

CONTENTS

<i>Preface</i>	v
<i>Biography Pieter van Dijk</i>	xxi
<i>Bibliography Pieter van Dijk</i>	xxiii

I. PIETER VAN DIJK

Pieter van Dijk: the Person

Joke VAN DER MEER	3
-------------------------	---

Pieter van Dijk: the Scholar. Recalling a ‘Wide-ranging Study of Comparative Jurisprudence’

Jos KAPTEYN	9
-------------------	---

Pieter van Dijk: the State Councillor and Human Rights Lawyer. Preconditions for Safeguarding Fundamental Rights

Erik VISSER and Annerie VERBEEK	17
---------------------------------------	----

1. Introduction	17
2. The Council of State: Its Tasks and Contexts	18
3. Acting Vice-President and Chair of the Constitutional Law Committee	21
4. President of the Administrative Jurisdiction Division	22
4.1. Reducing Turnaround Times	23
4.2. Accessibility and Predictability of Judgments	26
4.3. Judicial ‘Lawmaking’	28
4.4. Cooperation with the Joint Court of Justice and Developments in the Area of Mediation and the Right of Complaint within the Administrative Jurisdiction Division	29
5. Conclusion	31

II. STRASBOURG

The Concurring and Dissenting Opinions of Pieter van Dijk as a Judge of the European Court of Human Rights

Fried VAN HOOF and Leo ZWAAK.....	35
1. Introduction	35
2. The Interpretation and Application of Article 6 of the Convention.....	36
2.1. Anonymous Witnesses	36
2.2. Objective Impartiality	37
2.3. Adequate Time and Facilities for the Preparation of the Defence ...	38
2.4. Absence of an Oral Hearing.....	40
3. Article 8 of the Convention	41
3.1. Transsexualism.....	41
3.2. Expulsion and the Right to Family Life	43
4. Article 9 of the Convention: Freedom of Religion	44
5. Article 10 of the Convention: Freedom of Expression	45
5.1. Freedom of Expression in a Democratic Society.....	45
5.2. Proportionality	46
6. Exhaustion of Domestic Remedies	47
7. Conclusion.....	48

Pieter van Dijk and His Favourite Strasbourg Judgment. Some Remarks on Consensus in the Case Law of the European Court of Human Rights

Egbert MYJER.....	49
1. Introductory Remark.....	49
2. The <i>Christine Goodwin</i> Case.....	50
3. The Notion of Consensus and Margin of Appreciation and the Brighton Declaration	56
4. Interpretation and Application of the Convention.....	57
5. The Interpretation Given by the Court also of Importance for Other High Contracting Parties	59
6. Interpretation Methods Used by the Court.....	60
7. Consensus in the Case Law of the Court	61
8. How Does the Court Determine Consensus?	69
9. Concluding Remarks.....	70

Judicial Minimalism and 'Dependency'. Interpretation of the European Convention in a Pluralist Europe

Janneke GERARDS	73
1. Introduction	73
2. Autonomous and 'Dependent' Interpretation	77

2.1. Autonomous Interpretation and Its Risks	77
2.2. 'Dependent' Interpretation and the Value of Flexibility	79
Deliberate Choice for a Non-autonomous Approach	80
Dependency, or the 'in for a Penny, in for a Pound' Approach	81
Conclusion	82
3. Judicial Minimalism: Shallow, Narrow and Analogical Reasoning	83
3.1. Shallow Reasoning	83
3.3. Narrow Reasoning, Analogical Reasoning and General Principles ..	86
3.4. Disadvantages of Judicial Minimalism	88
3.5. Conclusion	89
4. Conclusion	90

Switzerland before the European Court of Human Rights

Giorgio MALINVERNI	93
--------------------------	----

The Impact of the Case Law of the European Court of Human Rights on the Political Debate in the Netherlands concerning the Court

Martin KUIJER	99
---------------------	----

1. Introductory Comments	99
2. The Period of the Sleeping Beauty: 1950 till mid Nineteen Seventies	101
3. The Court's Awakening: The Nineteen Eighties and Nineties	104
4. The Rise of a European Immigration Tribunal: Anno 2012?	108
5. Concluding Comments	112

Environmental Protection under Article 8 of the European Convention on Human Rights

