Articles

The Lisbon Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration?

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Abstract

The German Federal Constitutional Court (FCC) has found that there are no constitutional objections against the Lisbon Treaty. At the same time, the FCC imposed limitations to future integration by identifying a number of state functions that are non-amenable to integration and which have to be retained at the national level. This article examines the scope and content of these core competencies. It also discusses to what extent the criteria used by the FCC for the determination of core competencies might reflect a European-wide standard for the determination of limits to the transfer of competencies to the European Union. The article concludes that the judgment clarifies the limitations of the transfer of competencies, even though the criteria used by the FCC cannot claim to produce the set of inalienable sovereign powers that were recognized as such throughout the Union.

A. Introduction

On 30 June 2009, the German Federal Constitutional Court (FCC) assessed the compatibility of the Lisbon Treaty with German law, judging that there are no decisive constitutional objections to the Act Approving the Lisbon Treaty.[1] There is widespread relief, in particular in the political class, that the FCC had not blocked Germany's entry in the Lisbon Europe.[2] However, a closer look at the judgment reveals that the apparently clear "yes" of the Court to Germany's involvement in European integration is accompanied with some clear articulations on the delimitations of future integration. For the first time, and in contrast to previous

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[1] Judgement on 30 June 2009, *Bundesverfassungsgericht*, BVerfG, 2 BvE 2/08.

[2] At the same time, however, the Court urged the German Parliament to take responsibility for the process, to undertake preparations and discussions, and to vote on the bill that must accompany the ratification process so as to clarify the role of the Parliament in the process of the EU integration.

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judgments and the recent ruling on the constitutionality of the Czech Constitutional Court,[3] the FCC undertook to specify core state functions, which cannot (or only under restrictive conditions) be transferred to the European Union (EU) and would have to be retained at national level.

The extent of the Union's freedom of action has steadily and considerably increased, not least by the Lisbon Treaty, so that in some fields of policy, the EU has a shape that corresponds to that of a federal state.[4] By contrast, the internal decision-making and appointment procedures remain predominantly committed to the pattern of an international organisation. It is widely recognized that with increasing competencies and further independence of the institutions of the Union, safeguards that keep up with this development are necessary in order to preserve the fundamental principle of conferral exercised in a restricted and controlled manner by the Member States.[5] In previous judgments, the FCC,[6] as well as other European constitutional courts,[7] underscored that, with progressing integration, fields of action that are essential for the development of the Member States' democratic opinion-formation must be retained at the national level.

The underlying idea of the national constitutions is that only the exercise of delimited powers has been delegated to the EU, whereas ultimate sovereignty remains with the Member States. By contrast, a predominance of responsibilities and competencies accorded to the EU was seen to substantially weaken the democracy on the national level, so that the Member States' parliaments could no longer give democratic legitimacy to the sovereignty exercised by the Union.[8] But even though the highest courts have clarified the content of delegation of delimited powers and established a number of criteria to assess the permissible level of

[3] Judgement on 26 November 2008, *Ústavní soud*, decision No. Pl. ÙS 19/08. The English translation is available at: http://angl.concourt.cz/angl_verze/doc/pl-19-08.php (last accessed 21 March 2010).

[4] Joseph Weiler, *Federalism and Constitutionalism: Europe's* Sonderweg, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE US AND THE EU, 54, Kalypso Nicolaidis and Robert Howse eds., 2001); Jakob Kellenberger, *Federalism in Foreign Relations, in* FEDERALISM IN A CHANGING WORLD: LEARNING FROM EACH OTHER, 192 Raoul Koller and Arnold Blindenbacher eds., 2003).

[5] For a general discussion of the fundamental principles governing the exercise of competence by the EU, see Alan Dashwood, *The Relationship between the Member States and the European Union/European Community*, 41 COMMON MARKET LAW REVIEW 355 (2004).

[6] Judgement on 12 October 1993, *Bundesverfassungsgericht*, BVerfGE 89, 155, 207.

[7] For the Czech Republic, see decision No. Pl. ÙS 19/08, *supra*, note 3, paras. 93, 96 and 114; for France, see, decision on 9 April 1992, *Conseil Constitutionnel*, décision No. 92-308 DC, para 14; for Denmark, see, *Carlsen v. Rasmussen*, Højestret, 6 April 1998, paras. 35-36.

[8] BVerfGE 89, 155, *supra,* note 6, 186.

integration, so that sovereignty would not be lost,[9] constitutional courts refrained from specifying those fields of national policies that could under no circumstances be yielded to the EU.

In its recent judgment, the FCC undertook the unprecedented attempt to give shape to the scope of sovereign powers that are not amenable to integration. This contribution will therefore identify the considerations leading the FCC to develop a set of inalienable sovereign rights. To this end, the article shortly highlights the FCC's interpretation of the German constitution regarding its openness to and limitations on integration. It then examines the scope and content of essential core competencies that have to remain under control of national states and the criteria the FCC uses to specify such competencies non-amenable to integration. Finally, the article discusses to what extent the FCC's criteria reflect a European-wide standard for the determination of limits to the transfer of competencies to the EU.

B. The Flexibility of the Democratic Principle and Openness to Integration

The judgment focuses on the connection between the democratic system prescribed by the German constitution (the Basic Law) on the level of the Federation and the level of independent rule that has been reached on the European level. Given the extension of competencies accorded to the EU, the FCC identifies a need to clarify the requirements posed by the democratic principle to ensure the democratic legitimacy of the transfer of sovereign rights. In this connection, the FCC already stated in the Maastricht decision that the elaboration of the principle of democracy by the Basic Law is open to the objective of integrating Germany into an international and European peaceful order and recognized that the principle of democracy could not be realized in identical manner at both the national and supranational level.[10] This view is reiterated in the Lisbon decision underlining the FCC's notion of the relative - and not absolute - character of democracy that can be institutionalized depending on the characteristics of the constitutional context. The new shape of political rule is not schematically subject to the requirements of a constitutional state applicable on the national level and may therefore not be

[9] For a discussion on the delimitations set by the German FCC, the Danish Supreme Court and the French Constitutional Council, see Anneli Albi and Peter Van Elsuwege, *The EU Constitution, national constitutions and sovereignty: an assessment of a "European constitutional order"*, 29 EUROPEAN LAW REVIEW 745 (2004). Also, the Italian Constitutional Court imposed so-called "counter-limits" in order to guarantee "the fundamental principles of the Italian constitutional order." See, Marta Cartabia, *The Italian Constitutional Court and the relationship between the Italian legal system and EU, in* THE EUROPEAN COURTS AND NATIONAL COURTS, 138 (Anne-Marie Slaughter, Alec Stone Sweet, Joseph Weiler eds., 1998).

