Vertical division of powers from the perspective of the member states

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Police power in the context of European Union constitutionalism?

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Abstract

This paper argues that some recent developments of EU constitutionalism may be better understood by relying on a classic term of US federalism. This term is police power that was widely used in the 18th-19th century US constitutional discourse. In the first part, in order to point out the relationship between the actual EU developments and the concept of police power the paper presents and discusses its various meanings in US constitutional law. In the second part the paper critically examines whether Article 4 paras (1) and (2) TEU incorporated into the founding treaties following the Lisbon reforms may be interpreted as the emergence of the concept of police power in this context. In sum, the paper submits that the first judgments of the ECJ touching upon these Articles will answer the question if the concept of police power is really relevant in the EU constitutional discourse, but the use of term of police power can considerably contribute to the conceptual understanding.

1. The *sui generis* legal nature of the EU

When attempting to clarify the nature of the European Union, legal scholarship seems very reluctant to apply federal terms. On the contrary, it has developed various *sui generis* concepts to describe the unique nature of both the post-World War II European integration and the European Union itself (cf. Schütze 2009, 1–10).

On the one hand, it is easy to understand the main reasons behind this line of thinking. The first forms of integration had already been unique political and legal constructions, alloying intergovernmental, federative and supranational components from the very outset. The institutional system of the European Coal and Steel Community serves as a good example (cf. Alter-Steinberg 2007, 13). The High Authority had certain regulatory competences of supranational nature, while the Council provided considerable room for inter-state bargaining. In addition, the Assembly may be regarded as the seminal stage of a representative body as it had certain consultative competences in the early institutional setting.[1] The developments of the decades that followed have rendered this picture even more complicated with the appearance of both novel institutions and inter-institutional mechanisms (see Bitsch-Loth 2009). Furthermore, the emergence of a supranational legal order aiming to provide direct legal guarantees for the citizens of the member states also added a new element into this complexity. (Weiler 1990-1991, 2405–2431). In sum, the very nature of European integration called for non-conventional interpretation, which did not necessarily follow the existing patterns of public law or international law scholarship.[2]

On the other hand, the birth of this line of thought was also due to the special characteristics of the post-World War II European political scene. Although the vision of a

[1] Cf. Article 14 TECSC empowering the High Authority to make binding decisions in order to carry out its tasks; Article 27 TECSC requiring member states to delegate one member from their governments to the Council; Article 24 TECSC empowering the Assembly to have an open discussion about the High Authority's general, yearly report.

[2] A vehement critque of these theories is formulated by Robert Schütze when advocating a federal understanding of the European Union: 'In the absence of a theory of federalism beyond the State, European thought invented a new word – supranationalism – and proudly announced the European Union to be sui generic. The belief that Europe was incomparable ushered in the dark ages of European constitutional theory. (…) In any event, the sui generis theory only ever provided a thin veneer in times of constitutional times.' (Schütze 2009, 3.).

unified Europe had already been elaborated by Richard Coundehove-Kalergi and others during the interwar period or even earlier (see Prettenthaler-Ziegerhofer 2012), sovereignty remained a prominent concern of European politics (Harpaz 2011, 77–78). Thus, European politics regarded sovereignty as an eminent value, and it determined its general attitude toward any supranational integration plans. The designation of the emerging European Communities as a federal entity would have raised serious criticism in both politics and academia. Therefore, in order to avoid these pitfalls, a non-federal understanding of European integration dominated the legal and political discussions from the 1960s. This facilitated the emergence of a broad academic discussion without forcing it to deal with very sensitive issues such as the future of sovereignty or the prospects of national interest. The study of Community law, therefore, has gradually become a narrow professional segment of legal scholarship developing its own conceptual tools – losing, however, almost all ambitions to address general questions of political nature.

