

## Editorial 1/2018

Research in criminal law, and especially in criminal procedural law, requires knowledge of fundamental rights. This is also evident from reading the articles of the *European Criminal Law Review*. A few decades ago, almost all references to fundamental rights were references to the European Convention on Human Rights and case law from European Court of Human Rights (ECtHR) in Strasbourg. However, this has changed in the past 6 to 8 years. The development is, for example, visible in the *European Criminal Law Review*, including this issue, where several of the articles address human rights instruments from the European Union.

According to art. 2 of the EU Treaty, the Union is founded on the values of respect for democracy, rule of law and human rights. On the basis of these ideas, the Union wants to offer its citizens an area of freedom, security and justice. We all know that. Today, it seems to be self-evident, maybe even trivial. However, the importance and emphasis of these ideas changes over time – and we are in the middle of these changes.

The wording of art. 2 goes back to the Amsterdam Treaty from 1997 even though – of course – the ideas go further back in time. Nevertheless, a few decades ago, the economic aspects of EU cooperation were prevailing (hence also the name European Economic Community). The development of human rights and preservation of rule of law were primarily in the hands of the Council of Europe and the ECtHR. Today, there seems to be two parallel trends.

On the one hand, the ECtHR is struggling with challenges related to overload of applications and widespread criticism of judicial activism. The challenges are addressed in the draft Copenhagen Declaration by the Committee of Ministers of the 5<sup>th</sup> of February 2018. Under the headline “subsidiarity”, there seems to be a tendency to restrict the powers of the ECtHR. On the 19<sup>th</sup> of February 2018, the Plenary Court discussed the draft of the Copenhagen Declaration. The Court adopted an opinion, in which it expresses concerns in relation to the references in the draft to “constitutional traditions”, and even more so, to “national circumstances”. The Court finds that – although both elements may be relevant in assessing whether a State has complied with the Convention in a particular case – it is ultimately for the Court itself to determine whether there has been a breach of the Convention.

On the other hand, there seems to be another trend at the moment making the EU system more and more important in the field of fundamental rights. The EU legislator is (now) adopting one directive after another concerning procedural rights. Before 2009, it was very difficult for the EU to agree on human rights instruments. Thereafter, numerous directives have been adopted, for example on “minimum standards on the rights, support and protection of victims of crime”, “right to interpretation and translation”, “right to information”, “right of access to a lawyer”, “presumption of innocence”, “procedural safeguards for children”, “legal aid for suspects and accused persons”. The Court of Justice in Luxembourg (CJEU) seems to be referring increasingly to human rights standards developed by the EU. This is due to, not least, the Charter

of Fundamental Rights of the European Union (2010), which is legally binding for the EU Member States. A realistic estimate would be that 20-30 % of all cases before the CJEU involve rights enshrined in the Charter.

The increasing importance of EU human rights standards is evident in almost every issue of the *European Criminal Law Review*. Research and discussions on human rights are, today, not only a matter of ECHR and case law from ECtHR, but very much a matter of EU law. Thus, in the articles in this issue you will find references to numerous EU directives etc. on human rights, to the EU Charter of Fundamental Rights and to case law from CJEU, which are relevant to human rights.

The potential impact of the EU Charter and EU human rights directives is huge and the need for strong international institutions to protect the fundamental values of democracy, rule of law and human rights is more crucial than in many years. This is reflected in the articles of the *European Criminal Law Review* and recently, by the (historical) decision in December 2017 of the EU Commission to trigger art. 7 of the EU Treaty against Poland for the controversial changes to the judicial system in the country.

Almost 70 years after adoption of the ECHR, there seems to be a need for the ECtHR to give a warning: Although there has been progress in cases of national compliance to the Convention, these cases “must be contrasted, however, with the many others in which it is clear that such progress is simply absent, and that reveal instead a failure to engage effectively not only with the reform process, but with the Convention itself.” (Opinion of 19<sup>th</sup> of February 2018 on the Draft Copenhagen Declaration).

The EU Charter and other EU human rights instruments seem to be increasingly important.

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