

# **European Yearbook of Constitutional Law**

Volume 3

The *European Yearbook of Constitutional Law* (EYCL) is an annual publication devoted to the study of constitutional law. The yearbook provides a forum for in-depth analysis and discussion of new developments in constitutional law in Europe and beyond. Each issue is dedicated to a specific theme. Papers are subject to editorial and double-blind peer review. The yearbook is published by T.M.C. ASSER PRESS in cooperation with Springer Publishers.

**Contact**

To get in touch, please send an e-mail to [eycl@tilburguniversity.edu](mailto:eycl@tilburguniversity.edu)

More information about this series at <https://link.springer.com/bookseries/16431>

Jurgen de Poorter · Gerhard van der Schyff ·  
Maarten Stremmer · Maartje De Visser  
Editors

# European Yearbook of Constitutional Law 2021

Constitutional Advice



ASSER PRESS



Springer

*Editors*

Jurgen de Poorter  
Department of Public Law and Governance  
Tilburg Law School  
Tilburg, The Netherlands

Gerhard van der Schyff  
Department of Public Law and Governance  
Tilburg Law School  
Tilburg, The Netherlands

Maarten Stremmer  
Faculty of Law  
Maastricht University  
Maastricht, The Netherlands

Maartje De Visser  
Yong Pung How School of Law  
Singapore, Singapore

The views expressed in this Yearbook are not necessarily those of the members of the Editorial Board, the Board of Recommendation and/or those institutions they represent, including the T.M.C. Asser Instituut and T.M.C. ASSER PRESS.

ISSN 2405-6111 ISSN 2405-612X (electronic)  
European Yearbook of Constitutional Law  
ISBN 978-94-6265-534-8 ISBN 978-94-6265-535-5 (eBook)  
<https://doi.org/10.1007/978-94-6265-535-5>

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands [www.asserpress.nl](http://www.asserpress.nl)  
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

© T.M.C. ASSER PRESS and the authors 2022

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work. The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

This T.M.C. ASSER PRESS imprint is published by the registered company Springer-Verlag GmbH, DE part of Springer Nature.  
The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

## **Editorial Board**

### *Series Editors*

Prof. Jurgen de Poorter (*Editor*), Tilburg University  
Dr. Gerhard van der Schyff (*Editor*), Tilburg University  
Dr. Maarten Stremmer (*Editor*), Maastricht University  
Dr. Maartje De Visser (*Editor*), Singapore Management University

## **Board of Recommendation**

Prof. dr. Armin von Bogdandy, Max Planck Institute for Comparative Public Law  
and International Law  
Prof. em. dr. Marc Bossuyt, University of Antwerp  
Prof. dr. Alfonso Celotto, Roma Tre University  
Prof. dr. Janneke Gerards, Utrecht University  
Prof. dr. Daniel Halberstam, University of Michigan

# Preface

The editorial board of the *European Yearbook of Constitutional Law* would like to share with its readers that founding editor Prof. Ernst Hirsch Ballin has retired from the board after the publication of the Yearbook's second volume on cities in constitutional law. Together with Dr. Gerhard van der Schyff, he conceived the Yearbook and was instrumental in conceptualising its first volume in 2019 on judicial independence. The board would like to express its sincere gratitude to him for his tireless efforts, skill and dedication in establishing the series and wishes him all the best in his retirement.

It is further with great pleasure that the editorial board welcomes Prof. Jurgen de Poorter to its ranks, starting with the current volume on constitutional advice. Professor De Poorter has supported the *Yearbook* from its inception and secured the project's continuity by embedding it in the Department of Public Law and Governance at Tilburg Law School. His academic and professional expertise will undoubtedly be most valuable as the Yearbook grows from strength to strength.

