

# Democracy and Rule of Law in the European Union

Flora A.N.J. Goudappel · Ernst M.H. Hirsch Ballin  
Editors

# Democracy and Rule of Law in the European Union

Essays in Honour of Jaap W. de Zwaan



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# Foreword

Professor Jaap de Zwaan retired from Erasmus School of Law of the Erasmus University Rotterdam in March 2014. He had been a highly valued colleague for over 16 years. Following a career in the legal profession and almost 20 years at the Dutch Ministry of Foreign Affairs, Professor De Zwaan opted for the academic world in 1998. From his appointment on 1 January 1998 until becoming a professor emeritus on 14 March 2014, he was Professor of European Law at Erasmus University Rotterdam. As holder of this chair, he made major contributions to the education and research of the law school. Professor De Zwaan, a highly regarded lecturer, ensured that European law was given the prominent place in the curriculum that it continues to have today. As a researcher, he published many works on European integration and supervised many doctoral candidates. Reflecting his passion for European integration, from 1998 to 2014, Professor De Zwaan also held the Jean Monnet Chair in Future Developments of the European Union.

In addition to his academic achievements, Professor De Zwaan was a very accomplished administrator. He was the Faculty of Law's dean of internationalization from 1999 to 2001 and, from 2001 to 2004, head of the faculty as dean. In this capacity, he was responsible for overseeing two major and complex structural reforms that were taking place in the Dutch academic world at the time, namely the administrative reorganization under the University Government (Modernisation) Act and the shift to the bachelor–master structure. With a diplomatic management style aimed at fostering cohesion and cooperation, Professor De Zwaan ensured that Erasmus School of Law emerged from the process stronger. As dean of internationalization, he established strong and lasting contacts with leading universities in China and Indonesia. He strengthened cooperation with the academic world in the former colonies like the Netherlands Antilles. Many international students have found their way to Erasmus University Rotterdam through the many successful projects that he set up.

Professor De Zwaan is a true European, an idealist who could be seen building bridges between different countries and peoples. He focused in this regard mainly on the new and candidate Member States of the European Union, many of them in Eastern Europe. He established special partnerships with a number of prestigious

universities, such as the Moscow State Institute of International Relations (MGIMO University) and Comenius University in Bratislava. As a member of the board of the European Studies Institute (ESI) of MGIMO University, he made a special contribution to Russo–European cooperation in higher education. Through his personality and academic qualities, Professor De Zwaan played a significant part in establishing a relationship of trust and commitment between Russia and the European Union.

As a scholar, a diplomat and an administrator, Professor De Zwaan has contributed in significant ways to the development of European law and thus European integration. He played a leading role in the Certificate of European Law and Economics (CELE) project. The purpose of this project was to disseminate knowledge about the key processes in European integration, not only in legal and economic terms but in an interdisciplinary way, mainly in Eastern Europe. As a token of appreciation for his outstanding services and the high quality of his work, Comenius University in Bratislava awarded him a Gold Medal of Merit. He had already been awarded the Imrich Karvas Medal by the same university in 2004 and received the Award of Excellence from the Romanian ambassador to the Netherlands in 2009. Professor De Zwaan also showed his qualities in other positions. These included Substitute Judge in the District Court of The Hague from 1979, Vice-President of the Executive Board and member of the Governing Board of the Asser Instituut from 2002 to 2005 and, from 2005 to 2011, Director of the Clingendael Netherlands Institute of International Relations. Moreover, he performed charitable administrative work. In recognition of his achievements, Professor De Zwaan was appointed an Officer in the Order of Orange-Nassau on the occasion of his retirement from Erasmus School of Law in March 2014.

Professor De Zwaan was a highly valued colleague in both personal and professional terms. He was a real team player and builder of bridges who truly justified his nickname, “The Diplomatic Dean”, on a daily basis. The Erasmus School of Law is sincerely grateful for his services and wishes him all the best as a professor emeritus.

Rotterdam  
Summer 2015

Professor Suzan Stoter  
Dean of Erasmus School of Law  
Professor Fabian Amttenbrink  
Vice-Dean of Erasmus School of Law

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- July 2014: TEPSA, new opportunities in spite of setback
- July 2014: The European Parliament, the winner takes it all (column)
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# Curriculum Vitae Jaap Willem de Zwaan