[10] BVerfGE 89, 155, *supra,* note 6, 182.

measured without further ado against the concrete manifestations of the principle of democracy in a Contracting State or Member State.[11] This relativistic democratic principle thus implies certain flexibility as to the manner in which democracy is applied and, consequently, empowerment to embark on European integration permits a different shaping of political opinion forming than the one that is determined by the Basic Law for the German constitutional order.[12]

The flexibility in the implementation of the democratic principle also allows the German Basic Law to be open to integration. The FCC establishes the need for integration in supranational structure in view of the implications of globalisation for sovereign states. The phenomenon of globalisation is widely regarded as implying national states' loss of control over economic and political trans-border interaction. According to the FCC, democratic constitutional states can thus gain a formative influence on an increasingly mobile society, which is increasingly linked across borders, only by sensible cooperation that takes account of their own interest as well as of their common interest.[13] The FCC stresses that only those who commit themselves because they realise the necessity of a peaceful balancing of interests and the possibilities provided by joint concepts gain the measure of possibilities of action that is required for being able to responsibly shape the conditions of a free society also in the future.[14] To this end, not only the principle of openness towards international law, but also the principle of openness towards European law (*Europarechtsfreundlichkeit*) applies.[15] The Court's reading of the constitution is thus to facilitate functional international cooperation in politically important areas that would embed Germany in the international community.[16]

The openness for integration is not limited to economic issues but also encompasses a political dimension. In the Lisbon decision, the FCC no longer distinguishes between economic and political integration. This marks a change in the reasoning developed in the Maastricht decision[17], where the FCC pointed out that the Union's

[11] BVerfG, 2 BvE 2/08, *supra,* note 1, para. 219.

[12] *Id.*

[13] *Id.*, para. 221.

[14] *Id.*

[15] *Id.*, para. 225.

[16] Carl Lebeck, *National Constitutionalism, Openness to International Law and Pragmatic Limits of European Integration – European Law in the German Constitutional Court from EEC to the PJCC – Part I/II*, 7 GERMAN LAW JOURNAL NO. 11, 1 (2006).

[17] For a discussion of the Maastricht decision, see *e.g.,* Matthias Herdegen, *Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union*, 31 COMMON MARKET LAW REVIEW 235 (1994).

competencies are mainly limited to the economic field, whereas fundamental spheres of state sovereignty, such as defence, foreign policy and internal affairs, fall under inter-governmental cooperation, requiring the unanimous consent of all Member States.[18] By contrast, in the Lisbon decision the FCC noted that the participation of Germany in the development of the European Union comprises, apart from the formation of an economic and monetary union, also a political union. Political union means the joint exercise of public authority, including the legislative authority, which even reaches into the traditional core areas of the state's area of competence. This is rooted in the European idea of peace and unification, especially where it deals with the coordination of cross-border aspects of life and with guaranteeing a single economic area and area of justice in which citizens of the Union can freely develop.[19]

C. The Delegated Nature of EU Competencies – Respecting the Masters of the Treaties

Notwithstanding a certain adaptability of the democratic principle to supranational structures and openness to integration, the FCC has established limitations, since the fundamental principles of the Basic Law, the principle of democracy and the protection of fundamental rights, constrain the extent of delegation of decision-making powers as well as the powers over individuals that limit the forms and extent of delegation of powers to international cooperation.[20]

One major restriction to the openness for integration and flexibility in application of the democratic principle at supranational level lies in the eternity guarantee,[21] which takes the disposal of the identity of the free constitutional order even out of the hands of the constitution-amending legislature and thus guarantees sovereign statehood.[22] The FCC confirms its well-established jurisprudence that the principle of democratic self-determination and of participation in public authority with due account being taken of equality remains unaffected also by the Basic Law's mandate of peace and integration and the constitutional principle of the openness towards international law (*Völkerrechtsfreundlichkeit*).[23] Integration into a free

[18] BVerfGE 89, 155, *supra,* note 6, 190.

[19] BVerfG, 2 BvE 2/08, *supra,* note 1, para. 248.

[20] Lebeck, *supra,* note 16, 2.

[21] As laid down in Article 79, para.3 of the Basic Law

[22] BVerfG, 2 BvE 2/08, *supra,* note 1, para. 216.

[23] *Id*., para. 219 with reference to the judgement on 4 May 1971, *Bundesverfassungsgericht*, BVerfG, 1 BvR 636/68, 75-76.

community requires neither submission that is removed from constitutional limitation and control nor forgoing one's own identity.[24] What corresponds to the non-transferable identity of the constitution, which is not amenable to integration in this respect, is the obligation under European law to respect the constituent power of the Member States as the masters of the Treaties.[25]

Deciding to keep one's own identity means not handing over sovereignty, which under international and public law requires independence of an alien will particularly for the constitutional foundations,[26] and only allowing the supranational organisation to exercise derived (i.e. accorded by other legal entities) powers. Derived but not genuine legitimacy ensures that the empowerment to exercise supranational competencies continues to come from the Member States of the EU. Thus, the constitution requires that the national states permanently remain the masters of the Treaties. In a functional sense, the source of Community authority, and of the European constitution that constitutes it, are the peoples of Europe with their democratic constitutions in their states. The "Constitution of Europe", the law of international agreements or primary law, remains a derived fundamental order.[27] It establishes a supranational autonomy that is quite far-reaching in political everyday life but is always limited factually. Here, autonomy can only be understood - as is customary regarding the law of self-government - as autonomy to rule that is independent but derived.[28]

D. The Member States' Need to Retain Sufficient Space for the Political Formation of the Economic, Cultural and Social Circumstances of Life

The derived legitimacy of EU competencies cannot lead to an unlimited delegation of genuine national sovereign rights. Even though the creation of the EU and the deepening of integration through various Treaties sparked an intensive debate as to how many powers a Member State may delegate without incurring the loss of its sovereignty, the FCC and other constitutional courts in EU Member States have not

[24] *Id*., para. 228.

[25] *Id*., para. 235.

