



ALBERT-LUDWIGS-
UNIVERSITÄT FREIBURG

Institute of Public Law

The Stealthy Development of the Treaty on European Union into the Supreme European Constitution

**On the Consequences of the Dissolution of the Pillar
Structure of the European Union and of the Extension of
the Jurisdiction of the European Court of Justice to the
EU Treaty**

by

Professor Dr. Dietrich Murswiek

This is a slightly modified version of the original article
that is going to appear in German in the law journal
Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2009, No 8 (April)

© Dietrich Murswiek, 2009

This paper can be downloaded at
www.jura.uni-freiburg.de/institute/ioeffr3/forschung/papers.php

Papers and Preprints of the Institute of Public Law

April 2009

Professor Dietrich Murswiek, University of Freiburg*

The Stealthy Development of the Treaty on European Union into the Supreme European Constitution

On the Consequences of the Dissolution of the Pillar Structure of the European Union and of the Extension of the Jurisdiction of the European Court of Justice to the EU Treaty

The Treaty of Lisbon dissolves the pillar structure of the European Union. The provisions of the Treaty on European Union are thereby invested with the same supranational character which has hitherto been the sole preserve of the Treaty Establishing the European Community, and the jurisdiction of the Court of Justice of the European Union will therefore be systematically extended to the entire EU Treaty, as far as restrictions are not explicitly provided. Consequently, the basic values of the European Union will henceforth amount to a supreme Constitution for the whole of the Union, preordaining national constitutions, and the Court of Justice will also operate as a higher constitutional court, taking precedence over national constitutional jurisdictions, in matters relating purely to domestic constitutional norms. This amounts to a fundamental restructuring of the relationship between the European Union and the Member States. This revolutionary result of the Lisbon Treaty has not been noticed until now, and the only way to halt the process would be for those Member States that have not yet ratified the Treaty to formulate a reservation in accordance with international law.

I. Extension of Union Jurisdiction to the Constitutions of Member States

Sometimes it is enough to alter a single word to give a radically new meaning to an entire system of legal norms. This has happened in the case of the Treaty of Lisbon,¹ where, in various provisions on the jurisdiction of the Court of Justice of the European Union – particularly in Articles 258 and 259 of the Treaty on the Functioning of the European Union (ex Articles 226 and 227 EC) and in Article 267 of the TFEU (ex Article 234 EC) – the formula ‘this Treaty’ is to be replaced by ‘the Treaties’. The consequence of this amendment is that the Court will have comprehensive jurisdiction to find that Member States have failed to fulfil an obligation under the EU Treaty. This jurisdiction has hitherto applied to the EC Treaty, while in matters regulated by the EU Treaty the Court has a restricted sphere of competence, which is explicitly defined in the TEU itself. In future, the Court will have full jurisdiction to deal with infringements of either Treaty; only matters relating to the common foreign and security policy are largely excluded (Article 275 TFEU), while Article 276 TFEU also restricts the jurisdiction of the Court by prohibiting it from reviewing operations carried out in a Member State by the police or other law-enforcement services for the purpose of maintaining law and order and safeguarding internal security.

* The author is the Managing Director of the Institute of Public Law at the Albert Ludwig University of Freiburg (Germany). He is representing Bundestag Member Peter Gauweiler in the constitutional proceedings on the Treaty of Lisbon. This is a slightly modified version of the original article that is going to appear in German in the law journal *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 2009, No 8 (April).

¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1. In the following text, the TEU will be cited in the Treaty of Lisbon version unless the version currently in force – cited as the Nice TEU – is referred to explicitly.

This extension of the Court's jurisdiction does not appear particularly spectacular at all at first sight. It might merely be regarded as a consequence of dissolving the pillar structure of the European Union. It closes gaps in legal protection and enforcement, so how could anyone object to it?

The veritable revolutionary character of this extension of jurisdiction results from the fact that the European constitutional principles, by which the Member States are bound when they frame elements of their own constitutional order, will not only be obligations under international law in future but will also apply in the Member States as European constitutional law and be subject to the jurisdiction of the EU Court of Justice. These principles have so far been enshrined in Article 6(1) of the Nice TEU. Along with additional fundamental principles relating to the state and with principles relating to the organisation of society, all of which are now described as 'values', these original principles are now set out in Article 2 TEU, which reads as follows:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

