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THE PRINCIPLE OF CONFERRED POWERS AND THE DIVISION OF POWERS BETWEEN THE EUROPEAN COMMUNITY AND THE MEMBER STATES

ABSTRACT. This article is a reflection about the division of powers between the European Community and the Member States. It focuses on the adventures and misadventures of the principle of conferred powers in the process of European integration. Section I is about the initial vertical division of powers in the European Community. Section II is dedicated to an analysis of the progressive erosion of conferred powers during the 70's and the 80's. Section III refers to the slow return to the application of the conferred powers principle that started after the Single European Act.

KEY WORDS: division of powers, European Community, principle of conferred powers

The European Community was established in a clear international law manner. The six States that signed the 1957 Treaty of Rome were intended to create an international organization, even though it remained characterized by certain aspects that would lead it to diverge from the common functioning of such entities of international law.

In international organizations powers are seen instrumentally. The powers of those entities are for the fulfillment of the aims embodied by those very same international organizations. One might even say that the powers of those subjects of international law should be seen as the legal expedient created to enable them to proceed with the tasks stipulated in their constitutive acts. Yet despite the way they are instrumentally defined, at least as regards the purposes behind the founding of an international organization, the question of powers is still a significant aspect within such entities, insofar as for an agreement between States to be considered an international organization, it must enjoy its own powers to carry out its mission, and they must be distinct from those of its members.

Thus, and contrary to States possessing inherent and plenary powers, international organizations only enjoy those powers that are conferred

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upon them for the achievement of their aims.[1] International organizations possess enumerated powers. In other words, since contrary to the case with States, international organizations are not set up with a universality of aims, their powers of normative action are defined according to the idea of specialty, evident in the so-called principle of conferred powers.

THE RISE OF CONFERRED POWERS

Due to the European Community's genesis as an international organization as regards its powers, it enjoys the fundamental characteristics of such bodies. The truth is that on the one hand the European Community is an entity endowed with conferred powers,[2] while on the other hand its powers are determined based on the objectives assigned it by its institutive Treaty. Thus the Community necessarily enjoys limited powers, insofar as an international organization it is governed by the principle of specialty of powers,[3] which may be set against the principle of plenary powers enjoyed by States. In fact, and despite the extensive attribution of powers that benefits the European Community, it is a well known fact that it enjoys no universality of aims,[4] the only situation whereby a subject of international law may be allowed to retain plenary powers.

Likewise, the way in which powers are conferred to the European Community is shaped by canons also used by international law. Powers are not conferred following the model of the list of powers, that is, by provisions in the constitutive legal act enumerating all the powers the founding members agree to grant. Rather, they are conferred via the functional attribution method. This implies that the Treaty of Rome defined the aims and objectives of the European Community as established, and that the powers of the latter derived from the general framework of the institutive provisions themselves. Indeed, given the size and complexity of the fixed purposes behind the creation of the European Community, its founding States preferred that the system adopted should contain an indispensable flexibility, which could be best obtained via a functional attribution

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[1] D. Carreau, *Droit International*, 4ème éd. (Paris: Éd. Pedone, 1994), at 370.

[2] M.L. Duarte, *A Teoria dos Poderes Implícitos e a Delimitação de Competências entre a União Europeia e os Estados-Membros* (Lisboa: Lex, 1997), at 213.

[3] V. Constantinesco, *Compétences et Pouvoirs dans les Communautés Européenes – contribution à l'étude de la nature juridique des Communautés* (Paris: Librairie Générale de Droit et de Jurisprudence, 1974), at 89.

[4] L.M. Díez-Picazo, "Reflexiones sobre la Idea de Constitución Europea", *Revista de Instituciones Europeas* (1993), at 549.

of Community jurisdictions, instead of a simple rigid determination of powers that would mean a list of them.[5]

The powers the States decided to attribute to the European Community can be ascertained through the joint reading of articles 2 and 3 of the Treaty. They also set down the limits to the principle of conferred powers in the Community, which though implicit in the spirit of the authors of the Treaty – as a natural presumption in the power framework of any international organization – was not explicitly referred to in the text of the constitutive act.[6] The attribution of powers to the Community would be completed by the various material provisions in the Treaty, which not only specified the scope of such attributions, but also covered the conditions and the mode for exercise of the respective powers, and also by the clause contained in its article 308 (*ex* article 235).[7]

The legal nature of powers of the European Community

The objectives that the Treaty of Rome assigned to the Community and how those objectives had determined the attribution of vast areas of powers, insofar as the establishment of a common market encompassed the free movement of production factors and the adoption of a certain number of common policies, implied that the Community was endowed with an ample range of powers to enforce the aims for which it had been created. Indeed, the establishment of a common market and the progressive approximation of economic policies of the Member States presupposed that the European Community held regulatory powers in almost all matters of an economic nature, given its more or less close connection with the harmonious development of economic activities.[8] Given the scope of the powers conferred upon the Community, the consequences of such powers upon the Member States must needs be known, that is, to what point the States can continue to concern themselves with the matters covered by the vast scope of Community powers – ergo, to know the legal nature of the powers of the European Community.

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[5] P. Pescatore, *La répartition des compétences et des pouvoirs entre les États membres de les Communautés Européenes – Étude des rapports entre les Communautés et les États membres* (Argentina: Instituto para la Integración de la America Latina, 1967), pp. 108–152.

[6] Indeed, the principle of conferred powers was only explicitly set into the body of the Treaty during the revision process that it was submitted to on the occasion of the adoption of the European Union Treaty, and is contained in the first paragraph of article 5.

[7] All references to Treaty articles are made in accordance with the new numeration order established by the Treaty of Amsterdam.

[8] B. De Witte, "Community Law and National Constitutional Values", *Legal Issues of European Integration* (1991), at 3.

