

Prof. Stephan Hobe

Doctor honoris causa of Sofia University “St. Kliment Ohridski”

Academic speech

The (legal) future of the European Union

Currently nobody can deny that the European Union is in considerable trouble. There was not only the referendum in the United Kingdom on an exit decision of the United Kingdom on 23 June 2016. For the first time it had been made visible that there is an option for countries to be allowed to leave the Union. Also some rather problematic handling of the negotiations with the bilateral international trade agreements with Canada, the CETA, and with the United States, TTIP, led a considerable number of people to have doubts on whether and how much the European Commission was “in charge of the situation”. Moreover, the current internal situation in Poland and Hungary aiming at a considerable restriction or even denial of basic human rights like the freedom of the press and of the judiciary leave us in Europe with the impression that there may be wide gaps of the value systems among the still 28 EU Member States. The European Court of Justice has just confirmed the violation of the European treaties by the Polish Government. Also, since a couple of years Europe is confronted with a deep financial crisis. This concerns the very core of the European Union, its common currency, the EURO, that seems to be in danger and the countries of Southern Europe like Greece and more recently Italy are not out of the danger yet. Rather Italy’s insisting on its deficit making budgetary exercises is an extraordinary example of a total denial of European discipline. And finally one development has really topped the entire situation: This was the stream of refugees starting in 2015 that has overwhelmed many European countries and has made evident that there is a considerable split of opinions on how to deal with these problems. This all doesn’t make it easy

to wholeheartedly defend what the European Union constitutes today. Therefore, in the following I will ask the question on whether from a legal perspective there are fundamental problems that may lead to an innovation or even reinvention of the European Union. Bulgaria which had the EU presidency in the first half of 2018 has seen how difficult it is to handle the multiplicity of problems.

What these observations shall aim at is to answer one fundamental question: Does the EU have a future? And, more precisely, does the EU have a future in its present shape? I will approach the question in three steps: After a short and necessary description of the history of European integration, I shall somewhat highlight the main problems of the EU and will particularly focus on legal reasons for these problems. This shall finally allow for some concluding remarks about the future of Europe and Bulgaria's role in Europe.

I. The history of the European Integration

Before coming to a description of some of the rather critical points and their legal ramifications we should briefly take into account what made up the history of the European Union. It all started in 1952/53 as a result of the Second World War when wise statesmen like Jean Monnet, Alcide De Gasperi, Robert Schumann and Konrad Adenauer were of the firm opinion that Europe needed some institutionalized construction in order to avoid what had happened before, e.g. warfare even among European countries. With the European Community on Coal and Steel 1952 and the European Atomic Community in 1957 two communities were created that had for purpose to establish a system of supervision of armaments in order to limit the danger of countries to fabricate weapons for warfare purposes. The most important organizational mechanism was certainly the supranational character of these new communities. They would enable – what is rather extraordinary in international law - the organs of the Union and in

particular the Commission, the Council and the Parliament to enact law and other single actions with direct effect for the citizens in the member states. The most important community was certainly the European Economic Community (EEC) which was founded in 1957 and had for purpose to create a common market, i.e. a market without any internal customs but with an external custom (so-called Customs Union) as well as with the basic freedoms, at the beginning of purely economic nature but later much more far reaching. The freedom of movement for workers and entrepreneurs, the free movement of goods, the free movement of capital and the free movement of services became the core of an enlarged European market that over time grew from six founding members (France, Germany, Italy, The Netherlands, Belgium and Luxemburg) to now 28. That it may in a foreseeable future be 27 member states does not change the fact that there was this considerable augmentation of the members. In other words: The central message of the foundation of the European Communities was that all – at that time Western - European countries should have one common goal: The trade which would make it their self-interest not to destroy the neighbor but to help him to grow.

And Europe grew as we have seen. There was not only the number of countries which were initially opposed to the European idea, beginning with Great Britain that joined the Union in 1972, there was also a Southern enlargement with Greece, Portugal and Spain, (all former dictatorships) and as a culmination the enlargement of the European Union to some of the former Eastern Bloc countries like Poland, Hungary, the three Baltic States, the Czech and the Slovak Republic. It may have been a bit premature to ask those countries to join the European Union but it was important to stabilize governance of certain Western values for more countries. Later, as is well known, next to Romania also Bulgaria joined the Union. Bulgaria is neither a catholic nor a protestant State but a Christian Orthodox State, one of the first ones of this kind in the entire EU.

As is furthermore known some countries are currently on an application status, like e.g. Turkey which however, due to more recent internal developments does not currently really have a chance to join the European Union.

A really culminating point of the idea of integration was then the adoption of the Treaty of Maastricht, a reform of the previous Treaty of Rome of 1957, in the year 1992 which created the European Currency Union that had for purpose to provide for a single monetary European currency, the Euro. It was formally introduced in 2001 and is now as you all know in the pocket of European citizens in 19 Member States (not e.g. in the UK).

