

OF BILLS AND RIGHTS

OF BILLS AND RIGHTS

Human rights proofing legislation
Comparing the United Kingdom
and the Netherlands

Gijsbert TER KUILE



intersentia

Cambridge – Antwerp – Portland

Intersentia Publishing Ltd.
Trinity House | Cambridge Business Park | Cowley Road
Cambridge | CB4 0WZ | United Kingdom
Tel.: +44 1223 393 753 | Email: mail@intersentia.co.uk

Distribution for the UK:
NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7 PP
United Kingdom
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for the USA and Canada:
International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free)
Email: info@isbs.com

Distribution for Austria:
Neuer Wissenschaftlicher Verlag
Argentinerstraße 42/6
1040 Wien
Austria
Tel.: +43 1 535 61 03 24
Email: office@nwv.at

Distribution for other countries:
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Email: mail@intersentia.be

Of Bills and Rights. Human rights proofing legislation. Comparing the United Kingdom and the Netherlands
Gijsbert ter Kuile

© 2013 Intersentia and Gijsbert ter Kuile
Cambridge – Antwerp – Portland
www.intersentia.com | www.intersentia.co.uk

Cover image: © Ellywa (Elly Waterman) – Part of the world map on the floor of the Dam Palace Amsterdam

ISBN 978-1-78068-148-1
D/2013/7849/28
NUR 828



British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.

*To my mother
and
in memory of Sophie Hulthén*

CONTENTS

INTRODUCTION

Chapter 1.

Of Bills and Rights	3
1. Research question & thesis	3
2. Conceptualising human rights	5
3. Comparative research	7
4. Empirical socio-legal research	8
5. Choice of jurisdictions	9
6. Pre-legislative scrutiny	10
7. Terminology	12
8. Structure	12

PART I.

DESCRIPTION

Chapter 2.

The Hague: The Government and its Ministerial Departments	17
1. Introduction	17
2. Governmental policy on legislative quality	18
2.1. Three decades of debate and criticism	18
2.2. Government action	20
2.3. Requirements for legislative quality	22
3. Initiating bills	25
3.1. Sources of legislation	25
3.2. Starting memorandum	26
4. Drafting bills	28
4.1. Draftsmen	28
4.2. Training and information	29
4.3. The instructions for legislation	30
4.4. The scenario for legislation	33
5. The Division for Constitutional Affairs	35
5.1. Task	35
5.2. Staff	36
5.3. Becoming involved	37

5.4.	Working method	38
5.5.	The politics in the working method	40
6.	The Policy Sector for Legislative Quality	42
6.1.	Task	43
6.2.	Staff	44
6.3.	Becoming involved	44
6.4.	Working method	45
7.	The Council of Ministers	46
8.	Political expediency versus legislative quality	48
9.	Summary	50

Chapter 3.

The Council of State	53
1. Introduction	53
2. Historical background	54
3. Main functions	55
4. Councillors and staff	56
4.1. Royals and other members	57
4.2. Councillors – background & selection	58
4.2.1. Selection ‘qualities’	60
4.2.2. Some reflections	60
4.2.3. Appointment	62
4.3. Staff	64
5. Requests for scrutiny	66
6. Working method	68
6.1. Internal organisation	68
6.2. Labelling the bill & time constraints	69
6.3. Team of rapporteur and lawyer	70
7. Framework for scrutiny	74
7.1. Background	74
7.2. Policy-analytical scrutiny	75
7.3. Scrutiny of legislative technicalities	76
7.4. Legal scrutiny	76
7.4.1. Higher written law	76
7.4.2. Unwritten legal principles	78
7.4.3. Fitting into the system	78
7.5. Empirical research 1998–1999	78
8. Scrutinising human rights compatibility	80
9. Advisory opinions	83
9.1. Dicta	83
9.2. Unanimity	85
9.3. Response and publication	86

