

# European Constitutional Law Review

2017 VOLUME 13 ISSUE 2

*Contributions by*

Urška Šadl & Sabine Mair, Mehrdad Payandeh, Pavel Ondřejek, Jacob Öberg,  
Paul Dermine, Lucia Dalla Pellegrina & Jef De Mot & Michael Faure & Nuno Garoupa,  
Angela K. Bourne & Fernando Casal Bértoa, Jeremy B. Bierbach

*Subjects*

EUROPEAN DEMOCRACY: a call for reflection; 'MILITANT DEMOCRACY': party ban practices  
in European democracies; JUDICIAL REVIEW: vertical competence review of EU secondary  
law; HORIZONTAL EFFECT OF FUNDAMENTAL RIGHTS: a structural approach; 'LITIGATING  
FEDERALISM': an empirical analysis of Belgian Constitutional Court decisions; PRINCIPLES  
OF EU LAW: Case C-441/14 *Dansk Industri*; EU INSTITUTIONS IN ESM CONTEXT: Case  
C-8/15 to C-10/15 *Ledra Advertising*; EFTA COURT ON DERIVED RIGHT OF RESIDENCE:  
Case E-28/15 *Yankuba Jabbi*; GERMANY: the OMT judgment of the German Federal  
Constitutional Court



**CAMBRIDGE**  
UNIVERSITY PRESS

*EuConst*  
2017/2

## 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

*Thomas A.J.A. Vandamme*  
University of Amsterdam

*Bastian Michel, managing editor*  
University of Amsterdam

*Andrew Faughman, language editor*  
Amsterdam

*Special language advisers*  
*Jeremy B. Bierbach*  
Amsterdam

*Russell E.M. Lawson*  
Oxford

## BOARD OF ADVISERS

*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

*Miroslaw 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

## 2017 VOLUME 13 ISSUE 2

### CONTENTS

#### *Editorial*

Talking about European Democracy – 207

#### *Articles*

Angela K. BOURNE & Fernando CASAL BÉRTOA – Mapping ‘Militant Democracy’: Variation in Party Ban Practices in European Democracies (1945-2015) – 221

Jacob ÖBERG – The Rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes – 248

Pavel ONDŘEJEK – A Structural Approach to the Effects of Fundamental Rights on Legal Transactions in Private Law – 281

Lucia DALLA PELLEGRINA, Jef De MOT, Michael FAURE & Nuno GAROUPA – Litigating Federalism: An Empirical Analysis of Decisions of the Belgian Constitutional Court – 305

#### *Case Notes*

Urška ŠADL & Sabine MAIR – Mutual Disempowerment: Case C-441/14 *Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* and Case no. 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A* – 347

Paul DERMINE – The End of Impunity? The Legal Duties of ‘Borrowed’ EU Institutions under the European Stability Mechanism Framework: ECJ 20 September 2016, Case C-8/15 to C-10/15, *Ledra Advertising et al. v European Commission and European Central Bank* – 369

Jeremy B. BIERBACH – The Reality Test of Residence goes through the Looking Glass: Court of Justice of the European Free Trade Association States (EFTA Court), judgment of 26 July 2016, Case E-28/15, *Yankuba Jabbi v The Norwegian Government, represented by the Immigration Appeals Board* – 383

Mehrdad PAYANDEH – The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture – 400

## EDITORIAL POLICY & GUIDELINES FOR CONTRIBUTORS

The journal is edited in the Hogendorp Centre 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 Hogendorp Centre, 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](mailto: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](http://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](http://journals.cambridge.org/euconst).



The G.K. VAN HOGENDORP CENTRE FOR EUROPEAN CONSTITUTIONAL STUDIES, short: HOGENDORP CENTRE, 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.