

one guarantee the right itself? If everyone is guaranteed this right then publicity itself will be seriously impaired by mixing authentic and unfounded information together inseparably.

Chapter 6 deals with the issue of anonymity on the Internet, a topic that is regularly discussed these days. It is characteristic of Internet communication in general that the 'traditional' issues related to freedom of speech are presented in new guises or in a magnified manner with the consequence that the continuing validity of regulatory approaches developed in the pre-Internet era is questioned. The power of the legal doctrines developed in the offline world seem to weaken in connection with the restriction of Internet content. We have similar problems with anonymity as well: on the Internet, anonymity can be maintained much more easily, meaning that the author is much harder to identify; what is more, many more people are able to express themselves fairly spontaneously on the Internet, whether using their proper names or anonymously. The much more democratic nature of the Internet as compared to previous forms of media, the nearly completely free and unrestricted access, and as its inevitable result, the immense number of violations committed by exercising free speech and the difficulties of identification may all lead one to conclude that no legal action should be taken against anonymous violations at all. However, this technologically inflicted difficulty does not provide, in itself, sufficient grounds for loosening the limits of free speech without proper theoretical foundations. Neither Professor Barendt, nor the currently applied European legal approach, endorses this direction. This is why, for example, Internet intermediaries can be held liable for the content posted by third parties that cannot be identified by the aggrieved party; see for example the *Delfi v Estonia* case (App No 64569/09, judgment of 16 June 2015) regarding the content provider's liability for anonymous comments. Perhaps the most important point in this decision was that the European Court of Human Rights acknowledged the potential liability of the website operator. This point was reinforced later by the judgment passed following the closing of the manuscript of Barendt's book in the *MTE and Index.hu Zrt. v Hungary* case (App No 22947/13, judgment of 2 February 2016).

The concluding Chapter of the book discusses the issues related to secret ballot and election financing, as special types of opinions. Whereas the secrecy of the vote cast at an election is self-evident, the mandatory disclosure of the financial support given to the candidates is nevertheless accepted. This is accepted even by the US Supreme Court, in the interests of democracy, so that voters can be aware of who, or which interest group supports which candidate, and thereby they can make a more well-informed decision in the polling booth (at least that's the idea behind the forced disclosure).

Professor Barendt has once again presented us with the kind of book that we have become accustomed to receive from him during his long career: this new book also deals with the fundamental questions of freedom of speech, provides a thorough comparative legal analysis, considers all important arguments carefully and takes a stand regarding the solutions he deems appropriate, but still remains sensitive to the opposing points of view as well. The author is an advocate of freedom of speech, more specifically, the kind of freedom of speech which serves the interests of democratic society and which also cares for the interests of the audience of the speech and, as such, is destined for eternal balancing.

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Participatory Constitutional Change: The People as Amenders of the Constitution, edited by XENOPHON CONTIADES and ALKMENE FOTIADOU [Routledge, Abingdon, 2017, 244pp, ISBN 978-1-47247-869-6, £95.00 (h/bk)]

Published as part of Routledge's series on *Comparative Constitutional Change*, the collection of essays edited by Contiades and Fotiadou engages with a pressing issue in European

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constitutional theory and practice, namely the perceptible trend towards direct democracy whereby ordinary citizens are increasingly involved as active participants in the making and amending of constitutional orders. Taking as its cue an acute distrust of remote (often supranational) political and technocratic elites variously responsible for the global financial crisis, the Greek sovereign debt, the Icelandic banking collapse, the collection analyses a clear shift in constitutional design whereby the constituted powers (legislatures, governments and courts) enjoin the people to take seriously their role as the constituent power in a democracy and become more actively involved in the authoring of their constitutional destinies. Of course, as history in Europe and elsewhere shows, 'the people themselves' can go wrong, and 'rule by men' (usually as experienced in representative democracies) rather than by laws can be shown to have led to arbitrariness, oppression and discriminatory treatment of unpopular minorities. Contiades and Fotiadou's edited volume offers a valuable interdisciplinary and, at times, comparative exploration of the central issues and tensions that are implicated in the shift towards more direct forms of popular constitutional rule and away from both majoritarian systems of representative democracy and counter-majoritarian alternatives favoured by legal constitutionalists.

The collection is organized in the following way: the themes of the book are introduced in the opening chapter. Theoretical and historical aspects of popular involvement in constitutional change are considered in Chapters 2 and 3. The themes of popular versus legal constitutionalism are explored in Chapters 4 and 5 via an analysis of developments in Swiss and Californian/US constitutional law. National experiences of referenda are discussed in Chapters 6–9 whilst the collection is concluded by two chapters on EU aspects of popular participation.

Blokker in Chapter 2 notes the tendency in European politics to include the expression of popular opinion in processes of constitutional review and remarks correctly that this represents a shift away from the legal constitutionalism paradigm that has been dominant across the Continent since 1945 (and which has enjoyed renewed prominence in the aftermath of the collapse of former Communist countries post-1989). The emphasis in legal constitutionalism on the role of courts in safeguarding democratic processes and outcomes cabins rule-making by majoritarian institutions such as the legislature and executive within certain limits determined by prevailing understandings of the rule of law and individual rights. Political constitutionalists challenge the primacy accorded to the courts in this account of democratic self-government, preferring instead to settle open-ended rights questions in the political realm of the constitution, although as Blokker observes, as explicated by Waldron and others, this approach has focused on representative structures such as legislatures rather than structures of unmediated, direct democracy such as binding referenda. Ackerman's US-based episodic account of popular support for constitutional revision projects (undertaken by political representatives in the face of Supreme Court resistance) is invoked to suggest a mediated, rather than a direct role for 'the people' in processes of constitutional change. Its relevance to European contexts is less clear, however. As suggested by recent developments in Iceland and Ireland (and seemingly in the UK Brexit referendum), despite their formally consultative status, the expression of popular opinion in national decision-making structures has been accorded considerable weight by political elites in setting the direction of constitutional reform. Some useful analysis of the emergent and decidedly more radical conception of democratic politics ('democratic constitutionalism') in Iceland, Ireland and Romania is offered here, although whether these participatory initiatives also seek (and are successful in so seeking) a more deliberative style of decision-making (and what this might entail) is glossed over.