The late Walter van Gerven's thesis on the nature of the European Union is a typical example of this line of legal scholarship. As for the nature of the EU, the former Advocate General argues that the EU is certainly not a state in the Westphalian sense. Although some of its features are comparable to conventional states – i.e. it exercises certain competences over a specific territory or it is recognized by other states as an actor on the international plane – it lacks basic competences that would be necessary for exercising a real power of coercion. Without being able to exercise competences in the field of foreign, security and defense policy autonomously, that is, independently from the will and interests of the member states, the EU cannot fulfill the criteria of independent statehood (van Gerven 2005, 36–39). Therefore, it is argued by van Gerven, that the EU should be perceived as a political system or a body politic. This is the case, since there is a specific EU institutional setting; the EU has governmental powers through which political aims can be realized; the EU also has a certain

impact on the distribution of resources; and, lastly, a continuous interaction exists among the various actors involved (ibid. 38.).

What is very telling in van Gerven's otherwise well-founded concept is that he explicitly rejects the federal understanding. Even though this body politic clearly resembles federal systems on many points, it cannot be regarded as a federal entity yet. In van Gerven's eyes, the non-federal nature of the EU is due to the lack of the powers of internal and external coercion, the tensions between the supranational and member state levels of government, and the unsupportive attitudes of member states' populations (ibid. 60.). In sum, the EU is a multi-layered political system, but not a real federation.

One should admit that van Gerven's anti-federal concerns are all valid points in the context of the current European political scene; however, they are not decisive factors with regard to the legal understanding of the EU's constitutional nature. In many European and non-European federations one can also point out similar tensions between the central and member state levels of government, and there are some groups or peoples with clear separationist attitudes in most of them. It is apparent that the EU has no comprehensive coercive power compared to a 'traditional state'; however, this does not at all mean that it has no chance to promote its own interests through other, sophisticated legal, means.[3] Thus, the constitutional mechanisms of the Treaties enable the EU to enforce the Community interests against the member states without a clear transfer of coercive power to it. That being said, although van Gerven raises important doubts on the federal nature of the EU, his theses fail to convincingly prove why a federalist understanding of the EU is unsuitable *ab ovo*. On the contrary, they mostly point out how fragile these 'non-federal but *sui generis*' approaches are if one compares their explicatory value to that of the federal theories.

[3] The most important mechanism is the action for infringement of community law by a member state, that can be started by the European Commission and it may be ended in front of the European Court of Justice (Article 258 TFEU).

Yet, contrary to this influential line of thinking, some scholars have intentionally applied federal terms in the discussion of the EC's or EU's nature in the last decades. These scholarly attempts illustrated how fruitfully the federal approach can be applied in this context. These efforts focus primarily, albeit not exclusively, on analogies to the US federal doctrine. The best examples may be the works of J.H.H. Weiler, Koen Lenaerts or Robert Schütze. For instance, in his influential article highlighting the major trends of the early development of Community law, Weiler relied on core federal terms – i.e. enumerated powers or preemption – and argued for a clear federal understanding of the European Community (Weiler 1990-1991). Koen Lenaerts – the current Vice-President of the European Court of Justice – also applied federal tenets and discussed the main federal features of the European Community on a comparative basis (Lenaerts 1998). Recently, from the next generation of European scholars, Robert Schütze advocated for a federal-oriented approach of European integration. In doing so, he directly linked some provisions of the founding treaties to their US counterparts in order to demonstrate the applicability and relevance of this approach. For instance, he repeatedly referred to Article 235 of the Treaty establishing the European Economic Community (TEEC)[4] and its successors as the 'necessary and proper clause'[5] of European integration (Schütze 2009, 133–143).

One may conclude that it is certainly not impossible to discuss EU constitutional evolution with the language of federalism even if European public opinion is still reluctant to accept the federal scenario. Essentially, it may offer a more suitable conceptual framework than the *sui generis* theories since it makes it possible to learn from the century old federal experiences. By contrast, *sui generis* approaches may only rely on their own, post-modern conceptual framework lacking similar historical underpinning.

[4] 'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

[5] The Constitution of the United States of America Art. 1 Sec. 8. 18.

The present study intends to assess the development of EU law through federal lenses. In essence, it discusses how a main tenet of US federalism – police power[6] – can contribute to the ongoing discussion of the latest developments in EU constitutionalism.

