Oxford Journal of Legal Studies, Vol. 23, No. 2 (2003), pp. 333–344

Dynamic Integration—Article 308 EC and Legislation 'in the Course of the Operation of the Common Market': A Review Essay†

ROBERT SCHÜTZE*

1. *Introduction*

Article 308 EC (ex-Art 235 EC) represents the most general power in the system of legislative competences of the European Community. Placed at the margins of the Rome Treaty, the controversial 'residual power'[1] has come to define and symbolize the very margins of Community law.[2] Article 308 offered a type of '*petit revision*' of the Treaty in cases in which the painfully slow procedure of formal Treaty amendment would be inapt for legislation of a merely technical nature.[3] In the history of the Community's growing legislative presence, Article 308 has become one of the most active sources of legislative expansion. The wide and open wording of the competence—which has never been amended or modified

† A review of M. Bungenberg, *Article 235 nach Maastricht—Die Auswirkungen der Einheitlichen Europäischen Akte und des Vertrages über die Europäische Union auf die Handlungsbefugnis des Art. 235 EGV* (1999), hereafter referred to as Bungenberg.

* Researcher at the European University Institute (Florence). I am grateful to Gráinne de Búrca for her encouragement and comments. The usual disclaimer applies. All translations from the German text are my own.

[1] G. de Búrca & B. de Witte, *The Delimitation of Powers between the EU and its Member States*, EUI Working Paper at 16 (http://www.iue.it/RSCAS/e-texts/CR200103.pdf.)

[2] One of the earliest debates on the position and character of Article 308 EC in the Community legal order can be found in the *Sonderheft* of the 1976 edition of *Europarecht*. Contributors include U. Everling, I. E. Schwartz, and C. Tomuschat. See also Constantinesco, *Das Recht der Europäischen Gemeinschaften: Band 1* (1977) at 272–81. For a first monograph dedicated to the subject see Dorn, *Art. 235 EWGV—Prinzipien der Auslegung—Die Generalermächtigung zur Rechtsetzung im Verfassungssystem der Gemeinschaften* (1986).

[3] The Treaty of Rome had provided for a Treaty amendment procedure in Article 236 EEC. The procedure is now set out in Article 48 TEU (ex-Art N), which states: 'The government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded.¶ If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. ¶ The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements'.

since the coming into force of the original 1957 Treaty—provides as follows:

> 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.[4]

Article 308 entitles the Community to legislate in cases where the Treaty lacks a specific legal base for realizing one of its objectives or tasks. It provides a functional power in all areas that touch upon the establishment or functioning of the common market and, thus, spans the entire ambit of the Treaty.[5] In terms of material scope, this was the widest possible legislative power the Community could be given: the general competence was neither limited sectorally to a specific policy field, nor by a particular method of legislation such as harmonization.[6] Only the aims of the Treaty and the necessity of their realization were to be guide and boundary of the provision.[7] This authorization to 'derive' legislative power from a task or objective equipped the Community with a '*Kompetenzreservoir*' (competence reservoir),[8] whose unclear boundaries could pose a serious threat to the principle of enumerated powers of the Treaty.

2. *The Rise of Article 308 as a Legal Base Within the Community Legal Order*

The Article's open character had from the outset given it an unmitigated teleological dependence. Its content was flexible and varied according to the interpretation given to it by the institutional practice of the Community organs. Its porous operating criteria contributed to the article's changing fate. The close connection between the constitutional development of the Community at large and the scope and functions of Article 308 make it vital to place the article's use in a historical and constitutional context.

Article 308 underwent a series of qualitative and quantitative changes since the coming into force of the EC Treaty. Three distinctive stages are conventionally

[4] Emphasis added. The German version reads: 'Erscheint ein Tätigwerden der Gemeinschaft erforderlich, um im Rahmen des Gemeinsamen Marktes eines ihrer Ziele zu verwirklichen, und sind in diesem Vertrag die hierfür erforderlichen Befugnisse nicht vorgesehen, so erlässt der Rat einstimmig auf Vorschlag der Kommission und nach Anhörung des Europäischen Parlaments die geeigneten Vorschriften'.

