Editorial 2017/3

In our editorial at the beginning of this year, we raised the question of whether the EU was not hopelessly exposed to a revival of nationalism, including authoritarian governments prepared to break away from their international commitment. And yet, with the recent elections in France, a first sigh of relief was audible; it seemed as if "Brexit" would not be followed by a "Frexit", "Auxit", "Grexit" and the like.

However, the rifts through the European community[1] of states are by far not overcome. One crisis area has emerged in Eastern Europe: Consider Hungary's attitude to simply ignore a decision by the ECJ, obliging it to take in a certain number of refugees. This is indicative of Europe's recent estrangements. And Hungary is not alone in its approach; just think of the vociferous acclamation received by the new German right wingers "AfD". The practice of the ECJ is in their eyes an expression of the "dictate from Brussel".

Talking of Europe's recent rifts: After a sequence of precipitous events in Spain this September, matters seem to be going out of hand currently, in a state we had considered as a stable democracy and reliable partner of the EU; in a state where one would have expected that the brutal suppression of regional cultures was ended. Evidence belies it, though. Even though Catalonia enjoys a series of autonomous rights (in particular in education and local administration), a collective sense of oppression and economic exploitation by the central government has prevailed. For too long this sentiment has been ignored; too long both sides have hesitated to engage in constructive dialogue. Obviously, nobody does know where the majority of inhabitants of Catalonia stands. For sure though, memories of the Franco era linger.

Even if the EU, understandably, wants to support its reliable Member State, it has an obligation to prevent a further escalation. Let's face it – the EU is the only real power able to mediate in this conflict.

Turning the Catalonian experience into the more general, the recently created European institutions like the European arrest warrant are being subjected to a rigorous test: we are proud to develop the concept of mutual recognition, yet now, however, it could be abused for political goals. Are we sure we wanted to include such crimes as sedition into this approach? Does our mutual trust really reach that far?

Fundamental rights are again one of common denominators of this volume. It starts with an overview given by *Maria Kaiafa-Gbandi,* who introduces the recent case-law of the ECJ on the protection of fundamental rights in EU law and its importance for member states' national judiciaries. In her article, she discusses the *ne bis in idem* principle by focusing on the *Fransson* decision; she raises questions on the statute of limitations and the protection of the EU financial interests, in particular the inapplicability of national provisions, which were relevant in the *Taricco* case, and she finally draws attention to the cases *Aranyosi* and *Căldăraru* concerning the restriction of the mutual

1 *Geinitz/Kafsack,* Frankfurter Allgemeine, 28th October 2017.

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recognition principle on reasons of the protection of human rights in the context of the European arrest warrant.

Anneke Petzsche's contribution tries to find a balance between the freedom of expression and essential security interests when addressing the penalisation of public provocation to commit a terrorist offence. Equally, *Ariel Falkiewicz* emphasises crucial human rights aspects when focusing on the double criminality requirement. Although this principle has been more and more restricted by numerous instruments based on mutual recognition, it is still significant in the area of freedom, security and justice, as *Falkiewicz* points out, based on the interpretation of the ECJ in the *Grundza* case.

Jamil Ddamulira Mujuzi also deals with the principle of mutual recognition of judgments in criminal matters. In particular, he draws attention to art. 17 of the framework decision on the enforcement of judgments in the European Union according to which the concerned sentence shall be enforced by the national law of the executing State, and which the ECJ interpreted quite restrictively in the recent *Ognyanov* case.

Charlotte Schmitt-Leonardy retraces the border between legitimate infiltration by an undercover agent and incitement of a crime, drawn by the ECHR in the case *Furcht vs. Germany.* She then outlines how the German jurisprudence has to be modified to meet this requirement. Finally, *Athina Giannakoula* gives an overview of the future of the framework decisions established under the former third pillar prepared to be transformed into the concept of Art. 82 and 83 TFEU.

Again, this issue shall be understood as a constructive contribution to the development of a balanced European criminal law system – despite all crises the EU is faced with today.

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