2. Police power as both a symbol and a cluster of competences

Police power had certainly been one of the key concepts of US constitutional law. It was frequently cited in 19th century American jurisprudence (Freund 1904), also resurfacing in contemporary US constitutional adjudication and thinking. However, contemporary US constitutional law scholarship is rather skeptical about its applicability; indeed, it does not refer to it frequently (cf. Nowak-Rotunda 2010, 139). One may argue that state police power has lost its relevance in general because of the pervasive influence of constitutional rights on state competences. The impact of constitutional rights has considerably reduced the room for autonomous state action in the post-World War II period, contributing to the gradual fading of its importance.[7] Further, certain recent developments in Supreme Court case law have treated the idea of police power unfavorably, since the states' right to interfere with public morality has also been pushed into the background by constitutional concerns.[8]

However, police power – although its actual legal value has manifestly been reduced during the last century – as a concept of federal constitutional law may still be relevant from the aspect of comparative federalism. This is because it can help achieve a better understanding of federal structures. That is, the concept of police power may make it possible

[6] Police power is a unique concept originating from the 18th century English legal thinking (Legarre 2007, 748 – 761). Its meaning is much broader than the simple indication of a government regulatory power of basic offenses, but encompasses governmental competences necessary to protect domestic order (for a detailed discussion see Freund 1904, 1–23).

[7] For example: In 1927, the Supreme Court acknowledged that to punish those who abuse freedom of speech is a part of state police power (Whitney v. California), however, it overruled this interpretation in judgments dealing with the freedom of speech from the 1950's (Brandenburg v. Ohio).

[8] For example: In 2003, the Supreme Court banned a Texas bill that made homosexual sodomy a crime on public morality basis by relying on the Fourteenth Amendment (Lawrence v. Texas).

to shed light on the logic of member states' competences from their own point of view. Indeed, it can provide a different view on a question that was traditionally and prominently discussed from the perspective of federal governments.

Nonetheless, one problematic point should be taken into account. An inherent difficulty of police power is its rather broad and, therefore, imprecise meaning. In sum, throughout the last two centuries US legal scholarship has applied the concept in various contexts, and, therefore, diverse interpretations have been associated with it. Because of this broad penumbral meaning, as a first step of our study, two meanings of police power shall be contrasted.

2.1. Police power as a symbol of states' internal regulatory autonomy

The idea that is described by the term police power in constitutional law scholarship had already been an important component of the discourse that inspired the US Constitution of 1787. During the wide-reaching discussions surrounding the US constitution-making process, no one denied that British colonies had their own power to ensure 'peace, order and good government' on their territory (Legarre 2007, 770–771). Furthermore, the participants of these public debates regarded this power as a cornerstone of states' political existence. That is, the idea of inalienable self-government was among the major components of US constitutional thinking (ibid. 771–774). Thus, the constitutional system for the emerging United States of America was only conceivable if a certain degree of autonomy for the States was guaranteed. The Articles of Confederation (1777), predecessor to the US Constitution, afforded a prominent place for such a commitment to self-government. Article 2 set forth that:

‘Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.’

That being said, the internal legislative autonomy of the states in the emerging Union was a undisputed point of the US constitutional thinking. During the Federal Convention in 1787, a Connecticut representative – Roger Sherman – even proposed the incorporation of an article explicitly referring to police power into the text of the new constitution in order to protect this idea. Sherman argued that the federal government should not ‘interfered with the government of individual States in any matters of internal police’ (ibid. 776.). That is, police competences, whatever this term might have meant at the time, should have remained with the States. However, this proposition was rejected, and therefore the original text of the US Constitution did not mention the police power of states.

Yet, it should be borne in mind that the rejection of the above proposal did not at all mean that the existence of police powers was not later confirmed by corresponding constitutional practice. It simply meant that the original text of the US constitution did not include it – but police power, and the idea of self-government, has seriously influenced the public discourse on the limits of federal power from the birth of the US constitution (ibid. 777.). This line of thinking was incorporated into the text of the constitution in 1789 since the Tenth Amendment was designed to emphasize the importance of internal state competences. This amendment declared that:

‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’

The Tenth Amendment finalized the federal structure of the United States since it pointed out the fundamental limits of federal legislation (see Casto 1948-1949). The classic principle of the enumerated powers receives special emphasis here since the consequence of this clause is that those competences that are not explicitly delegated to the federal level remain with the states. That is, all other power, essentially competences that are manifest components of internal government and administration, are reserved to the states. And, these powers can be conceived of as police power in general. In this understanding, indeed, police power is the sum of those competences that remain with the states, under their autonomous legislative authority.

