

## PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

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# PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

Practice, Concept, and Theory

Leonie M. HUIJBERS



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## ACKNOWLEDGMENTS

In 2014, I was busy writing my master's thesis on freedom of religion and belief in the ECHR system, not knowing where life had in store. In mid-August, in an e-mail, my law supervisor Janneke posed an unexpected question: 'would you be interested in writing a PhD under my supervision?' A bit flabbergasted, but very honoured, I said I would think about. The project Janneke had in mind was called 'Improving supranational adjudication in fundamental rights cases: towards a procedural approach for the European Court of Human Rights'. As I had never heard of procedural review – or process-based review as it is called in this book – nor read anything of John Hart Ely, I basically had no idea what I was getting myself into. But with any great journey, perhaps it is best to have no idea where the road will take you. After all, Frodo never let Bilbo's cautionary words, 'It's a dangerous business, Frodo, going out your door. You step onto the road, and if you don't keep your feet, there's no knowing where you might be swept off to', stop him from his grand adventure. So, why should it stop me?

I happily accepted and I took off on my big adventure. The academic journey of writing a PhD was an exciting and inspiring time. Not only because it gave me the chance to be part of academia, which allowed me to mull over a topic and then spit out my ideas in the shape of articles, blogs, presentations, and finally a dissertation, but also because of the wonderful people I met along the way. It is therefore with great pleasure that I take this opportunity to thank all those inspiring, cheerful, and precious people in my life without whom I never would have finished this book, nor started it for that matter.

So first, the one who sent me on my quest. My Gandalf, as it were. Janneke, since the days you supervised my master's thesis you have been a mentor to me and I would not have been able to finish my dissertation without you. You are a source of inspiration, a cradle of kindness, and a beacon of knowledge. You truly deserved the 'Best Supervisor of the Year 2018' award you received, even though I still think it should have been the 'Best Supervisor Ever' award. And Paulien, my second supervisor, you joined at quite an advanced stage of the dissertation writing, yet were able to grasp the topic in no time at all. As a copromotor you provided me with valuable new insights and raised questions that helped me to critically reflect on my writing. As my office buddy you provided me with companionship at work and acted even as my roomie in the winter months in room 3.01 at ASP. *Merci pour tes conseils et ton humour!*

Speaking of roommates, I wish to thank my ‘official’ roommates who made our room the most fun – I mean hardworking – room at ASP, and later on at Newtonlaan. Thank you all – Hilke, Catherine, Xia, Erie, Sanne, Jesse, Heqing, Niels, Erin, and Lisa – for the wonderful times, the pour-your-heart-out Thursdays, the laughter, and the endless discussions. Special thanks go out to Erin and Lisa, as my paranymph and secret paranymph, respectively. Both of you have been my work-based support system in the last couple of years. You gave me the much-needed endurance for my quest of slaying the ‘many-headed monster’ – also known as my dissertation – and our get-togethers provided much needed distraction from our PhD life crises. Cheers to you!

My gratitude also extends to my other wonderful colleagues and former colleagues at Utrecht University. As there are so many of you, and I am sure I will forget names if I list them here (‘I am old, Gandalf ... like butter that has been scraped over too much bread’), I would like to say thanks to all of my colleagues at the Montaigne Centre, at the Netherlands Institute for Human Rights (SIM), and at the department of Constitutional Law, Administrative Law, and Legal Theory. You have been a true inspiration to me, each in your own way. You shared your ideas and thoughts on philosophical writing, on methodology, on fundamental rights, and on courts’ institutional position, but also on all sorts of work-related issues and not-so-work-related-yet-surely-very-urgent-and-existential matters. Thank you for all the amazing insights, laughter, and critical reflections during the many seminars, lectures, and conferences, and for the many coffee (tea!) breaks and hallway bump-ins, drinks and fika’s, brown bag and regular lunches, bezinningsdagen and leesclubjes, feel good chats and brainstorm sessions. My thanks also extend to the editors, international members, and executive assistants of the *Netherlands Quarterly of Human Rights*. I am especially grateful to Antoine with whom I worked closely and who showed me the reigns of academia as well as of the editorial business. In addition, I am grateful to Laura for setting up the *Research Brokers* project with me and to the students who participated in the pilot. I am sure, albeit in a different way, this project will continue – in the end, it is wonderful when students’ human rights research contributes to the work of human rights organisations.

Although Utrecht is the place where I spent most of my time as a PhD, my PhD journey started in a different city to the East. A small and kind place, surrounded by hills, called Nijmegen. For my first steps outside student life and into the land of ‘academic adults’ – as I used to call them – I found my first fellowship at Radboud University Nijmegen. My colleagues at the International and European Law department made me feel welcome and provided me with opportunities to develop my teaching and research skills. My colleagues at the Constitutional Law department provided me a place to work as well as some essential constitutional law lessons. I am glad we still see each other now and again at PhD defences and conferences. Special thanks goes out to the Jonge Gaerde for the fun activities, including bowling, pub quizzes, and juggling, and for the friendships that have resulted from it.

All these people were essential to the part of writing a dissertation. But five wise men and women were ultimately left to decide whether my PhD quest was completed or whether some more battles had to be fought and won. I express my sincere gratitude to Ittai Bar-Siman-Tov, Eva Brems, Patricia Popelier, Robert Spano, and Jerfi Uzman, for reading my dissertation, providing valuable comments, and offering their critical reflections. I also thank you for your academic writing, which formed an important source of inspiration for this book. My gratitude also goes out to Elaine Mak and Antoine Buyse, who were willing to reflect on my work and to take part in the opposition during the defence.