The legal nature of the Community's powers depends above all on the specific contents of the material provision of the Treaty that set out the scope and manners of exercise of those same prerogatives.[9] It is thus natural that in certain aspects, the Community acts more intensely in cases where there is the likelihood of a parallel intervention by the States, and in other cases the States assume a more active role vis-à-vis Community intervention. The EEC Treaty thus contained no explicit indication whatsoever as to the nature of the Community's powers.[10] This being so, and given the Treaty's silence on the subject, it is up to the Court of Justice to pronounce on this question.

The most current classification of the legal nature of powers found in the literature distinguishes between exclusive powers and overlapping powers.[11] Exclusive powers are understood to be those matters that may only be the object of regulatory intervention by the Community, and are entirely outside the realm of Member States' activity. In principle, this does not prevent the States from eventually carrying out legal activity in these areas. But if they do so, it would be either in a situation of previous authorization for State action or via a delegation of powers by the competent Community institution.

For their part, the Community's concurrent powers are those where there is no initial exclusion of either of the two main centers of power of the Community process; the powers that remain are those considered as overlapping powers submitted to the joint regulation of the Community and the Member States. The expression "concurrent powers" does not mean matters subject to a pure and simple competition of regulatory intervention by both centers of power, but only areas where power remains divided between the Community and the States. A more correct designation would be shared powers,[12] the expression that the Court of Justice has used in a number of recent decisions wherein it was called upon to decide on problems stemming from the vertical division of powers.[13]

Keeping in mind the features of the powers of international organizations, the genesis of the European Community, and the wide-ranging powers thereof, it is imperative to state that the exclusive nature of

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[9] A. Tizzano, "Lo Sviluppo delle Competenze Materiali delle Comunità Europee", *Rivista di Diritto Europeo* (1981), at 146.

[10] M. Lopez Escudero, *Los Obstaculos Tecnicos al Comercio en la Comunidad Economica Europea* (Granada: Universidad de Granada, 1991), at 221.

[11] For all, see K. Lenaerts, *Le Juge et la Constitution aux États-Unis D'Amerique et dans l'ordre juridique européen* (Brussels: Bruylant, 1988), at 502.

[12] P. Pescatore, *Supra* n. 5, at 7.

[13] *Opinion 2/91* [1993] E.C.R. I-1077, point 12; also, *Opinion 1/94* [1994] E.C.R. I-5422, number 2 and 3 (points 98 and 105 of the Opinion).

Community powers is not to be taken for granted, that is, the idea of exclusivity ought not be understood as the general principle. Indeed, it would make no sense for an international organization, even though holding very specific features vis-à-vis the common type of such bodies, to be endowed with such vast prerogatives, which by principle ought be considered exclusive, therefore disallowing the States any autonomous regulatory intervention in such broad-ranging matters. Thus the general principle applicable in matters concerning the legal nature of Community powers ought to be their nature as overlapping, or sharing, with the Member States.[14] Pescatore spoke of this idea in the late 1960s, when he confirmed the rarity of exclusive powers, which included only the customs union and the adoption of a common customs tariff.[15] Constantinesco in the early 1970s also seems to describe this scope of Community powers exclusively limited to the customs union, whereby regarding customs matters there had been a destruction of State powers, though in anticipation that the common policies laid out in Treaty would lead to a gradual disappearance of the respective national powers.[16]

The Court of Justice only removed two kinds of matters considered the exclusive province of the Community from the general framework of powers initially defined by the primary law of the Community. These consist of the powers held by the Community in the areas of common trade policy[17] and those concerned with the preservation of the biological maritime resources.[18] Although the institutive acts of the Community did not refer to the explicit legal nature of these powers, the Court has understood them via a teleological interpretation of the referred-to provisions.[19] All the other numerous powers conferred upon the Community can be considered as being shared with the Member States, because they are covered by the general rule concerning the legal nature of Community powers: the principle of overlapping powers.

However, this leads to great uncertainty where the fundamental idea underlying the principle of overlapping powers – that is, the possibility of the Community and national legal orders continuing to regulate such matters – tends to give way before another opposing idea: the Member

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[14] J. Schwarze, "The Distribution of Legislative Powers and the Principle of Subsidiarity: The Case of the Federal States", *Rivista Italiana Diritto Pubblico Comunitario* (1995), at 719.

[15] P. Pescatore, *Supra* n. 5, at pp. 6–7.

[16] V. Constantinesco, *Supra* n. 3, at pp. 282–292.

[17] *Opinion 1/75* [1975] E.C.R. 1355; Case 41/76, *Suzanne Donckerwolcke v. Procureur de la République* [1976] E.C.R.1921.

[18] Case 804/79, *Commission* v. *United Kingdom* [1981] E.C.R. 1045.

[19] K. Lenaerts, *Supra* n. 11, at 506.

States preserve their regulatory prerogatives in the areas where Community powers overlap, insofar as the latter has not yet adopted legal acts in those areas of intervention. Once the Community issues such regulatory provisions, where these are considered to be of a complete nature, the States should abstain from regulating such matters. In such situations, the exercise of powers on the part of the Community would have the immediate effect of displacing the regulative concomitance that until then had joined the Member States. These regulatory joint Community powers were, by their usage, transformed into exclusive powers of the Community.[20] In other words, though having been initially understood as overlapping, by being exercised by the Community these powers metamorphosed in their legal nature in such a way as to enable only the Community to continue to legislate in such matters.

