Carmen-Mariana MIHALACHE
Universitatea “Ion Ionescu de la Brad “ de tiin e Agricole i Medicin Veterinar Ia i

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Theoretical article

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Abstract

The purpose of this paper is to highlight the fact that the modern national state, oscillates on an orbit of conflict of laws, often marked by delegations of powers from the national to the supranational level. The movement of people, goods and services have always pointed out, through their national element, the appearance of conflicts of laws in the context of their migration to other national spaces, being carriers of cross-border implications.

This issue is characterized by geopolitical developments in the international community that created the United Nations Organization and other alliances and delegated competence of interstate conflicts to the International Court of Justice on the one hand, in order to avoid another world conflagrations. In another train of thoughts the geopolitical world is constantly changing and its appearance, the geopolitical construction leads to a new system of law, the European one and other conflicts of laws which I symbolically call national versus European.

If the beginning of the 19th century was marked by the nationalism era, national sovereignty, pointing out the great empires collapse, the 21st century is marked by globalization, the federalization, the creation of entities that generate possible conflicts of laws and delegation of state powers.

The United Nations Organization and the Charter which defines it, represents the pacific concept of the interstate conflict resolution in order to avoid armed conflicts. In this framework we point out the existence of the International Court of Justice, as an arbitral court agreed by Member States with well-defined role in addressing interstate conflicts, the contesting states accepting the resolution of the Court in its capacity as an international arbitrator.

The unanimous current is that we can not speak of monistic or dualistic tendency a priori but it is considered that either of the two currents is externalised depending on the actual way of expression of the legal entities involved.

Authors such as Sir Gerald Fitzmaurice, considers that legal assumptions launched by the two monistic and dualistic currents are false as long as the action territory for the national legal system and the international one is different, each with its area of jurisdiction supremacy. The real conflict residing in the opinion of other authors (Rousseau,1953**,**Droit international public, claims the priority of international law in its area of jurisdiction.) actually occurs between the international obligations of states and their national rules.

The conflict does not automatically mean the repeal of internal rules in favor of the international ones but it creates only a matter of state responsibility at an international level. In these circumstances, the State can not be relieved of this responsibility baseed on the fact that the assumed state obligations are contrary to its system of law. Moore,1872 Alabama claims arbitration, The United States won the case against Great Britain who has breached the obligations of neutrality on the civil war.).Such an interpretation avoids that, by changing the national government or other deciding state factors, the national state could exempt itself from assumed international obligations.Therefore it is considered that, unlike the national legal system, the international law (Ian Brownlie ,2003, Principles of Public International Law,Sixth Edition ,Oxford University Press,2003,pp.3-pp.33) does not have as a formal source of law the legal custom, unable to rule on, as in national law, by decoding the intention of the legislature as a whole, accredited by the constitutional law of any state.

The fundamental rule of international law is that the main source of law will remain states' willingness expressed by international treaties and agreements to which they acquiesces as signatories.

The statute of the International Court of Justice is defined by art.38.1 which provides that the Court will settle disputes between Member States of the United Nations Organization, on the basis of international law which include general or particular agreements recognized and accepted by the contesting states, based on the principles of law committed and validated by civilized nations, based on court decisions, according to settled case law defining the procedures for settling international disputes arbitration, and points of doctrine of well-known national jurists, as well as the principle of fairness,(ICJ Reports 1969).The reference on the principle of human rights law is found in the preamble of the UN Charter as well as in the diplomatic practice.Thus in the Corfu Chanel Case dispute situation the Court recognized the need to take into account the human elements.North Sea Continental Shelf Cases.

The Court applied the principle of fairness in sharing the continental shelf of the North Sea. A similar situation was reflected by the Fisheries Jurisdiction Case-United Kingdom v. Iceland the court forcing the two countries to respect the principle of equity by negotiating on the question of fishing rights between two states, (ICJ Reports 1974) of humanity in terms of human values **.**The interest legitimacy principle can play an important role in creating exceptions to the rules of international dispute settlement. Judge McNair manifested a separate opinion on the principle of interest legitimacy in the Fisheries Case dispute, who claimed that manipulating the territorial boundaries in order to protect economic and social interests of a state leads to the substitution of objective international standards with the subjective ones which can create dangerous precedents. concerning the legitimate interest.

Another type of conflicts of law may arise from international obligations requiring the trial of persons for crimes against humanity. For example the International Military Tribunal at Nuremberg and other national courts do not admit to prosecute citizens for war crimes as long as in terms of national law this can not be classified as such.

The rule of law (Cristina Dallara,2009 European Union and promoting Rule of Law in Romania, Serbia and Ukraine, European Institute, .) and the European Union as concepts are part of the realities of the 21st century, where the national states of the European continent from the desire to be part of a centre of political and economic stability tend to join the European model by becoming a Union membership.

This reaction behaviour from the part of the state actors is classified as gravity model described by Emerson and Noutcheva (2004) as the manifestation of the tendency of states to rally to a

reference model according to its reputation and attractiveness.

