

Editorial

2016 was the year of authoritarian hardliners. Under the leadership of strong agents who believe, going it alone, instead of forging alliances would bring the biggest political capital, the Nation State is experiencing an unforeseen renaissance.¹ Typically, these populists are ready to ignore international agreements, outrightly, if it serves securing their position of power.

Is the EU, faced with this transformation, totally powerless? 2017 could develop into the year of decisions: Can the (over-) ambiguous construction of Europe survive the revival of nationalism? Is there a core of European values beyond debate? What are these values and how does this “continuously feuding continent”² enforce them? Will Europe be able to establish a clear majority for peace, integration, fairness and the rule of law? Will it be possible to secure constructive cooperation in a common area of freedom, security and justice?

EuCLR offers a platform to work – at least – on one step towards creating such a common area for a balanced and equitable European Criminal Policy in accordance with the rule of law. Of course, this will not itself overcome the multitude of crises and catastrophes of this world. Nevertheless, criminal law offers one of the strongest means to establish state authority. Thereby it can also be a primary instrument for abuse of state authority. The protection of fundamental rights, legal certainty, proportionality and judicial control of the proceedings in criminal law thus become key. These are part of the European consensus that we should not allow to be questioned.

This position is further developed in this issue by *Alessandro Rosanò* using examples of three decisions of the ECJ on the European Arrest Warrant (EAW). He reminds us that the transfer of suspected persons within the EU Member States is no longer a *political* process but – with the system of the EAW – is moving towards becoming a purely legal matter. As a result, merely a judicial authority is in charge of issuing an arrest warrant – and police services do not meet this requirement.

In a highly complex area, the investigation of tax offences, *Lorena Bachmaier-Winter* shows that the European Investigation Order will simplify the transnational gathering of evidence. However, expecting that it will create a “single evidence area” seems, according to *Bachmaier-Winter*, exaggerated: in the interest of legal security, one would need to promote the harmonization of the national rules of evidence.

Constance Chevallier-Govers discusses the effects of EU law on French Criminal Law, and emphasizes in particular changes in criminal procedural law. In view of the coming European Public Prosecutor’s Office, she anticipates not only French opposition in EU Member States: procedural law is probably even more intensely linked to national tradition than substantive criminal law.

- 1 Eric Gujer, Hysterie ist keine Politik, Neue Zürcher Zeitung 28nd January 2018, p. 1, translated from German.
- 2 Eric Gujer, n. 1.

Jannemieke Ouwerkerk demonstrates how strongly connected the topics addressed in Art. 83 TFEU – the competences of the EU legislator to harmonize substantive criminal law– and in Art. 82 TFEU on the principle of mutual recognition are. Further developing procedural cooperation based on the principle of mutual recognition of judicial decisions, however, demands a certain restraint of the EU in the use of its competences to criminalize behavior.

Maria Kaiafa-Gbandi focuses on yet unresolved jurisdictional conflicts. Her contribution is based on the fundamental concept of *ne bis in idem* (double jeopardy) prohibiting even multiple prosecutions for one and the same act. She advocates creating an international regulation of jurisdiction based on the territoriality principle, offering the individual *ab initio* a single and, therefore, unambiguous procedure. This single procedure should guarantee the right to be heard and judicial control over invasive decisions.

The protection of fundamental rights of the accused and a well-balanced criminal policy are concerns which are not popular in times when the sense of fear seems to be omnipresent and the effectiveness of criminal procedure is considered as paramount for security. But more than ever, it is our task to argue that only a procedure respecting the rule of law leads to social acceptance of judicial decisions and the restoration of peace.

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