[26] Carlo Schmid, *Generalbericht in der Zweiten Sitzung des Plenums des Parlamentarischen Rates am 8. September 1948*, *in* DER PARLAMENTARISCHE RAT 1948-1949, AKTEN UND PROTOKOLLE, 20, Band 9 (Deuthscher Bundestag/Bundesarchiv ed., vol. 9, 1996).

[27] BVerfG, 2 BvE 2/08, *supra,* note 1, para. 231.

[28] *Id*.

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specified the precise competencies that are inalienably linked to the exercise of sovereign nations and cannot be delegated to the EU.

I. Prior Case Law from the National Courts

Constitutional Courts in the various Member States remained vague in this regard. In the Maastricht decision, the FCC ruled that the German *Bundestag* (Parliament) has to retain a formative influence on the political development in Germany. This would be the case if the German *Bundestag* retains responsibilities and competencies of its own of substantial political importance or if the Federal Government, which is answerable to it politically, is in a position to exert a decisive influence on European decision-making procedures.[29] By contrast, a predominance of responsibilities and competencies accorded to the EU would substantially weaken the democracy on the national level, so that the Member States' parliaments could no longer give democratic legitimacy to the sovereignty exercised by the Union.[30] However, the FCC did not elaborate on the nature of responsibilities having substantial political importance and the scope of responsibilities that could be accorded to the EU without reducing the democratic legitimacy of Member States. In the aftermath of the Maastricht decision, doubts have been expressed as to the possibility of specifying and quantifying the competencies that would have to remain with the national state.[31] Criticism was also raised that the FCC omitted a reflection upon the role and character of national state, which would have been necessary to determine the scope of responsibilities inalienably linked to the notion of statehood.[32]

Other national Constitutional Courts have been similarly vague in this regard, although all constitutions share the idea that only delimited sovereign powers can be transferred.[33] The French Constitutional Council stated that changes to the European Treaties may be acceptable provided that they do not undermine the

[29] BVerfGE 89, 155, *supra,* note 6, 207.

[30] *Id.*,186.

[31] Meinhard SCHRÖDER, DAS BUNDESVERFASSUNGSGERICHT ALS HÜTER DES STAATES IM PROZEß DER EUROPÄISCHEN INTEGRATION 318 (1994).; Hermann-Josef BLANKE, DER UNIONSVERTRAG VON MAASTRICHT - EIN SCHRITT AUF DEM WEG ZU EINEM EUROPÄISCHEM BUNDESSTAAT? 421 (1993).

[32] Peter Lerche, *Die Europäische Staatlichkeit und die Identität des Grundgesetzes*, *in* RECHTSSTAAT ZWISCHEN SOZIALGESTALTUNG UND RECHTSSCHUTZ, FESTSCHRIFT FÜR KONRAD REDEKER 131 – 135 (Bernd Bender, Rüdiger Breuer, Fritz Ossenbühl and Horst Sendler eds., 1993).

[33] Bruno De Witte, *Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?*, *in* EU ENLARGEMENT. THE CONSTITUTIONAL IMPACT AT EU AND NATIONAL LEVEL 78 (Alfred Kellermann, Jaap De Zwaan and Jeno Czuczai eds., 2001).

essential conditions for the exercise of national sovereignty. These "essential conditions" are the state's institutional structure, independence of the nation, territorial integrity, and fundamental rights and liberties of nationals.[34] The Czech Constitutional Court – in its recent decision on the constitutionality of the Lisbon Treaty – found that only certain powers may be transferred by a treaty to an international organization. The transfer of powers could not go so far as to violate the very essence of the Czech Republic as a sovereign and democratic rule of law-based State, founded on respect for the rights and freedoms of human beings and of citizens, to establish a change of the essential requirements for a democratic rule of law-based State.[35] However, the Czech Constitutional Court gave broad discretion to the legislature by reasoning that "these limits should be left primarily to the legislature to specify, because this is *a priori* a political question which provides the legislature wide discretion".[36] Thus, even though Constitutional Courts unanimously agree on the limitedness of transferable competencies and require an essential core of responsibilities to remain with the national State, they refrained from concretizing the kind of responsibilities falling into this category.[37]

II. The Lisbon Judgment

The Lisbon judgment of the FCC undertakes to give clearer shapes to this category of "substantial responsibilities" that national states (or the German state) need to retain. The reason for this concretization is a response to the continuous expansion of competencies of the EU and the need to determine sufficient space for Member States for the political formation of the economic, cultural and social circumstances of life, which the European unification on the basis of a union of sovereign states must not take away from Member States. According to the FCC, this applies in particular to areas that shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and

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[34] See, Albi and Van Elsuwege, *supra,* note 9, 746 with reference to decision on 9 April 1992, *Conseil Constitutionnel*, décision No. 92-308 DC.

[35] Horni Bříza, *The Czech Republic - The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008*, 5 EUROPEAN CONSTITUTIONAL LAW REVIEW 149 (2009).

[36] [35] Case No. Pl. ÙS 19/08, *supra,* note 3, para. 109.

[37] The Lisbon Treaty gives at least some guidance as to what such inalienable core competencies would be. Article 4.2 (2) TEU Lisbon provides that the Union shall respect the essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

that unfold in discourses in the space of a political public that is organized by party politics and Parliament.[38]

The FCC underscores national particularities as regards culture, history and language and the extent to which these remain in a purely national sphere of the political public. In this connection, the existence of a European political public is necessary for sensitive areas to be governed by the EU because of the importance of a political public as the key element of democracy, as democracy first and foremost lives on, and in, a viable public opinion that concentrates on central acts of determination of political direction and the periodic allocation of highest-ranking political offices in the competition of government and opposition.[39] Only this public opinion makes visible the alternatives for elections and other votes and continually calls them to mind also as regards decisions relating to individual issues so that they may remain continuously present and effective in the political opinion-formation of the people via the parties, which are open to participation for all citizens, and in the public space of information.[40] However, on a European level, the FCC finds that the public perception of factual issues and of political leaders remains connected to a considerable extent to patterns of identification that are related to the nation-state, language, history and culture.[41] As a consequence of the lack of a European political public, the FCC requests to factually restrict the transfer and exercise of sovereign powers to the European Union in a predictable manner particularly in central political areas of the space of personal development and the shaping of the circumstances of life by social policy. "In these areas, it particularly suggests itself to draw the limit where the coordination of circumstances with a cross-border dimension is factually required."[42]

The FCC's determination of inalienable state competencies raises three questions. First, what are the essential core competencies that have to remain under control of national states and what are the criteria the FCC uses to specify such competencies non-amenable to integration? The second question relates to whether the FCC's reference to the heterogeneous cultural community can serve as a legitimate criterion to delimit the openness to integration. And lastly, on the implementation level, the question is how the precise limitation on the transfer of competencies can be implemented in individual cases.