The justification for this metamorphosis of the legal nature of overlapping powers depended on the fact that the Community's rules were of an exhaustive nature. In the areas of overlapping power where the Community had been exercising its powers, and when of an exhaustive character, the States would be equally deprived of their regulatory powers in those areas.[21]

In the area of powers the Community legal order has been characterized by a changeable or dynamic understanding of those self-same powers, insofar as the exercise of those prerogatives granted to the Community have tended to unleash a mechanism leading to occupation of this normative field by the Community legal order.[22] This occupation of the normative field has been made at the cost of a correspondent reduction of the regulatory prerogatives of the States that have seen their normative room to manoeuver diminished, though this has occurred in areas where the Community was supposed to benefit only from shared powers. This phenomenon of the metamorphosis of powers has technically led to a large-scale idea of the concept of the pre-emption of national powers.

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[20] R. Bieber, "On the Mutual Completion of Overlapping Legal Systems: The Case of the European Communities and the National Legal Orders", *European Law Review* 13 (1988), at 148; also P.J.G. Kapteyn and V. van Themaat, *Introduction to the Law of the European Communities* 2nd Ed. (Deventer: Kluwer Law, 1989), at 193; P. Mengozzi, *Il Diritto della Comunitá Europea* (Padova: CEDAM, at 1990), at 77.

[21] J. Temple Lang, "The ERTA judgement and the Court's case-law on competence and conflict", *Yearbook of European Law* (1986), at 193.

[22] D. Lasok and J.W. Bridge, *Law and Institutions of the European Communities* 5th Ed. (London: Butterworths, 1991), at 37.

THE FALL OF CONFERRED POWERS

The metamorphosis of the overlapping powers, via the case law issued by the European Court of Justice, is an aspect that is part of a wider phenomenon of transformation within the Community system. It is an integral part of what Weiler has called the constitutionalisation of the EC Treaty.[23] Community powers were affected by a significant process of change from the 1970s onwards. From that time on the European Community witnessed a decisive erosion of that self-same principle of conferred powers. Generally speaking, there were two types of elements that provoked that erosion: on the one hand, the decisions of the European Court of Justice concerning powers, and on the other hand, the use made of the clause contained in article 308 of the Treaty.

The case law of the European Court of Justice

It is well known that the Court of Justice was an institution that, in the exercise of the mission conferred upon it by the Treaty, assumed a strongly favorable attitude to the strengthening of the integration process by reference to Community legality. This pro-integrationist attitude, which characterised this institution's decisions, has been necessarily reflected in its approach to problems related to the range of the Community's powers and the way they are divided with the Member States. In developing case law in the area of powers, the Court's pro-integrationist attitude has primarily rested on recourse to elements of extensive, teleological, and dynamic interpretation, as well as on the use of the principle of *éffet utile* of the Treaty's provisions. As a result of this interpretive approach to Community law a number of ways can be identified that tend to reflect the comprehensive effect of the Court's decisions in the process of changing the framework of powers initially stipulated in the Treaty.

Firstly, in the Community legal order the Court of Justice has made a very limited use of the implied powers doctrine. Indeed, the judicial recognition of the *implied powers* doctrine in the European Community legal order has been limited to the field of external relations. This implicit recognition of powers in the area of international relations is even more interesting due to the fact that it was preceded by a period wherein the dominant understanding in legal literature considered that the Community

[23] J.H.H. Weiler, "The Community System: The Dual Character of Supranationalism", *Yearbook of European Law* 1 (1981), at 267, and "The Transformation of Europe", *Yale Law Journal* (1991), at 2403.

only enjoyed external powers in areas where such jurisdiction resulted from powers conferred by the Treaty.[24]

Yet the Court of Justice, went against this limited view of the Community's external powers, in a series of three cases in the 1970s[25] which stated the principle of parallelism of the external Community powers vis-à-vis the internal powers, declaring that the Community's jurisdiction in matters of external relations could implicitly stem from the provisions of the Treaty that fixed their internal powers, the acts of secondary law adopted in their application, or, even more boldly, the situations wherein the Community's participation in an international agreement made it necessary to fulfill the aims prescribed in the Treaty – thus overcoming the thesis of conferred powers.

Secondly, from the 1970s the case law of the Court of Justice has led to what can be describes as a metamorphosis of the legal nature of Community powers. The full understanding of this case law necessitates it being considered within the wider context of a decisive mutation imposed by the Court of Justice when approaching the division of powers between the Community and the States. That approach led to progressive erosion, or rather a weakening of the principle of conferred powers as the guiding notion of the question of division of powers in the Community legal system.

Implied powers and pre-emption are thus legal categories identifiable in this process of jurisdictional mutation of Community powers. However, this does not mean that the dynamic and diversity of the Court of Justice's contribution to the narrow limits of that classification ought to be closed. For over the course of this period of change, which began in the 1970s, it has demonstrated a continuing tendency to carry out an expansive approach of the Community's powers, manifested both by an extensive and teleological interpretation of provisions of the Treaty that stipulated the attributions therein contained, or by a restricted understanding of the regulatory powers of the Member States.

It is thus worthwhile considering the elements and methods of interpretation to which the Court of Justice took recourse when dealing with the question of division of powers between the Community and the States.

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[24] On this subject, see R. Kovar, "Les compétences implicites: jurisprudence de la Cour et pratique communautaire" in *Rélations extérieures de la Communauté Européenne et marché intérieur: aspects juridiques et fonctionnels*, ed. P. Demaret (Bruges: Collège d'Europe, 1986), at 17.

[25] Case 22/70, *AETR*, [1971] E.C.R. 263; joint cases 3, 4 and 6/76, *Kramer* [1976] E.C.R. 1279; *Opinion 1/76* [1977] E.C.R. 741.