[5] The classical understanding of the notion of the 'common market' views the concept as coterminous with the entire scope of application of the Treaty, so for example J.-V. Louis, *L'ordre juridique communautaire* (1981). Evidence of such a broad understanding can still be found in Article 211 EC, which empowers the Commission to 'ensure the proper functioning and development of the common market'.

[6] Unlike Article 94 EC, which requires the Council to 'issue directives *for the approximation* of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market' (emphasis added).

[7] U. Everling, 'Die allgemeine Ermächtigung der Europäischen Gemeinschaft zur Zielverwirklichung nach Art. 235 EWG-Vertrag' (1976) 11 *Europarecht Sonderheft* 2 at 4.

[8] I. E. Schwartz in H. Groeben, J. Tiesing and C-D. Ehlermann (eds), *Kommentar zum EU-/EG-Vertrag* (1999), *Artikel 235* at Rn 2.

identified to pattern the evolution of the competence—each phase representing a particular mode of application of the article by the Community institutions.[9]

In a first foundational phase from 1958 to 1972, the Community employed its general common market power to the immediate and central tasks relating to the realization of internal and external aspects of the emerging common market.[10] During this first period of the Community's existence, the residual power of Article 308 was exclusively applied in relation to the Community's common agricultural policy and the establishment of the customs union.[11] Article 308 was sparingly used—on average five times a year.[12] This limited early use of Article 308 may have simply been the result of the Commission and the Council being busy in their pursuit of the core mandates of the Treaty. Specific legal bases were still sufficient to authorize each and every step along the road to economic integration. Encountering textual limits to Community competences was still exceptional at a time when the 'foundations' of the Community were being put in place. The lack of political ambition to go beyond the 'core' mandates of the Treaty—expressed to some extent by the Luxembourg Accord of the time—stifled the expansion of the Community's sphere of activity.

The 1972 Paris Summit was the point of departure into a much more vivid second period in the general power's life. The heads of State and Government endorsed the need for changes in a changed political climate. A new political consensus had emerged in which '*une certain idée de la France*' had given way to '*une certain idée de l'Europe*'.[13] The Paris *communiqué* called upon the Community to make the widest possible use of all the provisions of the Treaty, in particular Article 308.[14] The revived political will—backed up judicially by the ECJ[15]—fuelled the transformation of Article 308 into a potent legal base. Those were the years, for example, in which the Commission 'greened' the Community by pursuing an environmental policy through its use of Articles 94 and 308. Policy areas not expressly mentioned in the Treaty 'entered' the ambit of Community

[9] Two recent and fairly representative examples in this respect are P.J.G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities* (1998) at 238–9; E. Grabitz & M. Hilf, *Kommentar zum EG-Vertrag* (1999), *Artikel 235* at Rn 9–10.

[10] The most famous illustration perhaps being Regulation No 803/68 EEC (OJ L148/6) on the valuation of goods for customs purposes, which was the subject of judicial interpretation in Case C-8/1973 *Hauptzollamt Bremerhaven* v *Massey-Ferguson GmbH* [1973] ECR 897.

[11] For a useful survey of the sectors in which Article 308 EC was applied until 1975 see U. Everling, above n 7 at 22–5. Writing in 1972, P. Pescatore characterized the article's limited application in the following words: 'For many years it was feared that this clause, whose possibilities are quite manifest, was destined to remain a dead letter. To begin with, it had never been used except in a sporadic manner to settle some marginal, essentially technical, problems in the organization of the agricultural markets. It is noticeable that recourse to this provision is becoming more and more significant. In particular, an essential part of the Community legislation implementing the customs union has been based on this provision' (P. Pescatore, *The Law of Integration-Emergence of a new phenomenon in international relations, based upon the experience of the European Communities* (1974) at 41).

[12] Bungenberg at 50.

[13] The latter expression was coined by Judge P. Pescatore in response to General C. de Gaulle's famous statement.

[14] §15 of the Final Declaration. The Declaration read: 'They [Heads of State or government of six Member States and three future Members] agreed that in order to accomplish the tasks laid out in the different action programmes, it was advisable to use as widely as possible all the provisions of the Treaties including Article 235 of the EEC Treaty'. (First Summit Conference of the Enlarged Community, Bull EC 10-1972, 9 at 23.)