Thijs DRUPSTEEN	115
-----------------------	-----

1. Some Recent Cases	115
<i>Deés v. Hungary</i>	115
<i>Ivan Atanasov v. Bulgaria</i>	116
2. Criticism of the Strasbourg Court	118
3. Environmental Cases under Article 8 of the Convention	120
<i>Lopez Ostra v. Spain</i>	120
<i>Guerra v. Italy</i>	121
<i>Hatton v. the United Kingdom (the Heathrow case)</i>	122
<i>Kleyn and Others v. the Netherlands (the Betuweroute case)</i>	123
<i>Taskin and Others v. Turkey</i>	124
<i>Moreno Gómez v. Spain</i>	124
<i>Fadeyeva v. Russia</i>	125
<i>Giacomelli v. Italy</i>	125
<i>Tatar v. Romania</i>	126

<i>Bacila v. Romania</i>	126
<i>Oluic v. Croatia</i>	126
<i>Mileva v. Bulgaria</i>	127
<i>Dubetska and Others v. Ukraine</i>	127
<i>Zammit Maempel v. Malta</i>	127
<i>Di Sarno v. Italy</i>	128
4. Conclusion	128

State Obligations to Adequate Judicial Response in Cases under Article 2 of the Convention. Issues of Admissibility

Zdravka KALAYDJIEVA	131
1. The Positive Procedural Obligations of National Authorities under Article 2 of the Convention	131
2. The Rights to Effective Remedy and Access to Court and the Positive Obligation to Judicial Response	132
3. Admissibility Criteria	134
3.1. Manifestly Ill-founded Complaints	134
3.2. Failure to Exhaust Domestic Remedies	135
3.3. The <i>Ex Officio</i> Nature of the Investigation and the Requirements of Article 35	136
3.4. Victim Status in the Convention Proceedings	138

III. LUXEMBOURG

Access to the European Union Courts. Standing in Direct Actions after Lisbon

Arjen MEIJ	141
1. Introduction	141
2. From <i>Plaumann</i> to <i>Jego-Quéré</i> , <i>UPA</i> and <i>Lisbon</i>	144
3. First Applications: <i>Inuit</i> and <i>Microban</i>	147
4. Final Observations	152

The Role of the European Parliament in the Fundamental Rights Architecture of the European Union

Johan VAN HAERSOLTE and Jan-Kees WIEBENGA	153
1. Introduction	153
2. The European Parliament from the Nineteen Fifties to the Nineteen Eighties: an Actor in Search of a Script	154
3. The European Parliament from the Nineteen Eighties to the Present: Bringing Fundamental Rights Home	161
4. The European Parliament: with a Little Help from Its Friends	164

5. The European Parliament after Lisbon: Staying Alert	168
6. Review and Appraisal	170
 IV. BETWEEN STRASBOURG, LUXEMBOURG AND THE HAGUE...	173
 The European Convention on Human Rights and the Charter of Fundamental Rights of the European Union: Back to the Roots	
Kamiel MORTELMANS and Hanna SEVENSTER.	175
1. Sources of Human Rights: Competition and Cooperation	175
1.1. Introduction	175
1.2. Added Value of the Charter Compared to Other Sources of Human Rights.	176
1.3. Competition and Cooperation	177
2. Rethinking (the Sources of) Human Rights Within the Council of State	178
3. Human Rights Addressees	180
3.1. The Case Law Before the Entry into Force of the Legally Binding Charter	180
3.2. The Case Law After the Entry into Force of the Charter	181
3.3. The Evolution of the Administrative Jurisdiction Division's Case Law on Public Authorities Invoking the Convention	182
The Place of Article 34 of the Convention (the Right of Individual Petition)	184
The Unique Character of the Convention	185
The Nature of the 'Public Authority'	185
3.4. The Administrative Jurisdiction Division's Case Law Regarding the Charter and Public Authorities	186
The Right of Application of Public Authorities within the European Union System	186
The Unique Character of the European Union System	187
The Character of the 'Public Authority'	187
4. The Ability to Invoke Certain Provisions (Direct Effect)	188
4.1. Direct Effect within Union Law	188
4.2. Direct Effect and the Constitution of the Netherlands: Convergence?	190
5. Back to the Roots	193
5.1. Pieter van Dijk's Academic Roots	194
5.2. Back to Pieter van Dijk's Academic Roots	195

The Role of the Administrative Jurisdiction Division of the Council of State in Relation to the European Court of Human Rights

Jurgen DE POORTER.....	197
1. Introduction	197
2. The Constitutional Foundation for the Relation Between the Division and the Strasbourg Court	199
3. Interaction in a <i>Ménage à Trois</i>	201
4. More Room for Joint Responsibility Held by the Division and the Strasbourg Court	202
4.1. Introduction	202
4.2. The Strasbourg Court as Injunctive Relief-Granting Judge	203
4.3. The European Court of Human Rights as Trial Judge	206
5. The Meaning of More Dialogue for National Courts.....	209
6. Towards a Preliminary Reference Procedure and a Certiorari System at the European Court of Human Rights?	211