The methods of interpretation of the Court of Justice

Initially the Court of Justice seemed to adopt an interpretation of the provisions of the Treaty, after commencing with arguments common in all legal interpretation of both literal and systematic elements, using the classic methodology of international law which consists of the application of the so-called '*éffet utile*' of its provisions. This led to an interpretation of Community law that aimed to favor the reasonable interpretation of the rules in order to assure a minimum of efficiency of Community provisions, and to avoid interpretations that in practice would empty them of useful meaning.[26] It was therefore an interpretation of a somewhat minimalist nature that above all sought to safeguard the above-mentioned '*éffet utile*' of the contents of Community law.

However, the Court increasingly used a "finalist method of interpretation" which, based upon both functionalist and teleological elements, can be considered as the search for the reason of the law, the *ratio legis*, through valuation of the interests subjacent to them and via the discovery of the purposes thereof.[27] It is therefore, a method of interpretation focusing more on the scope behind adoption of the rule than on the instruments with which it hopes to achieve them, which favors an analysis of the interests in conflict to the mere order resulting from its textual formulation. It must be noted, however, that the use of this method of interpretation is considered usual practice not only in the internal order of the States, but also in the context of international law.[28]

Thus in cases where there was doubt about the significance of the Community clauses, the ECJ was no longer concerned only with guaranteeing the efficiency of that provision, but began to develop an approach to interpretation of the Community legal order employing the finalist method, consisting of the identification of the *ratio*. It is in these terms that Lecourt referred to the need to use this interpretative method, as either an auxiliary instrument for the use of other methods, as an element to verify the fairness of a certain legal line of argument, or even as a principal basis for legal reasoning of a decision in cases where there had been greater difficulty in identifying the precise scope of the normative texts. As Lecourt observed, the Court, in the reasoning for its decisions, used the finalist method of interpretation through various formulations, at times alluding to the aims

[26] A. Bredimas, *Methods of Interpretation and Community Law* (Amsterdam: North-Holland Publishing Company, 1978), at 77.

[27] M.A. Domingues de Andrade, *Sentido e Valor da Jurisprudência* (Coimbra: Boletim da Faculdade de Direito, 1973), at 27.

[28] E. Betti, *Interpretazione della Legge e degli Atti Giuridici* (*Teoria Generale e Dogmatica*), 2nd Ed. (Milano: Giuffrè Editore, 1971), at 441.

and objectives of the Treaty, and at others only invoking the spirit or context within which the provision in question was inserted.[29]

The Court based its decisions on the justification of a finalist method that may be considered to have a double sense. The Court hoped to determine the goal of the particular provision, or the regulatory act which contained it, thus providing an interpretation which kept in mind the functional element of the respective pretext. However, the legal basis for its decisions frequently went this finalist stance centered upon the character of the act, to refer to the aims of the Community itself, to whose legal order the pretext in question belonged. This second level of finalist interpretation was thus made within the wider reference framework of the objectives assigned to the Community by the Treaty itself.[30]

As the Court of Justice followed its teleological approach to interpreting fundamental Treaty provisions, it revealed an intangibility within its approach to the fundamental principles of the establishment of the common market. Lecourt has stated that no type of legal provision could be invoked against the full application of these principles, which include clauses contained in areas supposedly under the exclusive jurisdiction of Member States, for which there were marginal conflicts with the application of the said fundamental principles of Community legal order, and those clauses issued in their application.

Nevertheless, the originality of the legal interpretations used by the Court of Justice, when considering the division of powers, was not only found within its broad use of the teleological element in interpretation of Community law. Another aspect of the view taken by the Court of Justice about the legal order of the Community was of crucial importance in the manner in which it defined the material limits of power of the European Community. This consisted of a "dynamic criterion of interpretation".

The dynamic criterion of interpretation of provisions of Community law implies an inversion in the approach to the regulatory texts made via some of the basic arguments of legal interpretation, such as the literal element and the systematic element. Although these constitute starting instruments indispensable to the determination of the sense and scope of the legal clauses, they do tend to provide the interpreter with a predominantly static perspective of the constitutive rules of a certain legal order. The Court of Justice considered the Community law as a fundamentally dynamic legal order, insofar as it, according to the intention that the authors of the Treaty wrote into its very Preamble, "lays the foundations of an ever closer union among the peoples of Europe". The result of this has been a

29 R. Lecourt, *L'Europe des Juges* (Brussels: Bruylant, 1976), at 242.

30 In the same sense, P. Mengozzi, *Supra* n. 20, at 301.

kind of historical determinism guided by the idea of "an ever closer union" between the European peoples, which constitutes a profound mark in the reading the Court made of the combination of aims assigned by the Treaty to the Community, as well as the respective powers that Member States have consented to confer upon it.

The materialization of the dynamic criterion of interpretation of Community law was not something that resulted *per se*, but rather ought to be considered, according to Bengoetxea, as the effect of the combined use of three different types of arguments at the level of interpretative activity: functional, teleological, and consequentialist.[31] Through this dynamic criterion, the interpretation of Community law tended to represent this order as a type of moving picture, where each figure in the frame was represented not only in relation to the various other figures, but also with reference to the sequence of developments.[32]

The centralization of powers

It may be deduced from the above discussion that the framework of division of powers between the Community and the Member States in the mid 1980s was profoundly changed. Indeed, there was a definitive toning down of the subtle line of division of powers adopted by the Treaty authors.[33] Yet the attempt to establish, during that time, the limits of Community power was a very difficult exercise due to the vague definition of the very boundaries of constitutional delimitation.[34] Lenaerts stated, in analysising the dominant feature of the division of powers, Member States could invoke no core of sovereignty whatsoever against the Community as long as its residual powers did not hold any type of *reserved status*[35] under the Community legal order.

It may then be argued that the comprehensive impact of the aforementioned developments affected the allocation of powers between the center

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[31] J. Bengoetxea, *The Legal Reasoning of the European Court of Justice – Towards a European Jurisprudence* (Oxford: Clarendon Press, 1993), at 251.