[15] Case C-8/1973 *Hauptzollamt Bremerhaven* v *Massey-Ferguson GmbH* [1973] ECR 897.

law via the backdoor of Article 308 ushering in a period characterized by an increasing 'erosion of strict enumeration'.[16] The most imaginative use was made of Article 308 in this second phase and the provision unfolded its potential as a competence reservoir by providing a legal base for any action that could be remotely linked to one of the aims or objectives of the EC.[17] In the course of the subsequent decade, Article 308 became a reliable point of reference for the Community's new flanking policies and the setting up of new ancillary institutions.[18] Quantitatively, recourse to the general power of the Community rose in the period from 1972 to 1987 to an average of 27 legislative acts per year.[19]

The Single European Act (SEA) heralded a third phase in the development of Article 308. Tacitly developed Community policies were finally given express recognition through the insertion of new policy titles and a host of fresh specific legal competences to support them. The insertion of Article 95 EC (ex-Art 100a) in particular was bound to attract a substantial share of 'common market legislation'. The Article had been designed as the central plank for the implementation of the *Internal Market Programme* and—unlike Articles 94 and 308 EC—it allowed for qualified majority voting. Yet, contrary to intuition, recourse to Article 308 did *not* decline after the coming into force of the SEA, in spite of the enormous constitutional changes brought by the first Treaty revision in 30 years.[20] The overall recourse to Article 308 in the period from 1987 to 1993 actually increased in absolute terms to an average of 30 acts per year.[21] The Commission and the Council thus continued to interpret and employ the general power as widely as before, despite, and in addition to, the range of new specific legal competences.[22] This insight is one of the original contributions of Bungenberg's empirical analysis and should provide a warning to those still believing in an automatically clearer division of vertical competences by means of simply adding more specifically defined legal bases into the Treaty framework.

[16] J.H.H. Weiler 'The Transformation of Europe', 100 *Yale Law Journal* 2403 at 2450 (1991).

[17] Writing in 1982, J.H.H. Weiler could therefore already criticize the 'assumption that the word objectives in Article 235 must be confined exclusively to those set out in Article 3 and that the concept of Common Market is limited to its functional economic meaning and not to its political-geographical one' by showing that there was 'nothing either in the Treaty or the jurisprudence which necessitates such a restrictive view' (J.H.H. Weiler, *Supranational Law and Supranational System: Legal structure and political process in the European Community* (1982) at 380).

[18] The policy fields in which Article 308 was most frequently used were the areas of 'research and development' and 'environmental policy'. The former accounts for roughly one fourth, the latter for about one fifth of the overall legislative output under Article 308 during this second phase (Bungenberg at 59).

[19] Bungenberg at 60.

[20] See, however, Grabitz, above n 9 at Rn 9 ('Seit dem Inkrafttreten der EEA ist die Zahl er Rechtsakte [unter Artikel 308 EC] wieder rückläufig') and, to some extent, P.J.G. Kapteyn and P. VerLoren van Themaat, above n 9 at 239 ('The need to fall back on Article 235 has now significantly diminished since the coming into force of the SEA on 1 July 1987').

[21] Bungenberg at 70.

[22] The most obvious illustration of a continuous blurring of competences again being 'research and development'. Despite having been given explicit recognition in a new title in the SEA (ex-Arts 130f-q), this policy field ranked second—preceded by external relations—in the policy fields in which Article 308 was most frequently employed until the TEU (Bungenberg at 69).