These principles apply not only to the institutions of the Union but are binding in respect of the internal order of the Member States. The original version of this 'homogeneity clause' was inserted into the EU Treaty by virtue of the Treaty of Amsterdam.² The requirement that Member States' systems of government must be based 'on democratic principles' had already been laid down in Article F(1) of the TEU as established by the Maastricht Treaty of 1993. The primary purpose of including the homogeneity clause in the Treaty of Amsterdam was to enshrine in the Treaty the political criteria for the accession of new Member States.³ The provision is connected with the enforcement procedure prescribed in Article 7 TEU, which likewise became part of the EU Treaty by virtue of the Treaty of Amsterdam. This article was designed above all to convey an emphatic message to the prospective Member States in Central and Eastern Europe about the seriousness of the Union's commitment to the common constitutional principles.⁴

The fact that the European Union has laid down common constitutional principles for the Union and the Member States, then, is not an entirely new development. Previously, however, these principles could be regarded as political principles which were self-evident, or should be regarded as self-evident, for all Member States and which were politically enforced in the accession procedure and also later, if need be, by means of the enforcement procedure. The decision to initiate enforcement action is designed as a political decision, appeals against which may be made in respect of the procedural stipulations alone and may not be based on the substance of the decision (Article 46(e) of the Nice TEU, and in future Article 269 TFEU). Moreover, enforcement action may be taken only in the case of a 'seri-

² See Hilf/Schorkopf, in Grabitz/Hilf (eds.), *EUV/EGV*, Article 6 EUV (as updated in Jan. 2004), point 6.

³ Hilf/Schorkopf, *op. cit.* (see footnote 2 above), points 12 and 13 with further references.

⁴ Pechstein, in Streinz (ed.), *EUV/EGV*, 2003, Article 7 EUV, point 1.

ous and persistent breach' of the constitutional principles.⁵ Until now, judicial review of violations of constitutional principles by Member States in individual cases is not provided.

This will be changed by the Treaty of Lisbon. Because the jurisdiction of the Court is extended to the entire EU Treaty, an action for infringement of the Treaty may be brought against a Member State by the Commission under Article 258 TFEU or by another Member State under Article 259 on the grounds of an alleged breach of Article 2 TEU.

It is no defence to claim that infringement of the values listed in Article 2 is not justiciable on account of their indeterminate nature. This could apply at most to values named in the second sentence such as 'tolerance' or 'justice'. The values to which the first sentence refers, however, are constitutional principles which Member States' constitutions also contain and which are applied as standards for decision-making by national courts, especially national constitutional courts. There can be no argument against their being used by the EU Court of Justice as decision-making criteria.

What might be questioned is whether, with regard to Article 2 TEU, the enforcement procedure under Article 7 TEU takes precedence over judicial enforcement by the Court as the more special provision and whether it may be regarded as the final enforcement norm. The answer to these questions is 'no', for the enforcement procedure applies only to cases in which a Member State violates the fundamental principles seriously and persistently in such a way that the other Member States cannot reasonably be expected to endure its continued participation in the Community. It is not about cases in which a Member State fails to uphold one of the fundamental values in one specific instance but about those in which it unrepentantly and intransigently persists with its illegal conduct. The political character of the sanction options indicated in Article 7 TEU is also reflected in the fact that they are to be exercised at the discretion of the Council.⁶ For the sole reason that the persistency and seriousness of a violation of fundamental values is subject to political evaluation, there is logic in the conclusion that the Treaty should not provide for redress on the merits but only in respect of the procedural rules, as in Article 269 TFEU.⁷

For this reason it is not irrational that the enforcement procedure under Article 7 TEU and the legality test by the Court should coexist. Accordingly, commentaries on the existing legal situation have not objected in principle to the parallelism of infringement proceedings before the ECJ and the enforcement procedure, their sole grounds for rejection being that infringement proceedings have hitherto applied only to breaches of the EC Treaty but not of the EU Treaty.⁸ Ruffert⁹ rightly states that the

⁵ Since the Treaty of Nice entered into force, the new paragraph 1 which it inserted into Article 7 creates an 'early-warning mechanism' whereby recommendations may be made to a State even when there is only "a clear risk of a serious breach" of the principles.

⁶ The same point is made in the communication from the Commission on Article 7 TEU, COM(2003) 606 final, subsection 1.2.

⁷ This lack of redress is not without its problems, as is shown in section V below.

⁸ See Pechstein (footnote 4 above), point 14, and Schorkopf, in Grabitz/Hilf (eds.), *EUV/EGV*, Article 7 EUV (as updated in Jan. 2004), point 2.

⁹ Ruffert, in Ruffert/Callies (eds.), *EUV/EGV*, third edition (2007), Article 7 EUV, point 29.

purpose of infringement proceedings under Article 226 TEC (henceforth 258 TFEU) is to penalise concrete individual breaches of particular precepts of EU law, whereas the suspension procedure under Article 7 TEU is designed to safeguard the EU against a general deviation from its canon of values, which, by reason of its general nature – presumably Ruffert is contrasting such deviations with individual violations of specific values – is scarcely actionable by means of infringement proceedings.