[32] Idem at 252.

[33] When referring to the evolution of Community powers, Temple Lang stated that after the Single European Act, the Community institutions "have comprehensive general powers, and not a series of limited specific powers (compétences d'attribution)", cfr. J. Temple Lang, "European Community Constitutional Law: The Division of Powers Between the Community and the Member States", *Northern Ireland Legal Quarterly* 39 (1988), at 224.

[34] J.H.H. Weiler, "Problems of Legitimacy in Post 1992 Europe", *Aussenwirtschaft* (1991), 426.

[35] K. Lenaerts, "Constitutionalism and the Many Faces of Federalism", *American Journal of Comparative Law* (1990), at 220.

and the periphery in the framework of the Community process, generating the phenomenon of a centralization of Community powers.

To achieve the Treaty aims, Member States allocated the Community conferred powers that served as an instrument to realize its purposes. A definite equation was thus shaped for the division of powers between the Community and the States. And even though some of the center's powers could be considered as powers *ex novo*, most of them originated in the material jurisdiction of the States which, for their part, due to the elasticity of powers suffered a corresponding reduction in scope.

Thus in referring to a centralization of powers, one notes a change in the equation of initially defined powers that translated into a tendency to shift powers from the constituent units to the center. Occasional changes in the allocation scheme did not, in this writer's opinion, reach a significant enough level to allow observation of either a tendency to shift or even to identify the corresponding direction thereof.

Thus it appears from the discussion above that, during the period between the early 1970s and the adoption of the Single European Act (1986), there was a continuing tendency towards a centralization of powers, as, during that time, the Community witnessed an extraordinary increase in its material sphere of regulatory activity. The shift of powers was in one direction, always moving towards the benefit of the center in detriment to its constituent units.

Implied powers and pre-emption doctrines, as well as the use of article 308, are thus themselves useful elements for the analysis of the subject of centralization of powers, as long as they mainly deal with shifts of powers from constituent units to the center of the system. However, the Court of Justice had a significant role in this centralising process by its contribution to legal interpretation of the Treaty, especially in the extensive interpretation of the provisions enumerating the Community's powers, the corresponding restrictive interpretation of the principles that safeguard the prerogatives of State action, and above all the use of the finalist method discussed above. All these factors can be included within those elements that favoured the above-mentioned trend in shifting powers towards the Community.

CONSTITUTIONAL AMENDMENT AND THE RETURN TO CONFERRED POWERS

The Single European Act provided the occasion for a first constitutional change to the mechanism of powers conferred to the European Community, enhancing its scope of intervention with reference to the areas

initially defined by the Treaty of Rome. Member States thus granted the Community powers in areas of economic and social cohesion, research and technological development, and in environmental matters.[36] The powers granted at the environmental level were the more interesting from the perspective of the legal technique used.[37] A new Title was thus created for the environmental area, which like the other areas above, had already been object of considerable Community action.[38]

Indeed, article 174 (4) set the subsidiary nature of the Community's action regarding the environment, to the extent that the established objectives for that sector may be better achieved at the Community level than at the level of the individual Member States. This was the first appearance of the principle of subsidiarity within the framework for division of powers between the Community and the States. On the other hand, number 5 of that article, after referring to the Community's international powers in the environmental field, states that it does not prejudice the powers of the Member States to negotiate in international bodies and to conclude international agreements. The States thus introduced an express constitutional saving clause for their international jurisdictions in the area of the environment, with the aim of avoiding an eventual future pre-emption of their relevant external powers. Article 176 also ought to be highlighted, for it established the minimum character[39] of environmental rules adopted by the Community, allowing the States to maintain or introduce more stringent protective measures. The conferring of powers to the Community in the environmental sector was therefore characterized by a new triptych of principles as regards the legal technique of division: subsidiarity of Community rules; denial of what was considered necessary pre-emption of States' external powers; and the preference for national regulatory competition, which implies denial of the idea of Community occupation of the normative field of the States.

The innovations introduced by the Treaty of Maastricht (1992) can therefore be considered within the context of the Member States' unease regarding the future of their powers when faced with an apparently irre-

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36 A. Moravcsik, *The Choice for Europe* (New York: Cornell University Press, 1998), at 365.

37 R. Dehousse and G.Majone, "The Institutional Dynamics of European Integration: From the Single Act to the Maastricht Treaty", in *The Construction of Europe. Essays in Honour of Émile Noël*, ed. S. Martin (Dordrecht: Kluwer, 1994), at 101.

38 By the time of adoption of the Single Act, the Community had already adopted nearly 350 regulatory measures in the area of the environment, N. Haigh, "Direito Comunitário do Ambiente", in *Direito do Ambiente*, ed. D.F. Amaral and M.T. Almeida (Oeiras: Instituto Nacional de Administração, 1994), at 175.

39 J. De Ruyt, *L'Acte Unique Européen – Commentaire* (Bruxelles: IEE, 1989), at 214.

sistible increase of Community powers. The Treaty set out fundamental principles concerning the vertical division of powers and dealt with the idea of conferred powers. Article 5 (1) of the EC Treaty states that "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein". This explicitly established, in the Treaty text, the principle of the European Community's conferred powers some 35 years after it foundation. As we have seen, those conferred powers were always considered an obvious pretext for powers granted by the States to the Community, their register for want of fundamental principles was an eloquent demonstration of the extent to which that same principle had fallen in the course of the Community process.