With the approval of the reading committee, my PhD quest has now come to an end. It is therefore time to embark on a new mission. One that allows me to explore a new land. I am therefore happy to have been given the opportunity to set sail to the land of fundamental rights practice. Although I am not saying goodbye to academia forever – unlike the divides of Middle-earth, there is no unbridgeable divide between the lands of practice and theory – the possibility to contribute to the promotion and protection of fundamental rights in the Netherlands is a new adventure that I am excited to begin. Or rather, to continue. Through the years, as part of the Public Interest Litigation Project (PILP), I have worked with fundamental rights in practice. From this work I've seen that, if the time is right and if enough effort is put in by many organisations and people, it is possible to change policies for the better. I am truly grateful to have gotten the opportunity to act as an expert on housing policies for travellers, and have worked closely with the inspiring Jelle. In my new position as policy advisor at the Netherlands Institute for Human Rights (College voor de Rechten van de Mens) I will continue these efforts in different areas. To my new colleagues, I would like to express some words of gratitude. Thank you for allowing me to embark on this ship with you, for your patience with me figuring out how to do this job, and for your support in the final stages of completing this book. I look forward starting this new venture with all of you.

As I leave the shores of academia, I find myself reflecting more broadly on the ones dearest to me and how each and every one of them was essential for the completion of my quest. I greatly appreciate my friends for their willingness – seemingly voluntarily – to be my companions. Through unthinkably funny and awkward moments as well as through inconsolable moments of sadness, we have seen each other through. As true Eärendils, all of you have made my life brighter and less heavy. I believe friendship was the only reason why Frodo's quest succeeded, as did mine.

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Now that the journey is getting close to its end and the contours of the new land start to take shape, I think of all the places my PhD quest has brought me. After all, a serious quest requires you to travel beyond your own comfortable realm into the unknown. Amongst other places, my PhD took me to a co-organised expert seminar with Janneke and Kasey McCall-Smith in Edinburgh and a summer school organised by the Venice Academy of Human Rights and Democratisation in Venice, and to smaller and larger conferences in Barcelona, Cambridge, Copenhagen, and Granada. These events made me grow as a scholar and I am grateful for the opportunities I have had to share my research and for the useful feedback I received. I am also thankful for the chance I got to visit the library of the European Court of Human Rights, to consult the case files of several cases, and to meet with several ECtHR judges and Registry members to talk about process-based review. It was great to be back in Strasbourg – the place where I spent a year as an Erasmus student – and it was truly valuable to talk to the people who make such a significant contribution to the protection of fundamental rights in Europe.

My time in Strasbourg was even more enjoyable as I was not on my own – this time I was there with the Sam to my Frodo, my greatest companion of all. Floris was a visiting ECtHR scholar at the time, and he made my stay in Strasbourg triple (Karmeliet) the fun. You are the person who perhaps suffered the most of my journey, as you were often my sounding board even when you were tired and really needed to sleep. Thank you for your support and for the funny, sarcastic, and painfully bad jokes. Thank you for your love,



your inspiration, and your friendship. I am so happy that we have accompanied each other in our journeys as PhDs. Above all, I am happy that unlike my dissertation, our story will not end in a cover on the shelf, but will continue long after the final sentence of this book has been written.

Thank you all!

Leonie

La Blaisotterie, August 2019



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## LIST OF ABBREVIATIONS

AHC	Australian High Court
ACHR	American Convention on Human Rights
BCC	Belgian Constitutional Court
Canadian Charter	Canadian Charter of Fundamental Rights and Freedoms
CCC	Colombian Constitutional Court
CCRF	Constitutional Court of the Russian Federation
CESCR	UN Committee on Economic, Social, and Cultural Rights
CJEU	Court of Justice of the European Union (encompassing the ECJ, the General Court and EU specialised courts)
CoATH	Court of Appeal of The Hague of the Netherlands
CRPD	UN Committee on the Rights of Persons with Disabilities
CSC	Canadian Supreme Court
DSC	Danish Supreme Court
DCTH	District Court of The Hague of the Netherlands
EAW	European Arrest Warrant
ECJ	European Court of Justice
ECHR	European Convention for Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights and Freedoms of the European Union
FAC	French Administrative Court
FCFCA	Full Court of the Federal Court of Australia
Framework Decision	EU Framework Decision on the European Arrest Warrant
GFCC	German Federal Constitutional Court
GHRC	German Higher Regional Court
GLoK	German Landgericht of Koblenz
HCA	High Court of Argentina
HRA	Human Rights Act of 1998
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ISC	Irish Supreme Court

NCOP	National Council of Provinces
NZBORA	New Zealand Bill of Rights Act of 1990
OECD	Organisation for Economic Co-operation and Development
OHCHR	UN Office of the High Commissioner for Human Rights
SACC	South African Constitutional Court
SCA	Supreme Court of Argentina
SCBC	Supreme Court of British Columbia of Canada
SCC	Spanish Constitutional Court
SCH	Supreme Court of Hawaii
SCN	Supreme Court of the Netherlands
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UKCoA	United Kingdom Court of Appeal
UKSC	United Kingdom Supreme Court
UN	United Nations
US	United States
USSC	United States Supreme Court
VCLT	Vienna Convention on the Law of Treaties