Thereafter, shortly after the change of the century two other projects tried to further strengthen the European Union and the cooperation of countries in the European Union which shall just very briefly be mentioned here. There was first of all with the idea of creating a Fundamental Rights Charter, reached in a Convention of representatives of the different member states, a project which was still somewhat successful; although e.g. important countries like the United Kingdom and Denmark declared their reservation concerning the direct effect of this Charter. Today these fundamental rights belong through the explicit inclusion in the TEU to European primary law.

The second project was, however, much less successful and can be seen as more or less the end of the pro-European stream into the direction of an ever closer integration. This was the project of creating a European constitution – besides the national constitutions. The peoples of the Netherlands and France refused this idea of having enclosed the most fundamental principles of the European Union in one constitutional document by referenda in these countries and just stopped the entire project.

The disappointment was big! Europe was tumbling! Politicians tried to explain but were not really able to. Only after a couple of years under German leadership, European countries met again in Lisbon and put together what is today in force: The Treaty of Lisbon. So the Treaty of Lisbon tried to save some of the fundamentals of the European Constitution and to make all the things more acceptable to countries. This constitutional treaty was after many problems had overcome - the repetition of the referendum in Ireland is only a good example for that - finally adopted and went into force in 2009.

But, from this moment on, European integration had lost its momentum. And all the problems which were listed in the introduction have to do with some fundamental points of disagreement among European Member States on the purpose of the European Union.

And the financial crisis as well as the anticipated Brexit are but concrete examples of such European hangover for many.

II. The Problems

I would just like to highlight three main problems.

1. If one looks more closely into the problem areas than at the beginning we can first state that the Brexit, e.g. the referendum relating to an exit of the United Kingdom from the European Union is not really a problem of European law. We must however see that with the Lisbon Treaty for the first time the explicit permission to leave the Union was incorporated in primary law. Art. 50 of the Treaty provides for the first time an explicit provision that allows for the exit on the basis of an accompanying international agreement enlisting all the details for the future cooperation of the country with the European Union. One may very well have doubts on whether or not the inclusion of this provision – which really stems from the European

Constitution – was a wise thing. It could rather be understood to be an encouragement for those countries who have an inclination to drop out, or even more dangerous, for people who for their very personal reasons dislike the European Union and therefore make strong propaganda against the Union. Jörg Haider of Austria was and Nigel Farage of the United Kingdom as well as Marine Le Pen, France, and even perhaps Boris Johnson from the UK are good examples for this. But the core of the Brexit is not really a fundamental problem of Europe. Although it looks like some European themes were on the agenda, particularly the problem of migration and other much more internal policy problems of the UK were probably crucial for the majority to vote in favor of a Brexit.

2. Whether or not the European Union in the negotiations on the bilateral trade agreements with Canada, USA (CETA, TITIP etc.) showed uttermost professionalism was questionable. More important is however, whether it will stand the test of dealing with questions of internal problems of human rights in Poland and Hungary. The Union has taken up the case of the press laws and the judiciary in Poland quite successfully before the ECJ and intends to enact sanctions against Poland which can at the uttermost lead to a denial of voting rights in the Council (Art. 7, para. 3 TEU). It seems however to be doubtful whether it will come to sanctions because such sanctions need unanimity in each case and it is obvious that from the two countries involved, Poland will veto any sanction against Hungary and Hungary will veto any sanction against Poland.

3. The two problems to be described now are however of rather deep and more fundamental character. The problem of Greece as was the problem of Portugal, Spain and Ireland after the World Financial Crisis of 2007/2008 is the problem of the Euro. These countries are members of a club without, as it seems, being able to live up to its standards. It is impossible for them to devalue their currency, e.g. to make their products cheaper or to

enhance their chances on the market because there is no flexibility and no floating of currencies any more since Greece is member of the European Single Currency Union. Here are very important problems at stake. The most important problem is how Europe is going to deal with its own principles in cases of emergency. Since it was considered to be important to keep Greece in the Currency Union, the previously existing No Bail-Out Rule (each country must help itself) was changed into its opposite. The No Bail-Out Rule – each member State must see that it masters its own problems - was a fundamental basis of the original construction of the European Union. This poses some fundamental problem that I will address in the following section with regard to the risk for European Law.

4. And finally the refugee situation. It has profoundly split Europe. The Schengen scheme of having open frontiers and asking the country where the immigrant enters Europe first to engage into the entire refugee procedure doesn't work anymore. It has been replaced by border controls - Schengen has practically been abandoned. Europe is completely broken in pieces after the enormous stream of refugees in 2015. And what is worth highlighting is the fact that there is a fundamental disagreement among the countries on how to deal with the refugee situation. There are practically all countries from Eastern Europe and the majority from Western Europe that are strictly opposed to any acceptance of refugees from Africa and Afghanistan within the European region. On the other hand there are few countries like Germany, Spain and France who are open – some say too open – in accepting refugees. They started however reformulating their policies more recently. What is in my opinion very frightening is the fact that there is such deep and fundamental split between Western Europe and Eastern Europe.