However, it was via the establishment of the principle of subsidiarity in article 5 (2) of the EC Treaty that the Member States undertook to endow the Community legal order with the legal-constitutional instrument that would allow Member States to alter the logic of growth and centralization of Community jurisdictions which, as we have seen, tended to not favor their relative position in matters of division of powers.[40]

The principle of subsidiarity

Despite the unfortunate language used in article 5 (2) of the EC Treaty, some conclusions may be drawn as regards its normative scope. The first point regarding formulation of the principle of subsidiarity is that its range is confined to the so-called areas of overlapping Community powers. The discussion above concerning the legal nature of Community powers referred to the dichotomy existing between exclusive powers and shared or overlapping powers. However, such a dichotomy enjoyed no explicitly constitutional support in the letter of the Treaty, and is the result of the interpretation carried out by the Court of Justice. Through this new rule, the authors of the Treaty not only sanctioned the classification introduced by the Court's case law concerning the nature of Community powers, but also received the so-called *acquis communautaire* in this field[41] by the acceptance of areas of exclusive Community powers, which, as has been noted, are limited to common trade policy and the conservation of mari-

[40] Note also that the last paragraph of article 5 establishes the principle of proportionality of the Community's actions, stipulating that they shall not go beyond what is necessary to achieve the objectives of the Treaty. This principle had for a long time been confirmed by the case law of the Court of Justice as one of the general principles of law applicable in the context of the Community legal order. On this topic, see J. Schwarze, *European Administrative Law* (London: Sweet and Maxwell, 1992), pp. 708–866.

[41] N. Emiliou, "Subsidiarity: An Effective Barrier Against 'the Enterprises of Ambition'?", *European Law Review* 17 (1992), at 401.

time biological resources, where the respective regulatory intervention is outside the scope of subsidiarity.

In all other areas of Community action, that is, in areas of overlapping or shared powers with the Member States, Community action is carried out according to the principle of subsidiarity. Thus the principle of subsidiarity oversees the process that governs the constitutional division of powers between the Community and the Member States. Its inclusion in *Part I* of the Treaty, which concerns the Principles of the European Community, reveal the Member States' intention to compensate for the then valid situation in Community law that was characterized by the absence of a guiding criterion for the vertical division of powers. In this sense, one may consider that a statute of the supra-constitutional principle is incumbent upon subsidiarity.[42]

Another result of this new Treaty rule was its authors' intention to introduce a negative formulation of its contents. Indeed, the idea of subsidiarity could be formulated either in a positive sense, that provided the basis for Community action in cases where such action was deemed necessary for the achievement of its goals, or in a negative formulation that aimed to establish a mechanism to protect the powers of the member States. An inference may be made from the letter of article 5 that the Treaty only retained subsidiarity as a criterion regulating the way to use the powers retained by the Community, and that it could not be used to grant it any additional jurisdiction.[43] The reasons that lead to a narrow formulation clearly stem from the political context that led to adoption of this principle within the Community legal order.

The result of this narrow formulation of the principle of subsidiarity by the Treaty of the European Union is that the aim of its introduction was to establish a type of presumption in favor of the use of national powers.[44] One of the main purposes of this presumption in favor of national powers was to put a brake on the erosion of conferred powers that occurred at the cost of the States' powers and thus provoked a centralizing flow within the system of vertical division of powers.[45]

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[42] K. Lenaerts and P.v. Ypersele, "Le Principe de Subsidiarité et son Contexte: Étude de l'Article 3-B du Traité CE", *Cahiers de Droit Européen* (1994), at 10.

[43] R. Dehousse, "Community Competences: Are there Limits to Growth?", in *Europe After Maastricht – An Ever Closer Union?*, ed. R. Dehousse (Munich: Law Books in Europe, 1994), at 110.

[44] A.G. Toth, "The Principle of Subsidiarity in the Maastricht Treaty", *Common Market Law Review* 29 (1992), at 1100.

[45] E.J. Edwards, "Fearing Federalism's Failure: Subsidiarity in the European Union", *American Journal of Comparative Law* 44 (1996), at 542.

However, subsidiarity as a fundamental principle of the Community legal order is also an essential instrument of the European Court of Justice and its task of interpretation and application of the Treaty as per article 220. Whenever this jurisdictional body is called upon to decide on questions concerning the division of powers between the Community and the Member States, the Court ought to resolve eventual conflicts on the scope of Community powers by taking account of the introduction of the principle of subsidiarity in Community law.

As we have seen, the case law handed down by the Court of Justice played an important role in the so-called centralization of Community powers. Now both the reasons behind the introduction of the principle of subsidiarity in the Community legal order and the way in which it was embodied in the text of the Treaty demonstrate the willingness of its authors to oppose the above-mentioned phenomenon of shifting of powers in the Community's favor.[46] Hence it may be inferred that application of the principle of subsidiarity implies an inversion of the rationality underlying the decisions of the Court of Justice in situations that in some way derive from the vertical division of powers. It thus appears that the principle of subsidiarity stands opposed to the so-called dynamic criterion of interpretation, which is an aspect of fundamental importance in the interpretation of Community powers by the European Court of Justice.

Thus the introduction of subsidiarity within the framework of the fundamental principles of Community law obliges serious reflection on the use of certain elements and methods of interpretation of Treaty provisions. Indeed, both systematic use of extensive interpretation of the rules conferring powers to the Community and the restrictive interpretation of norms aiming to establish a reserve of State jurisdictions should be reworked in light of the new principle governing powers, especially taking account of the fact that the latter introduced a presumption in favor of the normative exercise of States' powers. Thus the use of the so-called finalist method of interpretation ought to be submitted to more moderate use, especially in situations whereby there is a possible interference in the area of State normative actions. Indeed, the orientation underlying the Court case law based on teleological and consequentialist arguments of interpretation – for example the cases where it was declared that the States have been precluded from adopting regulatory measures in areas that resulted from the overlapping powers of two legal orders – will hardly be

[46] G. de Búrca, "Reappraising Subsidiarity's Significance after Amsterdam", *Harvard Jean Monnet working paper* 7 (1999), at 6.