2.2. Police power as a cluster of competences protecting public interests

Besides the earlier, self-government oriented understanding of police power, another interpretation has emerged from the end of 19th century. This understanding is associated with specific state powers and competences. Because of the constantly increasing pressure of federal legislation, states tried to justify their local rules by relying on the concept of police power in order to defend public goods on their territory. The federal government intended to justify its jurisdiction from two directions. Firstly, a part of these federal regulations was based on the Commerce Clause allowing for the regulation of inter-state commerce by the Congress (cf. Cushman 2000). Secondly, the due process clause of the Fourteenth Amendment and its substantive corollaries, such as the protection of property or the principle of the liberty of contract, also served as a justification for challenging state acts and regulations in the field of public interest (cf. Harrison 1997). In defending their internal regulatory autonomy, states argued that their local rules were necessary to protect public health, public safety and public morals. Moreover, they also claimed that the protection of

these public concerns was an essential component of the states' police power (Legarre 2007, 787.). That is, states wanted to thwart the effects of the growing federal legislation by using the concept of police power as a cluster of those state competences that cannot be interfered with by the federal government.

The Supreme Court did not elaborate a consistent case law in relation to this approach of police power. That is, the case law of the Supreme Court has never defined its precise scope. This might be due to the sensitivity of the problem, with special regard to its very political nature and the constantly changing historical circumstances. However, two cases may illustrate the constraints among which the court had to find a proper balance. The *Mugler* case (Mugler v. Kansas) summarizes the early attitude of the Supreme Court, while the *Lochner* judgment (Lochner v. New York) points out the role of the Fourteenth Amendment when police power conflicts with the principles of federal constitutional law.

In 1887, a dispute between the state of Kansas and a brewery owner raised essential questions on the very nature of the states' legislative power. Peter Mugler, who started operating a brewery in 1877, had to shut down the business in 1881 when Kansas enacted certain new legal provisions in order to combat alcoholism in its territory. On the one hand, the constitution of Kansas was amended with an article generally prohibiting the production of alcoholic drinks. On the other hand, the local legislator also enacted a statute that linked the production of alcoholic beverages to holding a special license and ordered the fining of those producers who did not obtain such a permit. Muglers' attorney challenged the constitutionality of these regulations and argued that Kansas had no proper authority to pass them because of the due process clause of the Fourteenth Amendment.

First of all, the Supreme Court emphasized that its settled case law fully acknowledged the states' competence to regulate purely internal problems being connected to their 'moral and political welfare' (Mugler v. Kansas, 658). Further, the court argued that this amendment

focusing on – inter alia – the requirement of due process of law did not overrule these powers, as constitutional amendments were generally not about interfering with states' internal regulatory autonomy. That is, states possess an internal legislative autonomy in general, although the Supreme Court stressed that in exercising this autonomy, they must respect the authority of the Constitution with special regard to citizens' rights and the competences of the national government (ibid. 663). As for Mugler's case, the court affirmed the judgment of the Supreme Court of Kansas and did not find the contested act providing a legal basis for fining Mugler unconstitutional.

Later, this decision became authority since it acknowledged and declared the existence of state police power. Some parts of the decision attempted to define the major components of police power, contributing thereby to the clarification of this complex and blurry concept. It must be noted, however, that the Supreme Court was inconsistent in the explanation because it associated a certain range of different definitions to police power (cf. ibid. 658). Interpreted through the lens of *Mugler*, police power is basically about the protection of public health, public safety and public morals by state legislation. That is, if a state regulates a segment of life that falls into these areas and respects the general constitutional framework, its act in question can likely be justified as a valid exercise of state police power.

