

Statehood and Sovereignty: The Difficult Equilibrium between European Union and Member States in Crisis Management - Refugee Crisis and Brexit

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Abstract

The notions of statehood and sovereignty form the common denominators of Europe's two major issues, the Brexit and the refugee crises as well as the field of tension for the achievement of equilibrium between the EU and its Member States in crisis management. Unilateral reactions by Member States in the management of refugee and migration flows prove that ineffectiveness at the EU level leads to the reemergence of the Member States as the critical entity taking measures, while the decision in the European Council of 18-19.2.2016 on Britain's special status is a classic example of intergovernmental negotiation and compromise. The various crises thus constitute the field in which the historical procedure of a constant, open

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negotiation is continued. Nevertheless, experience underlines the importance of European integration and the demand for significant political initiatives to be undertaken in the direction of its resurgence.

DURING this period (first semester of 2016), the EU has to deal mainly with two issues: first, the management of the huge refugee and migration flows that enter the Union from Turkey through the gateway of the Greek maritime borders in the Aegean Sea and the Eastern Mediterranean and second, the referendum about Britain's future in the EU.

The common denominator of these two issues is the resurgence of the conflict between European integration and the sovereignty of Member States either for conjunctural reasons (arrival of a large number of refugees and irregular migrants) or because this results from the rise of Eurosceptic or openly anti-European views in some Member States in a degree that calls into question the participation in the EU itself (as in the case of the UK). A deeper common denominator is the contestation of the sufficiency, effectiveness and more generally the added value of EU membership and the European integration.

1. Our Definition of Crisis

For the needs of this analysis, as crisis can be defined each situation that deviates from the "usual", from what would not have called into question the existing arrangements and equilibria within the institutional edifice of the EU. In other words, crisis conditions emerge when the circumstances and *a fortiori* the new conditions that are prolonged challenge the sufficiency of the existing mechanisms.

The economic and, to be more specific, financial crisis that erupted in 2008 and had a strong impact on many Eurozone countries appertains certainly to this broader sense of the crisis¹. Moreover, the same notion includes the huge increase in refugee and migration flows from Syria and other countries of the Middle East as well as North Africa or Asia to the EU² from 2015 on.

This broader sense of the crisis nowadays includes the promised by the British government proclamation of a referendum as to whether the UK should remain in or leave the EU as well. In this case, the crisis is caused by a political initiative of a Member State government and not by economic

¹ EVANGELOS VENIZELOS, State transformations and the European integration project (CEPS, 4 February 2016) <<https://www.ceps.eu/system/files/SR%20No%20130%20State%20Transformation%20and%20European%20Integration.pdf>>

² On the refugee issue, see indicatively: Is the humanitarian migration crisis different? (OECD, 7 September 2015) <<http://www.oecd.org/migration/Is-this-refugee-crisis-different.pdf>>. The Refugee Surge in Europe: Economic Challenges (IMF Staff Discussion Note, 20 January 2016) <<https://www.imf.org/external/pubs/ft/sdn/2016/sdn1602.pdf>>. STEFAN LEHNE, How the Refugee Crisis Will Reshape the EU (Carnegie Europe, 4 February 2016) <<http://carnegieeurope.eu/2016/02/04/how-refugee-crisis-will-reshape-eu/itj7>>. CHRISTIAN CARYL, If You Think Europe Has a Refugee Crisis, You're Not Looking Hard Enough (Foreign Policy, 2 February 2016). ELSPETH GUILD / CATHRYN COSTELLO / MADELINE GARLICK / VIOLETA MORENO-LAX, The 2015 Refugee Crisis in the European Union (CEPS Policy Brief, No 332, September 2015). <<https://www.ceps.eu/publications/2015-refugee-crisis-european-union>>.

or international reasons; it is, though, still a crisis, since existent arrangements and equilibria in the institutional edifice of Europe are challenged. After all, the deeper question that the British government had to answer was whether it would deal with the reactions of a large part of British society against European integration as a British problem or whether it would render it a problem of the Union, asking the latter to manage the pressure by agreeing upon new specific arrangements for the UK. The internal political crisis in one or more Member States is thus turned into an institutional and political crisis of Europe as an entity with community and inter-governmental characteristics which is asked to successfully confront it through the intergovernmental method.