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[38] BVerfG, 2 BvE 2/08, *supra,* note 1, para. 249.

[39] *Id*., para. 250.

[40] *Id*.

[41] *Id*., para. 251.

[42] *Id*.

E. The Scope of Core State Functions

I. Areas Considered as Core State Functions

The FCC specifies the space, which European unification must leave Member States for the political formation of the economic, cultural and social circumstances of life. In particular, this applies to the private space of citizens' own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language. As such essential areas of democratic formative action, the FCC considers citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of association and the dealing with the profession of faith or ideology.[43]

The criteria the FCC uses for the determination of certain functions create two categories of core state functions. The first category comprises state functions characterized by significant cultural differences between Member States. If the EU would gain authority to perform these functions, the level of democratic legitimisation would not commensurate with the extent and the weight of the supranational power of rule in light of the differences in cultural values between states. Competencies that are deemed to be not amenable to integration based on the well-established essentiality principle enshrined in German constitutional law fall in the second category.

1. Cultural Roots and Values as Source of Democratic Legitimisation

According to the FCC, state functions can be inalienable due to differences between Member States in cultural terms. Fundamental policy decisions that bear a strong connection to the cultural roots and values of every state can be only to a limited extent normatively derived from values and moral premises that are shared Europe-wide. In this category fall the laws on family relations and decisions on issues of language and the integration of the transcendental into public life, the

[43] *Id.*, para. 249.

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dealing with religious communities, and the manner in which school and education are organised, particularly as they affect grown convictions and concepts of values that are rooted in specific historical traditions and experiences.[44] The democratic self-determination requires that the respective political community that is connected by such traditions and convictions remains the subject of democratic legitimisation.[45]

Similar considerations apply to criminal law, as the code of conduct that a legal community gives itself is anchored in its values. Violation of this code of conduct, according to the shared convictions on law, is regarded as so grievous and unacceptable for social existence in the community that it requires punishment.[46] Considerations concerning criminal conduct depend on cultural processes of previous understanding that are historically grown and also determined by language, and on the alternatives that emerge in the process of deliberation and that move the respective public opinion.[47] Due to the fact that democratic self-determination is affected in an especially sensitive manner by provisions of criminal law and law of criminal procedure, the corresponding foundations of competence in the Treaties must be interpreted strictly - on no account extensively - and their use requires particular justification. The core content of criminal law does not serve as a technical instrument for effectuating international cooperation but stands for the particularly sensitive democratic decision on the minimum standard according to legal ethics.[48] However, regarding the extension of new competencies in the Lisbon Treaty in relation to the area of the administration of criminal law, the newly established competencies are not "elements that establish a state," which also in an overall perspective do not infringe the sovereign statehood of Germany in a constitutionally relevant manner.[49]

The FCC identifies a number of fields (family law, criminal law, dealing with religions, citizenship), where cultural differences prevent the creation of a homogenous political community as source of democratic legitimisation. Hence, existing differences between political communities with respect to traditions and convictions across Europe imply that the subject of democratic legitimisation remains necessarily limited to individual nations. The transfer of competencies in

[44] *Id.*, para. 260.

[45] *Id.*

[46] *Id.*, para. 355.

[47] *Id.*, para. 253.

[48] *Id.*, para. 358.

[49] *Id.*, para. 351.

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these cases would lead to an imbalance in the level of democratic legitimisation and the extent and the weight of supranational power.

a) Homogeneity of Values as Precondition for Deeper Integration?

The FCC refers to differences between Member States as regards culture, history and language and the public perception of factual issues and of political leaders, which remain connected to patterns of identification that are related to the nation-state, language, history and culture.[50] Since these elements are found to be missing at the European level, the FCC infers that legitimisation of the EU decision-making process primarily takes place through national democratic channels. Similar arguments were made in the Maastricht decision, where it identified a lack of structures for public debate and democratic participation and that the kind of deliberative community necessary for a democratic society had not yet emerged.[51] The FCC then found that the states need sufficiently important spheres of activity of their own in which the peoples of each can develop and articulate in a process of political will formation that it legitimates and controls, in order to give legal expression to what – relatively homogenously – bind the people spiritually, socially, and politically together.[52]

The present judgment raises the question whether the FCC's reference to the heterogeneous, as opposed to homogenous, cultural community can serve as a legitimate criterion to limit the openness to integration. In literature, the FCC was previously considered to adopt an ethno-cultural approach, finding that democratic representation presumes a homogenous community bound together by common language, history and culture.[53] The alleged differences between Member States as regards culture, history and language and the lack of an European-wide political public gave rise to the discussion of the existence of a European "*demos*" (i.e. the people of a nation regarded as a political unit) and whether ethno-cultural differences suffice to deny a European *demos*.[54] It has been submitted that the European *demos* is based on the common, transcending cultural and political values enshrined in the constituent documents, as opposed to organic ethno-cultural

[50] BVerfG, 2 BvE 2/08, *supra,* note 1, para. 251.

[51] Lebeck, *supra,* note 16, 9.

[52] BVerfGE 89, 155, *supra,* note 6, 186.

[53] Albi and Van Elsuwege, *supra,* note 9, 757.