Born on 9 February 1949 in Amsterdam

## Professional activities

- 2012– Lector European Integration at the The Hague University of Applied Sciences (part-time)
- 2005–2011 Director of the Netherlands Institute of International Relations (Clingendael), The Hague
- 1998–2014 Professor of the Law of the European Union at the Law School of Erasmus University Rotterdam and holder of the EU Jean Monnet Chair ‘Future developments of the European Union’. In the period 1998–2005 on a full-time basis, in the period 2005–2014 on a part-time basis
- Served also as:
- Dean of International Relations (1999–2001)
- Dean of the Law School (2001–2004)
- 1979–1998 Ministry of Foreign Affairs
- 1979–1981 Staff Member of the Department on European Integration, The Hague
- 1981–1983 Member of the Legal Service, The Hague
- 1983–1988 Legal Advisor of the Netherlands Permanent Representation to the European Communities, Brussels
- 1988–1995 Senior Member of the Legal Service, The Hague
- 1995–1998 Legal Advisor and Head of Division Justice and Home Affairs of the Netherlands Permanent Representation to the European Union, Brussels
- Acted during his work as member of the Legal Service of the Ministry of Foreign Affairs (1981–1983 and 1988–1995) as Agent for the Netherlands Government in numerous cases, covering all aspects of the institutional and substantive Law of the European Union, before the Court of Justice of the European Union in Luxembourg.

Was involved as Legal Advisor of the Permanent Representation (1983–1988) in the negotiations on and the drafting of the Single European Act. Was furthermore involved in the negotiations on and the drafting of the Treaties of Accession of Spain and Portugal to the European Communities.

Was involved as Legal Advisor of the Permanent Representation (1995–1998) in the negotiations on and the drafting of the Treaty of Amsterdam. Chaired during the Netherlands Presidency (first half of 1997) the Group ‘Friends of the Presidency’/‘Amis de la Présidence’. Was involved as Head of Division Justice and Home Affairs in the development of the Third Pillar cooperation.

1979–1985 Substitute Judge in the District Court of The Hague

1973–1979 Member of the Bar of The Hague (Office Pels Rijcken & Droogleever Fortuijn)

### Education

1993– Doctor’s degree in Law at the University of Groningen (‘The Permanent Representatives Committee, its role in European Union decision making’)

1972–1973 Postgraduate studies at the College of Europe, Bruges in Belgium. Main courses in European Law (Institutional law, Substantive law, Legal protection, Competition law), optional courses: Political Sciences and Economy

1972– Traineeship at the Commission of the EC, Brussels, Belgium (DG VI, Agriculture)

1967–1972 Study at the Law School of the University of Leiden. Main courses in Dutch Civil Law, optional courses: European Law and Public Finances

1961–1967 Secondary Education (Gymnasium B) at ‘Het Amsterdams Lyceum’ in Amsterdam

### Other Activities

2015– Member of the Dutch Helsinki Committee (OSCE, Organization for Security and Co-operation in Europe)

2014– Member of the European Group of Public Law (EGPL) of the European Public Law Organisation (EPLO), having its seat in Athens, Greece

2014– Secretary-general of the Trans European Policy Studies Association (TEPSA), a network organization for Institutes for European Studies in the Member States and candidate-Member States of the European Union, having its seat in Brussels, Belgium

2013– Member of the Participation Council (Hogeschoolraad), of The Hague University of Applied Sciences, Chair of the Committee on Personal and Organizational matters (P&O)

- 2011– Member of the Foresight Advisory Council of the Alfred Herrhausen Gesellschaft, the International Forum of Deutsche Bank, Berlin, Germany
- 2009– Member of the Board of the Trans European Policy Studies Association (TEPSA), a network organization for Institutes for European Studies in the Member States and candidate Member States of the European Union, having its seat in Brussels, Belgium
- 2009– Member of the Advisory Board (‘Wissenschaftlichen Direktorium’) of the Institut für Europäische Politik, Germany, Berlin
- 2008–2011 Chairman of the Board of the ‘Haagse Academische Coalitie’ (the ‘Hague Academic Coalition’), a foundation serving as framework for cooperation between academic institutions in The Hague in the context of the profile of the city of The Hague as UN ‘Legal Capital’ of the World
- 2007–2015 Member of the Board of the Amsterdam Institute of German Studies in Amsterdam (‘Duitsland Instituut Amsterdam’)
- 2006– Member of the Governing Board of the European Studies Institute, established by the European Union and the Russian Federation in the framework of the Partnership and Cooperation Agreement (PCA-cooperation), in Moscow, Russia  
As from April 2012 also Member of the Executive Committee of the Governing Board
- 2005–2010 Editor-in-chief of the ‘Internationale Spectator’, the monthly periodical for international affairs published on behalf of the Netherlands Institute of International Relations (‘Clingendael’) in The Hague
- 2005– Member of the French–Dutch Cooperation Council (‘Conseil de coopération franco-néerlandais’)
- 2005–2010 Member of the Board of the Netherlands Association for European Law (‘Nederlandse Vereniging voor Europees Recht’)
- 2004– Member of the Board of Directors of the European Public Law Organisation (EPLO), having its seat in Athens, Greece
- 2004–2008 Member of the General Board of the ‘Europese Beweging Nederland’ (‘EBN’), European Movement, section of The Netherlands
- 2004– Member of the Commission ‘European Union’ instituted in January 2004 by the Government of the Kingdom of the Netherlands to review the modalities of cooperation between the Dutch Antilles and Aruba on the one hand, and the European Union on the other
- 2002– Member of the Board of the ‘Rotterdams Juridisch Genootschap’ (Rotterdam Law Association)
- 2002–2008 Member of the Board of the Foundation ‘Nederland-Roemenië’ (The Netherlands—Romania)
- 2002–2005 Vice President of the Executive Board (‘Dagelijks Bestuur’) of the T.M.C. Asser Instituut, Institute for International Private and Public Law and European Law, in The Hague