This understanding of police power was seriously challenged by the controversial and vehemently debated *Lochner* judgment in 1905 (see Sunstein 1987). The major question of the case was if New York had the authority to regulate the working conditions of bakers, especially the maximum number of working hours in a week, in order to protect their health and safety. That is, the state of New York wanted to justify its labour conditions regulation by claiming that it pertained to the exercise of police powers. However, the Supreme Court substantially curtailed the potential totality of police power since it argued in favor of liberty of contract against the states' legitimate authority to legislate on general labour conditions

prevailing in their territory. As Justice Peckham pointed out, if state regulations on labour conditions interfere with the liberty of contract as provided by the due process clause of the Fourteenth Amendment, the individual liberty had to prevail unless such rules are related to very special and peculiar working conditions, as for instance underground mining which was seemingly not the case here (Lochner v. New York, 57).

Hence, this decision put general economic purposes in a prominent place and state public interests only came in second. Needless to say, it considerably decreased importance of police power on a state level by giving prominence to general economic interests. Following *Lochner*, to exercise state police power in a 'fair, reasonable and appropriate' manner, the state has to act in a way that is directly linked to public goods. A far and remote relationship, as was the case with the New York bakery working conditions regulation, was, in the eyes of the court, simply inadequate.

Following the *Lochner* decision, the scope of general state police power has been reduced even further, since both substantive due process arguments (cf. Lawrence v. Texas) and the influence of constitutional rights have eroded it (e.g. Brandenburg v. Ohio). However, the existence of police power as such has never been questioned, and states' internal regulatory autonomy in respect to public goods is still a value of US constitutional architecture.

2.3. Summary: multiple, but intertwined layers of meaning

In conclusion, police power is mostly associated with two meanings in US constitutional history – a broader concept and a narrower one (Legarre 2007, 785–793.). The broad concept is a cornerstone of federalism, since it reaffirms that federal power has its own internal limits posed by the jurisdiction of states and their residual sovereignty. In this sense, police power does have a symbolical meaning as it exposes an inherent limitation of Congress's powers. At

this point, not the precise components and parts of police power that are important, but its message: federal power cannot be unlimited, but as to be balanced with the fact that states retained a part of their original sovereignty which they will never give up since a part of public goods can only be protected this way.

The narrow concept reflects a different approach. It sheds light on the fact that states' jurisdiction in a federal system comprises at least three important areas: the protection of public health, public safety and public morals. Thus, it points out some components of states' residuary sovereignty by putting emphasis on the public good. Obviously, these competences have been under a strong pressure from the beginning of the 19th century stemming from various sources, e.g. the Fourteenth Amendment's due process clause, or the pervasive effect of constitutional rights. But, their existence could never be denied; it was merely their proper scope that has been up for discussion.

3. Police power in the Post-Lisbon constitutional architecture?

3.1. Article 4 (1) and (2) TEU: a European approach to police power

The Lisbon Treaty that, among other objectives, aimed to restructure the system of Union competences by simplifying the pre-Lisbon setting (see: von Bogdandy-Bast 2002, 229–251) introduced qualitatively new provisions setting forth precise rules for delimiting the competences between the Union and the member state levels of government. Both the TEU and the Treaty on the Functioning of the European Union (TFEU) contain relevant

provisions,[9] but Article 4 paras (1) and (2) TEU may have a prominent role to play in this discussion.

As for these articles, the first point that should be emphasized is the lack of any antecedents in the earlier treaty versions. It can generally be stated that the Lisbon articles on the division of competences originate from either some earlier articles or the case law of the European Court of Justice (ECJ) (cf. Lenaerts-Van Nuffel 2011, 125–126). However, these two articles do not exhibit such a close connection to the constitutional past of the EU, and it makes their appearance in the corpus of the TEU even more surprising. Generally, it can be argued that Article 4 paras (1) and (2) TEU indicate a clear shift in the constitutional philosophy of the EU with respect to the vertical division of powers. It is so because both of paragraphs are devoted to the protection of member state powers. That is, they are centered on the legislative activities of member states.