3. *'Article 308* after *Maastricht': A Legislative Power in Decline?*

In drawing a further temporal dividing line after '1992', Bungenberg deposits a fourth landmark along the evolutionary lines of Article 308. While a critical eye might suspect a distinction without a difference, the proposed temporal isolation of a post-TEU phase seems already warranted in purely quantitative terms. The use of the residual power has dropped to about twenty acts per year since the coming into force of the Maastricht Treaty.[23] Bungenberg's analysis of this fourth phase in the application of Article 308 by the Community organs represents a novel and fascinating 'sequel', continuing at a point where the majority of the earlier commentary had stopped. Three legislative and judicial developments are proposed as influential in altering the constitutional climate of the Community in general, and the application of Article 308 within the Community's system of competences in particular. First, the Maastricht Treaty added again a number of new sector-specific competences, thus further increasing the range of policy areas governed by qualified majority voting. Second, the TEU's amendment of the opening provisions of Articles 2 and 3 EC as well as the insertion of Article 5 EC (ex-Art 3b) constituted—at least at the level of intent—a commitment towards a clearer division of competences. A third factor suggestive of a new constitutional climate is seen in the European Court's famous opinion on the accession of the European Community to the European Convention of Human Rights.[24] The Opinion sounded a new tone in the discourse over the constitutional limits of Community action, with the ECJ drawing for the first time express outer conceptual limits around the scope of Article 308. These three factors might well account for the gradual decline of Article 308 as a legal basis after 1993. As the title of the monograph suggests, the better part of the book concentrates and elaborates on those constitutional issues surrounding Article 308, which arose or gained momentum *after* the Maastricht Treaty.

In his third chapter, Bungenberg investigates the impact of the amendments of the opening provisions of Articles 2, 3 and 5 on the reach of Article 308. The angle selected by the author is obviously premised on the assumption that textual modifications of the opening provisions will have an effect on the potential sphere of application of the Treaty—an issue, which has been hotly debated in German European law circles ever since Maastricht.[25] The direct link between Article 308 and the tasks, aims and objectives of the Treaty ensures theoretically that any extension of the latter will simultaneously widen the scope of the Community's legislative competence. Bungenberg engages with this argument and enters the legalistic terrain of comparing the different linguistic versions of Articles 2 and 3 EC in the fashion of German *Begriffsjurisprudenz*, yet in an informed and

[23] Bungenberg at 96.

[24] *Opinion on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Opinion 2/1994) [1994] ECR 1759.

[25] The curious reader is referred to the comprehensive discussion in I.E. Schwartz, above n 8 at Rn 111–71.

moderate manner. His personal conclusions on the issue represent an intellectual compromise. Although the Maastricht Treaty did increase the number of express aims and objectives of the Community, the amendments only recognized and concretized objectives, which had already been part of the Community legal order. Except for the provisions dedicated to monetary union, no normative extension of the Community's potential competences has occurred through the changes in the programmatic opening provisions.[26] An analogous conclusion is reached as regards the introduction of Article 5 EC that elevated the enumeration principle, the subsidiarity principle and the proportionality principle to general constitutional principles of the Community legal order.[27]

Possible horizontal changes in the Community's system of competences are the theme of chapter four. This part of the book deals with the question of how the insertion of new specific competences has influenced the scope of application of Article 308 in the aftermath of the Single European Act and the Maastricht Treaty. Due to its subsidiary character, Article 308 should be increasingly superseded by the multitude of fresh legal bases. Moreover, the willingness on the part of the Commission to have recourse to Article 308 as a supplementary legal base was likely to decline with the spread of qualified majority voting. The *Titanium Dioxide* ruling finally provided a further disincentive to the article's complementary function, as the ECJ sidelined all those legal bases using the consultation procedure in cases where a 'more democratic' legal base could be used.

Perhaps of greatest interest to an audience not so familiar with the constitutional sensitivities and domestic peculiarities of the German constitutional order will be chapter five. Unlike the rest of the book, which looks at various normative and empirical aspects of Article 308 from the birds-eye view of the Community legal order, Bungenberg analyses here the controversies surrounding the residual power clause from the perspective of a specific national legal order. The selection of the German constitutional debate over other national constitutional discourses is luckily not just a matter of linguistic convenience and academic pragmatism. Thanks to Germany's federal structure, a sub-national 'sovereign'[28] enters the equation, adding a third constitutional layer to the multi-level governance system of the Community. The German judiciary's commitment to the protection of fundamental rights has equally contributed to make the German debate on the proper limits of the Community's competences such a rich and dramatic one.[29] Not to mention, of course, the *Bundesverfassungsgericht*'s famous cry of defiance in its *Maastricht* decision.[30] These 'German' constitutional sensitivities are

[26] Bungenberg at 119.
[27] Bungenberg at 156–7.
[28] Cf. BverfGE 60, 175 at 207.
[29] The particularly intense concern with the protection of human rights surfaced in Case C-11/1970 *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125—one of the first cases to address the issue of fundamental rights in the Community legal order—which had been brought by two German courts.
[30] BVerfGE 89, 155.

discussed in turn, with the focus being on those parts of the general debate that concern Article 308 directly.