One of the collection's main strengths is the breadth of expert analysis it offers. Thus we learn in Chapter 3 by Jan-Herman Reestman how constitutional reforms in France have bucked the trend towards more direct citizen involvement in constitutional amendment. National referenda can only occur with the concurrence of two of the President of the Republic, the Government and the Parliament. Given their inherent unpredictability in an era of palpable distrust of political elites, French political leaders are unlikely to rush into national plebiscite. Consequently, the main

opportunity for citizens to influence constitutional reform is through the five-yearly election for the Presidency.

Where the people have regular opportunities to propose constitutional amendment as occurs in Switzerland, the potential exists for emanations of the popular will to conflict with international law (as for example set out in bilateral treaties with the EU, human rights treaties and customary law) and core democratic principles. This tension between majoritarian rule-making and fundamental norms provides the focus for successive chapters by Thomas Fleiner and Claudia Josi. Fleiner's contribution examines citizen-led constitutional reform initiatives where just 2.5 per cent of the Swiss electorate (or 100,000 voters) are required for a proposal to be put to the people. The federal Parliament can approve/reject the proposal or even put a counter-proposal to be voted on at the same time as the citizens' initiative. Since an earlier set of constitutional reforms in 1999, popular initiatives have to respect mandatory international law but this has not stopped the right of centre Union Democrats proposing amendments to the Constitution that would limit the rights of asylum seekers and immigrants and the Swiss People's Party seeking to use popular opinion as expressed in referenda to overturn the 1999 reforms and assert the primacy of referenda outcomes over commitments in international law.

Stated thus, direct forms of popular sovereignty pose an obvious challenge to universal human rights claims and other values associated with legal constitutionalism, including the rule of law and independence of the judiciary. Claudia Josi's chapter takes up this theme in the context of fundamental individual rights and proposes a set of administrative and legal constraints upon the exercise of direct democracy. Her contribution contrasts the possibility of federal constitutional change in Switzerland with state level amendment in California. Concerned about the relative ease by which a majority of Swiss citizens approved an amendment to the federal constitution prohibiting the building of minarets (and thus possibly infringing upon Article 9 ECHR freedom of religion), Josi makes the case for greater judicial pre- and post-election scrutiny of plebiscite initiatives and is favourably disposed towards counter-majoritarian, US-style judicial review in the federal courts. One is left wondering, however, whether the author will remain so inclined when Trump administration appointees begin to fill federal judicial offices and use their strike down powers to invalidate progressive legislation from the Obama era.

In the second half of the book, chapters by Thorarensen, Farrell (and Harris and Suiter), Gerkrath and Fotiadou take as their respective themes recent direct democracy initiatives in Iceland, Ireland, Luxembourg and Greece. Two concluding chapters by Tosi and Krunke look at the European dimensions of referenda as a tool of European integration. Each of these nationally/EU focused chapters will repay in their own way close reading, offering as they do expert insights into the distinct political culture and broader constitutional contexts within which some recent attempts to bring the demos more fully into political/constitutional decision-making. The detailed attention afforded to national processes and outcomes (and the roles played political elites in shaping each) will provide much food for thought for advocates of greater citizen participation. Space constraints prevent the reviewer offering a detailed commentary on each chapter. Nonetheless, the chapter by Fotiadou on the Greek people's recent experience of self-government prompted by the financial crisis provides a sobering account of elite manipulation of a hitherto dormant constitutional mechanism. In October 2011, then Prime Minister Papandreou first called and then cancelled a referendum on an EU debt rescue package. As Fotiadou points out, however, even if the referendum had been held, it would have post-dated the imposition of bailout's terms on the Greek people. In addition to upsetting Greek proponents of popular sovereignty, Papandreou also managed to unsettle the President of the European Commission. Jean-Claude Juncker publicly criticized the Greek Prime Minister for failing to discuss his referendum plans with other European leaders in advance, prefiguring future EU involvement/interference with the 2015 bailout referendum that did actually occur and did reject the package of measures on a turnout of 62.5 per cent. Fotiadou is critical of the ambiguity of the referendum question that was put to the Greek people and the extremely short time frame from the announcement of the referendum to the actual vote (nine days) which left inadequate time to examine the implications of a

rejection of the bailout's terms. Where, as in Greece, there is an absence of a background referendum culture, 'the people' are asked to embark upon a steep learning curve. We might also conclude from the Greek experience that the design of participative procedures points additionally to the need for constituted authorities to wise up. What is also clear is that, from time to time, direct democracy is going to yield up uncomfortable outcomes, not only for political elites (notwithstanding their undoubted scope to manipulate outcomes) but also for disadvantaged minorities. Of these two, we should be more concerned about popular endorsement of discriminatory and oppressive treatments of the latter and ask whether certain substantive outcomes should be placed beyond the reach of temporary political majorities. To advocate such a position is to shift effective determination of political questions into the judicial sphere and a potential loss of democratic legitimacy in which citizens cease to be the authors of their constitution.

In conclusion, this is a timely and much needed set of analyses of contemporary constitutional amendment. It will offer scholars a rich and diverse range of perspectives on a cross-European trend towards greater citizen participation in government.

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