereas the ICJ is due to its composition it most susceptible to partisan views. The CJEU seems to occupy a middle ground. From this it could be inferred that perhaps there is a correlation between the scope of competences given to courts and their need to behave less as a political actor. To say it differently teleological courts make more sense in a multi-level governance system that is in its early evolution. Yet having a teleological court does not necessarily mean that a court is particularly competent to adjudicate in a broad scope of issues. Something else may actually be a more adequate description of the role of courts in general and the CJEU in particular namely that the member states have an agenda for a deeper EU in some areas. Being faced with sceptical electorates conferring the task of being a pacemaker for integration to the CJEU might then help in circumventing political gridlock in some political areas. On the basis of this thought it seems to me that there is neither an open nor a covert agenda of deepening the governance of liberal democratic principles on the level of the EU in which the CJEU could play a role. Thus rather than acting as a teleological court the CJEU as a sort of notary that ensures the most basic rules of the Art.7 TEU procedure are respected. However since in general the CJEU is a very teleological court this hints once again at the fact that whilst liberal democratic principles are an important part of the EU's agenda the EU's main competence lies not in guaranteeing liberal democratic principles at least for states that have already become member states of the EU.

## 7) Conclusions

Having analysed all six sub-questions of my research question in depth it makes sense to take a step back and try to give an answer to the initial research question: **What does a comparison of the Art.7 TEU procedure with equivalent provisions in the German Basic Law and the international law of the United Nations tell us about the state of protection of liberal democratic principles in the EU against its constituent parts?**

This research could show that in fact all three legal-political systems the Federal Republic of Germany, the EU and the UN though to different degrees are legal-political systems based on human rights.

All three of these systems basically dispose of some kind of separation of powers at the higher level of government into a legislative, an executive and a judicial arm. In the case of the UN though this separation of powers is incomplete since the legislative and the executive powers are both vested in the UNSC.

The procedural requirements to take action against member states (Länder) are strictest in the EU, followed by the UN. In Germany though the procedural requirements are relatively lenient. However when it comes to the material requirements it seems as if there is a wider breadth of permissible deviation in the regulation and implementation of liberal democratic principles in the UN than there is in the EU. In the EU on the other hand there seems to be a wider spectrum of permissible deviation with regards to liberal democratic principles between the member states than seems to be the case in Germany.

With regards to the measures permissible against constituent parts it does not seem to be useful to order the measures in terms of severity. Rather the analysis revealed that sanctions between the different legal-political systems are of very different natures.

Whereas in the EU measures taken pursuant to Art.7 TEU impact on the rights of that member state flowing from the application of the EU Treaties to a member state, measures taken pursuant to Art.37 Basic Law impact on the inner functioning of a Land rather than their rights flowing from the application of the Basic Law to the Land. Measures taken in the UN framework against member states usually happen on an ad-hoc rather than

a structured basis since Art.2.3 UN Charter calls upon member states to peacefully resolve their disputes. Similarly what it is that is required to take action against constituent parts in the UN framework depends to a large degree on the assessments of the other member states. Unless a state is perceived to violate jus cogens or occasionally the ICJ is called upon to give its opinion on an interstate issue UN institutions have little to say about the disputes between its member states.

In the EU and the Federal Republic of Germany the judicial arms of government dispose of powers and are tasked with exercises that are roughly comparable. However when it comes to Art.7 TEU and Art.37 Basic Law the CJEU respectively the FCC have little to say about the choice of measures taken against a member state (Land) whereas they remain fully competent to review those acts on procedural grounds.

Interestingly neither in the EU nor in the Federal Republic of Germany the provisions of Art.7 TEU respectively Art.37 Basic Law have ever been applied against a member state (Land).

Only ever has an equivalent provision been used in the notoriously unstable Weimar Republic.

The use of sanctions against a member state (Land) in the case of violations of liberal democratic principles represents the most drastic decision that can possibly be taken. In the UN which is much less developed and ambitious in its institutional settings measures taken against a member state by the UN in general and the UNSC in particular frequently do cause severe international crises yet they did never lead to a total breakdown of the institutions of the UN.

There is however reason to believe that this could be different in the context of the EU and the Federal Republic of Germany. To me it seems that there could be in fact very diverse consequences ranging from the peaceful assertion of the higher level of government against the lower level of government over a peaceful dissolution of the legal-political system to a conflict- and perhaps violence-ridden struggle to keep the upper hand in such a dispute between the higher and the lower level of government.

Constitutional Pluralism has proven to be a promising path in the conduct of this research. Transcending traditional debates about the origins of sovereignty has allowed me to identify and analyse the quirks of legal autonomy in systems of multi-level governance. Yet this research has also shown that even a heterarchical account of sovereignty alone fails to represent how membership in a multi-level governance system is actually regulated and the homogeneity of the members of the club is ensured. In fact it could be shown that multi-level governance systems vary on a number of dimensions when it comes to ensuring

homogeneity. This is particularly obvious with regards to the type of measures that a club chooses to punish a misbehaving member for breaches of liberal democratic principles where clubs either opt for the internal or the external restraint of the rights of a member of the club. Also with regards to the function of the judiciary notable variations can be perceived. Whereas some legal systems are extensively juridified (the Federal Republic of Germany) other systems defy extensive legalization (the UN) partly due to the lack of a will to create a level playing field for all members.

This research was conducted in the awareness of its methodological limits. Since this research focussed merely on three systems of multi-level governance with only one pick for each of the three types of legal persons in international law (strictly speaking only two since the EU is an international organisation) this research could not analyse differences within the group of federal states respectively the group of international organisations. However the main purpose of this research was to perform a cross-level analysis taking into account a representative of the group of federal states, a representative of international organisations plus the EU.

For future research it could be useful to analyse the consequences of the application of mechanisms equivalent to Art.7 TEU with regards to the continued existence of both the higher and lower level of government. The case of the drastic transition from the Weimar Republic to the Third Reich but perhaps also the constitutional relationship between states and the Federal level of the US in the aftermaths of the US civil war and perhaps also the disintegration of the Warsaw Pact. Moreover it could be useful for future research to analyse in more detail differences within the group of federal states if one was to have an overview of what kinds of federal arrangements there are with regards to liberal democratic principles and which possible models there could be for the EU to more deeply integrate in the field of liberal democratic principles.

This research was not intended to focus on the consequences which a triggering of Art.7 TEU respectively its functional equivalent in Germany might have on the overall relationship between two levels of government but rather it was intended to focus on what it might be that could shape the question of if, under which circumstances and how the procedure of triggering Art.7 TEU would actually become reality.

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