[54] Dieter Grimm, *Does Europe Need a Constitution?,* 1 EUROPEAN LAW JOURNAL 295 (1995); Frederico Mancini, *Europe: The Case for Statehood*, 4 EUROPEAN LAW JOURNAL 35 (1998).

values.[55] Similarly, Habermas' theory of constitutional patriotism proposes that it is the common universal principles of the constitution rather than shared cultural identity that bind a society together in the modern multicultural liberal democracies.[56] In this line of argument, common values, such as respect for human dignity, democracy, equality, and the rule of law, and human rights, have been identified both in the Lisbon Treaty and the Human Rights Charta being attached thereto. Also, the Preamble of the Lisbon Treaty mentions that the European peoples are "united ever more closely" and a dual legitimacy of states and peoples has been considered throughout the EU's constitutional process leading to the Lisbon Treaty. Some commentators no longer referred to the language of the Member States as the "Masters of the Treaties," but instead to the "*pouvoir constituent*" lying with the European peoples – or peoples and Member States – collectively.[57] The European *demos* is regarded as implying European peoples rather than a single European people. It is thus the European peoples collectively rather than a single European people – examples referred to are South Africa, India, Russia and Brazil - that have a plurality of nations and languages instead of a homogenous people. The belief in an organic, natural nature of the national identity and nation-states is thus referred to be a myth: numerous nation-states have been created by various forms of force by non-representative elites, and homogeneity is rare in the light of ubiquitous ethnic minorities and growing immigration movements.[58]

The aforementioned approaches infer a European *demos* either by recognition of the communality of certain values across Europe or by acknowledging that plurality of nations and cultural identities does not form an obstacle to the creation of a state. They neglect, however, the relevance of these differences for a functioning democracy. The central point in the FCC's analysis is the observation that there is no shared public perception of political issues and that the creation of public opinion takes place only within national borders subject to national particularities. For the FCC, the existence of a viable public opinion is pivotal for a functioning

[55] Joseph Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUROPEAN LAW JOURNAL 238 (1995); Joseph WEILER, THE CONSTITUTION OF EUROPE "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON THE EUROPEAN INTEGRATION 345 (1999).

[56] Jürgen Habermas, *The European Nation State. Its achievements and its limitations. On the Past and the Future of Sovereignty and Citizenship*, 9 RATIO JURIS 125 (1996); Jürgen Habermas, *The European Nation-State and the Pressures of Globalization*, NEW LEFT REVIEW 40 (1999).

[57] Koen Lenaerts and Marlies Desomer, *New Models of Constitution-Making in Europe: the Quest for Legitimacy*, 39 COMMON MARKET LAW REVIEW 1252 (2002); Armin Von Bogdandy, *The Preamble*, *in* De Witte, ed., TEN REFLECTIONS ON THE CONSTITUTIONAL TREATY FOR EUROPE 5 (Bruno De Witte ed., 2003). Article available at: http://www.iue.it/RSCAS/Publications (last accessed 21 March 2010); Amaryllis VERHOEVEN, THE EUROPEAN UNION SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY 292 (2002).

[58] Albi and Van Elsuwege, *supra,* note 9, 758.

democracy and the observed differences as regards culture, language and history are an explanation of why such public opinion does not yet exist. Understanding the FCC correctly means taking the democratic principle as requiring a viable public opinion in order to give legitimacy to the transfer of sensitive core state functions to the EU. It is the participation and contribution of the people to the creation of a viable public opinion that concentrates on central acts of determination of political direction, and differences in cultural roots and values can impede this process. By contrast, the existence of a common set of shared values across the EU does not create a public sphere of active citizens – in that view, shared common values facilitate but do not legitimate integration.

A separate question is how the connection between the political public and national patterns of identification that are related to the nation-state, language, history and culture, can be overcome to arrive at a European-wide public opinion. The experience shows that enhanced European integration and the implications of globalisation lead to a shift of public perception from a purely national to EU-wide (or even global) perspective. In this new perspective, functions that were previously seen to be domestic are now gradually viewed to be "community tasks." For example, responses to global challenges like mass migration, environmental pollution, poverty, as well as telecommunications and the interaction in global markets are fields in which the perception in public media suggests that they are no longer perceived as domestic fields. If a task – as, for example, environmental protection or trade policy – asks for collective action, it must and will necessarily be pursued through a concerted action on the EU level, assuming a "community" interest to do so. It is in these fields that the EU has gained more competencies. This would mean that the increase in competencies has been the response to the phenomenon that solutions of migration, environmental issues and trade issues cannot be effectively pursued on a national level, suggesting an EU competence to assume these responsibilities. However, it could also be argued that the reverse may hold true, that is only the transfer of competencies has led to the Europeanization of political issues and fostered the conviction that solutions have to be pursued on a European level. For example, political debate concerning migration issues was seen as a national problem and only the enlargement of the Union in combination with the implementation of the basic freedoms throughout Europe has widened the view of citizens from a national to European perspective. Thus, such "anti-democratic" views would argue that, first, there was enlargement and accomplishment of free movement across Europe and, subsequently and consequently, a European public opinion emerged. The gradual expansion of fields falling into European competence would lead to a de-nationalization of the public perception of political issues, whereas the predominance of national patterns of identification related to the nation-state, language, history and culture would thus be diminished through the transfer of competencies to the EU. It is obvious, however, that such a reverse approach of creating a European political public by

handing competencies over to the European Commission (EC) militates against the democratic principle. Generally, democracy requires that an existing public opinion gives legitimacy to the exercise of powers on the EU level, because only this public opinion makes visible the alternatives for elections and continually calls them to mind also as regards decisions relating to individual issues so that they may remain continuously present and effective in the political opinion formation of the people via the parties and in the public space of information.[59] Public opinion cannot grant this source of legitimisation, where an exercise of sensitive competencies by the EU would be the cause but not the ensuing consequence of a public opinion.

2. The Court Applies the German Doctrine of the Essentiality Principle in the Allocation of Competences between EU and its Member States

Besides the ethno-cultural approach, the FCC bases its determination of non-alienable core state functions on the importance of the decisions concerned. This approach reveals the FCC's attempt to ensure consistency with the well-established German doctrine of the essentiality principle in the field of public law. It is well-established jurisprudence and doctrine that essential decisions have to be made by the German *Bundestag*. The FCC has developed its so-called theory of essentials or essentiality principle (*Wesentlichkeitstheorie*).[60] According to this theory, when the legislature seeks to regulate issues that fundamentally (*wesentlich*) affect the freedom and equality of the citizen, it is obliged by the principle of democracy and the principle of the rule of law to make the essential or substantially important decisions and regulations itself and not leave them to the discretion of the administration.[61] In relation to the constitutionality of the Lisbon Treaty, the FCC extends the application of this concept to the sphere of external relations. Applying the essentiality principle, the FCC finds that an unacceptable structural democratic deficit would occur if the legislative competencies, which are essential for democratic self-determination, were exercised mainly on the level of the Union. The essentiality principle thus serves to avoid an imbalance between character and the extent of the sovereign powers exercised at the EU level and the degree of democratic legitimisation.