9.4.	Influence	87
9.4.1.	Previous assumptions	87
9.4.2.	Empirical research 2001–2002	88
9.4.3.	Own empirical research	89
10.	Summary	91
Chapter 4.		
The States-General		
		93
1.	Introduction	93
2.	Historical background	93
3.	Role and characteristics	94
3.1.	Tasks	94
3.2.	Competencies	96
3.3.	Election	97
3.4.	Party discipline	97
4.	Parliamentarians and staff	98
4.1.	MPs	99
4.2.	Senators	99
4.3.	Staff	100
5.	Passage and scrutiny in the lower house	101
5.1.	Submitting bills	102
5.2.	Succinct and extensive legislative reports by Clerks	102
5.2.1.	The extensive legislative report	104
5.2.2.	Influence	106
5.3.	Report by the permanent parliamentary committee	107
5.3.1.	Committee structure	107
5.3.2.	Committee competencies	108
5.4.3.	Committee reporting	108
5.4.	Debating and voting bills on the floor of the house	109
5.5.	Human rights scrutiny by MPs	110
6.	Passage and scrutiny in the upper house	114
6.1.	Speaker and College of Seniors	114
6.2.	Legislative reports by the Division for Substantive Support	114
6.3.	Report by the permanent parliamentary committee	118
6.4.	Debating and voting bills on the floor of the house	119
6.4.1.	Rejections	119
6.4.2.	Influence	120
6.5.	Human rights scrutiny by Senators	120
7.	A separate committee for human rights scrutiny?	122
8.	Enactment of bills	123
9.	Summary	124

Chapter 5.

Whitehall: The Government and its Ministerial Departments 125

1.	Introduction	125
2.	Criticism and guidance on legislation	125
2.1.	Debates, criticism, and Government action	126
2.2.	Rights brought home – The Human Rights Act	129
2.3.	Section 19 statements	131
2.4.	The Guide to Making Legislation	131
3.	Initiating bills	133
4.	Developing bills	134
4.1.	Bill teams, policy leads, and departmental lawyers	134
4.2.	The Human Rights Toolkit	137
5.	The Human Rights Division	139
5.1.	Task	139
5.2.	Staff	142
5.3.	Becoming involved	142
5.4.	Working method	144
6.	The Cabinet	148
6.1.	Collective responsibility for bills and policies	149
6.2.	Policy clearance	150
6.3.	Slot and bill clearance	152
6.4.	The ECHR Memorandum	153
6.5.	Human rights scrutiny	155
7.	The Office of the Parliamentary Counsel	156
7.1.	Task	157
7.2.	Staff	158
7.3.	Becoming involved	159
7.4.	Working method	160
8.	The Attorney General	164
8.1.	Task	165
8.2.	Staff	168
8.3.	Becoming involved	169
8.4.	Working method	171
9.	Summary	175

Chapter 6.

The Westminster Parliament 177

1.	Introduction	177
2.	Role and characteristics	178
2.1.	Tasks	178
2.2.	Competencies	179

2.3.	Election & appointment	181
2.4.	Party discipline	182
3.	Passage of bills through the Commons	184
3.1.	Three Readings, a Committee and Report Stage	184
3.2.	Public Bill Committees	185
3.3.	Departmental Select Committees	186
3.4.	Library	188
4.	Section 19 statement	189
4.1.	Purpose	189
4.2.	Manner	190
4.3.	Frequency	190
4.4.	Minister's individual responsibility	192
4.5.	No explanation	192
4.6.	Improving the explanation	194
5.	Joint Committee on Human Rights	198
5.1.	Task	199
5.2.	Members and staff	201
5.3.	Becoming involved	202
5.4.	Working method	203
5.5.	Influence	207
6.	Passage of bills through the Lords	209
6.1.	Three Readings, a Committee and Report Stage	209
6.2.	Section 19 statement	210
6.3.	Select committees	210
7.	Ping pong and Royal Assent	212
8.	Summary	213

PART II.

COMPARISON

Chapter 7.