- 2002–2005 Member of the General Board ('Algemeen Bestuur') of the T.M.C. Asser Instituut, Institute for International Private and Public Law and European Law, in The Hague
- 2000–2012 Member of the Commission on European Integration (CEI), which is one of the committees of the Advisory Council on International Affairs (AIV) of the Minister of Foreign Affairs
- 1999–2002 President of the Scientific Council (Wetenschappelijke Raad) of the T.M.C. Asser Instituut, Institute for International Private and Public Law and European Law, in The Hague
- 1998–2000 Member of the Administrative Council of the Salvador Madariaga Foundation, research foundation for the College of Europe in Bruges (Belgium)
- 1997–2002 Member of the Advisory Board (Curatorium) of the Europa Institute of the Law School of the University of Leiden
- 1991–1994 Lecturer in the European Law courses of the Rijks Opleidingsinstituut ('State Training School') in The Hague. Main target group: members of the Legal and Legislative Departments of all Ministries of the Government in The Hague
- 1984–1988 President of the Association of Former Students of the College of Europe in Bruges (Belgium). In the period 1988–1995 regional representative of the Association in the Netherlands
- 1976–1978 Member respectively President of the Board of the Young Bar Association to the Supreme Court in The Hague
- 1967–1972 Several functions in student associations, such as President of the Liberal Student Association in Leiden (1969–1971)

### Miscellaneous

- 2014– Dutch Royal decoration 'Officier in de Orde van Oranje-Nassau'
- 2014– 'Ad Fontes'-medal of the Erasmus University Rotterdam
- 2010– 'Commemorative Medal' of the Faculty of Law of Comenius University Bratislava, Slovak Republic
- 2009– Award of Excellence' of the Embassy of the Republic of Romania in recognition of the outstanding contribution to promoting Romanian values in The Netherlands and to supporting assistance projects for Romania throughout the 20 years after 1989
- 2004– 'Imrich Karvas' medal of the University of Economics in Bratislava, Slovak Republic
- 1998– Officier dans l'Ordre national du mérite of the French Republic

# Introduction

When Jaap de Zwaan retired in 2014 from his position as professor of European Union Law at Erasmus School of Law, he left a large legacy in research and lecturing. The contributions in this volume reflect not only the intellectual ties between the authors and their colleague and friend Jaap de Zwaan, but also his distinguishing approach to the development and enlargement of the European Union. Jaap de Zwaan viewed the European Communities and, later on, the European Union as a constitutional structure that should be characterized by the principles of democracy and the rule of law. And, most important, he developed this view at a time when most other specialists still concentrated on the four freedoms of the internal market: the free movement of goods, capital, services and people. This is not to say that the economic freedoms decline in importance. What we, following the traces of his work, think that should be emphasized is this: in the long run these freedoms can only retain their importance under the condition that they are rooted in a fuller realization of the constitutional principles of rule of law and democracy. Article 2 of the Treaty on the European Union states: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

Euophobic resistance against the freedoms of movement, especially that of persons, can only be counterbalanced by the inclusion of the persons in a shared

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public sphere, informed by these principles. This is why European citizenship, another topic that is consistent with his basic approach received Jaap de Zwaan's attention, and why he in his practical activities and teaching abroad rightly viewed adherence to these principles as essential, at a time when most politicians and civil still thought that economic liberalization in the new Member States was the only really important thing and rule of law merely its framework. Jaap was already advising and lecturing on this years before the adherence of new Member States in these Member States themselves. When the TFEU's preamble promises "an ever closer union", it is not the disappearance of socio-cultural differences between the Member States that we should have in mind, but a continuous growth in the shared acceptance of democracy and rule of law. In recent case law of the Court of Justice, we may even view how the fundamental rights of the Charter and the principle of the rule of law give direction for further development of the economic freedoms.