III. Legal reasons for the current crisis of Europe

Let me in the following ask for some of the legal reasons of the current problematic situation. I just want to list three of them which of course does not mean that there are not more problems.

1. Respect for the law

My first point is that the lack of respect for written rules may have considerably destroyed the authority of the law. This is especially the case for economic matters and here particularly in terms of financial affairs. It particularly affects the fundamental form of cooperation of the European States, the cooperation within the Currency Union.

Already with regard to the negotiations on the entry into the Currency Union some typical compromises diluted the authority of the law. There were clear criteria formulated by lawyers, economists and by politicians for an entry into the Union. Some countries had a problem but politicians later said: A Currency Union without country xyz (I don't want to mention particular countries) is not a real Currency Union. So, the criteria were diluted to allow the wanted but weak candidates to join the European Union.

The same happened with regard to the avoidable deficit of member states which may lead to a serious warning letter of the Commission to their governments if they haven't achieved the acquired maximum inflation. France as well as Germany violated these central rules but no sanctions were taken – presumably because one was afraid of doing anything against the biggest European countries. The same political arguments were prevalent: “What is a Currency Union without France and Germany?” This was the question which seemed to provoke a clear answer. Also some countries were after thorough consideration by the EU asked to join the Union who thereafter turned out to have considerable problems with some fundamental principles like the rule of law. And – as was mentioned – currently Italy is strongly opposed to any budgetary discipline and the EU Commission seems to tolerate this.

Despite obvious hints to widespread irregularities and obvious hints of the Commission which accompanied the accession negotiations with those countries, the political class denied the existence of these problems and allowed their adherence.

Finally the change of the No Bail-Out Rule in Art. 136 III TFEU was highly problematic. But this fundamental change of the philosophy of the Currency Union was made in order to avoid the consequences of Greece leaving the Union.

All this is a very dangerous development from the legal point of view. It fundamentally dilutes the respect for the law respectively the rule of law.

2. A Missing Ultimate Goal of the EU.

Another problem of fundamental character is that there is an inherent fundamental disagreement of countries with regard to what the European Union shall become at the end. Is this just a club of independent sovereign states or is it designed to become a federal state at the end? These are very important problems and questions because there are so different aspirations of countries and a different political conduct for example between Germany and France on the one hand and Great Britain on the other hand. I believe that the current crisis of the European Union which lasted already much longer, has made it very clear that we should abandon any idea of Europe becoming a federal state. This is true because it is simply not wanted by the majority of the European citizens. There is no state because there is no common European citizenship. The Union citizenship does not replace national citizenships and this is ok. Only if it is made very clear that Europe is not going to replace the nation states then we can think of common projects that can be achieved through a closer cooperation of states. And here we can see a certain

flexibility for countries to come up with a more advanced form of cooperation vis à vis others who cannot go there.

3. The Subsidiarity Rule Needs to be Strengthened.

Finally I want to highlight that the idea of subsidiarity should be considerably strengthened. As is well known, according to the principle of single authorization the member states are the sovereigns. They determine on how much of their competencies they want to transfer for a given time to the European Union. Only in very few cases, i.e. external custom and the currency Europe has an exclusive competence. In most of the cases the member states are still the competent players. But in all other areas mentioned in the Treaty on the Functioning of the European Union there should be a substantial competition between the Union and the member states on who is going to fulfil which task. It is the section of split competences in Art. 4 TEU where either the Union or the member states may be competent. If the Union, however, wants to act according to Art. 5, para 3 TEU it must prove that it may be entitled to act because the task cannot be sufficiently fulfilled at state level and for the reason of the amount of the task and its size the European Union would be better equipped to do. In the Protocol of Subsidiarity, annexed to the Treaty on the EU in 1992, fundamental rules for the fulfillment of these principles are given. We must be aware of the fact that most of the competences are split competences. But I am not aware that with regard to this kind of competition, this kind of proof has been carried out in a satisfactory way. It has a lot to do with the possibility of judicial review of such decisions. We must strengthen the possibility to review assertions of the European Unions' Commission, that in particular cases the Union would be better equipped to fulfill a certain task. Here it has not been done enough yet. This is in my opinion one of the most important prerequisites for a better fulfillment of the European Union. It is so important to strengthen this because the democratic legitimacy of the Union still stems mostly from the people in the member states. So their role and the role of national parliaments in the terms of

the adoption of the European law should be strengthened. This would give citizens more of an impression that important things in Europe are dealt with in a way that they may be familiar with. And in any case there should be a strengthening of the subsidiarity law suit - it should be facilitated for member states to claim the violation of the principle of subsidiarity. The European Court of Justice should hear those cases and decide them as a matter of priority.