One should not forget that prior to the Maastricht Treaty there were no provisions in the founding treaties dealing either with the existence of member state powers or their precise scope. They rather focused on the exercise of the Community powers, then later on Union competences.[10] Following the adoption of the Maastricht Treaty, the concept of subsidiarity appeared in the corpus of EU constitutional law, but it constituted much more of a political response to the fears of certain member states regarding an emerging federative union than a real and functioning legal remedy against the potential misuse of Community powers (cf. Davies 2006). Therefore, these articles illustrate to what extent the constitutional philosophy of the EU has changed in relation to the question of federalism. The nature and scope of

[9] Interestingly the EU constitutional order has no single competence clause that would regulate the division of competences in a single chapter. Actually, Articles 4 and 5 TEU, Articles 2 to 6 TFEU and Article 352 TFEU contain relevant provisions and their entirety can be conceived of as the 'competence clause' of the EU.

[10] It should be mentioned that those provisions that enlisted certain exceptions under the principle of free movement of goods on the basis of – inter alia – public morality, public policy, public security and protection of health and life cannot be regarded as antecedents since they did not deal with the competences of member states but they provided general grounds to justify those member state measures that may infringe this principle. (see Article 36 TFEU).

member state competences have to be emphasized only in federal structures; in other, fundamentally non-federal constitutional orders it is simply unnecessary.

Moreover – and this is the most striking feature from the aspect of the present study – one can easily recognize that both articles reflect an understanding of member state powers that is almost identical to the US interpretation of police power. One may even conclude that they are intended to be the "police power clauses" of the EU treaties.

First of all, Article 4 para (1) TEU must be analysed in detail. It declares that:

'In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.'

It can hardly be denied that this provision shares the same federal commitment that the Tenth Amendment to the US Constitution exemplifies. Obviously there are apparent differences between the two provisions. Firstly, the phrasing of Article 4 para (1) TEU is not as sophisticated as in the case of the US Amendment, since it is nothing more than a simple statement on the position of powers not conferred upon the EU. Secondly, as compared to its US counterpart, this Article does not contain any reference to the people, but merely mentions the member states as depositaries of these powers.

Yet, the meaning is definitely the same in a constitutional sense. A part of the EU member states' competences is not transferred to the supranational level, to the EU government. Thus, EU member states retain a part of their sovereignty irrespective of the strengthening of the supranational level of government. Put another way, one can find a clear reference to a basic tenet of federalism as determined by the symbolical meaning of police power. In the eyes of the European constitution-maker, the powers of the Union level are certainly not unlimited, but rather they are restricted by the residuary sovereignty of member states. That being said,

contrary to the manifest differences on the surface, this conviction on the limited nature of the powers of the supranational level is a common point in both the US and the post-Lisbon EU constitutionalism. Basically, the symbolical understanding of police power earlier analysed is reflected in this new article.

Article 4 para (2) TEU implies even more surprising conclusions when compared to the narrower approach of US police power. Indeed, this provision delimits the core of the political and constitutional existence of the member states; that is, it defines those competences that cannot be overruled by acts of the Union. In terms of the present analysis, the second sentence of this Article may gain particular importance. It obliges the EU to respect the member states (i.) essential state functions in general, and it mentions (ii.) the ensuring of territorial integrity, (iii.) the maintenance of law and order and (iv.) the safeguarding of national interest as major components. Although the constitution-maker did not specify the exact scope of these powers, these are the basic state competences necessary for territorial administration.

It is worth mentioning that Working Group V of the European Constitutional Convention originally had a different, essentially broader vision when drafting this provision. It argued that national identity as a constitutional concept consists of two main components. The first one focuses on 'the fundamental structures and essential functions' of a member state, whereas the second one concentrates on 'basic public policy choices and social values' (Final Report 2002, 11). However, perhaps as a sign of European *realpolitik*, the final draft entirely neglected the public policy choices and social values components in the text, and it only contained references to the essential state functions.

It is striking again to what extent the second sentence of Article 4 para (2) TEU echoes or mirrors police power when conceived of in a narrow sense – that is, as a cluster of state powers related to the protection of public goods in its territory. Essentially, no one can deny that the aim of this Article is to define, as broadly as possible, those legislative areas that

cannot be dissociated from the member states in this configuration of power sharing. That is, the EU constitution-maker followed the same approach as the US constitutional discourse when trying to specify which state powers are needed to protect public health, public safety and public morals. Basically, the terms of 'essential state functions' and the 'maintenance of law and order' may comprise all those competences that have been identified as police powers in front of the US Supreme Court from the second half of the 19th century. A direct reference to public morals is actually missing from text of this article, but, theoretically, the word 'order' could be interpreted in this sense by the ECJ if necessary.