The contributions to this volume apply, step by step, this approach to the present and the future of the European Union. The *first part* deals with the "Constitutional Foundations" as such. The notion "rule of law" is differently interpreted among and within distinct legal traditions. In the common law tradition, it appears to state simply that the law, not men should govern relations between people, whereas the words "Rechtsstaat" and "État de droit" in the German and Dutch, respectively, French language versions, appear to have a more substantive connotation. In a historically underpinned account, Mortimer Sellers demonstrates that the principle of the rule of law is intrinsically defined by the absence of arbitrary power and the notion that "power should be regulated by law, to advance the common good".

This means that the rule of law is procedural as well as substantive, which justifies the emerging EU practice of assimilation between the notions derived from different legal traditions. The procedural and substantive dimensions of the rule of law cannot be separated from each other, since procedures are needed in order to substantiate the values. These procedures ought to be democratic, since democracy is the political decision-making process in which all political views have to be treated equally and in a democratic debate have to compete with each other. The democratic legitimacy of the European Union is however under pressure, especially as far as the political culture continues to concentrate on the national sources of legitimation. Ton van den Brink demonstrates that this is especially visible with respect to the new EU Economic Governance Model, which coordinates public finance and macroeconomic policies of Member States. In a realistic analysis he recommends national parliaments to redefine their own role with respect to these policies in the actual European context, instead of merely complaining about an alleged loss of sovereignty.

It is only through the interaction between the EU political level and that of the Member States that the aspirations of Article 2 TEU can be brought to life. Helena Raulus concentrates on the ultimate sanction for policies of the Member States that do not comply with Article 2, and how to prevent such a situation. In the Hungarian situation the Article 7 has even not been initiated. After having discussed recent initiatives from the Dutch and other governments as well as from the Commission, Helena Raulus recommends going one step further and enhancing the role of the Fundamental Rights Agency under the treaties.

Contrary to the state-centred approach that the development of European law has inherited from its constitutional origination from treaties, a constitutional adherence to the principles of democracy and rule of law brings the citizens to the forefront. This has been confirmed in the emphasis on human rights in Articles 2 and 6 TEU and the adoption of the Charter of Fundamental Rights, which includes a title on citizens' rights, as a part of the treaty framework. European citizenship is the legal institution that completes the principles of democracy and rule of law. Fiona Murray elucidates how European citizenship has broadened and deepened since 1993 and how the way ahead is connected with the rule of law and democratic participation.

When the notion of rule of law is discussed, one of the most obvious elements is the right of citizens to invoke the decision of an independent court in a dispute with the administration. Since national courts are the first in line to respond, the rule of law in the European Union depends primarily on them. Urszula Jaremba argues that the entry into force of the Charter of Fundamental Rights as EU primary law has contributed to the importance of the role of national courts. The protection of the rights of individuals under the Charter when Member States implement EU law, might increase the number of requests for a preliminary ruling from the Court of Justice by national courts. At the same time, lack of time, resources and knowledge might hamper the fulfilment of this important role by national courts.

Marc van der Woude draws our attention to the fact that at the same time, the court system of the European Union itself, especially the General Court and the Court of Justice, are confronted with a huge workload. The administration of the court is such a demanding task that improvements while maintaining the independence of the courts is urgently needed. This chapter includes a vintage description of the internal management and governance of the European courts. The vital importance of truly independent courts in any constitutional set-up that aims at full compliance with the principle of the rule of law, has been the reason in several EU Member States for the instruction of a Council for the Judiciary. The Netherlands has followed this example, in 2002. Marc van der Woude recommends the establishment of a High Council for the Judiciary at the European level, a recommendation that deserves the attention of anyone who understands that the quality and effectiveness of both political and judicial decision-making are key factors in the future of the European project.

Part I of the book concludes with a thought-provoking reflection by Christiaan Timmermans on the constitutional identity of the European Union. Many avoid this subject after the demise of the Treaty establishing a Constitution for Europe, but Timmermans demonstrates that the subject continues to be politically and—given the outplacement of certain procedures, e.g. concerning the monetary stability, as well as the ongoing debate on the relation with German Constitutional Law—judicially relevant. Qualifying the European Union as a “Union of States and Citizens” (a proposal from J. Hoeksma) would in Timmermans' view be appropriate because of the required strengthening of European citizenship.

