Chapter 1

Introduction

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What are the aims of this publication and of its editor, the Standing Committee of experts in international immigration, refugee and criminal law? It can be stated, with some boldness, that each intelligent person is in favour of European integration. However, this integration creates the risk of the loss of values which have been ascribed to by all states participating in the European integration process: democracy and the connected protection of fundamental rights of the individual.

For democracy to exist, three essential conditions have to be met: formation of law in openness, decision on the law to be formed by freely elected representatives of the people, and deciding on the proper application of the law formed by an independent judiciary. Within the Member States of the European Union, the individual is protected by the European Convention on Human Rights and by the 1951 Refugee Convention of the United Nations. At least until now, the transfer of public authority from states, participating in the European integration, to bodies personifying the integration, implies a loss to the values aforementioned especially within immigration, refugee and criminal law. To draw attention to this loss and to counter or prevent it where possible, are the aims of both this Committee and the essays in this publication.

The first essay, entitled "The principle of open government in Schengen and the European Union: democratic retrogression?" (Chapter 2), attacks the tendency of secret decision-making within the organs established by the Implementing Agreement[1] as agreed to at Schengen in 1990, and within the organs of the European Union.[2] The presumption of secrecy dominating both European conventions is analysed. It is demonstrated that the transfer of national powers of decision-making to the European level, especially in the areas of immigration, refugee and criminal law, is a significant deterioration for the citizens of all Member States with regard to their right to be informed about the way decisions concerning them are arrived at, and in some cases even with regard to their right to know of the contents of those decisions. It is stated that "European government under Schengen or Union law should, as a matter of principle, be no less open than is customary at the national level for the area of government involved". For that reason the principle of openness should, *inter alia*, be included in the Treaty on European Union ("TEU").

The European Court of Justice is the international court capable of discharging its functions, so effectively exercised within the framework of the European Community, also within the context of the so-called third pillar of the Union: to "ensure that in the interpretation and application of this Treaty the law is observed".[3] However, when formulat-

1 Trb. 1990, No. 145. For the English translation, see 30 I.L.M., p. 84 *et seq.*
2 See TEU and Final Act, 31 I.L.M., p. 247 *et seq.* For the Dutch text, see Trb. 1992, No. 74.
3 Compare Art. 164 EC Treaty.

ing Title VI of the Treaty of Maastricht (incorporating Justice and Home Affairs) the competence of the Court of Justice was carefully eliminated from that Title (the "third pillar"), except when brought in later by a treaty text to be decided on by unanimous vote of the Member States. The result is that the executive branch, the Council of Ministers, decides on the interpretation and implementation of the European law developed under Title VI, except for treaties to be concluded between the Member States which introduce the Court as an independent judge deciding on the meaning of the treaty concerned. The essay entitled "The European Court of Justice and the third pillar" (Chapter 3), provides a survey and analysis of the clauses in treaties and drafts of treaties formulated within the context of "Justice and Home Affairs" that bear on the widely diverging competences attributed to the Court and accepted by the Member States under each treaty text drafted up to March 1996 under Article K.3, paragraph 2, *sub* c, of the Treaty of Maastricht.

"Europol, who is watching you" (Chapter 4) is about the "Convention on the establishment of a European Police Office". The title of the essay alludes to the images created by the book by George Orwell, "1984": a Big Brother, controlled by nobody, collects all information about everybody thus controlling everything.

Essential to authoritarian regimes is the non-public characteristic of their administrations. Collaborative agreements of states which are rooted in the democratic tradition, and especially where it concerns a police organisation, should be surrounded by many safeguards. These safeguards are not apparent from the text of this treaty, discussed in this essay.[4]

It looks like Europol is becoming a gruesome organisation. It originated from the so-called Europol Drugs Unit. The creation of this Unit was never made dependent on approval by any parliament whatsoever. Remarkably quietly, this organisation has expanded far beyond its original scope (drugs) and now concerns itself with "illegal immigrant smuggling" and other crimes. These crimes and the overall scope of Europol have been described through very vague terminology. The text of the treaty does not include any parliamentary body to monitor the execution of the treaty. Any invasion of privacy of citizens cannot be checked by them, especially not in those cases in which Europol is involved in the so-called "proactive" collecting of data. In most Member States of the Union, the judge decides whether a police officer involved is to testify in a criminal case, and not the Chief of Police. In the case of testimony of an employee of this European organisation however, it is the highest chief, the Director of Europol, who is to decide on the admission of the testimony, as opposed to the judge. The essay on Europol mentions other Europol constructions, which are impossible within any national context of the older Western European democracies. The title of this essay appears to be justified.