Extending the jurisdiction of the EU Court of Justice to Member States' adherence to the values listed in Article 2 TEU has extremely far-reaching consequences. Whereas the 'values' (previously referred to as 'principles') have been regarded to date as norms which are enforceable only by means of political sanctions, with no judicial recourse to enforce compliance in individual cases, these values are now to be transformed into fully applicable legal obligations.

II. Degradation of National Constitutions into 'State Constitutions'

This transformation does not pose any problems to the extent that these values are, of course, intended to express a transnational constitutional consensus and ought to be taken for granted by every individual Member State. However much the values may be regarded as self-evident, the provision nevertheless virtually inverts the relationship between the Member States and the Union as far as the regulation of the Member States' internal constitutional order is concerned.

The point is that the Member States are competent to determine their own internal order. They govern their internal affairs by virtue of their sovereignty. The power to constitute the political order of each State lies with its people. The conversion of these fundamental principles, which have hitherto been binding in international law only, into supranational fundamental values that are to be binding and enforceable in Community law transfers the constituent power of the Member States to the European Union. The basic decisions regarding the political order of all Member States are to be governed by the EU Treaty. Peoples' exercise of their constituent power will now be limited to determining specific details in the same way as national legislatures still have a degree of leeway in the way in which they transpose European directives but must abide by the framework that the directives prescribe. Although Article 4(2) TEU states that the Union shall respect the Member States' "national identities, inherent in their fundamental structures, political and constitutional", this respect will naturally depend on Member States' continuing adherence to the values enumerated in Article 2 TEU.

The structure of the homogeneity clause corresponds to that of Article 28(1) of the German Basic Law,¹⁰ under which the German federal states (*Länder*) may enact their own constitutions but in so doing must adhere to the prescripts laid down in Article 28(1) of the Basic Law. That, indeed, is right and proper in a federation. Article 2 of the Lisbon TEU, however, reduces the Member States' national constitutions to the status assigned to state constitutions in a federation. By virtue of the homogeneity clause EU primary legislation assumes the function of an overarching European constitution. In the same way as the German Basic Law applies to all the German *Länder*, the supreme European Constitution will apply in future to all Member States of the European Union collectively and will also be judicially enforceable against them. Compared

¹⁰ The Basic Law (Grundgesetz, abbreviation: GG) is the name of the German Constitution.

with Article 28(1) of the Basic Law, indeed, Article 2 TEU has far more extensive effects, for Article 28(1) binds only the legislature and constituent authority of a *Land* but is not directly applicable in the *Länder*,¹¹ whereas Article 2 TEU is directly applicable in the Member States (for more details, see section IV below).

As long as the constitutional consensus among all the States of the EU and their peoples remains vigorous, this would not seem to be a practical problem. It must be remembered, however, that genuine constituent power will no longer lie with the Member States and that, because of the dependence of the Member States' constitutions on an overarching European Constitution, the European confederation of States will assume the structure of a federation, becoming a multilevel 'compound of constitutions'¹² with a core of constitutional law that applies not only to the Union but also directly to all the Member States.

A State's determination of its own constitutional structure is the nucleus of its sovereignty. If that nucleus is lost, the country can no longer be termed an independent sovereign State. Under the Lisbon Treaty, the only way in which Member States can regain their sovereign constituent power is by withdrawing from the Union. The right of withdrawal, which is enshrined in Article 50 TEU, is the sole distinction between the status of Member States *vis-à-vis* the European Union and that of the German *Länder* in relation to the Federal Republic. Given the extent to which the countries of Europe are already politically interdependent and economically integrated, the only purpose served by the right of withdrawal is to provide theoretical evidence substantiating the argument that the Member States are still sovereign. In practice, however, the supreme Constitution will always prevail over subordinate constitutions in any conflict, for adapting a national constitution to the European Constitution will invariably appear to be a lesser evil than withdrawal.

Regardless of whether the right of withdrawal actually has any practical relevance, the reduction of constituent power to the option of withdrawal is incompatible with the principle of sovereign statehood,¹³ for as long a Member State does not exercise the right of withdrawal,

¹¹ See, for example, Nierhaus, in Sachs (ed.), *Grundgesetz*, fifth edition (2009), Article 28, points 28 et seq. with further references.