In the first place, Bungenberg reviews the development of political safeguards within the German federation, which were introduced to ensure a say for the German parliament, the *Bundestag*. Germany opted for a 'soft' institutional approach: the federal government is only required, according to Article 23 of the Basic Law, to take account of Parliament's position in the decision-making process in the Council of Ministers. This form of co-determination falls short of imposing a legal duty on the federal executive branch. After a lengthy analysis of the background, content and contradictions of the German Supreme Court's decision on the compatibility of the TEU with the German constitution in a second section, a third section changes perspective once again, inviting the reader to look at the integration process from the sub-national level. From the point of view of the German *Länder*, the exercise of Community competences has led to an extensive encroachment upon their regional competences. To shape and take part in the integration process, the *Länder* have therefore consistently sought to obtain rights of political participation. Starting off with the right to be informed and the right to be heard, the constitutional amendments on the eve of Germany's ratification of the Maastricht Treaty finally acknowledged more substantive rights of participation. Article 23 (paras 2–7) of the German Constitution, fleshed out in the *Gesetz über die Zusammenarbeit von Bundestag und Bundesregierung in Angelegenheiten der Europäischen Union* (Statute concerning the Cooperation between Parliament and Government in European Union Affairs), lays down the forms and degrees of cooperation between the federal and the *Länder* level, varying according to the policy field at stake. Paragraph 5(3) of the Statute defines the obligation to cooperate in the event of Community legislation under Article 308: the federal and the state level play an equal role and act as co-legislators in the adoption of Germany's position in the Council. A simple majority of the *Bundesrat* (chamber composed of representatives of the *Länder*) suffices to veto a government proposal, thus ensuring some degree of internal control on the expansion of the Community's activities in fields of 'reserved' *Länder*-competences.

4. *The Community as a 'Process'—Dynamic Integration and the* Grundgesetz

One key to deconstruct any type of literature lies in identifying the philosophical presuppositions of the text, with each author writing *in* and *against* a particular cultural environment. This is even truer for academic writing, which by definition will have to engage with a pre-existing academic literature on a given subject. A key to the deeper layers of Bungenberg's account lies thus in locating his constitutional philosophy—the point from which he views and evaluates Community affairs in general and the development of Article 308 in particular. Bungenberg dedicated his first chapter to explaining and justifying his adopted

constitutional creed as regards the nature of European integration. In line with the dominant tenor of the German literature, he starts and ends with a conception of the European Union as an evolutionary and dynamic *process*. This premise has indeed shaped German legal perceptions of European integration for a long time, finding to some extent its manifesto in an outstanding 1980 monograph bearing the very title of '*Die Europäische Union als Prozeß*'.[31] Foreign readers of the German European law literature might be reminded of functionalist integration theories, which have become so influential in political science accounts of European integration. Despite some obvious overlaps, the two theories, however, differ at least in one essential respect: unlike the merely descriptive explanatory model offered by (neo-)functionalist theories, the German process-theory has come to serve an overtly legitimatory purpose. To present and argue in favour of the 'Community as a dynamic process'[32] within the German legal literature therefore means subscribing to a particular ideological package, which—as will be seen below—provides a wholesale justification for all centralizing tendencies within the European Union.

