

TABLE OF CONTENTS

TABLE OF CONTENTS.....	V
------------------------	---

Frits Stroink

INTRODUCTION	XIII
1. The Theme	XIII
2. The Dutch Situation.....	XV
3. Brief Description of the Essays	XIX

LIST OF AUTHORS	XXVII
-----------------------	-------

PART I: THE INFLUENCE OF INTERNATIONAL LAW

Rob Widdershoven

THE PRINCIPLE OF LOYAL COOPERATION LAWSMAKING BY THE EUROPEAN COURT OF JUSTICE AND THE DUTCH COURTS	3
1. Introduction.....	3
2. The Principle of Loyal Cooperation	5
3. Direct Effect and Consistent Interpretation	8
3.1. Introduction.....	8
3.2. Direct Effect and Consistent Interpretation: Possibilities and Limits	8
3.3. Lawmaking by the ECJ	11
3.4. The National Courts	12
4. Legal Protection in EC Cases before the National Courts.....	16
4.1. General Aspects	16
4.2. The ECJ's Creation of National Means of Legal Redress	17
4.3. Lawmaking by the ECJ	21
4.4. The National Courts	23
5. Loyal Cooperation in the Community Legal Order.....	26
5.1. Introduction.....	26
5.2. Loyal Cooperation between the Member States and the Community	27
5.3. Loyal Cooperation between the Member States.....	28
5.4. Lawmaking by the ECJ and the National Courts	33
6. Conclusion.....	34

Sander Janssen

TOWARDS AN ADJUSTMENT OF THE TRIAS POLITICA: THE ADMINISTRATIVE COURTS AS (PROCEDURAL) LAWMAKER; A STUDY OF THE INFLUENCE OF THE EUROPEAN HUMAN RIGHTS CONVENTION AND THE CASE LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS ON THE TRIAS POLITICA, IN PARTICULAR THE POSITION OF DUTCH ADMINISTRATIVE COURTS IN RELATION TO THE ADMINISTRATION	37
1. Introduction.....	37
2. Reasons for the Study.....	38
3. Background	38
4. Bottlenecks.....	39
4.1. European Convention on Human Rights.....	39
4.1.1. The Convention and the Trias.....	39
4.1.2. Relevant Judgments	41
4.2. What Changes Are Needed at National Level?	47
5. Conclusions	52

Marjan Peeters

THE CONCEPT OF PRECAUTION AS SHAPED BY THE COURTS.....	57
1. General Principles of Administrative Law and Environmental Principles	57
2. The Precautionary Principle.....	61
3. Dutch Administrative Justice in Relation to the Precautionary Principle..	63
3.1. The Impact of the European Precautionary Principle on the Dutch Legal Order	63
3.2. Cases Decided by the Dutch Administrative Courts.....	65
3.2.1. Precaution in Policy Leads to Judicial Review	65
3.2.2. Uncertain Risk and Review Criteria.....	67
3.2.3. The Absence of Insight into the Effects Bars the Granting of a Licence.....	67
3.3. Analysis.....	72
4. Precaution in European Community Law	73
4.1. Introduction.....	73
4.2. Case Law.....	75
4.3. Analysis.....	78
5. Final Observations.....	79

Aleidus Woltjer

FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION – THE EVOLUTIVE APPROACH OF THE COURT OF JUSTICE EC	81
1. Introduction.....	81
2. Legislative Framework	81
3. Free Movement of Persons: the Court of Justice's Approach	83
3.1. 'Worker'	83
3.2. 'Public Policy'	84
3.3. 'Effet Utile' ('Principle of Effectiveness')	84
3.4. 'Union Citizenship'	90

3.5.	Application of Article 8 European Convention on Human Rights.....	93
4.	Epilogue	95

PART II: SEPARATION OF POWERS/TRIAS POLITICA

Aalt-Willem Heringa

JUDICIAL LAWMAKING (UN)LIMITED.....	99
1. Introduction.....	99
2. Trias Politica.....	100
3. Constitutional Judicial Mandate: a Right to Review?.....	101
4. Constitutional Dialogue.....	104
5. Consensus.....	106
6. 'Type' of Court	107
7. Third Parties: Interpretation and the General Public.....	109
8. Conflicting Principles.....	114
9. Case Law and Judicial Lawmaking: a Step-by-Step Approach	115
10. The Influence of the European Courts: the ECJ and the ECHR as Legitimisation for the National Courts.....	116
11. Other Variables	117
12. In Conclusion	118