As is well known, in spite of the exceptions provided in the Treaty of Lisbon for the United Kingdom³, the British government asked for additional significant exceptions and special arrangements for the UK that were agreed upon by the Member States in the European Council of 18-19.2.2016 and reflected in the conclusions of the summit in order to be assessed in a referendum and for the British people to decide whether they want their country to remain a member of the European Union under this special relationship or to leave the Union. The British Prime Minister has expressed satisfaction with the 19.2.2016 deal and supported its acceptance, causing reactions among his cabinet ministers, MPs and party members. The political and academic discussion over the bindingness of the agreement that has been reflected in the conclusions of the 18-19.2.2016 European Council, over the legal procedure of leaving - if this is decided - and the further

³ REBECCA ADLER NISSEN, *Opting Out of the European Union: Diplomacy, Sovereignty and European Integration* (CUP 2014).

economic and other consequences of each decision of the British people is extremely intense and rich⁴; the new arrangements have, though, already been agreed upon and the management that has taken place at the Union level is under assessment by the British people. If the result of the referendum is in favor of remaining in the EU, Europe will be proven more suitable for the management of the crisis than the UK and the latter will continue to be a Member State. If the result is exiting the EU, Europe will be proven insufficient in the management of the British challenge and the UK as a Member State will leave, undertaking to deal with the crucial issues relating to the safety and economy that influence the position of the British people at its own level.

2. Who is the Most Effective Crisis Manager: The Nation State or the EU?

All these circumstances that appertain to the notion of crisis pose again in a convincing way the fundamental question of

⁴ SIR STEPHEN WALL, *Leaving the EU* (2016) 22 *European Public Law* 57. GRAHAM GEE / LUCA RUBINI / MARTIN TRYBUS *Leaving the EU? The Legal Impact of 'Brexit'* (2016) 22 *European Public Law* 51. ADAM LAZOWSKI, *EU Withdrawal: Good Business for British Business?* (2016) 22 *European Public Law* 115. ROGER LIDDLE, *The risk of Brexit: Britain and Europe in 2015* (*Policy Network*, 15 January 2015) <<http://www.policy-network.net/publications/4812/The-Risk-of-Brexit-Britain-and-Europe-in-2015>>. JOHN SPRINGFORD / PHILIP WHYTE, *The consequences of Brexit for the city of London* (*Centre for European Reform*, 8 May 2014). <http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/pb_city_brexit_js_pw_8may14-8816.pdf>

whether the nation state is the most effective and final crisis manager or whether the crisis management vindicates participation in the institutional pattern of the EU, that cannot be directly compared to any known institutional type of strong and multilayered regional collaboration. Many interesting parallels of the European phenomenon have been proposed, such as with older confederations of states or with a “Commonwealth”⁵ or recently with empires (e.g. the Austro-Hungarian or the Ottoman); the EU is however characterized as a “non-imperial empire”⁶. The simplest and most precise characterization is the notion of “*sympoliteia*” introduced by Dimitris Tsatsos⁷, having the drawback entailed by the difficulty of translating the term in languages other than Greek. *Politeia* (polity) refers to a platonic perception of political organization, to the most idealistic and simultaneously democratic and mild, namely symbiotic approach to the phenomenon of the state that takes seriously into account the civil society. At its level, the EU can be characterized as a

⁵ NEIL MACCORMICK, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP 1999) 142.

⁶ HONOR MAHONY, Barroso says EU is an empire (*EUobserver*, 11 July 2007) <<https://euobserver.com/institutional/24458>>. HARTMUT BEHR / YANNIS A. STIVACHTIS, *Revisiting the European Union as Empire* (Routledge 2015). JOSEPH M. COLOMER, *The European Empire* (CreateSpace Independent Publishing Platform 2016).

⁷ DIMITRIS TSATSOS, *European Sympoliteia* (Kastaniotis 2001). PETER SCHIFFAUER, Constitutional Aspects of European Economic Governance: Threat or opportunity for the European ‘sympoliteia’ (*DTIEV-Online*, 2014) <<https://www.fernuni-hagen.de/imperia/md/content/rewi/iev/dtiev-online2-2014.pdf>>. GLYN MORGAN, *The Idea of a European Superstate: Public Justification and European Integration* (Princeton University Press 2005) 43.