3.2. The ECJ and the individual, country-specific constitutional identity: opening the door for police power in EU context?

Today, it is impossible to say whether or not Article 4 paras (1) and (2) play a similar role in the future of EU constitutionalism that police power had played on the other side of the Atlantic. One may direct attention to the apparent similarities, but the judicial interpretation of these articles is still an open question. That is, the ECJ will play a prominent role in shaping the understanding of the exclusive member state competences, in establishing a fair balance between the Union and member state interests in order to create a fair and efficient system of division of powers.

The attitude of the ECJ toward member state competences as they are conceived in these two articles cannot be foreseen due to many reasons. Chief among these reasons is the actual uncertainty of the European political scene, as the ongoing European debt crisis profoundly changed the general attitude towards integration. And, this transformation may have a serious effect on the assessment of basic constitutional problems, such as member states' inalienable

powers. However, in examining the settled case law of the ECJ, there is one decision that may yield some insights for predicting the ECJ's future approach in this field.

As regards state police powers, the most important decision of the ECJ may be the *Omega Spielhallen* (Omega-Spielhallen). While this case had many implications, only one aspect has to be mentioned in the present context. The case, which started in Germany and gained particular importance, explicitly raised the question whether the principle of freedom to provide services can be restricted by referring to specific fundamental constitutional values – human dignity in this case – as a public policy choice. Human dignity has a prominent place in German constitutionalism, and its protection is one of the basic goals of the entire legal order. Therefore, it plays a special role beyond comparison with other member states.

In other words, the main dilemma of this case can be reformulated by using the term of police power. Does the Federal Republic of Germany have the right to provide a special, high-level protection to human dignity in order to protect a prominent value of German constitutionalism, even against the principles of the European Union? Essentially, the police powers of Germany in the field of public morals had to be weighed against EU basic principles. The ECJ answered the question affirmatively, declaring:

'[…] that the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty […]' (Omega-Spielhallen, para 31)

That is, in the *Omega Spielhallen* the ECJ theoretically acknowledged the existence of public policy objectives varying from one country to another. Moreover, it even accepted that these can be protected by country-specific restrictions, and if these do not conflict with some

general principles of EU law – such as non-discrimination and proportionality (Omega-Spielhallen, paras 29 and 38) – they may even be valid under EU law.

Essentially, the argumentation of the ECJ in *Omega Spielhallen* certainly indicates one point. The ECJ is open to accept the existence of police powers if they are justified under the strict scrutiny of substantive and procedural requirements. Of course, this argumentation remains silent about the future interpretation of Article 4 paras (1) and (2) TEU, it only points out the starting position of the ECJ that may obviously change due to other relevant considerations.

4. Conclusion

In conclusion, two theses can be formulated at the end of this analysis that discussed the reception of police power in EU constitutional law. First of all, no one can seriously question the usefulness of this federal concept in the better understanding of EU law. The idea of police power is very useful for highlighting the broad, so to say comparative, context of Article 4 paras (1) and (2) TEU, and, therefore it contributes to their in-depth understanding.

Moreover, the more than two hundred years of constitutional history regarding police power, be it a symbol of residuary sovereignty or a cluster of specific powers, can also help in projecting the prospects of EU member states within the conditions of an emerging federal polity. Comparative constitutional history teaches us that the real room for member states to exercise their own competences in a federal system is determined by a case-by-case approach. That is, it is the field of a never-ending constitutional controversy between the supranational and member state levels of government, in which both sides try to preserve, and if it is possible, broaden and strengthen their powers. And, obviously, federal supreme courts have always been key actors in this process.

Therefore, we may conclude that the question of what kind of constitutional future the EU member states are looking ahead to in a more-and-more federalized EU can only be answered in the longer run by analysing the relevant case-law of the ECJ. Thus, we are looking forward to the first judgments of the ECJ interpreting Article 4 paras (1) and (2) TEU. Until such time, all legal literature regarding this problem is nothing more than a simple, but fascinating speculation.

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