Luc Verhey

PROTECTION OF FUNDAMENTAL RIGHTS: INTERACTION BETWEEN THE LEGISLATURE AND THE JUDICIARY. JUDICIAL CONSTITUTIONAL REVIEW IN THE UNITED KINGDOM AND THE NETHERLANDS	121
1. Introduction.....	121
2. Constitutional Review in the United Kingdom.....	122
2.1. The Situation Prior to the Human Rights Act 1998.....	122
2.2. The Human Rights Act 1998	125
2.3. Developments following the Human Rights Act	131
3. The Netherlands	137
3.1. Constitutional Fundamental Rights	137
3.2. Judicial Review on the Basis of Treaty Rights	140
3.3. The Prohibition against Constitutional Judicial Review	144
4. Comparative Reflections.....	146
5. Conclusion	150

Arie Jansse Bok

JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS BY THE DUTCH ADMINISTRATIVE COURTS: RECOURS OBJECTIF OR RECOURS SUBJECTIF? A SURVEY INCLUDING FRENCH AND GERMAN LAW	153
1. Introduction.....	153
2. France	154
2.1. Two Main Forms of Judicial Review.....	154
2.2. Persons Entitled to Judicial review	156

Table of Contents

2.3.	Preliminary Administrative Proceedings.....	157
2.4.	Judge-directed or Party-directed Proceedings?.....	158
2.5.	Judgments.....	159
2.6.	Interim Measures	161
3.	Germany	162
3.1.	Individualrechtsschutz	162
3.2.	Persons Entitled to Judicial Review	163
3.3.	Preliminary Administrative Proceedings.....	164
3.4.	Judge-directed or Party-directed Proceedings?.....	165
3.5.	Judgments.....	166
3.6.	Interim Measures	168
4.	The Netherlands	169
4.1.	General Observations.....	169
4.2.	Jurisdiction of the Administrative Courts	170
4.3.	Persons Entitled to Judicial Review	172
4.4.	Preliminary Administrative Proceedings.....	173
4.5.	Court-directed or Party-directed Proceedings?.....	174
4.6.	Judgments.....	176
4.7.	Interim Measures	177
4.8.	In Conclusion: Recours Subjectif or Still Recours Objectif?	178

Raymond Schlossels

LIABILITY FOR LAWFUL ADMINISTRATIVE ACTION. OBSERVATIONS ON COMMON PRINCIPLES OF LAW, JUDICIAL LAWMAKING AND NATIONAL COURTS.....	181	
1.	Introduction.....	181
2.	The Netherlands: the Magical Tightrope.....	182
2.1.	Historical Outline	182
2.2.	Developments from 1990 until the Present	184
3.	France: Birthplace of <i>égalité</i>	185
3.1.	Application Criteria: Proportionality and Equality	186
3.2.	Legislation	187
4.	Germany: Theory and Dogma	188
4.1.	The Civil Court's Move: 1794-1981.....	188
4.2.	The Constitutional Court's Move: 1981-present.....	189
5.	England: the Rule of Law?.....	190
5.1.	The Legislature's Primacy	190
5.2.	'Equality Before Public Burden' Nonetheless?	191
6.	Strasbourg and 'Equality Before Public Burdens'	192
7.	In Conclusion: Lawful Administrative Action and Judicial Lawmaking	193
7.1.	Judicial Lawmaking: Intermezzo.....	194
7.2.	Judicial Lawmaking and Administrative Liability	196
7.3.	Égalité Devant les Charges Publiques: Lawmaking and 'Ius Commune'?	197

Eveline van der Linden

THE WILL OF THE JUDICIARY. THE ALIENS COURTS' ROOM FOR MANOEUVRE.....	201
1. Lawmaking and the Law Relating to Aliens.....	201
2. Characteristics of Lawmaking in the Area of Aliens Law.....	202
3. The Aliens Courts' Room for Manoeuvre and Legal Protection by the Aliens Courts.....	205
4. The Legitimacy of the Aliens Courts' Room for Manoeuvre.....	209
4.1. The Remit of the General Administrative Courts	209
4.2. The Remit of the Appellate Aliens Court.....	211
4.3. Comparison between Judicial Appeal in Aliens Cases and General Administrative Judicial Appeal.....	215
5. The Design of the Aliens Courts' Room for Manoeuvre	220
6. Conclusion	222

Ton Duijkersloot

DO COURTS ENGAGE IN LAWMAKING IN RELATION TO SUPERVISION OF THE INSURANCE INDUSTRY? REFLECTIONS ON SUPERVISION IN THE NETHERLANDS AND GERMANY	225
1. Introduction.....	225
2. Insurance Supervision in the Netherlands and Germany: a Brief Orientation.....	226
3. Vague Norms in Insurance Supervision.....	227
4. Judicial Review	229
5. Conclusion	234