The European Court of Human Rights and the Court of Justice of the European Union: an Imperfect Match? Interaction between both Courts in the Field of Immigration Law

Aleidus WOLTJER.....	215
1. Introduction	215
2. The Court of Justice and the European Court of Human Rights on Expulsion.....	216
3. The Court of Justice and the European Court of Human Rights on Asylum.....	220
4. Epilogue.....	223

Fundamental Rights Protection in Europe before and after Accession of the European Union to the European Convention on Human Rights

Christiaan TIMMERMANS.....	225
1. Introductory Remark.....	225
2. Relationship between both European Courts	226
3. The Charter of Fundamental Rights of the European Union	229
4. Accession to the Convention	230
5. Prior Involvement of the Court of Justice and the Co-respondent Mechanism	232
6. Future Relations between the Court of Justice and the Strasbourg Court	236

V. VENICE

The Venice Commission Twenty Years On. Challenge Met but New Challenges Ahead

Gianni BUQUICCHIO and Simona GRANATA-MENGHINI 241

1. The Original Challenge 241
2. The Venice Commission 242
3. The Venice Commission's Advice 246
4. The Venice Commission's Role 249
5. The Venice Commission's Future 252
6. Pieter van Dijk's Contribution to the Venice Commission 253

The Venice Commission and the Protection of Human Rights

Finola FLANAGAN 255

1. Introduction 255
2. Freedom of Assembly 257
 - 2.1. Advance Notification 261
 - 2.2. Location 262
 - 2.3. Blanket Restrictions 263
 - 2.4. Guaranteeing Human Rights 263
 - 2.5. Review and Appeal 264

VI. THE KINGDOM OF THE NETHERLANDS IN EUROPE AND OVERSEAS

Fundamental Rights in the Countries of the Kingdom of the Netherlands: Unity or Diversity?

Jaime SALEH 269

1. Introduction 269
2. Fundamental Rights: Democracy, Good Governance and Human Rights 269
3. The Safeguarding of Fundamental Rights in the Kingdom of the Netherlands 273
4. Unity in Diversity 275

Concordance in Administrative Law and the Joint Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba

Ton BIJLOOS, Rob LOEB and Joop DROP 277

1. Introduction 277
2. The Principle of Concordance 280

3.	The Principle of Concordance and the Lar Court.....	282
3.1.	<i>Ne-Bis-In-Idem</i> Principle.....	284
3.2.	<i>Brummen</i>	285
3.3.	Compensation Orders.....	286
3.4.	Analogue Application Not Acceptable in Cases Where the General Administrative Law Act and Lar Differ.....	287
3.5.	Article 20 of Chapter 6 of the General Administrative Law Act ...	287
3.6.	Article 22 of Chapter 6 of the General Administrative Law Act ...	288
3.7.	Articles 18 and 19 of Chapter 6 of the General Administrative Law Act	288
4.	Amendment of the Lar Netherlands Antilles	289
5.	Administrative Procedure on the BES Islands	291
6.	Conclusion.....	292

The Customisation Principle in the Council of State's Advisory Opinions

	Rein-Jan HOEKSTRA and Arnold WEGGEMAN	293
1.	Introduction	293
2.	Customisation Within One Legal Order	295
3.	Customisation in the International Context	299
4.	Customisation in European Cooperation	300
5.	Customisation in Regard to Cooperation Within One Kingdom Country	303
6.	Conclusion.....	307

VII. ON PRINCIPLES AND RIGHTS FROM VARIOUS PERSPECTIVES

The Status of General Principles of Law in the Legal Practice of the Netherlands. Some Observations

	Evert ALKEMA	311
1.	Introduction	311
2.	The Concept of Legal Principles.....	312
3.	Focus of this Paper.....	312
4.	International Legal Principles or 'General Principles of Law Recognized by Civilized Nations'	313
5.	International Legal Principles in Dutch Constitutional Law and Doctrine.....	315
6.	Domestic Legal Principles in Dutch Constitutional Law	318
7.	The Court of Cassation's View on Legal Principles in its 1989 and 2009 Judgments	320
8.	Principles in the Legal Practice of some Special Fields of Dutch Law....	322

9. Concluding Remarks	325
9.1. Can Principles Set Aside Acts of Parliament?	325
9.2. Is Constitutional Change Necessary?	326

The Development of General Principles of Good Governance in Dutch Administrative Case Law