supported by the application of the principle of subsidiarity of Community powers.[47]

It may be inferred that subsidiarity is not only intended to build a type of judicial antidote to the centralization of powers, but also to establish the possibility of defining a new framework for resolving conflicts of powers between the Community and the States that is not limited to a rigid application of the effects stemming from the supremacy of EC law over the national legal orders.[48]

The Treaty of Maastricht marked a repositioning of the States' attitude on the significance of the subject of division of powers. In fact, the governments of the Member States of the European Union, beyond their greater or lesser involvement vis-à-vis the nature and the scope of the integration process, never lost sight of the need to maintain their position as leaders of that same process, that is to say, as *Masters of the Treaty*. Until the adoption of the Single European Act, the Member States' position as Masters of the Treaty was perfectly assured via the absolute control they exercised on the Community decision making process. The absolute nature of that control allowed the States to assume a condescending position on constitutional developments that were occurring in the context of the Community legal order.

Among these developments of the (so-called) constitutionalisation of Community law, the most noticeable was the radical transformation suffered by the powers originally granted to the European Community by its institutive Treaty. The principle of conferred powers, underlying the allocation of Community powers, has been subject to strong erosion from a position where, at the height of the process, the Community powers presented a picture of unrestricted growth.[49] The Community process, via its dynamics of integration, had developed the mechanisms that allowed a continued extension of its powers of action.

The rupture of this foundational equilibrium caused by the abandonment of the vote by unanimity, and the crisis of confidence that this rupture caused in the leadership of the integration process on the part of the States, led the latter, concerned about maintaining their status as Masters of the Treaty, to shift their attention from a perspective of an institutional-procedural nature of development of the Community polity centered on the decision-making process, to another perspective with an institutional

47 R. Dehousse considers that subsidiarity and teleological interpretation are raised in diametrically opposite considerations and can hardly be reconciled, *Supra* n. 43, at 117.

48 A.G. Soares, "Pre-emption, Conflicts of Powers and Subsidiarity", *European Law Review* 23 (1988), at 142.

49 K. Lenaerts, *supra* n. 35, at 220.

nature, though with a decidedly substantial content: the division of powers. The Member States perceived that the Community's future was largely dependent on the scope of its own powers and that their own development posed fundamental questions within a Community integration process of which they could not, under any circumstances, relinquish control. The issue of the division of powers had revealed a lack of fundamental principles which led to the defensive position adopted by the Member States when formulating the principle of subsidiarity.

The post-Maastricht developments

With the national ratification procedures of the Maastricht Treaty, European integration changed from being a process followed only by political and academic elites to a process debated by public opinion in general. This led in turn to a change in attitude by the national powers towards the process of integration, in particular within the supreme jurisdictions of the Member States. Weiler notes that, if in the past these bodies had observed the constitutional principles of direct effect and supremacy of Community law, they would currently face more difficulties in accepting that judicial decisions regarding the limit of Community powers might be unilaterally decided by the Court of Justice. These implied an invasion of the areas of action reserved for the States as inherent to their traditional normative sovereignty, especially when the bases for such normative sovereignty might be affected.[50] This is one motive for the Court of Justice's judicial adjudication of the scope of Community powers to be sensitive to the problem of their receptivity on the part of national courts.

The German Constitutional Court decision regarding the Treaty of the European Union demonstrates this sensitivity.[51] In this case the *Bundesverfassungsgericht* considered that although Community powers may be interpreted in light of the objectives established in that Treaty, such objectives nevertheless do not allow the Community to create, or extend, validly new powers beyond those conferred upon it. Even more important was the fact that the *Bundesverfassungsgericht* declared that, in the future, the growth dynamic that had characterized extension of Community powers based on article 308 EC and judicial interpretation of the Treaty provisions, would not be considered an admissible manner to expand the scope of Treaty application. The Court restated the distinction between the exer-

[50] J.H.H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), at 212.

[51] 12th October 1993, Bundesverfassungsgericht (2. Senat), *Manfred BRUNNER and others* v. *The EUROPEAN UNION TREATY*, Cases 2 BvR 2134/92 & 2159/92, [Gaz: D931012], English version in *Common Market Law Reports* [1994], 57.

cise of conferred powers due to realization of the stipulated objectives and the process of formal amendment of the Treaty. Any interpretation of Community law that oversteps the framework of the Community's conferred powers, would be destined, according to the German Constitutional Court, to have no binding effects for the Federal Republic of Germany.[52]

The *Bundesverfassungsgericht* thus took a strong stance on the rationale that would oversee the future development of Community powers, with a clear warning for the Court of Justice, that it would not be disposed to accept renewal of the dynamics of growth of Community powers that could subordinate the importance assumed by the principle of conferred powers. It may be inferred that the supreme jurisdictions of the Member States, or at least some of them, will be increasingly vigilant regarding the adjudication of questions concerning the division of powers, and not agree that only the interests of one of the parties involved be considered, that is, the European Community.

The constitutional amendment introduced by the Maastricht Treaty and the changes it introduced into the system of allocation of Community powers, the awakening of national public opinion and interest in the integration process, the greater attention paid by the supreme jurisdictions of the Member States on the way in which the future division of powers would operate: all of these elements must weigh heavily in the analysis of the equation of powers as carried out by the *Court of Justice* when called upon to decide on problems of such nature. On the other hand, it can be said that the views held by a jurisdictional body about the attribution of powers to the Community is based not only upon the literal terms of the Treaty, but also upon reflection about the beliefs its members hold concerning that same integration phenomenon, that is, what Judge Pescatore understood to be the expression of '*une certaine idée de l'Europe*' that the Court would follow in its case law.[53] The perspective of the phenomenon of integration of an institution such as the Court of Justice also tends to change, not only as a result of external conditioners to its activity, but also because of alterations to its internal composition with the arrival of new elements as a consequence of the accession of new Member States to the Community. If both external and internal developments have affected the approach of the Court when considering the division of powers, then its case law should

[52] Idem, points 98 and 99, at 105.