¹² Paul Kirchhof, in Armin von Bogdandy (ed.), *Europäisches Verfassungsrecht*, 2003, p. 904 (with references), was able to demonstrate, in respect of the existing legal position, that a confederation of states (Staatenverbund) is not a multilevel compound of constitutions (Verfassungsverbund), since the member states of a confederation are each separately constituted, and their constitutions are therefore mutually independent.

¹³ On the principle of sovereign statehood as an immutable constitutional principle, and hence a limit on the transfer of sovereign powers to the European Union, see, for example, P. Kirchhof, in *Handbuch des Staatsrechts II*, third edition (2004), paragraph 21, point 84; idem, in *Europarecht*, 1991, supplement 1, p. 11 (13); Ranzelshofer, in Maunz/Dürig (eds.), *Grundgesetz* (as updated in Oct. 2008), Article 24(1), point 204; Herdegen, in *Europäische Grundrechte-Zeitschrift*, 1992, p. 589 (592); Murswiek, in *Der Staat*, 32 (1993), p. 161 (162 et seq.); Di Fabio, in *Der Staat* 32 (1993), p. 191 (199 et seq.); P.M. Huber, in *Thüringer Verwaltungsblätter*, 1994, p. 1 (2); Breuer, in *Neue Zeitschrift für Verwaltungsrecht*, 1994, p. 417 (423-4); Fink, in *Die Öffentliche Verwaltung*, 1998, pp. 133 et seq.; Streinz, in Sachs (ed.), *Grundgesetz*, fifth edition (2009), Article 23, point 84; Rojan, in von Münch/Kunig (eds.), *Grundgesetz*, Vol. 2, fifth edition (2001), Article 23, point 15 (with references); Clasen, in von Mangoldt/Klein/Starck (eds.), *Grundgesetz*, Vol. 2, fourth edition (2000), Article 23, point 4; Hillgruber, in *Handbuch des Staatsrechts II*, third edition (2004), paragraph 32, points 41 and 108; Isensee, in *Handbuch des Staatsrechts II*, third edition (2004), paragraph 15, points 30 et seq. and 196; Broß, in *Festschrift für Hans Hablitzel*, 2005, p. 55 (57-8 and 60). For opposing opinions see Scholz, in Maunz/Dürig (eds.), *Grundgesetz*, Article 23, point 63; Pernice, in Dreier (ed.), *Grundgesetz*, Vol. 2, 1998, Article 23, points 35 and 94;

its Constitution remains reduced to the status of a state constitution and is no longer a sovereign and non-delegated supreme constitution. As far as Germany is concerned, in this respect – and in others – the Treaty of Lisbon oversteps the limits on the transfer of sovereign powers defined in Article 23(1) of the Basic Law.¹⁴

Is there a valid counterargument to the effect that the development of international law has long since led to States subjecting themselves to international obligations regarding the framing of their domestic constitutions without this being regarded as a loss of sovereignty or a subordination of their constitutions to an overriding international constitution? It is true that many States have undertaken in international agreements to respect and guarantee human rights or even to uphold democratic principles within their own borders. Such commitments can be found in human-rights covenants such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and, above all, the European Convention on Human Rights. Particularly in cases where breaches of human rights are actionable before an international court such as the European Court of Human Rights, States parties have been disposed to roll back their *domaine réservé* quite considerably. Nevertheless, in all of the contractual constellations that exist at the present time, the obligations incurred by States with regard to their own constitutions remain obligations in international law, which do not affect the applicability and ranking of the national constitution. For example, the European Convention on Human Rights applies in Germany as a federal law by virtue of the relevant act granting parliamentary approval, but it ranks below the Constitution. The applicability of the ECHR, then, is without prejudice to the status of the Constitution.

The supranational applicability of the EU Treaty, by contrast, would supplant the validity of the national Constitution in the event of a conflict of norms because of the precedence of European law. This amounts to a far more profound legal effect than a mere obligation in international law. That Member States' constitutions should be subordinated not only in areas in which the European Union has legislative powers of its own but also in matters relating to the very structure of those constitutions is an unprecedented innovation.

III. Does the Fact that Consensus on Fundamental Values may be taken for granted Effectively render the Degradation of Member States' Constitutions Meaningless?

The subordination of national constitutions is not only a question of constitutional theory or of the theory of the state but has definite and far-reaching practical implications. The fact is that Member States will no longer take their own decisions on the interpretation of the basic principles that are now described as 'values', because the Court of Justice of the European Union will be responsible in future for delivering binding definitions.