Jaap POLAK	329
1. Introduction	329
2. The Compensation Idea	330
3. General Principles Before General Administrative Jurisdiction: Emphasis on Substantive Requirements of Decisions	331
4. Review Against General Principles of Good Governance after the Arrival of General Administrative Jurisdiction: Dominance of the Principle of Careful Preparation and the Duty to Give Sufficient Reasons	336
5. The Juridification Discussion: the Van Kemenade Report (1996)	339
6. Parallels with the Development of Review Against Provisions from the European Convention on Human Rights?	342
7. Finality as Solution?	343

The Principle of Legality Revisited

Piet Hein DONNER	345
1. Introduction	345
2. Thirty Years of Debate	346
3. Regulation and Legislation	347
4. A Self Sustaining Process	349
5. The Principle of Legality	350
6. The Principle Revisited	353

Fundamental Rights and Principles from an Attorney's Perspective

Arjen VAN RIJN	359
1. Introduction	359
2. Assistance of an Attorney as Another's Fundamental Right	360
3. Where the Subjective Rights of the Client and of the Attorney Meet: Attorney-Client Privilege	364
4. The Attorney's Freedom of Expression	367
5. The Attorney as a Subject of Fundamental Rights	369
6. Fundamental Rights as a Ground of Dispute	370
7. Do Attorneys Have a Public Function?	371
8. Conclusion	374

The Inter-American Commission of Human Rights and the Inter-American Court. New Rules for Individual Communications	
Cecilia MEDINA QUIROGA	377
1. Introduction	377
2. A Glimpse at History	378
3. The Changes in the Rules of Procedure of Court and Commission before 2009	380
4. The 2009 Amendments of the Rules of Procedure of the Inter-American Commission of Human Rights and the Inter-American Court; the Catalysts	382
5. The Process of Amending the Rules of Procedure	385
6. The Amendments Proper	386
6.1. The Amendments of the Commission's Rules of Procedure	386
6.2. The Amendments in the Court's Rules of Procedure	387
7. New Aid for Victims	391
8. Conclusions	393
 Freedom of Religion or Belief is an Asset	
Bahia TAHZIB-LIE	395
Prologue	395
1. Introduction	396
2. Internal Freedom of Religion or Belief and Challenges in Practice	398
2.1. Free and Alterable Choice of the Individual	398
2.2. Coercion Impairing Free Choice and Criticism of Religion and Belief	402
3. External Freedom of Religion or Belief and Challenges in the Public Sphere	405
3.1. Manifestations of Religion or Belief and Permissible Restrictions .	405
3.2. Challenges Related to Diversity in the Workplace and Personal Use of Religious Symbols	408
4. Concluding Remarks	413
Epilogue	415
 Freedom of Conscience and Tolerance in the Dutch Cultural Tradition	
Kees SCHUYT	417
1. Freedom of Conscience as a Human Right	417
2. The Place of Conscience in the Dutch Cultural Tradition	418
3. The Concept of Conscience	421
4. Freedom of Conscience and Contemporary Tolerance	424

The Rule of Law and Violations of Law in Police Investigations. Protecting the Embankments around Article 8 of the European Convention on Human Rights

Geert CORSTENS and Reindert KUIPER	431
1. Landslides in the Area of Law Enforcement	431
2. Shifting Responsibility	433
3. 'Van Dijk's' Test of the Rule of Law and Violations of Law in Police Investigations	434
4. Development of the Criminal Trial Judge's Review of Lawfulness	436
5. The Convention as a Review Mechanism	439
5.1. Article 6 of the Convention	439
5.2. Article 8 of the Convention	440
6. A Practical and Effective Article 8 of the Convention	441
7. Inspiration from the United States of America	443
8. Conclusion	445

The Effect of Article 8 of the European Convention on Human Rights on Dutch Family Law

Sylvia WORTMANN	447
1. Family Law and Child Law: Permeated by Fundamental Rights	447
2. Family Life: The Facts Determine the Law	448
2.1. Family Life According to Dutch Law but Not According to European Law	449
2.2. Direct Application of Court's Case Law Regarding the Existence of Family Life	451
3. Positive Obligations: A Whole Code of Family Law	452
4. Effect of (Positive) Obligations of Dutch Family Law	454

Article 8 of the European Convention on Human Rights. Proportionality and the Protection of Personal Data

LUC VERHEY and Mathijs RAIJMAKERS	459
1. Introduction	459
2. The Proportionality of Data Processing	462
2.1. Article 8(2) of the Convention: A General Overview	462
2.2. Article 8(2) of the Convention: the Proportionality Test	463
Nature of the Data	465
Status of the Individual Involved	465
Intrusiveness of the Interference	466
Effective Control	467
Measures to Prevent Abuse	468
2.3. European Union Law	468

