

European Constitutional Law Review

2016 VOLUME 12 ISSUE 1

Contributions by

Hubert Smekal & Ladislav Vyhnánek, Giovanni Piccirilli, Bastian Michel, Stefan Graziadei, Hanneke van Eijken & Jan Willem van Rossem, Olivier Duhamel, Luigi Corrias, Xenophon Contiades & Alkmene Fotiadou, Geert De Baere & Tina Van den Sanden, Chiara Bergonzini, Oddný Mjöll Arnardóttir

Subjects

FRANCE: constitutional amendment in the wake of the Paris terrorist attacks; EUROPEAN COURT OF HUMAN RIGHTS: changing jurisprudence on power sharing in multinational states; and the Court's two margins of appreciation; CONSTITUTIONAL THEORY: taking populism seriously; and the difficulties of modelling constitutional amendment cultures; EUROPEAN UNION: external action and the choice of legal basis; ELECTIONS TO THE EUROPEAN PARLIAMENT: the discovery of a substantive right to vote in Union law; and the question of thresholds in the German, Czech and Italian courts; ITALY: the Constitutional Court on balancing the budget



CAMBRIDGE
UNIVERSITY PRESS

EuConst
2016/I

BOARD OF EDITORS

Leonard F.M. Besselink, co-editor-in-chief
University of Amsterdam

Monica Claes, co-editor-in-chief
Maastricht University

Jan-Herman Reestman, co-editor-in-chief
University of Amsterdam

W.T. Eijssbouts
University of Amsterdam

John W. Sap
Open Universiteit and VU Amsterdam

Thomas Beukers
European University Institute, Florence

Jan Komárek
London School of Economics and
Political Science

Gerhard van der Schyff
University of Tilburg

Mattias Wendel
Humboldt-Universität zu Berlin

Aida Torres Pérez
Universitat Pompeu Fabra, Barcelona

François-Xavier Millet
Court of Justice of the European Union

Geerten Boogaard
Leiden University

Thomas A.J.A. Vandamme
University of Amsterdam

Bastian Michel, managing editor
University of Amsterdam

Special language advisors
Jeremy B. Bierbach
Amsterdam

Russell E.M. Lawson
Oxford

BOARD OF ADVISORS

Andreas Auer
Professor emeritus of public law, Universities of
Zurich and Geneva

Marta Cartabia
Vice-president of the Italian Constitutional Court
and Professor, Università Milano-Bicocca

Paul Craig
Professor of English law, St. John's College, Oxford

Gráinne de Búrca
Professor of law, New York University School of Law

Bruno De Witte
Professor of law, European University Institute,
Florence, and Maastricht University

Olivier Duhamel
University Professor at IEP (Sciences Po), Paris

Spyridon Flogaitis
Professor of administrative law, University of Athens

Jörg Gerkrath
Professor of European law, University of
Luxembourg

P.J.G. Kapteyn
Former judge in the ECJ

Rick Lawson
Professor of European law, Leiden University

Koen Lenaerts
President of the ECJ and Professor of European law,
KU Leuven

Ingolf Pernice
Professor of public law and of international and
European law, HU Berlin

Jit Peters
Professor emeritus of public law, University of
Amsterdam

Lucas Prakke
Professor emeritus of comparative constitutional
law, University of Amsterdam

Sacha Prechal
Judge at the ECJ and Professor of international and
European institutional law, Utrecht University

W.H. Roobol
Professor emeritus of European history, University
of Amsterdam

Dominique Rousseau
Professor of public law, Université Paris I
Panthéon-Sorbonne

Wojciech Sadurski
Professor at the University of Sidney and the
University of Warsaw

András Sajó
Judge in the European Court of Human Rights

Mirosław Wyrzykowski
Professor of constitutional law, University of
Warsaw

Peter G. Xuereb
Professor of European and comparative law,
University of Malta

Jiří Zemánek
Professor of European Union law, Charles
University, Prague, judge in the Czech
Constitutional Court

EUROPEAN CONSTITUTIONAL LAW REVIEW

2016 VOLUME 12 ISSUE 1

CONTENTS

Guest Editorial

Olivier DUHAMEL – Terrorism and Constitutional Amendment in France – 1

Articles

Luigi CORRIAS – Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity – 6

Oddný Mjöll ARNARDÓTTIR – Rethinking the Two Margins of Appreciation – 27

Stefan GRAZIADEI – *Democracy v Human Rights?* The Strasbourg Court and the Challenge of Power Sharing – 54