“sympoliteia”, namely through a term that has been used for early types of confederations; through a term that brings out the inclusive character of the Union and the potential of European integration, respecting both the Member States and their people that constitute at a second level the “European *demos*” as the organic sum of the European citizens, all those who hold the EU citizenship by being citizens of a Member State and are expressed politically both as the people of each Member State and collectively at the European level as the “European *demos*”.

All these approaches start with the inability to use the term “state” for the EU and secondly, they try to constitute a notion that reflects the hybrid characteristics of the Union, provided by the Treaties. This notion is however the notion of the European Union that, despite its deficiencies and contradictions, has such an institutional stature and historical weight that enables it to be introduced with its formal name, without the need for any further characterization. After all, the whole issue is not conceptual but deeply political and historical and results from the constant confrontation between the Union and Member States, from the development of a continuous negotiation with strong transnational (inter-governmental) characteristics.

3. Revisiting the Notion of Sovereignty

The question over the effective and final crisis management brings us exactly to the core of the whole historic experience of the European integration and the related academic discus-

sion: to the notion of sovereignty⁸, the limitation of which has been accepted with an increasing pace for more than sixty years by all Member States for the sake of the Union's competences. Nevertheless, despite their strengthening, they are not transformed from "competences" to "sovereignty" and, even deeper, to "statehood"⁹ that Member States possess.

Through the pressure exerted on the state (internationalization, privatization, depoliticization) we see the questioning of the notion of sovereignty and the quality of statehood itself. Simultaneously, we see the European Union claiming for the constant limitation of the sovereignty of Member States and for elements of statehood at a second level (e.g. territory and citizenship), but not for statehood itself, even if sovereignty is an attribute of confederations (confederate states), the legal foundation of which is an international treaty. These confederate states, however, whenever they have historically appeared, are defined by the express will of the states that

⁸ NEIL MACCORMICK, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP 1999) 123. JIŘÍ PŘIBÁŇ, Power in sovereignty and its self-legitimation: on the autopoeitic semantics and contingency of popular sovereignty (2015) 11 *International Journal of Law in Context* 481.

⁹ CHRISTINE CHINKIN, The Security Council and statehood in: CHRISTINE CHINKIN / FREYA BAETENS (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 155. PETER HALDEN, *Stability without Statehood: Lessons from Europe's History before the Sovereign State* (Palgrave Macmillan 2011) 182. ALEXANDER ORAKHELASHVILI, The dynamics of statehood in the practice of international and English courts in: CHRISTINE CHINKIN / FREYA BAETENS (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 172.

constitute them as well as conclude the relative international agreement and are institutionally organized as such.

4. The Persistent Institutional Characteristics of Sovereignty

Therefore, these two notions - sovereignty and statehood - are hidden behind all issues relating to the EU Member States relationship as well as to the institutional nature of the Union. Sovereignty, regardless of how it is defined, either as external sovereignty, namely as international legal personality and independence of the state, or as internal sovereignty in the sense of popular sovereignty which is exercised directly by the electorate or indirectly, through the presumption of competence, by the Parliament is absolutely interwoven with the notion of the state and with those elements that attribute to an entity the institutional characteristics of statehood:

The soil as territory, as the place on which state sovereignty is exercised, nationality as a legal bond with the state of all the persons who are its citizens and constitute its people, the institutional constitution of the legal person of the state that is the major legal person of the state's legal order in a self-referential way and mainly the legal enshrinement as well as the pursuit of the effective exercise of the monopoly of the legitimate use of force. This last element is related to a great extent to the competence of dealing with extraordinary or exceptional circumstances; a competence that does not automatically translate into a real ability to tackle extraordinary circumstances. Nevertheless, it means testing this ability with the relative competence and, therefore, responsibility taken for granted. Under this view, competence defines a relation-

ship of legality whereas ability and effectiveness define a relationship of legitimacy. These elements are part of the continental European perception of the state and in actuality of the British perception over the Crown and parliamentary sovereignty¹⁰ as well, though under a different terminology.

The European Union is striving to acquire many of the above characteristics, with regressions and difficulties, but without this changing its hybrid and evolving character: the international legal personality is an attribute of states as well as international organizations as subjects of international law, while issues concerning the citizenship and territory of the EU have a secondary character, resulting from the nationality and the territory of Member States. This applies *a fortiori* to the competences of the Union, which are conferred.