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[59] BVerfG, 2 BvE 2/08, *supra,* note 1, para. 250.

[60] For a comprehensive analysis, see *e.g.,* Fritz Ossenbühl, *Vorrang und Vorbehalt des Gesetzes, in* 3 HANDBUCH DES STAATSRECHTS 65 (Josef Isensee and Paul Kirchhof (Eds.), 1988).

[61] [60] Judgment on 18 August 1978, *Bundesverfassungsgericht*, BVerfG, 2 BvL 8/77, BVerfGE 49, 89, 126.

a) The Deployment of the Army as Genuine Member State Competence?

What has always been deemed especially sensitive for the ability of a constitutional state to democratically shape itself are decisions on the disposition of the police monopoly on the use of force towards the interior and of the military monopoly on the use of force towards the exterior. In line with the principle of substantiality, one of the decisions that always has to be made by the parliament is the approval for the deployment of the German *Bundeswehr* (Federal Armed Forces). There is a requirement of parliamentary approval, which concern defence if the context is a specific deployment and the individual legal and factual circumstances indicate that there is a concrete expectation that German soldiers will be involved in armed conflicts. The provisions of the Basic Law that relate to the forces are designed not to leave the *Bundeswehr* as a potential source of power to the executive alone, but to integrate it as a "parliamentary army" into the constitutional system of a democratic state under the rule of law.[62] The *Bundeswehr* therefore is a "parliamentary army", on whose deployment the representative body of the people must decide.[63] Thus, the essential nature of decisions concerning the deployment of the army prevents Germany from transferring the power to decide on the deployment of armed forces. The mandatory requirement of parliamentary approval for the deployment of the *Bundeswehr* abroad is not amenable to integration.[64]

The theory of substantiality applies above all in relation to the exercise of fundamental rights. As a general rule, intensive encroachments on fundamental rights have to be based on parliamentary decisions.[65] The approval of parliament is necessary in light of the impact of the decision on individual legal interests. The deployment of armed forces is essential to the individual legal interests of soldiers and other persons affected by military measures. This deployment can have dangerous and far reaching implications for those being involved within the armed forces.[66] Similarly, in respect of decisions on punishable conduct and the possibly ensuing deprivation of liberty or the placement in an institution, the legislature takes the democratically legitimised responsibility for a form of sovereign action

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[62] See, judgment on 19 April 1994, *Bundesverfassungsgericht*, BVerfG, 2 BvE 3/92, 5/93, 7/93, 8/93 BVerfGE 90, 286, 381-382.

[63] [62] *Id.*, 383.

[64] BVerfG, 2 BvE 2/08, *supra,* note 1, para. 255.

[65] Hartmut MAURER, ALLGEMEINES VERWALTUNGSRECHT 81 (5th ed., 1986).

[66] BVerfG, 2 BvE 2/08, *supra,* note 1, para. 254.

that counts among the most intensive encroachments on individual freedom in a modern constitutional state.[67]

Interestingly, the requirement of parliamentary approval does not, by far, exist in all EU Member States.[68] While states such as Ireland and Germany consider their armed forces as parliamentary and require *ex-ante* parliamentary consent before any deployment, other Member States executives such as France or Poland may deploy their forces without consulting their parliament at all. This indicates that the mandatory requirement of parliamentary approval for the deployment of the army is not part of a competence that would be necessarily viewed unanimously by all states as non-amenable to integration, as in many countries no parliamentary approval is required. Consequently, there are differences in national constitutions' limitations on transferability of competencies and thus in their respective openness to integration. On the other hand, different considerations may apply as regards the general transferability of the competence to deploy a nation's army. As this decision would be an issue concerning national security, it would generally be seen as non-amenable to integration, regardless of whether its disposal is decided by parliament or executive bodies.

b) Budget Sovereignty

Additional especially sensitive fields are the fundamental fiscal decisions on public revenue and public expenditure, with the latter being particularly motivated, *inter alia*, by social policy considerations. The right to retain sovereignty over conceptual political decisions is derived from the essentiality principle. In this regard, budget sovereignty is the place of conceptual political decisions on the connection of economic burdens and privileges granted by the state. The normative decision on the determination of the character and the amount of the levies affecting the citizen is a fundamental and essential decision in the sense that a specific enactment is constitutionally required. This is so because of the decision's far reaching effects on citizens, in particular on their sphere of freedom and equality, as well as on their general living conditions. The enactment is also required because of the kind and intensity of regulation necessarily connected with it. Only the legislature has the authority to make such a decision. This also implies that it is decisive that the overall responsibility, with sufficient space for political discretion, can still be

[67] *Id.*, para. 356

[68] Nicolai von Ondraza, *EU Military Deployment - an Executive Prerogative? Decision-making and Parliamentary Control on the Use of Force by the EU*, paper prepared for the GARNET EU *in* International Affairs Conference, (Brussels, 2008) 14, available at: http://www.ies.be/files/repo/conference2008/EUinIA_IX_2_vonOndarza.pdf (last accessed 21 March 2010).

assumed in the German *Bundestag*.[69] Even though indirect taxes are and may be harmonized on the European level, Member States have to retain power to decide on direct taxes.

c) Social Policy

Decisions on the shaping of circumstances of life in a social state are deemed especially crucial for the ability of a constitutional state to democratically shape itself. The essentiality principle requires that the essential decisions in social policy must be made by the German legislative bodies on their own responsibility. In particular, the securing of the individual's livelihood, which is a responsibility of the state that is based not only on the principle of the social state but also on Article 1.1 of the Basic Law,[70] must remain a primary task of the Member States, even if coordination that goes as far as gradual approximation is not ruled out.[71] This also corresponds to the state's mandatory obligation under the principle of the social state to ensure a just social order.[72] The state must fulfil this mandatory responsibility on the basis of a broad scope of discretion; the state must create the minimum conditions for a life of its citizens that is in line with human dignity.[73] The principle of the social state sets the state a task, which it cannot hand over to the EU.

F. Limitation of Coordination to where it is Factually Required

Finally, the limitations drawn by the FCC call for usable standards to determine the precise limitation on the transfer of competencies. The FCC merely stated that, in the mentioned sensitive areas, "it particularly suggests itself to draw the limit where the coordination of circumstances with a cross-border dimension is factually required."[74] The requirement limits the German constitution's openness to

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69 [68] Paul Kirchhof, *Demokratie in Europa*, FRANKFURTER ALLGEMEINE ZEITUNG 12 (4 July, 2009).