Given that highly diverse requirements may be deduced from concepts such as democracy, freedom or the rule of law, depending on prior understanding and interpretation methods, the values

Hobe, in Friauf/Höfling (eds.), *Berliner Kommentar zum Grundgesetz*, Article 23, points 53-4; Zuleeg, in *Grundgesetz, Alternativ-Kommentar*, third edition (as updated in Aug. 2002), Article 23, points 51 et seq.

¹⁴ For a detailed treatment of the status of the constitution as a limit on the authority to engage in further integration, see Murswiek, in *Der Staat*, 32 (1993), pp. 161 (164-5).

enshrined in Article 2 TEU provide a lever with which the European Union can exert enormous influence on the shaping of the Member States' internal order. It may well be that these values were initially regarded by the Member States as a common minimal consensus, which they would have ample freedom to fine-tune as they saw fit. Anyone who has followed the practice of the Community institutions in dealing with other general clauses in the Treaties in past decades and has observed the way in which the European Court of Justice,¹⁵ in particular, has constantly broadened the powers of the EU institutions at the expense of the Member States through its expansive case law will be unable to trust the Court to tread warily with regard to the application of Article 2 TEU.

The topicality and practical relevance of these reflections is illustrated by the fact that the Commission recently expressed the view, in connection with the proceedings that were pending in Turkey for the proscription of the Justice and Development Party (AKP), that legal provisions allowing the proscription of a political party which pursued its objectives in a non-violent manner were incompatible with European democratic standards. Olli Rehn, the European Commissioner responsible for enlargement, intervened directly in the pending judicial proceedings, calling on Turkey to make the appropriate amendments to its legislation governing political parties and its Constitution.¹⁶ Applicants for accession to the EU cannot be expected to fulfil more onerous obligations than members of the Union. What Mr Rehn said in respect of Turkey amounts to his interpretation of Article 2 TEU (ex Article 6(1) of the Nice TEU) and already takes account of the right of Member States to preserve their national identity. If this view is taken to its logical conclusion, it follows that Article 21(2) of the German Basic Law infringes Article 2 TEU or at least requires a very restrictive interpretation to align it with European law – an interpretation that is contrary to the present understanding of its provisions. Article 21(2) of the Basic Law allows the proscription of a political party that seeks to undermine or abolish the fundamental principles of the Constitution. This even applies in cases where the party seeks to achieve its unconstitutional aims – the abolition of democracy, for instance – by non-violent means.

¹⁵ On the expansive case law of the ECJ, see, for example, Roth/Hilpold (eds.), *Der EuGH und die Souveränität der Mitgliedstaaten*, 2008; Hailbronner, in *Neue Juristische Wochenschrift*, 2004, pp. 2185 et seq.; Herzog / Gerken, in the *Frankfurter Allgemeine Zeitung* of 8 Sep. 2008, p. 8; Wieland, *Der Europäische Gerichtshof im Spannungsfeld zwischen Rechtsanwendung und Rechtsgestaltung*, inaugural lecture delivered on 21 Jan. 2009 at the German University of Administrative Sciences, Speyer; Wieland quoted Weiler, endorsing his view that the ECJ had effected a 'quiet revolution' with its case law (Weiler, 'A Quiet Revolution', in *Comparative Political Studies* 26 (1994), pp. 510 et seq.); see also *idem*, *The Constitution of Europe*, 1999, pp. 188 et seq.

For examples of the expansive case law of the Court, see such landmark judgments as Case C-26/62 Van Gend & Loos [1963] ECR 3; Case C-6/64 Costa v. ENEL [1964] ECR 1253; Case 22/70 AETR [1971] ECR 263; Case C-6/72 Europemballage, ECR [1973], 215; Case C-41/74 Van Duyn v. Home Office [1974] ECR 1337; Cases C-3, 4 and 6/76 Kramer [1976] ECR 1279; Cases C-6/90 and C-9/90 Frankovich v. Italy [1991] ECR I-5357. For more recent judgments, see, for example, Case C-85/96 Martínez Sala v. Freistaat Bayern [1998] ECR I-2691; Case C-170/96 Commission v. Council (Airport Transit Visas) [1998] ECR I-2763; Case C-184/99 Grzelczyk [2001] ECR I-6193; Case C-413/99 Baumbast [2002] ECR I-7091; Case C-319/02 Manninen [2004] ECR I-7477; Case C-434/02 Arnold André GmbH & Co. KG v. Landrat des Kreises Herford (Tobacco Directive) [2004] ECR I-11825; Case C-105/03 Pupino [2005] ECR I-5285; Case C-217/04 UK v. Parliament and Council (European Network and Information Security Agency) [2006] ECR I-3771; Case C-372/04 Watts [2006] ECR I-4325; Case C-380/03 Germany v. Parliament and Council (tobacco advertising II) [2006] ECR I-11573; Case C-97/05 Gattoussi [2006] ECR I-11917 (see also Hailbronner, in *Neue Zeitschrift für Verwaltungsrecht* 2007, pp. 415 et seq.); Case C-318/07 Persche; Case C-301/06 Ireland v. Parliament and Council (data retention).