Geert DE BAERE & Tina VAN DEN SANDEN – Interinstitutional Gravity and Pirates of the Parliament on Stranger Tides: the Continued Constitutional Significance of the Choice of Legal Basis in Post-Lisbon External Action – 85

Case Notes

Hanneke VAN EIJKEN & Jan Willem VAN ROSSEM – Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship? – Court of Justice of the European Union – Case C-650/13, request for a preliminary ruling from the tribunal d'instance de Bordeaux, made by decision of 7 November 2013, in the proceedings in *Thierry Delvigne v. Commune de Lesparre-Médoc and Préfet de la Gironde*, 6 October 2015, ECLI:EU:C:2015:648 – 114

Bastian MICHEL – Thresholds for the European Parliament Elections in Germany Declared Unconstitutional Twice – Bundesverfassungsgericht – Judgment of 9 November 2011, 2 BvC 4/10, 5% threshold – Judgment of 26 February 2014, 2 BvE 2/13, 2 BvR 2220/13, 3% threshold – 133

Hubert SMEKAL & Ladislav VYHNÁNEK – Equal voting power under scrutiny: Czech Constitutional Court on the 5% threshold in the 2014 European Parliament Elections – Czech Constitutional Court 19 May 2015, Pl. ÚS 14/14 – 148

Giovanni PICCIRILLI – Maintaining a 4% Electoral Threshold for European Elections, in order to clarify access to constitutional justice in electoral matters – Italian Constitutional Court – Judgment of 14 May 2015 No. 110 – 164

Chiara BERGONZINI – The Italian Constitutional Court and Balancing the Budget – Judgment of 9 February 2015, no. 10 – Judgment of 10 March 2015, no. 70 – 177

Review Essay

Xenophon CONTIADES & Alkmene FOTIADOU – The Determinants of Constitutional Amendability: amendment models or amendment culture? – 192

EDITORIAL POLICY & GUIDELINES FOR CONTRIBUTORS

The journal is edited in the Hogendorpcentre for European Constitutional Studies, a Jean Monnet Centre of excellence. This Centre is based in the University of Amsterdam. Published three times a year. In the tradition of the Hogendorpcentre, the *European Constitutional Law Review* (EuConst) follows the classical approach of constitutionalism, to discuss EU law's developments as well as comparative public law of the member states, political and constitutional theory and history. The journal is a platform for scholarly discussion of European constitutional events and evolution. It is open to contributions in this field from any country in the world and from any discipline. These contributions should satisfy as to substance, apart from the common scholarly criteria, two specific conditions, to a) have a distinctly European relevance and b) include a reference to and discussion of legal aspects involved.

Submitting an article, case note or book review

The editors of the *European Constitutional Law Review* are happy to receive contributions on relevant subjects at any time. Before submitting, authors should ensure that their contribution falls within the scope of EuConst as stated above.

Articles, case notes and book reviews can be sent by email to euconst@uva.nl. Manuscripts should be attached in Microsoft Word format (and not, specifically, in PDF format) to enable editing, anonymisation and comments. EuConst has an exclusive submission policy. Authors are required to state clearly, when submitting, that their contribution is not under consideration elsewhere.

Authors of article contributions are asked to aim for a length of no more than 10,000 words (including footnotes). Case notes and book reviews should not exceed 5,000 words. Upon request, the editors will consider whether relaxation of these limits is justified.

All submissions must be written in good English. Authors who are uncertain whether their English is of sufficient quality, should have their manuscript reviewed and edited by a native speaker with a background in law.

Copyright, licence to publish and open access policy

Contributors retain copyright. By submitting to EuConst, authors agree that upon acceptance of their contribution they will grant an exclusive licence to publish by signing and returning the appropriate Licence Form. Authors can make their contributions available through academic repositories. For more information, including terms and conditions of publication and authors' rights of reuse, see journals.cambridge.org/EuConst_CTF.

Revisions and house style

Accepted contributions will be edited, linguistically and substantively, subject to authors' approval. Authors should ensure that their submissions conform to the house style. A style sheet is available on the journal website, journals.cambridge.org/euconst.



The G.K. VAN HOGENDORPCENTRE FOR EUROPEAN CONSTITUTIONAL STUDIES, short: HOGENDORPCENTRE, is a Jean Monnet centre of excellence at the University of Amsterdam. Founded in 1996, it promotes research and course development in the field of European Constitutional Studies, bringing together the disciplines of constitutional (including comparative) law, history, political theory. Gijsbert Karel van Hogendorp, 1762-1834, is the *auctor intellectualis* of the Dutch Kingdom's first constitution, of 1814.