[53] See P. Pescatore, "Contribution to the Discussion", in *Division of powers between the European Communities and their Member States in the field of external relations*, eds. Timmermans and Volker (The Netherlands: Kluwer, 1981) at 75.

provide supporting evidence since the Maastricht agreement. This article argues that such evidence can be seen in a number of cases.

The first echo of the Court's new understanding of the problem of division of powers may be found in the decision reached in the case *Keck et Mithouard,*[54] which concerned the scope of the notion of measures having an equivalent effect to quantitative restrictions in the framework of the free movement of goods under article 28 of the Treaty. The Court had previously applied the concept of measures of equivalent effect declared in the *Dassonville* case which, due to a broad construction of its formulation, had been transformed into a type of 'bottomless sack' into which were placed many types of national regulations regarding the manufacture and commercialization of goods. By recourse to the interdiction stipulated in article 28, the economic operators were normally able to achieve the suppression of national regulations of commercial activities that were unfavorable to them, even in situations where the article proved to have no protectionist effect whatsoever. This had led to a progressive loss of States' powers in that area. In the *Keck* decision, the Court excluded the national regulations on modalities of sale from the scope of application of the interdiction stipulated in article 28 of the Treaty, reducing the reach of case law that had attained an almost historic significance in the process of eliminating obstacles to commercial exchanges, while permitting the Member States to fully re-appropriate their regulatory capacity in this area.

Another example of a different approach to the problem of division of powers by the Court of Justice was that arising from *Opinion 1/94,*[55] on the agreement that established the World Trade Organization. In this decision, the Court was faced with a choice of either adopting an attitude of non-involvement in a dispute over the scope of the Community's external powers which had occurred during the negotiation of the Maastricht agreement and whose protagonists were the various political actors with a role in the integration process, or confirming its traditional case law in matters of external Community relations regarding the exclusivity of Community action. The latter was substantially defended by the Commission, which had been unable to obtain the consensus of the Member States for its enshrinement in the final text of the Maastricht Treaty. The Court of Justice, adopting a very cautious stance, opted for judicial self-restraint. It did not agree that through its decisions the Community institutions could attempt to expand the Community's powers without obtaining the agreement of the States in a constitutional amendment, and thus the Court clearly respected the existing differences between the exercise of the

[54] Joint cases C-267/91 and C-268/91, *Keck et Mithouard* [1993] E.C.R. I-6097.

[55] *Opinion 1/94* [1994] E.C.R. I-5267.

powers granted to the Community for the realization of its objectives and the process established by the Treaty for altering its framework of powers.

The Court of Justice demonstrated the same restraint on the use of article 308 of the EC Treaty (*ex* article 235) as the legal basis for Community accession to the European Convention of Human Rights. In *Opinion 2/94*, the Court said that in the field of international relations the competence of the Community to enter into international commitments may flow from the express provisions of the Treaty, but could be also implied on those provisions.[56] As no Treaty provisions conferred on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field, the Court considered whether article 308 of the Treaty could constitute the appropriate legal basis for accession. In its opinion the Court said that this provision, being an integral part of an institutional system based on the principle of conferred powers, could not serve as a basis for widening the scope of Community powers beyond the general framework created by the Treaty. On any view, article 308 could not be used as a basis for the adoption of provisions whose effect would be, in substance, to amend the Treaty without following the appropriate procedure. Indeed, accession to the Convention would mean a substantial change in the Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system. For the Court, such a modification would be of constitutional significance and would therefore go beyond the scope of article 308.[57]

An identical respect for the principle of conferred powers emerged in a decision delivered by the Court concerning the use of another horizontal legal competence, article 95 of the EC Treaty (*ex* article 100 A), in the case *Germany* v. *Parliament and Council* on the legal basis of Directive 98/43/EC relating to the advertising and sponsorship of tobacco products.[58] In this case the Court declared that article 95 of the EC Treaty could not be interpreted as meaning that it vests in the Community legislature a general power to regulate the internal market because that would be incompatible with the principle embodied in article 5 of the EC Treaty, which states that the powers of the Community are limited to those specifically conferred on it. For the Court, the Directive on the sponsorship and advertising of tobacco products aimed to approximate national measures which are, to a large extent, inspired by public health policy

56 *Opinion 2/94* [1996] E.C.R. I-1759.

57 Idem, points 28 to 35, at I-1788.

58 Case C-376/98, *Germany* v. *European Parliament and Council of the European Union* [2000] E.C.R. I-8419.

objectives. As article152 of the EC Treaty excludes any harmonization of national laws designed to protect and improve human health, the Court stated that other articles of the Treaty, like the general clause contained in article 95, could not be used as a legal basis in order to circumvent this express exclusion of harmonization.

CONCLUSION

The Maastricht Treaty definitively closed a cycle marked by notable expansion of Community powers as it reinforced the constitutional instruments that allowed a change in the division of powers between the Community and the Member States.[59] The dynamics of integration that led to the informal development of Community powers in a markedly centralizing manner, gave rise to the application of Community jurisdictions based on a restrictive reading of the principle of subsidiarity. In this sense, it is legitimate to state that a new phase was begun regarding the approach of Community powers characterized primarily by a return to the idea of conferred powers. For its part, the Court of Justice also reflected the necessary consequences of the start of this new phase, of the problem of division of powers between the European Community and the Member States, by its return to the principle of conferred powers.

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[59] A. Dashwood, "The Limits of European Community Powers", *European Law Review* 21 (1996), at 128.