Part II of the book concentrates on “Procedures”. The contributions to this part of the book demonstrate how the relation between procedure and substance in the European Union works out in legislative and treaty making practice. Anita Bultena elucidates the overwhelmingly important role of negotiations in the European legislative process. This feature distinguishes it from dominant practices in domestic legislative processes. Of course, negotiations play a role there as well, but not to the same extent as in the European Union. Maybe this is an (overlooked) explanation for the fact that notwithstanding the democratization of the European legislative processes, most people still experience a feeling of alienation vis-à-vis European legislation that is usually described as its “democratic deficit”. A never-ending sequence of negotiations can indeed hardly be viewed as an expression of the political will of the European citizenry yet it is part of the European Union’s everyday system.

The processes through which the European Union affirms its adherence to the principles of rule of law and democracy include the external action of the Union. Consistency of internal and external with respect to these principles is not only a question of effectiveness, but also of credibility. Cornelius James deals in his contribution with the extent to which these principles inform the European Union’s development cooperation policies. The Union’s agreements with third countries (be it bilateral or multilateral, like the Cotonou agreement) on financial and technical support usually, include, like trade agreements, a “human rights clause”. Through the promotion of “good governance” in its political, economic, social and environmental terms, the European Union gives “sustainable development” a meaning that is related to the rule of law and democracy. The relevance of this chapter surpasses its focus on developing countries. Developed countries, including the Union’s Member States themselves, also ought to review their policies and decision-making processes keeping in mind that we all need a wider understanding of sustainability.

Accession treaties to the European Union have to be preceded by an assessment procedure concerning the candidate Member State’s ability to comply with European Union law and policies. Here we can view a change in approach that reflects the profound change that we described at the beginning of this introduction. After the fall of the Berlin Wall, the enlargement process initially (over)emphasized the economic adaptation of the candidate Member State to the EC standards. In the view of many politicians at that time, who even belittled the lawyers with their concerns about reform of the judiciary and law enforcement, the most important thing was the privatization of the state owned companies. By now, we know how the privatization was turned into a grab bag for shrewd investors who consolidated their newly acquired wealth through financial support for their political benefactors. The failure of the one-sided privatization was the learning fee European politics had to pay before due priority was given to fighting fraud and corruption and strengthening the rule of law institutions in candidate Member States.



The author of the final chapter of this part, Alfred Kellermann, reflects on his active participation in Albania's preparations for the accession procedure. The story of this contribution may be something of the past—developments in Albania have meanwhile taken a turn for the good—but it helps us to understand how difficult transition processes can be and how much effort is needed before one can confirm that a state has effectively adopted and implemented the principles of rule of law and democracy.

Part III of the book deals with a number of policies in which the importance of the EU's adherence to the principles of rule of law and democracy emerges. Hans van Meerten discusses recent ECJ case law on pensions. State liability is a real-life rule of law guarantee in situations when workers risk to lose their pension entitlements.

Monica den Boer illustrates the unavoidable interconnectedness of experiences of injustice “inside” and “outside” the rule of law. Her examples are compelling: terrorism, human trafficking and other forms of criminal behaviour require action at the European level. It is part of the nature of such public tasks that they require actions at different levels. It is not easy, though, to live up to the standards of European principles when the European Union has to face areas with completely different standards, e.g. the countries in Africa from which asylum seekers crossing the Mediterranean border try to get to the EU. Specific subjects related to the Area of Freedom Security and Justice are discussed in the following chapters: the confiscation of proceeds from crime, by Ladislav Hamran and efforts to widen readmission of migrants in their countries of origin, by Türkan Ertuna Lagrand. The latter subject deals with the strict side of migration policy. Lagrand rightly emphasizes that this policy should also be guided by *respect for human dignity and freedom and by respect for human rights*. These contributions reconfirm indeed that internal and external commitment to the principles of rule of law and democracy have become more and more intertwined.

Finally, two chapters deal with policies related to the working of the rule of law across state borders. Viola Heutger discusses the relation between the EU's sphere of competence with respect to private international law and the attempts to make room for sub-national regional law. Gerhard Hafner elaborates on the relation between the European Union and the International Criminal Court, the first global court that deals with crimes against human dignity and international humanitarian law. Important practical questions concerning cooperation between the EU and the ICC, with respect to information and the position of the EU's civil and military personnel, have become the subject of a separate agreement that is analysed in this chapter.

An essay annexed at the end of the book by one of Jaap de Zwaan's fellow-travellers in EU Law and diplomacy, former deputy Prime Minister Laurens-Jan Brinkhorst, concludes with a forward-looking view on the close relationship between the European integration and democracy, and the need to translate the legal debate into a constructive political discourse, inside and outside parliaments.