The difficulty in crisis management does neither automatically and inevitably translate into the questioning of the state's monopoly in the legitimate use of force nor into the final incapacity of the state to deal with exceptional or simply extraordinary circumstances. The state has always had - to an even greater extent nowadays - the ability to turn to various mechanisms of international solidarity in order to deal with crisis conditions. This was initially ensured through bilateral or multilateral collaborations with other states, then at the level of international organizations, and now - for the EU

¹⁰ From recent bibliography see JANET MCLEAN, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP 2012) 1-18. OLE SPIERMAN, General legal characteristics of States: A view from the past of the Permanent Court of International Justice in: CHRISTINE CHINKIN / FREYA BAETENS (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015).

Member States - it is ensured primarily at the EU level through the institutions and mechanisms of European integration, constituting the highest level of collaboration among the Member States.

Nevertheless, the state, being gradually configured - let us say - from the Westphalia Treaty to nowadays as nation state¹¹, can be described as a historical phenomenon neither by the elements of its legal personality, internal and external, nor by the claim for the legitimization of its power due to its effective exercise. The state, in almost all cases, is connected to the national identity that either led to the establishment of the state or was configured by the existence and functioning of the state, or both in succession. The state refers to a civil society that either fought for its establishment or emerged due to its establishment and functioning or both in succession. Therefore, it encapsulates historical evolution and social correlations. The state is connected to an entire national economy that, despite its undeniable globalization, always retains its national characteristics in the sense of political concern and responsibility for the economy. This applies to the Member States of the EU as well, even under the present level of

¹¹ See the classic article by JÜRGEN HABERMAS, *The European nation-state and the pressures of globalization* 1999 (235) *New Left Review* 40. Moreover, SYLVIA WALBY, *The Myth of the Nation-State: Theorizing Society and Politics in a Global Era* (2003) 37 *Sociology* August 529. MICHAEL BURGESS / HANS VOLLARD (eds.), *State Territoriality and European Integration (Europe and the Nation State)* (Routledge 2011).

European integration. Therefore, the state encapsulates economic correlations that influence its economic functions.

All these observations apply *a fortiori* to the states' social solidarity mechanisms, to the functioning of the welfare state in any of its European versions. They apply to the functioning of the education system, to the protection of cultural heritage and the support of contemporary artistic creation, to the so-called ideological mechanisms of the state; and definitely to the guarantee of the internal and external security, to the field of foreign policy as well as security and defense policy that, both before and after the Common Foreign and Security Policy (CFSP) and the Common Security and Defense Policy (CSDP), is a *par excellence* object of state policy.

5. The Developments at the Member States Level Determine the Developments at the EU Level

All of the above are critical for the national political system, namely the political system that is constituted and functions at the level of each Member State and determines the national political correlations, the composition of national Parliaments and the character of the Member States regardless of whether they are unitary states or federations, or whether they belong to the continental or common law tradition. Nevertheless, the evolution of each national political system as well as the functioning of representative democracy at the Member State's level determine the developments at the European level, which is not functioning as a purely European political system but as a political and governance system with extremely intense intergovernmental (transnational) characteristics, in spite of the progress of European integration, the di-

rect election of the European Parliament, the strengthening of the competences and the drastic expansion of the Community method of decision-making at the level of the European Council and the Council of the European Union that lie at the core of the institutional edifice of the EU.

The political operation and mainly the strategic course of the EU depends on the correlations at the Member States level. As a result, when issues of great social and national sensitivity or economic policy that bring out the great differences and locked inequalities among the Member States are raised, the social dimension of the Union is challenged, since the intergovernmental dimension that takes *de facto* into consideration national priorities and sensitivities is intensified. Solidarity and *bona fide* collaboration among the Member States concern governments that are judged politically at the national level.

6. From the Financial Crisis to the Crisis of Refugee and Migration Flows

This is the current shape of the functioning of the EU. The fiscal and financial crisis which hit many EU Member States was tackled with special and consequently permanent economic governance and support mechanisms, under tough fiscal and structural terms. Now, only Greece actually continues to be subject to an ESM program that exceeds the usual measures that are provided in the case of excessive deficit. The Single Banking Market with the Single Supervisory Mechanism, the Single Resolution Mechanism and the harmonized (though to the moment) deposit guarantee is the most significant result of the changes that have taken place in the eco-

conomic governance of the EU and the Eurozone. Even more important is maybe the extension of the initiatives of the ECB, with quantitative easing (QE) and interest rates policy being the prime example.