The process-theory begins by consciously attributing a catalytic function to Community *law* in the process of European integration.[33] All Community institutions have an explicit 'constitutional mandate' to forge an ever closer Union.[34] The instruction given is to view European integration as a purpose and an end in and of itself.[35] The 'original and autonomous authority' of the Community legal order has given it its own logic and consistency, 'which cannot be reduced to a mosaic composed of the splinters of single enumerated powers'.[36] The open character of the Treaty and its underlying integrationist purpose are taken as sufficient evidence that the Member States' original intention was to 'endow the Community organs with the power to set the limits of their competences *themselves*'.[37] The constant expansion and redefinition of the boundaries of Community law by the Community organs is part and parcel of a process of '*immanente Verfassungsentwicklung*' (immanent constitutional development).[38] In a true Hegelian manner, the Community itself is idealized as a moving object that possesses the characteristics of a dynamic process.[39] However, the intellectual

[31] H. von der Groeben, R. Hrbek, H. Schneider and H. Möller, *Möglichkeiten und Grenzen einer Europäischen Union—Band 1: Die Europäische Union als Prozess* (1980).

[32] Bungenberg at 20–37; and also M. Bungenberg 'Dynamische Integration, Art. 308 und die Forderung nach dem Kompetenzkatalog' (2000) 35 *Europarecht* 879 at 879–83.

[33] For an early evaluation of Community law's influence on the integration process see M. Cappelletti, M. Secombe and J.H.H. Weiler (eds), *Integration through Law—Europe and the American Federal Experience* (1986); and Schwarze, 'Das Recht als Integrationsinstrument' in F. Capatori *et al.* (eds), *Du Droit international au droit de l'intégration- Liber amicorum* (1987) 641.

[34] Bungenberg at 31.

[35] Ibid.

[36] Bungenberg at 32.

[37] Ibid (emphasis added).

[38] M. Bungenberg 'Dynamische Integration, Art. 308 und die Forderung nach dem Kompetenzkatalog' (2000) 35 *Europarecht* 879 at 881–3.

[39] R. Bieber, 'Verfassungsentwicklung und Verfassungsgebung in der Europäischen Gemeinschaft' in R. Wildenmann (ed.), *Staatswerdung Europas? Optionen für eine Europäische Union* (1991) 393 at 410.

danger of theorizing European integration in such terms comes to light wherever the 'process' metaphor is used not only to *liken* the European project to an 'ever expanding Community galaxy',[40] but where it is employed to *justify* the increasing Europeanization of ever more diverse and remote policy areas by reference to legal logic alone or the unreflective necessity of the integration process as such.[41] The real is not always the rational, nor is the rational always the real.

Adopting the legitimatory variant of the process theory, Bungenberg's neglectful treatment of the obvious tension between the *système d'attribution* on which the Community legal order is built and a teleological power such as Article 308 should not come as a surprise.[42] The naiveté of such a constitutional view will still bewilder some of the more subsidiarity-oriented Community lawyers, as for example, when he confidently states that 'the incompleteness of the Treaty in certain areas has been obvious ever since its coming into force and *continues* to characterize the Treaty even after the Treaty amendments following the SEA, the TEU and the Treaty of Amsterdam'.[43] Despite the lack of express specific competences within certain areas, political, social and technical changes '*required* Community action, lest the Community be reduced to a mere *Zweckgemeinschaft* [partnership of convenience] on specific and selective issues'.[44] Article 308 had and has 'therefore' an important part to play in those fields in which the Community has no specifically attributed legislative powers, but where action would be nevertheless 'necessary'.[45] There is no elaboration on how this necessity might be determined, nor who should determine it. There is no serious or critical discussion on the delicate tensions with the principle of enumerated powers. Bungenberg contents himself with a tautology: 'To view Article 308 as a violation of the enumeration principle would mean to neglect the dynamic and *sui generis* character of the process of European integration'.[46] A simple reference to the dynamic character of the European Union as an evolutionary process—be it fortunate or unfortunate—will not be enough to lull the more sovereignist Member States of the Community to sleep over the continuous erosion of jurisdictional boundaries.[47]

The political character of Article 308 is often invoked to justify the apparent departure from strict enumeration, with each Member State able to veto any

[40] J.H. Kaiser 'Grenzen der EG-Zuständigkeit' (1980) 15 *Europrecht* 97.

