

## Editorial

In the aftermath of the Brexit referendum of June, 23 – after which we expressed our concern in the last Editorial published on EuCLR 2016/2 – another election date has recently upset the expectations of European governments and the European public opinion.

The election of Donald Trump as President of the United States seemingly marks another step towards the advent of a wave of nationalistic populism on both sides of the Atlantic, which is antithetical not only to the pillars of the European integration process, but also to the principles of a liberal criminal policy respectful of Human Rights. The United States of America have not yet managed to close Guantanamo; now they seem ready – if President-elect Trump were to actually fulfil the promises of his electoral program – to build walls, and to pursue a zero-tolerance policy against mass immigration from Mexico and Latin America. Irregular immigrants are – *per se* – considered illegal and criminal.

But similar walls are about to be constructed also on the borders of our European Union and illiberal criminal policies, evidently non-respectful of Human Rights, are coming to life. One need only consider what happened last summer in Hungary, where the government of Viktor Orban sought to counter the wave of refugees from Syria and other countries in the Middle East with the erection of a barrier on the border with Serbia and what is currently happening in Turkey, a country bordering the EU and a formal candidate to join the Union.

In Amnesty International's annual report about Turkey, the organisation stated that: «The human rights situation deteriorated markedly following parliamentary elections in June and the outbreak of violence between the Kurdistan Workers' Party (PKK) and the Turkish armed forces in July. The media faced unprecedented pressure from the government; free expression online and offline suffered significantly. The right to freedom of peaceful assembly continued to be violated. Cases of excessive use of force by police and ill-treatment in detention increased. Impunity for human rights abuses persisted. The independence of the judiciary was further eroded. [...] An estimated 2.5 million refugees and asylum-seekers were accommodated in Turkey but individuals increasingly faced arbitrary detention and deportation as the government negotiated a migration deal with the EU».

«Politically motivated appointments and transfers of judges and prosecutors continued throughout the year, wreaking havoc on a judiciary already lacking independence and impartiality. Criminal Courts of Peace – with jurisdiction over the conduct of criminal investigations, such as pre-charge detention and pre-trial decisions, seizure of property and appeals against these decisions – came under increasing government control. [...] Mass prosecutions under vague and broad anti-terrorism laws continued. [...] Waves of detentions took place after the eruption of violence between the PKK and state forces in July. By late August it was estimated that more than 2.000 people had been detained for alleged links to the PKK, while over 260 were remanded in pre-trial

detention. Prosecutions were commenced of individuals accused of membership of the Fethullah Gülen Terrorist Organization, included US-based cleric and former AK Party ally Fethullah Gülen».

«Respect for freedom of expression deteriorated. Countless unfair criminal prosecutions, including under criminal defamation and anti-terrorism laws, targeted political activists, journalists and other critical of public officials or government policy. Ordinary citizens were frequently brought before the courts for social media posts. [...] Reported cases of ill-treatment in detention and other inhuman or degrading treatment in the context of police or military operations against the PKK increased. [...] Impunity persisted for the human rights abuses committed by public officials»<sup>1</sup>.

The academic environment has also been affected by this wave of repression. Numerous arrests and repressive measures have been adopted: almost 1600 deans were forced to resign from their positions, professors are prohibited from leaving Turkey, travel and studies abroad in foreign countries are also prohibited and professors and office workers at Universities are carefully investigated and “background-checked” to unearth possible connections with the Fethullah Gülen’s movement.

As democratic legal experts and representatives of the academic environment, we are deeply affected by the destiny of our Turkish colleagues and we would like to show them our solidarity also from our periodical. Beyond the human concern for our colleagues, we would like to underline – as experts of criminal law – our unrest before the authoritarian and illiberal conversion of the Turkish regime that has used and abused criminal policy to repress the political dissent, so much that President Erdogan has declared that the capital punishment will be reintroduced in the Turkish legal system (perhaps with a retroactive application!).

It is common knowledge that – until few years ago – the situation in Turkey was very different. The movement for the criminal reform and the emanation of the new criminal code of 2005 – strongly influenced by the ideas and the practices used in the Western Europe as well as by the European education of the new Turkish criminal law professors – represented two important features to allow to the new Turkish State, secular and democratic, to become a member of the European Union.

In June 2010 a great congress for the celebration of the fifth anniversary of the Turkish criminal code took place in Istanbul and Ankara, with the participations of a large number of criminal professors from every part of Europe. The Europeanization of the academic culture and of the Turkish criminal legislation appeared one of the most important elements for Turkey on its long way to EU.

Today this idea seems very distant far back in the past. Meanwhile Turkey has – more and more – become a fundamental cornerstone of the delicate puzzle concerning political, economic and military balances of the Middle East: for example, the European Union needs Turkey to adequately face the refugee crisis. Notwithstanding this premise, it is not possible that the importance of Turkey could constitute a justification

1 Amnesty International, Annual Report 2015/2016, Turkey, p. 369-373.

to the inactivity of the European institutions before this unacceptable situation of repression of the dissent and the fundamental freedoms both.

The situation of inactivity and impotence of the European institutions has recently got worse with the latest and clamorous decision of the European Court of Human Rights in *Mercan v. Turkey*<sup>2</sup>. In this case, the Court declared the application inadmissible for failure to exhaust domestic remedies. The case concerned the placement in pre-trial detention of a judge who was dismissed from her post following the attempted coup d'état of 15 July 2016. The Court held, in particular, that Ms Mercan was required to lodge an individual application with the Constitutional Court with regard to her complaint concerning the lawfulness and duration of her pre-trial detention, which she had not done<sup>3</sup>.

So, in the opinion of the Strasbourg Court, the Turkish legal system had respected the conventional rules and the reasons presented by the applicant did not prove the lack of effectiveness of the complaint before the Constitutional Court.

This is an alarming and disconcerting decision, because if the European Court of Human Rights didn't find the reasons to consider the internal complaints in a case like this to be useless and ineffective, it is hard to say when it will do so<sup>4</sup>. Just to consider: while the application to the Strasbourg Court was presented, a heavy repression of Turkish judges was operated – even two judges of the Constitutional Court were arrested! – whilst Turkey had notified the suspension of the application of the European Human Rights Convention ex article 15. We strongly hope that a shocking decision as the one adopted by the ECtHR in the above-mentioned case, will finally wake up the numb conscience of the European institutions and popular opinion.

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2 ECHR, II, Mercan v. Turkey, App. 56511/16, 17.11.2016.

3 Press Release ECHR 372 (2016), 17.11.2016.

4 Cfr. www.marinacastellaneta.it.