¹⁶ Statements of 31 March 2008 and 30 July 2008, at

http://ec.europa.eu/commission_barroso/rehn/press_corner/statements/index_en.htm (accessed on 22 Feb. 2009).

Supposing an Islamist party were to form in Germany with the goal of establishing an Iranian-style theocracy, it could not be proscribed under Article 2 TEU as long as it pursued its objectives by non-violent means. If the German Government were to institute proscription proceedings, the Federal Constitutional Court would first have to submit the case to the European Court of Justice in order to establish whether the intended ban was actually admissible under Article 2 TEU.

This example shows that the Treaty of Lisbon can have extremely far-reaching consequences for the validity and application of national constitutional provisions.

National constitutional courts, in other words, will be degraded to the status of lower constitutional courts. Even in disputes relating to the organisation of the State, the national courts must first submit the case to the Court of Justice of the EU and will then be bound by its opinion.

Moreover, Article 2 TEU gives the European Court the means of interfering in the internal affairs of Member States in matters relating to fundamental rights, because the powers of the Court will now include the right to review cases relating to respect for human dignity, freedom, equality and all human rights. While the Charter of Fundamental Rights does not bind the Member States unless they are implementing Union law (Article 51 of the Charter of Fundamental Rights in conjunction with Article 6(1) TEU), Article 2 TEU gives the European Court of Justice supreme jurisdiction in the realm of fundamental rights, even in cases concerning purely national matters. Since the Member States, under the Charter of Human Rights and in the existing case law of the European Court of Justice, are bound by the European Charter of Fundamental Rights only in the application of European law, can it be argued that Article 2 TEU cannot bind them any further, given that Article 6 TEU is a *lex specialis* in respect of fundamental rights? The answer is ‘no’, because there is no relationship of *lex specialis* and *lex generalis* between Article 6 and Article 2 TEU, since each has its own separate function. Article 6 TEU governs the protection of fundamental rights against the exercise of public authority on the part of the EU and in this context on the part of the Member states too, in so far as they are implementing European law; in the latter case, comprehensive protection of fundamental rights is provided by Article 6. Article 2 TEU, on the other hand, governs the values that apply to both the Union and its Member States; its rules extend to domestic matters, including those which do not otherwise fall within the Union’s sphere of competence. Article 2 TEU requires the Member States to protect and respect freedom, equality, human dignity and all human rights not only when acting within the framework of the EU, but also and particularly with regard to their internal affairs. In this respect the provision is designed to prescribe ‘only’ a minimum level of protection rather than the full protection afforded by Article 6. But it is nevertheless a legal obligation based on a particular regulatory purpose with its own general scheme and teleological justification alongside protection of fundamental rights under Article 6. One can imagine the breadth of potential activity that an activist Court might discover here, especially if it decided that the second sentence of Article 2 was actionable too and then corrected the national courts even when it found that their decisions did not adequately defend the values of ‘justice’ or ‘solidarity’. The United Kingdom and Poland, each of which formulated a reservation in order to ensure that the Charter of Fundamental Rights would not apply in their respective countries, are in for a shock one day when the European Court of Justice

invokes Article 2 TEU to interfere in their constitutional affairs. They will then be forced to recognise that their reservation only solved a small problem while overlooking a large one.

National constitutional courts may seek consolation in the hope that the Court of Justice will exercise caution and, if only for reasons of workload, will not presume upon its ‘cooperative relationship’ with the national constitutional courts to their detriment. But can such hope be the basis for ratification of a Treaty containing provisions that allow such wide scope for interpretation? And it must be remembered that the ECJ has repeatedly claimed powers for the European Union which were not granted by the Treaties and whose exercise, in some cases, was even contrary to the clearly expressed will of the contracting parties.¹⁷

IV. On the Problems of Domestic Applicability

Domestic applicability is a particular problem that arises alongside the issues referred to above. In the existing three-pillar architecture of the European Union, Article 6(1) of the Nice TEU, which corresponds to the new Article 2 TEU, possesses the properties of a state obligation in international law. This is why it has been unequivocally non self-executing and inapplicable by domestic jurisdiction. This will change with the dissolution of the pillar structure. The obligations laid down in the EU Treaty will now be no different in legal character, in principle, from those created by the EC Treaty which will be renamed as the Treaty on the Functioning of the European Union (TFEU). The particular legal character that distinguishes the law of the European Community, according to the jurisprudence of the European Court, from ‘normal’ international law will now be ascribed to the EU Treaty too.