[41] J. Shaw attacked the complacent reference to the Community's dynamic character in the following words: 'In this way, two circles are squared through integration and through the rule of law. Integration is what is natural for the EU and equally what is natural for the law' (J. Shaw 'European Union Legal Studies in Crisis? Towards a New Dynamic' (1996) 16 *OJLS* 230 at 237).

[42] Bungenberg addresses the issue at 39–42 and at 120–32.

[43] Bungenberg at 40 (emphasis added).

[44] Ibid (emphasis added).

[45] Bungenberg at 41.

[46] Bungenberg at 123.

[47] The 1978 general review and critical debate on the use of Articles 94 and 308 by the House of Lords illustrates the more sovereignist sensitivities at stake in some Member States. A summery of the debate can be found in G. Close 'Harmonisation of Laws: Use or Abuse of the Powers under the EEC Treaty' (1978) 3 *European Law Review* 461.

proposed legislative activity of the Community. The use of Article 308 is—it should not be forgotten—not politically neutral when viewed from the perspective of national parliaments or when seen in the light of the often voiced criticism of the Community's democratic deficit.[48] Here the legitimatory overtones of the process-theory separate it distinctively from purely descriptive accounts of functionalist spillovers. The eulogistic character of Bungenberg's dynamic integration theory comes to the fore in his assessment of the compatibility of the Community's autonomous evolution with the German European Community Act:

> Die autonome Weiterentwicklung der gemeinschaftlichen Rechtsordnung ist aus nationaler Sicht durch das Zustimmungsgesetz gedeckt. Von deutscher Seite sind bei Ratifikation durch Bundestag und Bundesrat das der Gemeinschaft *zugrundeliegende Integrationskonzept* bekannt gewesen. Folglich ist man sich bei Vertragsratifizierung durch Verabschiedung des Zustimmungsgesetzes 1957 über die 'Möglichkeiten der Integrationsweite' und damit zusammenhängend der 'Möglichkeiten des Artikel 235' bewusst und gewollt gewesen.[49]

The constitutional narrative of the 'original consent' presents us with a conception of international and European law inspired by all the pitfalls of Rousseauean contract theory. Such a theory of European integration betrays an apparent disregard for the legitimatory advantages of periodic intergovernmental revisions to rearrange and re-politicize (!) the Treaty. It also ignores the reality of an ongoing 'constitutional conversation' through a semi-permanent Treaty revision process, which has come to characterize the development of the European Community ever since the Single European Act.[50]

This is, however, not to question the need for a flexible 'implied-powers-clause' to complement and round-off sharp textual limits, which would unduly tie the hands of the Community legislator. Indeed, if the integrationist project was and is to be successful in the long run a *certain* degree of autonomy had to be given to the Community organs. However, the point is that there should be *some* limits to the availability of the Community's residual power clause, and that there is a need to develop *some* conceptual criteria that distinguish its legitimate from its excessive use. To invoke the idea of an inevitable dynamism and to leave it to the Community organs alone to determine their scope of activities serves to justify all sorts of legislative developments *ex post facto* and would direct the

[48] The literature describing the democratic deficit of the EC is enormous. For recent accounts of the constitutional problem see P. Craig, 'The Nature of the Community: Integration, Democracy, and Legitimacy' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (1999) 1 at 23 ff.; A.J. Mackenzie-Stuart, 'The Amsterdam Treaty and after: is there still a "democratic deficit"?' in G.C. Rodríguez Iglesias *et al.* (eds), *Mélanges en hommage à Fernand Schockweiler* (1999) at 389–98.

[49] 'The autonomous development of the Community legal order is covered by the German European (Economic) Community Act. Both *Bundestag* and *Bundesrat* were familiar with the concept of dynamic integration underlying the Treaty framework. The possible reach of the integration project as well as the possibilities inherent in Article 308 were consequently not only known to but intended by the 1957 Act of Parliament' (Bungenberg at 35–6, fn omitted, emphasis added).

[50] B. de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process' in P. Beaumont, C. Lyons and N. Walker (eds), *Convergence and Divergence in European Public Law* (2002) 39 at 42.

Community and its citizens to the dangerous 'process' of de-politicizing integration—surely not the type of development most Europeans would wish the Community to follow.