I thus summarize that more respect for the rule of law through European institutions and in particular by the member states is necessary, that a farewell to the idea of the European federal state is important and that the meaning of the principle of subsidiarity could be a legal answer to the current crisis of the European Union. One thing is clearly of fundamental importance: the main decisions pertaining to Europe need to have full democratic support what they can only get at a member states level.

IV. The Future of Europe

What does this all mean with regard to the future of the European Union? In my opinion, certain prerequisites for the future of Europe need new and important legal decisions:

1. It should be clear that Europe does not aim to become a nation state. There is no nation, there is no European people, any idea in favor of a European statehood should therefore be clearly abandoned.

2. From the European White Papers as published in 2017 there may be indeed two or three options to be looked at more closely. In view of the crisis the first option “business as usual” looks not being feasible as well as option two “concentration of the internal market”. Therefore

one could look at option three called “who wants more, does more”, and option four “do less but more efficient” or option five that there should be overall more Europe.

In view of the multifold problems we have mentioned at the beginning that any end of the European Union in view of the need for European integration cannot be put into serious consideration. It seems to me that a mix in the sense of a “coalition of the willing” or “who wants more, does more” would be the right mix .But what does this mean in practice?

a) Let’s start with the internal market. This is the essential of the European integration. Not even the British have put the need for the internal market into substantial doubt. It is essential but it needs to be strengthened. Therefore the rule of subsidiarity should be much more closely followed with the possibility to even retransfer tasks and policies from the European Union to the member states. Not all that looks like having a transboundary effect must necessarily be followed at the European level. Moreover through a strengthening of the Unions need to give reasons (according to the regulation on subsidiarity of 1992) for a Unions competence and the facilitation of law suits against this assessment one should make this subsidiarity rule to become a firm and important principle.

b) The Currency Union has become another core pillar of the European Union. However, it looks like some countries are in real distress when considering the fulfilment of the roles of the Currency Union. Perhaps it would be wise to form a core group of European countries that can still fulfill the criteria of the Currency Union and leave it to the rest whether they want to stay or whether they want to change back to their national currencies.

c) What furthermore seems necessary is cooperation at different levels. As previously pointed out the internal market should be the center of activity of the European Union. Next, the

Currency Union should be construed as a must only for those members who stand a real (economic) fitness test.

d) Moreover, for me three policies seem to be absolutely necessary. Here I plead for a flexible but differentiated integration. This is, on the one hand, the making of certain basic tasks mandatory for all states and leaving the rest to be achieved by those who are willing to put more into these policies.

Here it is becoming more and more evident that the foreign and defense policy should be formulated more in common. Particularly in defense matters it simply makes no sense that common values like the ones protected by the member states of the European Union should not be commonly defended. As with the formulation of other parts of foreign policy, we should not aim at a too close cooperation but leave it in the field of looser integration.

Moreover because of their extraordinary and border transcending character agriculture and environmental protection should stay to be mandatory activities for all members States.

Finally the important question of migration overshadows everything. Although a European Union, based on solidarity, should be the aim one must in view of the existing reality confine the achievable possibilities at the moment to the principle obligation of all European countries to contribute for humanitarian reasons to the migration policy be it either in the form of making more by supporting the policy through financial means. Or, those countries who want to go ahead and find this an important task to be fulfilled can do more. It should also be mentioned in this respect that it must necessarily belong to the European migration policy to become active not only in Europe but in other countries through a farsighted foreign and development policy.

Finally it should be mentioned that it may help most to fight the reasons for migration at the source that is in the African countries.

e) Finally one should also think about some institutional necessities for the future of the European Union. There must urgently come the political will for a strengthening of the principle of democracy at the European level, i.e. there should be a more visible idea of accountability which should start with a directly elected head of the Commission with its entire Commission being responsible to the European parliament. Only if the population of Europe gets the visible idea of responsible politicians fighting for Europe there is a visible change of closing the gap between Europe and its citizens.

V. Conclusion

50 years of integration of Europe have brought an unprecedented era of peace and freedom as well as of welfare. It is time to head for some fresh start and this fresh start should be a start in a moment of crisis. Flexible but differentiated integration - a set of tasks mandatory for all member states and others according to the rule “who wants more can do more” - seems to be an appropriate answer to the current problems. Furthermore, there should a core of tasks necessary to be fulfilled by all countries and a random sphere where countries can choose of how much and how they may and want to participate. Only if such different forms of integration can be taken, Europe in my opinion has a firm chance to stay as strong as it has been in the past. And this would of course also for Bulgaria be a good chance of a wholehearted work for the European Union.

Europe needs a strong Bulgaria – and Bulgaria needs a strong Europe.