3.	The Legislature and the Proportionality Test	471
3.1.	Introduction	471
3.2.	The Proportionality Test in the Legislative Process	472
	Nature of the Data	473
	Intrusiveness of the Interference	474
	Effective Control and Preventing Abuse	477
3.3.	Closing Remark: the Proportionality Test as a General Framework.....	477
4.	Conclusion.....	478

Reasonable Legislation. A Matter of the Rule of Law and Human Rights

	Anna JASIAK.....	481
1.	Introduction	481
2.	Rationalities in a Legislative Process.....	482
3.	Reasonable Legislation	484
3.1.	Substantive Reasonableness	484
	European Convention on Human Rights and the Notion of Law ..	485
	Legal Certainty: Accessibility and Predictability	485
	Legal Certainty: Retrospectivity	486
	Legal Certainty: Consistency and Stability of Legislation.....	488
	Equality Principle.....	489
	Generality of Laws	490
3.2.	Procedural Reasonableness.....	491
	Proportionality Principle	492
	Debate/Weighing of all Interests	493
	Hasty Legislation/Timing.....	495
4.	Conclusion.....	496

The Right to Information under the European Convention on Human Rights

	Eric DAALDER	497
1.	Introduction	497
2.	Article 6 of the Convention: Access to Information in Legal Proceedings.....	500
3.	Article 10 of the Convention: A General Right to Information?	504
4.	Conclusion.....	509

Fundamental Rights, Fundamental Principles and Local Governments

	Hubert HENNEKENS	511
1.	Introduction	511
2.	The Phenomenon of Local Government.....	512

3.	Is There a Fundamental Right of Existence for Municipalities?.....	514
4.	The Right of Existence of the Municipality and the Municipality's Significance as a Government	517
5.	How Does One Determine and Guard the Interests that Are to Be Pursued?.....	519
6.	Perspectives on the Right of Recourse to a Judicial Authority in Order to Secure Local Autonomy	522

VIII. CONSTITUTIONAL REVIEW

The Priority Constitutional Review and Its Relationship to the Preliminary Reference Procedure

	Richard LAUWAARS.....	527
	Preface	527
1.	Introduction	528
1.1.	Priority Constitutional Review	528
1.2.	Some Numerical Data	528
1.3.	Relationship with the Preliminary Reference Procedure.....	529
2.	Background.....	529
2.1.	Article 26(4) of the Belgian Special Law for the Constitutional Court	529
2.2.	The Origin of Priority Constitutional Review.....	530
2.3.	The Constitutional Council: Composition and Competencies.....	531
3.	The <i>Melki</i> Case	532
3.1.	The Facts	532
3.2.	The French Court of Cassation.....	533
3.3.	The French Constitutional Council and the Council of State's Reactions: the Councils Strike Back	534
3.4.	The Judgment of the Court of Justice of the European Union	535
	Rejection (paragraphs 40–47)	535
	Interpretation in Conformity with the Treaty (paragraphs 48–53) .	536
	Directives (paragraphs 54–56).....	536
	Conclusion.....	537
4.	Comments	537
4.1.	Main Issue: The Relationship Between Priority Constitutional Review and the Preliminary Reference Procedure.....	537
4.2.	Implementation of Directives.....	539
5.	Conclusory Remarks	541
5.1.	The Final Decision of the Court of Cassation	541
5.2.	Lessons for the Netherlands?	541
5.3.	The French Constitutional Council and the German Federal Constitutional Court	542

Quis custodiet ipsos custodes? About the Institutional Position of Constitutional Courts

Willem KONIJNENBELT.....	543
1. Introduction	543
2. The Federal Supreme Court of the United States of America	545
3. The Federal Constitutional Court of Germany.....	548
4. The French Constitutional Council.....	551
5. The European Court of Human Rights	556
6. Final Remarks.....	559
Constitutional Review by the Dutch Courts. A View from Kneuterdijk 22	
Marjolein VAN ROOSMALEN and Ben VERMEULEN	563
1. Introduction	563
2. Dutch Constitutional Law and Fundamental Rights.....	565
3. Article 120 of the Constitution: No Constitutional Review of Acts of Parliament.....	567
4. Article 94 of the Constitution: Primacy of Self-executing Treaties over Acts of Parliament.....	569
5. The Dutch Court System: A Diversity of ‘Constitutional Courts’	574
6. Constitutional Judgments of the Administrative Jurisdiction Division; Some Reflections on the Council of State’s Constitutional Law Committee and its Chairman	578
<i>List of Contributors</i>	583