Nevertheless, while the economic crisis seems to be under control, issues are raised related to the arrival at the EU of a great number of refugees and irregular migrants from Syria, Iraq and other war zones, where conditions force thousands of people to leave their homes and move to Turkey, to the non-European Mediterranean coasts and to seek to reach the EU territory. Moreover, there is a great flow of irregular migrants who search for a better life in Europe. The Schengen Treaty and Dublin Regulations, designed under ordinary conditions and not for exceptional and huge refugee and migration flows, have been deeply challenged¹². The Member States that face disproportionately great pressures due to their geographical location, and mainly Greece, claim for the expression of European solidarity, the proportional distribution of burdens, support in the guarding of borders - especially of the extensive Greek maritime borders - which are borders of the EU. But it is obvious that when the arrangements - permanent and institutional or exceptional, special and political - at the EU level are not proven effective, the Member State reemerges as the critical entity that takes measures; in other words, it exercises its sovereignty, activates its competences and tries to comply with its political responsibilities, as it perceives them.

The above considerations can explain why on the issue of the management of the refugee and migration flows the uni-

¹² GUY S. GOODWIN-GILL / JANE MCADAM (eds.), *The Refugee in International Law* (3rd edn. OUP 2007) 190, 325, 537.

lateral reactions of the Member States which believe they have exhausted their potential for reception and hospitality are increasing; the same goes for the regional initiatives with the participation of Member States and neighboring non-EU countries, excluding, though, other Member States that are directly affected. The invocation of arguments of national interest, identity and safety is indicative of the questioning of a common perception of the European interest, identity and safety. Under this view, the simplest, most practical and highly symbolic measure is the imposition of internal (national) border controls (that are provided in certain cases and under conditions by the Schengen Treaty), since, this way, the notion of state sovereignty and control over the territory is underlined, constituted exactly because it is defined and controlled as such by the relevant state.

In this case the guarding of the external maritime borders of the EU and the effective collaboration with the critical neighboring countries, like Turkey, became an issue within NATO'S competence and mission¹³, so as to demonstrate one more time that the European safety is, already from the last phase of the First World War and obviously from the beginning of the Cold War, a Euro-Atlantic issue, with NATO, an alliance with a dominant US role, being the main lever.

The EU-Member States relationship is therefore challenged and judged on the fundamental elements of statehood and mainly on the effective management of crises considered by societies as humanitarian crises for the refugees and migrants and as security and identity crises for the host or transit

¹³ Cf. the reservations of METTE EILSTRUP-SANGIOVANNI, Europe's Defence Dilemma (2014) 49 *The International Spectator* 83.

countries. The Member State always has the main responsibility for these issues and the EU policy is formally shaped on the basis of the principles governing the EU and its operation as well as the Community *acquis*; but all these issues are tackled on the basis of the choices of the Member States' governments in a continuous negotiation of an intergovernmental character, with all the inequalities of size and power entailed.

Regarding the issue of the management of refugee flows, the will of the German government to host a great number of refugees played a decisive role, despite the reactions of the Member States of the so-called Balkan route, with Austria limiting drastically the number of refugees choosing it as country of residence as well as transit country on their road to Germany. The reexamination of the national positions caused by the huge number of refugees and irregular migrants and the constant flow from Turkey to the Greek islands gave rise to a great political upheaval at the national and European level and made apparent all the insufficiencies of the EU institutional edifice. Under such conditions of pressure, the usual European narrative of values, rights and humanitarian sensitivity continues to have exponents and supporters, but it now coexists with political decisions that, in the name of necessity and realism, constitute a deviation from the strict standards of the European legal and political civilization: Turkey is considered a safe country, readmission is used even for those that qualify for the refugee status or subsidiary protection, the closed detention centers that require administrative limitations of free movement of those who are waiting for readmission etc.