Two essays are concerned with refugee law. The first is entitled "Who is a refugee?" (Chapter 5). Since 1990, the States of Western Europe are involved with the harmonisation of the widely diverging interpretations of the term "refugee". These differing interpretations within the scope of one and the same treaty, *i.e.* the 1951 Convention relating to the Status of Refugees, imply unequal treatment, as a unifying international judiciary is kept at bay for the time being. Partly because of this, the United Nations published a Handbook describing unifying criteria in 1979. Of late, there is a tendency among state representatives to adjust these criteria in ways to allow fewer people to fall under the pro-

4 Trb. 1995, No. 282. The English text of the Europol Convention is included in Appendix B of this book.

tection of the treaty. It is therefore timely to reiterate from the private sector the validity of the Handbook criteria on the one hand. On the other, it had to be concluded that five problems have recently arisen, leading to very differing interpretations, which the Handbook was, at the time, unable to describe concisely. This essay presents certain articles as solutions to these problems.

The right to flee from persecution is possibly the most important human right. In practice however, this right is meaningless for refugees without a proper procedure for the admission of asylum seekers. The Council of the European Union has drafted "Minimum guarantees" to facilitate the harmonisation of the different national procedures. The second essay on refugee law, entitled "Minimum guarantees for asylum procedures" (Chapter 6), discusses the resolution of the Council concerned. It concludes that, indeed, powerful minimum guarantees have been formulated, but that the Council largely annuls these at the same time by allowing far-reaching exceptions to these guarantees.

A strong increase in migration has led to the tendency to either send back the migrants to their country of origin or to return them to the country which allowed them access, by means of repatriation treaties. In most cases this will involve involuntary repatriation. Repatriation treaties can jeopardise very important human rights, especially if those treaties apply to people seeking asylum and who have been unable to engage in proper asylum procedures, or apply to aliens who fear improper application of the extradition law of the returning state. The essay on "Forced repatriation" (Chapter 7) of aliens whose request for a right of residence has been conclusively denied, focuses on formulating a minimum standard for proper treatment to be included in repatriation treaties. These kinds of bilateral agreements between the expelling country and the country of nationality of the repatriates, often involve large groups of persons possessing the same citizenship. The second essay focusing on returning migrants not granted a right of residence (Chapter 8) looks at treaties covering both the return of citizens as well as the return by the country not granting residence (the expelling country) of people with the nationality of a third country, and who reached the expelling country through other parties to the treaty. These treaties involve admission to countries from which the migrants departed or through which they passed, in general. Thus they are usually called "readmission agreements". Guarantees against *refoulement* or improper application of extradition law are especially important in readmission agreements. The readmission agreements within the Benelux comply with these guarantees, which should be part of the text of these agreements, in accordance with the relevant human rights. The texts drafted within the context of Schengen or those texts drafted within the European Union are much less compliant or lack these guarantees altogether.

This publication concludes with a number of proposals to limit as much as is currently possible the democratic flaws as stated by the seven essays included during the Intergovernmental Conference of the Members of the European Union, opened on 29 March 1996 (Chapter 9). These proposals have been drafted as amendments to the TEU, and have been classified into sections A, B, C and D. Six amendments, as stated under A, B and C, involve the implementation of those characteristics of democracy as mentioned earlier. Section A therefore includes two proposed amendments concerning the "promotion of openness in European government". Section B includes two amendments aimed at increasing the scope of the Court of Justice of the European Union on those areas, as listed in Maastricht under Title VI of the TEU (Alien and Criminal Law). Section C proposes two changes to the TEU, which, if approved, would lead to an increase in influence of the European Parliament on the one hand, and of the respective nation-

al parliaments on the other. Section D does not regard the way in which decisions are arrived at (*i.e.*, the essential requirements for democratic administration) but instead proposes three amendments with reference to one of the significant material human rights: "combating racial discrimination and the promotion of equal treatment of immigrants in the Union".

The Standing Committee has formulated and published these amendments in the spring of 1995. The discussion on the revision of the Union's Treaty, especially on the issues as raised in the Committee's proposed amendments, is still ongoing.

So far, European integration seems to entail an infringement on generally accepted European values of democracy. Repeatedly different European Councils of Ministers, and more so the supporting civil servants, have taken over extensive powers from national administrations; usually this transfer of power occurred very quietly. As a corollary, the controlling powers executed on the national level by the public, parliament and the judiciary are often reduced or removed by the pressure of those who give priority to short term goals of efficiency and fast European cooperation. The essays in this publication indicate the impending dangers, threatening the most important political values common to all Members of the European Union.