Karianne Albers

THE FUNDAMENTAL DUTY TO ENFORCE, JUDICIAL LAWMAKING OR A GENERAL RECHTSSTAAT PRINCIPLE?	235
1. Introduction.....	235
2. The Fundamental Duty to Enforce under the Dutch Legal System.....	237
2.1. General Part: Restoration Sanctions as Enforcement Powers.....	237
2.2. A Fundamental Duty to Enforce.....	237
2.2.1. Condoning as Opposed to Enforcing.....	237
2.2.2. The 'Emergence' of Case Law on a Fundamental Enforcement Duty - General Part.....	242
2.2.3. Further Refinement	245
2.2.4. In Conclusion	246
2.3. Views of Scholarly Writers	247
3. The Fundamental Duty to Enforce in the German Legal System.....	248
4. Judicial Lawmaking?.....	251

Gio ten Berge and Philip Langbroek

TOWARDS INTEGRATED LAWSMAKING BY ADMINISTRATIVE COURTS AND PUBLIC AUTHORITIES ON INSTRUMENTS AND POSSIBILITIES FOR CONSTRUCTIVE INTERACTION BETWEEN THE ADMINISTRATION AND THE ADMINISTRATIVE COURTS IN RELATION TO ADMINISTRATIVE DECISION MAKING, ADMINISTRATIVE OBJECTION AND APPEAL.....	255
1. Introduction.....	255
2. From the Juridification Debate Towards a Dialogue on Lawmaking.....	256
3. Instruments for Proper Interaction on the Part of the Administration	259
3.1. Well-reasoned and Knowable Political Lawmaking by the Administration.....	259
3.2. The Organisation of the Administration	260
4. Possibilities of Proper Interaction on the Part of Judges and the Courts .	262
4.1. Formal Components of Administrative Procedure.....	262
4.2. Substantive Components of Procedural Law	263
4.3. Organisational Measures in Relation to the Judiciary	265
5. In Conclusion	266

PART III: OMBUDSMEN**Henk Addink**

THE OMBUDSMAN AS THE FOURTH POWER ON THE FOUNDATIONS OF OMBUDSMAN LAW FROM A COMPARATIVE PERSPECTIVE	269
1. Introduction: Reasons for the Article and Central Questions.....	269
2. The Concept of 'Fourth Power', the Ombudsman as part of the Fourth Power and the Relation to the Other Three Powers.....	273
3. Foundations of Ombudsman Law: Theoretical Perspective of Duties and Powers, Assessment Criteria and Implementation and Enforcement of Recommendations	277
4. Comparative Approach: both Horizontally and Vertically, within and without Europe	278
5. The Position of the Ombudsman and the Nature and Scope of his Competence.....	280
5.1. The Ombudsman's Position and the Nature and Scope of his Powers	280
5.2. Sweden and Denmark.....	281
5.3. Portugal and Spain	282
5.4. The Netherlands: At Present and in the Future.....	283
6. The Ombudsman's Assessment Criteria	284
6.1. Substance and Extent of Assessment by the Ombudsman	284
6.2. Assessment Criteria of the Ombudsman Institutions in Sweden, Denmark and Great Britain	285
6.3. Assessment Criteria Employed by the European Ombudsman.....	286
6.4. The Netherlands: At Present and in the Future.....	289
7. Compliance with and Enforcement of the Ombudsman's Reports and Recommendations	289
7.1. Aspects of Compliance and Enforcement	289

7.2.	Aspects of Compliance and Enforcement in European and Non-European Countries	290
7.3.	The Netherlands: At Present and in the Future.....	291
8.	Conclusions	291

Nicole Niessen

	LAWMAKING BY THE NATIONAL OMBUDSMAN?.....	303
1.	Introduction.....	303
2.	Thesis.....	304
3.	Access to the Ombudsman.....	304
4.	The criteria 'administrative authority' and 'administrative act'	305
5.	Additional Legal Protection	306
6.	Authoritative Opinion	307
7.	The Propriety Test	308
8.	The Relation Citizen-Administration: Two Perspectives	310
8.1.	Legal Relation.....	310
8.2.	Social Relation.....	312
9.	Is the Propriety Assessment of the Ombudsman of a Lawmaking Nature?.....	313
10.	Lawmaking 'Methods'	316
10.1.	The Propriety Standard and the General Principles of Proper Administration.....	316
10.2.	The Propriety Standard and Implementation Practice.....	318
10.3.	Translating the Propriety Standard into Legislation?.....	320
11.	Lawmaking in Practice.....	321
11.1.	Promptness.....	321
11.2.	The Ombudsman as Supervisor of the Implementation of the Internal Complaint Procedure	324
12.	Conclusion	327