5. *For the Impatient Reader: Evaluation in a Nutshell*

In contrast to the sometimes dry tone encountered in a German *Kommentar*, this monograph on Article 308 turns out to be a brilliant gem detailing the changing faces of the general power over time. Two ingredients were vital to transform the seemingly uninspiring and—one might be tempted to add—*German* subject-matter of the book into a truly fascinating account, which ought to become a central reference point for those academics working on the legislative boundaries of the Community. First, the meeting of the normative with the empirical world. Bungenberg is not the first to divide the development of Article 308 into distinct temporal phases as a heuristic devise.[51] Nor had the application of statistical methods and the sector-specific analysis of Article 308 legislation been unknown.[52] However, the way the empirical material is refined in the legal discussion of the constitutional issues and tensions of today's European Constitution is remarkable. The second merit of the study consists in this very holistic approach brought to the analysis of Article 308. The author did not shy away from embedding the tale of a single provision in the overall constitutional framework of the Community. This contextualizing of the provision allows him elegantly to revisit and review some of the major constitutional issues through the lens of Article 308. The permanently present constitutional dimension in the organization of the material expands the scope of the monograph way beyond a restrictive focus on Article 308.

The arguments of the book are well-structured, with each chapter having an independent value and discursive logic of its own. The book is well-researched, enlightening and interesting. Bungenberg nevertheless remains firmly rooted in the German tradition of European law. This is perhaps most obvious in his adopted constitutional perspective—viewing the Community as a dynamic 'process' and justifying the growth of the Community's powers by reference to the inherent logic in the Treaty. The nature of his arguments may perplex any European lawyer not versed in the more referential scholastic traditions of Continental legal scholarship. The extent to which he refers to academic writing (almost all of which is of German origin) at the expense of discussing the jurisprudence of the European Court testifies to the importance given to academic sources in Continental legal systems. Admittedly, the Court has not been so active a player as regards Article 308. Yet, the very self-restraint and deference towards the legislative organs of the Community is in itself an expression of

[51] J.H.H. Weiler, above n 17 at 351–79.
[52] Ibid.

'judicial politics' worthy of analysis.[53] (The lack of any list of cited cases might be taken as an unintentional illustration of this fundamental difference in the 'civil law' and 'common law' conceptions of European law!) It will still take some time before these *national* traditions in the reading of *European* law will—if indeed ever—eventually converge.

The decline of Article 308 as a legal base after the coming into force of the Treaty on European Union should not induce a belief in the 'death' of the horizontal legislative power. The controversy surrounding Article 308 EC up to the present day is ample evidence of its active presence within the Community legal order. Symbolically, the article is still perceived as *the* legal platform for 'creeping' Community competences—a view that surfaced recently in the controversial final report of the Working Group of the European Convention dealing with the Community's complementary competences.[54]

[53] There are a number of fascinating and controversial ECJ rulings on Article 308 which would have deserved to be discussed in depth. Amongst the better known judgments are, for example, Case C-22/1996 *Parliament* v *Council* [1998] ECR 3231; Case C-84/1994 *UK* v *Council* (Working time Directive) [1996] E.C.R 5755; Case C-233/1994 *Germany* v *Parliament and Council* (Deposit Guarantee Schemes) [1997] ECR 2405; Case C-268/1994 *Portuguese Republic* v *Council* (Cooperation Agreement between the European Community and the Republic of India) [1996] ECR 6177; Case C-271/1994 *Parliament* v *Council* [1996] ECR 1689; and, finally, Case C-426/1993 *Germany* v *Council* (business registers for statistical purposes) [1995] ECR 3723. Controversial recent decisions of the ECJ include, Case C-377/1998 *Netherlands* v *Parliament and Council* [2001] ECR 7079; Case C-209/1997 *Commission* v *Council* [1999] ECR 8067; Case C-232/1997 *Nederhoff & Zn.* v *Dijkgraaf en hoogheemraden van het Hoogheemraadschap Rijnland* [1999] ECR 6385.

[54] Final Report of Working Group V, CONV 375/01/02 at 14–17.