In the European Council of 7-8.3.2016 and 18.3.2016, the national priorities became apparent, while the international negotiation was formed at two levels; on the one hand, between the 28 Member States and, on the other, between the EU and Turkey, which was in an advantageous position due to its control over the refugee and migration flows as well as the importance of the readmission agreement among Turkey and the Member States or among Turkey and the EU for the decompression of Greece and more generally the EU. This opens, however, other issues of Turkish interest demanded in exchange, like the generous funding to Turkey, the acceleration of the process of visa liberalization of Turkish citizens in EU Member States as well as the opening of chapters (painless ones like chapter 33) in the negotiation for the accession of Turkey to the EU.

The European Council deals with these issues in a deeply “realist” way, with an obvious disposition to achieve transnational compromises or compromises and agreements with critical third countries, like Turkey. The European compromises are decisively influenced by national sensitivities and reactions. This disposition cannot be weakened by legal obstacles. When political agreements are closed, they are configured legally with imagination and flexibility within the framework of the EU’s legal order. The way in which the Schengen Treaty and Dublin Regulation function (or not) under conditions of a refugee and migration crisis is a characteristic example. The same goes - and on this issue great attention and sensitivity is demanded - for the way in which the EU perceives and implements the Convention relating to the Status of Refugees and the relevant ECtHR jurisprudence.

7. The Brexit Scenario and the Intergovernmental Arrangement

The transnational compromise is also apparent on the issue of Brexit. The agreement recorded in the conclusions of the European Council of 18-19.2.2016, through a simple legal scheme of an agreement of all the contracting parties on the interpretation of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) according to Article 31 of the Vienna Convention on the law of treaties¹⁴, changes substantially the framework of participation of the United Kingdom in the EU. Neither the approval of the British exception nor the more articulate arrangement of the relationship of those Member States that take place in the Eurozone with the rest is the issue anymore. The issue is now the finalization of a two-speed Europe and the demotion of the principle of “ever closer union” into a principle that is accepted by many, but not all Member States; or even the acceptance of the principle that for one Member State - and then maybe for more Member States - the current

¹⁴ PAVLOS ELEFThERiADiS, *The Proposed New Legal Settlement of the UK with the EU* (*UK Constitutional Law Association*, 13 February 2016) <<https://ukconstitutionallaw.org/2016/02/13/pavlos-elftheriadis-the-proposed-new-legal-settlement-of-the-uk-with-the-eu/>>. ANTONY AUST, *Modern Treaty Law and Practice* (2nd edn. CUP 2011) 239, generally, on Art. 31 of the Vienna Convention on the law of treaties that refers to older examples from European practice, like the transition from the ECU to the Euro through the conclusions of the European Council of Madrid in 1995 that just interpreted the then valid primary EU law.

level of European integration is an extreme point from which there can be steps back but no step forward.

In actuality, we have to do with the acceptance of the primacy of the nation state compared to the Union, the questioning of the notion of the self-referential supremacy of the European Union law over the law of the Member States. Nevertheless, as far as the United Kingdom is an ECHR State Party and accepts the individual application to the ECtHR, the supremacy of EU law and the role of the ECJ has less importance. The UK legal order, the laws that are passed by the UK Parliament as an expression of parliamentary sovereignty, within the framework of both popular (internal) and national (external) sovereignty as well as the judicial decisions are, anyway, subject to international legal control, with the criterion being a treaty that has been ratified by the UK Parliament¹⁵, as are the treaties that constitute the primary law of the EU.

¹⁵ DAVID FELDMAN, *The European Court of Human Rights and the UK - Why Should Strasbourg Decide On Our Human Rights?* (*UK Constitutional Law Association*, 7 December 2012) <<https://ukconstitutionallaw.org/2012/12/07/david-feldman-the-european-court-of-human-rights-and-the-uk-why-should-strasbourg-decide-on-our-human-rights/>>. COLM O'CONNOR, *Human rights and the UK constitution* (*British Academy Policy Centre*, September 2012) <<http://www.britac.ac.uk/policy/human-rights.cfm>>

8. The Crisis

as the Field of Open Negotiation among Member States as well as between Member States and the EU

The national political correlations in the interested as well as in all Member States lie at the core of the issue. In other words, at the core of the issue lies a political (social, ideological, communicative) questioning of the European Union and its definite value. We have, therefore, to do with a Euroscepticism that has ceased to be party-based or social or political, has become national and institutional and has entered into the continuous transnational negotiation that determines the future of the Union.