Now although Article 2 TEU, in so far as it concerns the Member States, is formulated more like an obligation on states than a self-executing norm directly establishing rights or duties of individuals, even if its wording does not entirely preclude the latter interpretation – in this respect it leaves room for doubt as to its domestic applicability – the European Court ruled long ago, in the *van Gend & Loos* case in 1963, that a provision whose wording clearly marked it as an obligation on states alone was directly applicable. The argument advanced by the Attorney-General that the wording of such a provision precluded its direct application by the authorities and courts of Member States was refuted by the Court’s interpretation, based on the aims of the Treaty, that the Community constituted a new legal order of international law for the benefit of which the States had curtailed their sovereign rights, albeit within limited fields, and the subjects of which comprised not only the Member States but also their nationals.¹⁸ According to this jurisprudence, individual rights cannot only be derived from provisions that expressly are addressed to individuals, but also from state obligations.

Once the Treaty of Lisbon has entered into force, this jurisprudence will also apply to the EU Treaty. The nature of Article 2 TEU as an obligation on states will therefore cease to be a valid argument against its direct applicability. The only possible argument against direct applicability could be the lack of precision of the values listed in Article 2 TEU. If, however, these values are

¹⁷ See the references in footnote 15 above.

¹⁸ Case 26/62 *Van Gend & Loos* [1963] ECR 3, pp. 24 et seq.

held to be precise enough for the European Court of Justice to use them as a yardstick for dispensing justice, they will be applicable by national courts too. The requisite degree of precision must be held to exist for the values enumerated in the first sentence of Article 2, at least. The ECJ has constantly ruled that the fundamental market freedoms are also directly applicable, although they were intended to be defined more precisely by means of directives.¹⁹ Although the values listed in the second sentence require more precise definition, there is undoubtedly a danger that they will be regarded by courts as sufficiently precise in the specific context and therefore held to be directly applicable.

The consequence of the direct applicability of Article 2 TEU is that the courts and authorities of the Member States are empowered and required to refrain from applying provisions of national law if and where they infringe one of the fundamental values enshrined in Article 2 TEU. In practice, this will have far-reaching consequences. In Germany, for instance, the trial and appeal courts, starting with the local court, will be able in future to circumvent the obligation under Article 100(1) of the Basic Law to obtain a preliminary ruling from the constitutional court. The said article provides that, if a court concludes that a law on whose validity its decision depends is incompatible with the Basic Law, it must stay proceedings and refer the matter to the Federal Constitutional Court. Under the Treaty of Lisbon, however, the courts will be able simply to refrain from applying a statutory provision which they deem to be unconstitutional on the grounds that it infringes freedom, equality or another human right and is therefore incompatible with Article 2 TEU. This will not only undermine the role of the Federal Constitutional Court as the sole instance with the power to overturn laws but will also undermine the authority of the legislature to an extent that may have a very critical effect on the legal order of the Federal Republic of Germany.

V. Inconsistency of the Second Sentence of Article 2 TEU with the Rule of Law

Furthermore, the second sentence of Article 2 of the Lisbon EU Treaty does not in any way satisfy minimum requirements in terms of consistency with the principle of the rule of law which is proclaimed in the first sentence and which, under the German Constitution, is a prerequisite for any transfer of sovereign powers by the Federal Republic of Germany to the European Union. An affirmation that values such as ‘pluralism’, ‘tolerance’, ‘justice’ or ‘solidarity’ should prevail in society does not pose any problems as long as it has the status of a political programme. Such terms adorn the programmes of all political parties and would not be out of place in the preamble to an international agreement. As soon as they become concepts that give rise to obligations, however, the fulfilment of which is enforceable judicially or by means of a procedure involving sanctions, these values can then be invoked to justify entirely arbitrary interventions in the internal affairs of Member States. When concrete problems arise, the fact is that there may well be diametrically opposed views, each based on sound reasoning, as to what constitutes ‘justice’ or ‘solidarity’, depending on people’s basic political assumptions. Even a value such as ‘tolerance’, on which there would seem at first sight to be ample scope for general agreement, turns out to be in need of more precise definition; what is more, defining it is potentially a highly contentious undertaking. One need only think of the disputes about whether the use of limited force may be tolerated for certain purposes or whether there must be ‘zero tolerance of the use of force’ or

¹⁹ See, for example, the references in Streinz, *Europarecht*, ninth edition (2008), points 407 et seq.

about whether particular ‘infringements of the rules’ should be tolerated or whether legal provisions should be strictly enforced. Legislation banning smoking in public places, for instance, may well be considered very intolerant from a smoker’s perspective.