[70] Article 1.1 of the Basic Law provides: "The dignity of man is inviolable. To respect and protect, it is the duty of all state authority."

[71] BVerfG, 2 BvE 2/08, *supra,* note 1, para. 259.

[72] See, judgment on 17 April 1999, *Bundesverfassungsgericht*, BVerfG, 1 BvR 2203/93, 897/95, BVerfGE 100, 271, 284.

[73] See, judgment on 29 May 1990, *Bundesverfassungsgericht*, BVerfG, 1 BvL 20, 26, 184 and 4/86 BVerfGE 82, 60,80.

[74] *Id*., para. 251.

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integration, as integration through the transfer and exercise of sovereign powers to the EU is prohibited where coordination of circumstances with a cross-border dimension is not factually required.

Since the FCC omits to provide a usable standard of delineation, the scope and content of the "factually required" standard should combine both elements from the subsidiarity principle as well as the proportionality principle as applied under EC law. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[75] Generally, under the subsidiarity principle, two requirements have to be met for Community action to be justified: it must be established that the objectives of the proposed action cannot be sufficiently achieved by the Member States and that they can be better achieved by action on the part of the Community.[76] By contrast, the proportionality standard is applied for the purpose of determining the EU's power to harmonise for the establishment and functioning of the internal market.[77] For harmonisation purposes, the EU is limited to taking measures that are necessary for the functioning of the internal market,[78] whereas the fact that the measures are "useful" for attaining the goals is not sufficient.[79]

The FCC gives an indication on how to incorporate the subsidiarity and proportionality principle into the "factually required" standard in its analysis of the competencies in the area of the administration of criminal law, which the Lisbon Treaty extends considerably. Under Article 83.1 (1) TFEU (Treaty on the Functioning of the EU), the EU is granted powers to establish "minimum rules" concerning the definition of criminal offences and sanctions in the areas of "particularly serious" crimes that have a cross-border dimension "resulting from the nature or impact of such offences" or from "a special need to combat them on a common basis". The FCC states that such a special need does not exist where the institutions have formed a corresponding political will. The special need cannot be detached from the nature or impact of such offences because it is unfathomable

[75] Article 5(3) TEU Lisbon.

[76] Trevor HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 113 (6th ed., 2007).

[77] Article 95 ECT (Article 114 of ECT Lisbon).

[78] Case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, 2002 E.C.R. I-11453, para. 179; see also, Catherine Barnard, THE SUBSTANTIVE LAW OF THE EU 583 (2nd ed., 2007).

[79] Jürgen Schwarze, EU-KOMMENTAR (2nd ed., 2009), Article 95 ECT, para. 25.

from what the need to combat these offences on a common basis should result if not from the nature and the impact of the offences in question. However, the FCC recognizes that the fight against particularly serious crime, which takes advantage of the territorial limitation of criminal prosecution by a state, or which, as in the case of corruption, threatens the viability of the rule of law and democracy in the EU, can be a special justification for the transfer of sovereign powers also in this context.[80] The FCC's approach to applying the "factually required" standard thus appears to allow only those competencies to be transferred that are necessary to remedy disadvantages resulting from a cross-border character and that would not be able to be performed equally efficiently on the national level. It thus implies an element of necessity, as a transfer of competencies to the EU must involve significant benefits and prevent disadvantages that would materialize if such coordination at the EU level were to not take place. Moreover, it requires a comparative analysis as under the subsidiarity principle in order to show that Member States acting individually would not be able to achieve the same result.

G. Lack of European-wide Standards for Delimitation of Transfer of Sovereign Powers

Both the ethno-cultural as well as the essentiality approach applied by the FCC have their origins in the democratic principle. According to the ethno-cultural approach, differences between political communities with respect to traditions and convictions across Europe imply that the subject of democratic legitimisation remains necessarily limited to individual nations in these fields. The essentiality principle requires parliamentary approval because significant encroachments on fundamental rights can only be justified if there is sufficient democratic legitimisation through parliamentary consent.

Application of these standards does not, however, ensure an indisputable identification of fields of politics that would be recognised in all European national legal orders as sovereign powers non amenable to integration. The criteria used by the FCC under the ethno-cultural approach exhibit a large degree of both subjective and indeterminate parameters and also reflect well-established but singular German law doctrine, which does not necessarily prevail in other EU Member States. This means that the FCC's specification of inalienable sovereign rights cannot claim to set a Europe-wide standard of preservation of sovereignty rights. By contrast, application of the essentiality principle closely corresponds to other EU Members' application of legality principles and is thus more likely to produce more similar results.

[80] BVerfG, 2 BvE 2/08, *supra,* note 1, para. 359.

Regarding the FCC's approach to cultural differences between Member States, no other national federal court has referred so far to ethno-cultural differences as standard to interpret the democratic principle. Also, controversy may arise in respect of the FCC's emphasis on differences in cultural roots as opposed to recognising the EU-wide acknowledgement for universal principles (such as human dignity, democracy, equality, the rule of law and human rights). Even though it is submitted here that the FCC's approach is consistent with its interpretation of the democratic principle, it is true that nation building across the world has not always been made on the premise of an organic, natural nature of the national identity. Other nations that have emerged on basis of diverse identities and cultures may disagree with requiring cultural homogeneity as a precondition for compliance with the democratic principle. Also, from a European perspective, the FCC requirement of homogeneity appears to be a typical German approach. The United Kingdom and France have been submitted as examples of countries where the states came before cultural homogeneity, as opposed to Germany and Italy where the cultural unification preceded the creation of the state.[81] Historians have classified nations such as Germany or Italy - where cultural unification preceded state unification - as ethnic nations, or ethnic nationalities. By contrast, 'state-driven' national unifications, such as in France, England, or China, are more likely to flourish in multiethnic societies, producing a traditional national heritage of civic nations, or territory-based nationalities.[82] Belgium, Spain, Finland and Switzerland are further examples of European states referred to as not being based on homogeneity and characterized by multilingualism and cultural diversity.