Therefore, the state functions both as a driving force and as a brake on the course of European integration. The elements that constitute the historical and institutional composition of the state, statehood and sovereignty are challenged at both levels: both at the Member State and at the level of the Union that claims those elements from the Member States, but without the support of the Member States and their agreement it faces the questioning of the most foundational element of sovereignty and statehood, namely crisis management.

The various crises thus constitute the field in which an historical procedure is continued in an intense way; a constant open negotiation both among Member States and between the Member States and the Union. But the result of this negotiation is not final and indisputable. The constant crises have transformed the viewpoint for both the limits and the self-sufficiency of the nation state as well as for the existence of a historical entity called European Union in a way that moves beyond the institutional *acquis* and the economic added

value. Uncertainties and backtrackings have taken place and will continue to do so in the future; Europe, though, as a field of a unifying process exists historically and geographically in spite of the political and legal regressions.

Nevertheless, now the central stream of public discussion on Europe does neither contain even the ultimate target of a Federal Europe that would be a federal state nor the restoration of the idea of a European Constitution nor the need to fill the democratic deficit nor the quest for steps at the level of Common Security and Defense Policy nor even the old and permanent mantra of the need for institutional steps of political integration that will support retrospectively the steps that have been taken in the field of monetary union and economic governance.

The urgent issue is now the confrontation of a very pressing conjuncture that is transformed, constantly opening new fronts, as well as the protection of a significant part of the European *acquis* with concessions and compromises; the assurance of the cohesion of the Union under the simple notion of all Member States staying in the Union, even under intense exemption clauses, and all Eurozone members staying in the Euro as well, as the Brexit discussion was preceded by a Grexit discussion that has not entirely died down.

9. The Current Aspirations of European Integration

The aspirations of European integration seem to be limited or rather to abandon the certainty of a linear course towards an even deeper unification. It has become apparent that the future of the European integration will not be self-referential but depends on the responsiveness and openness of the

Member States that have wielded the power for future developments.

The latest developments on the refugee and migration issue do not only bring out the highly transnational/intergovernmental character of the EU and the way in which the continued intergovernmental negotiation evolves, always under the strong presence of conjunctural political expediences and needs in all Member States. They bring out the limits of the international role of the EU as well. The refugee flows from Syria constitute a problem that is not only European but international, falling within the competence of the UN not only as a humanitarian issue that concerns the Office of the United Nations High Commissioner for Refugees but as an armed conflict, as a problem of international security that falls within the competence of the Security Council. The international political stature of the EU is neither equivalent to the sum of the international political statures of its Member States nor exceeds it, but practically falls short of it. The activation of NATO for the surveillance of the Aegean and Eastern Mediterranean in order to decrease the refugee and irregular migration flows from Turkey to the Greek islands underlines the international character of the problem. Moreover, it brings out the operative incapacity of the EU to control its borders, namely, to tackle an issue of police and not military character, an issue of border guard and coastguard. The European discussion on refugee and migration flows does not include serious and reliable European initiatives for the reasons that lead hundreds of thousands of people to leave their homes and countries. And the truth is that the EU does not have the international political weight to take on and coordinate such initiatives for problems (like the war in

Syria) where the major international actors, like the US and the Russian Federation as well as many crucial regional actors, play a central role.

Moreover, on the issue of the UK's staying in the EU and the imminent referendum, namely on an issue of European dimension, and of an institutional, political, economic and not military and humanitarian character, the EU has appeared quite eager to negotiate and agree upon special arrangements. A Brexit would cause a reexamination of the determination of Europe as a historic and geographical entity and not only of the institutional entity of the EU. Nevertheless, though this British pressure, the EU was forced to accept that all the aspects of the European *acquis* are renegotiable.

Experience from various crises that the EU was asked to confront during the last years demands significant political initiatives to be undertaken in the direction of the resurgence of the European integration. Initiatives at all levels, from the competitiveness of the European economy to the redetermination of the welfare state; from the European identity to the Common Security and Defense Policy; from the filling of the democratic deficit to the amendment of the institutional system of the Union.

Such great initiatives can, however, be undertaken only by the Member States, each of which is busy with pressing national policies, economic and social needs and priorities; with elections; with strong Eurosceptic or nationalistic tendencies. This is the fundamental contradiction of Europe; nevertheless, this can be its major advantage if it leads to the adoption of flexible and creative methods that ensure the prospect of European integration, with the criterion being - inevitably - the long historical time.