Tilburg, The Netherlands

The Editors

# Contents

<b>1</b>	<b>Introduction: Mapping the Emerging Field of Constitutional Advice</b> .....	<b>1</b>
	Jurgen de Poorter, Gerhard van der Schyff, Maarten Stremler and Maartje De Visser	
<b>2</b>	<b>Some Advice on Constitutional Advice</b> .....	<b>13</b>
	Tom Ginsburg	
<b>3</b>	<b>Do We Need Constitutional Advice? Denmark—The Story of a Self-Sufficient Political System</b> .....	<b>31</b>
	Pernille Boye Koch	
<b>4</b>	<b>Constitutional Advice and Signals in the Netherlands: Actors and Impact</b> .....	<b>53</b>
	Paul van Sasse van Ysselt	
<b>5</b>	<b>The Council of State of Belgium: Advising the Political Branches, and the Constitutional Court</b> .....	<b>83</b>
	Toon Moonen	
<b>6</b>	<b>Advising on Constitutional Matters in a Mixed Legal System: The Example of Cyprus</b> .....	<b>103</b>
	Constantinos Kombos	
<b>7</b>	<b>Understanding the Dilemma of Constitutional Advice in Transitional Societies: A Comparative Analysis of Ghana and Colombia</b> .....	<b>129</b>
	Marian Yankson-Mensah and Marialejandra Moreno Mantilla	
<b>8</b>	<b>Openness of Constitutional Review: A Comparative Analysis of How Transparency is Ensured in Ex Ante Constitutional Review</b> .....	<b>155</b>
	Maija Dahlberg	

**9 Constitutional Reasoning There and Back Again: The Facebook Oversight Board as a Source of Transnational Constitutional Advice ..... 197**  
Matija Miloš and Toni Pelić

**10 Advisory Opinions of the Dutch Council of State as Contributions to a Constitutional Dialogue ..... 225**  
Mentko Nap

**11 Courts as *Consiglieri*: Advisory Opinions in a Comparative Constitutional Perspective ..... 245**  
Willem Mingelen and Jerfi Uzman



# Editors and Contributors

## About the Editors

**Jurgen de Poorter** is Professor of Administrative Law in the Department of Public Law and Governance at Tilburg Law School, The Netherlands. His research focuses, in particular, on constitutional dialogues, public interest litigation and methods of judicial lawmaking.

**Gerhard van der Schyff** is Associate Professor in the Department of Public Law and Governance at Tilburg Law School, The Netherlands. His research interests include constitutional law and fundamental rights, especially from a comparative and European perspective.

**Maarten Stremler** is Assistant Professor of Constitutional Law in the Department of Public Law at the Faculty of Law of Maastricht University, The Netherlands. His research interests are comparative constitutional law and constitutional theory.

**Maartje De Visser** is Associate Professor at Yong Pung How School of Law, Singapore. Her current research focuses on constitutional engagement by courts and non-judicial actors, transnational judicial dialogues in Europe and Asia and means to improve constitutional literacy.

## Contributors

**Maija Dahlberg** University of Eastern Finland Law School, Academy of Finland, Joensuu, Finland

**Jurgen de Poorter** Tilburg University, Tilburg, The Netherlands

**Maartje De Visser** Singapore Management University, Singapore, Singapore

**Tom Ginsburg** The University of Chicago, Chicago, USA

**Pernille Boye Koch** The Danish Institute for Human Rights, Copenhagen, Denmark

**Constantinos Kombos** Law Department, University of Cyprus, Nicosia, Cyprus

**Matija Miloš** Constitutional Law, Faculty of Law, University of Rijeka, Rijeka, Croatia

**Willem Mingelen** Faculty of Law, Utrecht University, Utrecht, The Netherlands

**Toon Moonen** Faculty of Law and Criminology, Ghent University, Ghent, Belgium

**Marialejandra Moreno Mantilla** International Nuremberg Principles Academy, Nuremberg, Germany

**Mentko Nap** Ministry of Justice and Security of the Dutch Government, The Hague, The Netherlands

**Toni Pelić** Constitutional Law, Faculty of Law, University of Rijeka, Rijeka, Croatia

**Maarten Stremmer** Maastricht University, Maastricht, The Netherlands

**Jerfi Uzman** Faculty of Law, Utrecht University, Utrecht, The Netherlands

**Gerhard van der Schyff** Tilburg University, Tilburg, The Netherlands

**Paul van Sasse van Ysselt** Department Constitutional Affairs and Legislation, Ministry of the Interior and Kingdom Relations of the Netherlands, The Hague, The Netherlands; Department of General Law Studies and History of Law, Faculty of Law, University of Groningen, Groningen, The Netherlands; Department of Public Law, Faculty of Law, Free University Amsterdam, Amsterdam, The Netherlands

**Marian Yankson-Mensah** International Nuremberg Principles Academy, Nuremberg, Germany