Thus, it is likely that other European Constitutional Courts would not infer similar consequences from cultural diversity, multilingualism and value heterogeneity. As mentioned, a number of European states do not define their understanding of democracy by reference to cultural unification and homogeneity. In these multiethnic and multilingual societies, there is no shared, nationwide public perception but rather a regionally diversified one of political issues.[83] Accordingly, it cannot be submitted that the FCC's criteria reflect a Europe-wide standard for the determination of limits to the transfer of competencies to the EU.

Moreover, it appears difficult to provide an empirically unquestionable determination of the fields of politics and law that are characterized by

[81] Howard Richards, UNDERSTANDING THE GLOBAL ECONOMY 344 (2004).

[82] Philip White, *Globalization and Mythology of the Nation State, in* GLOBAL HISTORY: INTERACTIONS BETWEEN THE UNIVERSAL AND THE LOCAL 257 (Anthony Hopkins ed., 2006).

[83] This may, for example, be the case in Belgium or Spain, where individual regions enjoy substantial autonomy and where the process of public opinion-making is limited to regions both in terms of language and the substance of political issues.

heterogeneous cultural roots and values across the EU. The fine line of existing differences and communalities between cultural roots and values across EU Member States may be blurred and depend to a large degree on the subjective views of individual nationals and judges. Also, it is unclear what degree of common ground in cultural terms has to exist in order to accept the notion of a European political community. In other words, how is it possible to determine the precise point when cultural differences have been sufficiently reconciled to presume the existence of a homogenous political community?

By contrast, the application of the German essentiality principle doctrine yields results that would rather (but not necessarily entirely) reflect a unanimous European standard of inalienable sovereignty rights. A certain resemblance exists between the German essentiality principle and other Member States' forms of legality principles. This is so because of common roots between the various national legal orders in the movement of liberal and civil constitutions. Although no other European country applies the essentiality doctrine in the same explicit manner as developed in German law, comparative legal examinations show that national legal orders of the main EU Members require a law approved by parliament for any intrusion into the sphere of individual freedoms.[84] This suggests that the reluctance on the part of Member States to agree to a loss of their parliaments' approval on the legality of certain measures will increase with the intensity of the encroachment with fundamental rights. The more intrusive the exercise of sovereign power is on fundamental rights, the more Member States will be inclined to retain their sovereign rights. Intuitively, this holds particularly true for freedom-intensive rights affected by the administration of criminal law, citizenship, national security or the deployment of the army. It also extends to competencies that indirectly concern citizens' spheres of freedom and equality such as budget sovereignty and social policy. In all these cases, national legal orders are homogenous to the extent that they require a specific enactment of these decisions by their parliaments. The application of the essentiality principle thus yields results that are more reconcilable with rule of law provisions applied across EU Member States than with the ethno-cultural approach.

H. Conclusion

Deeper integration can be unconstitutional if the level of democratic legitimisation is not commensurable with the extent and the weight of supranational power of

[84] For comparative legal analysis, see *eg.*, Jürgen SCHWARZE, EUROPÄISCHES VERWALTUNGSRECHT 215 (2nd ed., 2005); Dimitris TRIANTAFYLLOU, VOM VERTRAGS- ZUM GESETZESVORBEHALT 113 (1996).; the French constitution seems to be an exception in this regard, as it accords to the parliament only a limited set of legislative competencies.

rule. With progressing integration, fields of action that are essential for the development of the Member States' democratic opinion formation must be retained. The gradual expansion of competencies to the EU, culminating in the Lisbon Treaty, induced the FCC - for the first time - to specify the core state functions that could not be handed over to the EC without risking an imbalance between the character and the extent of the sovereign powers exercised and the degree of democratic legitimisation. Previously, the FCC as well as other national Constitutional Courts have been vague in naming core state functions, although all constitutions share the idea that only delimited sovereign powers can be transferred. The Lisbon judgment of the FCC undertakes to give clearer shapes to the category of "substantial responsibilities" that national states need to retain to have sufficient space for the political formation of the economic, cultural and social circumstances of life. Such essential areas of democratic formative action comprise, *inter alia*, the civil and the military monopoly on the use of force, the administration of criminal law, citizenship, revenue and expenditure including external financing, and also extend to cultural issues such as the disposition of language, family and education, ordering of the freedom of opinion, of the press and of association and dealing with the profession of faith or ideology – a list basically covering any intensive encroachment on fundamental rights.

The criteria the FCC uses for the delimitation of the transfer of competencies are two-fold. First, the ethno-cultural approach reflects the FCC's observation that there is no shared public perception of political issues and that the creation of public opinion takes place only within national borders subject to national particularities. State functions can be inalienable due to differences between Member States in cultural terms. Differences as regards culture, language and history can explain the absence of a European public opinion because they are responsible for keeping a viable public opinion from being created. In a number of policy fields (family law, criminal law, dealing with religions, citizenship), cultural differences prevent the creation of a homogenous political community as the source of democratic legitimisation. Second, application of the well-established essentiality principle enshrined in German constitutional law requires that the decisions being most intrusive in fundamental rights will always have to be made by the parliament. Under this category, the FCC discusses the deployment of the army, fiscal decisions on public revenue and public expenditure and social policy considerations.

However, the criteria used by the FCC cannot claim to produce the set of inalienable sovereign powers that were recognised as such throughout the Union. Cultural diversity, multilingualism and heterogeneity of values are not viewed in other EU Members States as forming an obstacle to a functioning democracy, and the lack of cultural unification and homogeneity does not necessarily imply the absence of a viable political public. In turn, the essentiality principle is more likely

to be common ground for delimitation criterion because it reflects the legality principle as implemented in most EU Member States. However, national particularities and differences remain in areas where the need for parliamentary approval has grown based on historical circumstances and peculiar national attitudes – the deployment of the army is such an example.

The FCC has made an unavoidable step amid the continuous expansion of competencies of the EU. In an apparent attempt to remind politicians of the limitations imposed by the constitution on the transfer of competencies, the FCC has specified the fields of policy where competencies can be granted only if the coordination of circumstances with a cross-border dimension is factually required. It remains to be seen how these limitations will influence future negotiations of reforms of the European treaties and whether they will lead the FCC to review EU secondary law where this concerns the specified sensitive areas. In this connection, the FCC has also restated its right to review whether legal instruments of the European institutions keep within the boundaries of the sovereign powers accorded to them by way of conferred power.[85]

[85] BVerfG, 2 BvE 2/08, *supra,* note 1, para. 240.

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