	Comparison of the Governmental Phases	217
1.	Introduction	217
2.	Initiating and developing policy	218
3.	Government guidance	219
3.1.	Legislative policy	220
3.2.	Soft law instruments	222
3.3.	Level of scrutiny	223
4.	Human rights scrutinising units	226
4.1.	Task	226
4.2.	Staff and their human rights expertise	226
4.3.	Becoming involved	227

4.3.1. Involvement on request	227
4.3.2. Involvement out of own volition	230
4.4. Working methods	230
4.4.1. Co-operation	231
4.4.2. Co-operation turning into policing	232
4.4.3. Safety nets	234
4.4.4. Effectiveness	234
4.4.5. Political limits	235
5. Bill drafting	235
6. Clearance in Cabinet or Council of Ministers	238
7. Summary	240

Chapter 8.

Comparison of the Parliamentary Phases	243
1. Introduction	243
2. The scrutineers	244
2.1. Political affiliations and neutrality	244
2.2. Human rights expertise	246
2.3. Summary	247
3. Method of scrutiny	248
3.1. Selection for scrutiny	248
3.2. Selection criteria	249
3.3. Standard of scrutiny	252
3.3.1. Sources	252
3.3.2. Standard of scrutiny	253
3.4. Checklists	255
3.5. Time constraints	256
3.6. Unanimity of the reports and advisory opinions	258
4. The influence of scrutiny	260
4.1. Short term influence on Government	261
4.2. Short term influence on Parliament	262
4.3. Long term influence	263
5. Summary	265

PART III.

ASSESSMENT AND CONCLUSION

Chapter 9.

Accountability – A Framework	269
1. Introduction	269
2. The origins of accountability	271
2.1. An emerging concept	271
2.2. Etymology	272

3.	A general theoretical framework	275
3.1.	The six elements	275
3.2.	Listing fewer elements	276
3.3.	A relationship between accountant and forum	277
3.4.	The process of accountability	280
3.5.	The element of consequences	281
3.6.	The element of standards: prospection & retrospection	285
4.	Accountability at state level	288
4.1.	Three families of accountability	289
4.2.	The purpose of accountability at state level	289
4.2.1.	Objectives of accountability	289
4.2.2.	Delegation or principal-agent theory	291
4.2.3.	Criticism of the chains of delegation and accountability	293
4.3.	Genera of accountability at state level	295
4.4.	Three genera for our research	297
4.5.	The species amongst 'accountability at state level'	300
5.	Summary	301

Chapter 10.

Interpretation and Conclusion. 303

1.	Introduction	303
2.	Judicial accountability	304
2.1.	Relationship	305
2.2.	Procedure	306
2.3.	Standards	306
2.4.	Sanctions	310
3.	Political accountability	311
3.1.	Relationship	311
3.2.	Procedure	312
3.3.	Standards	313
3.4.	Sanctions	314
3.5.	Communication	315
4.	Administrative accountability	315
4.1.	Relationship	316
4.2.	Procedure	316
4.3.	Standards	317
4.4.	Sanctions	318
4.5.	Communication	319
4.6.	Summary	319
5.	Webs of accountability	320
5.1.	Chain of accountability	320
5.2.	Circle of accountability	321

5.3.	Interdependency and redundancy models.....	322
5.4.	Summary.....	324
6.	Anticipating accountability.....	325
6.1.	Anticipating judicial accountability.....	326
6.2.	Anticipating administrative and political accountability.....	328
6.3.	Summary.....	330
7.	Concluding remarks.....	331
<i>Appendices.....</i>		337
	Appendix 1A. Interview Guide (the Netherlands).....	339
	Appendix 1B. Interview Guide (United Kingdom).....	345
	Appendix 1C. Table of Draft Bills, 2002–2010.....	349
	Appendix 2. The Hague Departmental Process.....	351
	Appendix 3. Council of State.....	352
	Appendix 4. States-General.....	353
	Appendix 5. The Whitehall Process.....	354
	Appendix 6. The Westminster Process.....	355
	Appendix 7. The Dutch Legislative Process.....	356
	Appendix 8. The British Legislative Process.....	357
<i>Bibliography.....</i>		359
	Bibliography 1. The Netherlands.....	361
	Bibliography 2. United Kingdom.....	389