The predictability and transparency of sovereign authority as well as essential attributes of systems of governments based on the rule of law are abandoned in favour of a politically subjective exercise of power when such imprecise concepts allowing of so many widely divergent interpretations as those in the second sentence of Article 2 TEU are used in a legal norm as a basis for legal obligations. The same would still hold true for the second sentence of Article 2 even if one were to presume it to be non-actionable, for it is certainly a basis for the imposition of sanctions under Article 7 TEU.

In any case, problems also arise from the fact that very significant sanctions can be imposed – under Article 7(3), a Member State may have its voting rights in the Council suspended while still being required to fulfil all its obligations – without any right of substantive judicial redress. This problem has not been created by the Treaty of Lisbon but has plagued the enforcement regime from the outset and is merely exacerbated by the new second sentence of Article 2. The *causa Austria*, in which the inclusion of the Freedom Party of Austria (FPÖ) in the Federal Government led to the imposition of sanctions, even though there had been no specific violation by Austria of any of the fundamental values of the European Union,²⁰ demonstrated that the scope for political misuse of sanctions not only exists in theory but is also a factor to be reckoned with in practice, for that massive intervention against a democratically elected government was itself a flagrant violation of the fundamental principle of democracy.

VI. Necessity of a Reservation

In the light of the foregoing considerations, the German act granting parliamentary approval to the Treaty of Lisbon is unconstitutional. Without formal amendment of the Treaty – possibly by way of an additional protocol –, the only way to achieve conformity with the Constitution would be to ensure, by means of a reservation effective in international law, that Article 2 TEU, in conjunction with the extension of the Court’s jurisdiction to the entire EU Treaty, does not have the effects described above. The object must be to ensure that infringement proceedings and obligations to refer cases for an opinion do not relate to Article 2 TEU, that the European Court of Justice is not empowered to decide in any other way on Member States’ compliance with Article 2 either and that the said Article is not directly applicable by national courts. Such a reservation could be formulated along the following lines: “The values listed in Article 2 TEU are the fundamental political values of the Union. The only cases in which they have legal consequences are the accession of new members under Article 49 TEU and enforcement proceedings under Article 7 TEU. In particular, they are not directly applicable in the Member States.”

This reservation would not solve the problem of the imprecision of the second sentence of Article 2 TEU, an imprecision which is incompatible with the rule of law. The imposition of sanctions for failure to respect the values enshrined in that second sentence could be prevented by means of a reservation or interpretative declaration to the effect that “Infringement of the values referred to in

²⁰ These sanctions were imposed by the other 14 Member States outside the Treaty framework; see Pechstein, *op. cit.* (footnote 4 above), point 1 with references, and Schorkopf, *op. cit.* (footnote 8 above), points 47-48.

the second sentence of Article 2 TEU does not warrant measures pursuant to Article 7 TEU” or “Infringement of the values referred to in the second sentence of Article 2 TEU is not a serious breach within the meaning of Article 7 TEU unless one of the values referred to in the first sentence of Article 2 TEU has been seriously infringed at the same time”. Under Article 19 of the Vienna Convention on the Law of Treaties, it is still possible to formulate such reservations or declarations before the ratification of the Treaty. Since the contracting States were apparently unaware of the effect of the Treaty of Lisbon described above,²¹ they should unanimously welcome a decision on the part of the German Federal Government or the Government of another Member State that has not yet ratified the Treaty to formulate a reservation nullifying these consequences, which were probably unintended but which flow from the wording and general scheme of the Treaty. Trusting in the Court of Justice to respect the presumptive will of the States parties, even in the absence of an explicit reservation, would be irresponsible, given the history of its rulings, in which the wishes of the States parties have played a very minor part.²² – The problem of the lack of a right of judicial redress in the enforcement procedure, to be sure, cannot be eliminated by means of a reservation; the only solution to that problem would be to amend the Treaty.

²¹ The German Federal Government, for example, did not mention the problem discussed in the present paper in its memorandum on the Treaty of Lisbon (Bundestag printed paper 16/8300, pp. 133 et seq.), which meant that the Members of the Bundestag could not have known that, by approving that Treaty, they were consenting to a constitutional subordination of the Basic Law to the Treaty on European Union.

²² See the references in footnote 15 above; Case C-97/05 *Gattoussi* [2006] ECR I-11917 is a particularly glaring example.