The socio-political doctrine concludes that the EU remains the most active political actor, who initiated as the main policy promoting democracy by expanding its borders towards the East. The political criteria set by the EU for its accession system oscillates around the concept of *rule of law* that can be synthesized as „a procedural feature of a good democracy related to freedom, achievable through legislative assembly which establishes rights and freedoms and help translate them into practice.Thus in 1999, the EU has formalized its policy towards the Western Balkans, the Stabilisation and Association Process, called SAP and in 2000, by the Council of Fereira, the union formally defined these countries as potential candidates. The next step was represented by the European Neighbourhood Policy (ENP) addressed to the former Soviet republics and some Mediterranean countries; The European policy is characterized as an operating model based on concentric circles represented by the acceding countries, potential candidates and neighboring European countries, which are activated depending on the progress of states to reform and functioning of the national institutions according to European standards. This type of behavior of the European Union as a political actor has been awarded by poltiologists based on the research study called „ Evaluating the Influence of EU democratic rule of law promotion in variably integrated Countries: Romania, Turkey, Serbia and Ukraine as case studies", study coordinated by professor Leonardo Morlino in collaboration with the Centre on Democratic Development and Rule of Law, Stanford University (California, USA)

The concept of rule of law defining for the EU policy, inevitably arises a conflict between national and European law imposing itself as a standard by transferring European standards nationally, a transfer targeting administrative capacity of implementing the European policies, the independence and efficiency of the judiciary, anti-corruption policies, measures against abuse of power in order to protect the rights of civic freedoms as values defined by the European Convention on Human Rights.

The European standards and becoming a member of the European Union has brought a different kind of conflict of laws between the system of European and national law.([**C7**]G.Ispas, A.Manea, 2013, *The International Jurisdiction, between the State Sovereignty and the Need of Sanctioning the Atrocities,*G.Ispas, 2011) to the Treaty of Lisbon in 2009, also called the Reform Treaty, the areas of competence for the national as well as for the European law were established, by the concept of delegation of powers from the national to the European level.

Article 1 of the Treaty of Amsterdam, came into force on 1 May 1999, declaimed that the treaty itself represents a new step consisting in creating a union among the peoples of Europe in which decisions will be taken based on the conformation to principles of transparency and the widest openness towards citizens.The European Union through the provisions of the Treaty becomes a continuer of the European Communities, the purpose of the treaty being to establish the types of policies and arrangements for cooperation in a coherent and supportive way by developing relationships which will be established between each nation and national state, member of the Union. (Philippe Leger, 2000, Union Europeene, Communautee Europeene,Commentaire article par article des Traites UE et CE, sous la direction de Philippe Leger,Editura Dalloz,Paris)

If authors such as Frederick Anton believes that the foundation of the Community law is represented by the Amsterdam Treaty, which defines de facto and de jure the European citizen awareness of specific rights and obligations, we nevertheless consider that the future of Europe by a union of states is substantiated by the Lisbon Treaty in 2009, which puts community construction on other foundations.

Thus, such writers as Christine Kaddous and Marianne Dony**,** 2010, D Amsterdam a Lisabona , Dix ans d espace de liberte, de securite et de justice ,Dossier de Droit Europeen, colection dirigee par Christine Kaddous et Bernard Dubey,Helbing Lichtenhahn, Bruylant,L.G.D.J.),believe that the Lisbon Treaty changed the operating parameters of the area of freedom, security and justice. It is considered that the provisions of the Treaty mark as a novelty the disappearance of the pillars which establish the pattern of intergovernmental cooperation, opting instead for a common European legal framework by recognizing and pointing out all its features.

The most sensitive point is and remains the legal rules of criminal law, which, without sounding nationalists through such an assertion, remain as attribute of sovereignty and why not of state independence in a given territory, the enforcement of the national criminal law being primarily related to the principle of territoriality, then followed by that of officialdom.

Authors such as Jean-Louis Halperin 1999 Entre nationalisme juridique et communaute de droit,Presses Universitaire de France), deals with the idea of legal nationalism in terms of private international law known as the branch of law that resolves conflicts arising between the laws of national states, arising amid the mobility of people and goods in other states, branch that answers the question which one is the law applicable to the dispute which bears, from the perspective of the national judge, the trade of the cross-border

element, as analogy, the debate motto apparently or not characterizes the conflict between national and European legal systems under the aegis of the Lisbon Treaty of 2009. Is released as a point of debate: which are the ways of the law, the traditional concept, one-dimensional and very well hierarchized or a mobile legal structure model, multidimensional and random, wanting to draw attention of theorists, practitioners and civic consciousness of every citizen that we live an era of changes in legal system which is reflected in the daily life of the city.

The chapter Justice and Domestic Affair from the Amsterdam Treaty was now replaced by Title V of the Treaty of Lisbon, called Liberty, Security and Justice (Jaques Jean –Paul, 2002, La question de la base juridique dans le cadre de la justice et des affaires interieurs, in De Kerchove Gille/Weyembergh,Ed. L espace penal europeen,enjeux et perspective,Edition de l Universite de Bruxelles,p.249-256) and the role that is intended to be met by the European Court of Justice will be much wider.

The most important step that means solving many previous controversy is considered by legal doctrine granting legal personality to the European Union with a clearly established competence in matters of foreign policy, giving rise to obligations on the EU institutions and Member States. It thus completes the eternal dispute arising from the fight against illegal immigration and international terrorism, at least in terms of the legal basis., if we refer to art.216 of the Treaty on the Functioning of the European Union.By harnessing the discussions which took place at the Tampere Council the legal content of Article 68 of TFEU emerged, by which the European Council defines the legislative and operational policy guidance on the area of freedom, security and justice, which transforms the European Commission into an executive power. This clear separation of the European institutions' duties equated to cessation of disputes and settlement of eternal disputes regarding the primary legal basis related to the need for the EU as a legal entity to have powers in legal relations of repressive nature within the competence delegated by Union states.

Currently we can not speak of an European criminal code but only of police and judicial cooperation mechanisms that are functional. The judicial criminal nationalism makes impossible, from the perspective of the author of the study, the promulgation in a future more or less distant of an European criminal code.

The provisions of Article 71 of TFEU outlines the legal framework for operation of the Committee on Internal Security as part of the institution of the European Council, which aims to promote and secure functional cooperation on internal security matter, without infringing the jurisdiction of the Member States, drawn from Article 240 of the TFEU.

The legal doctrine considers that, based on the declaimed willingness of Member States, to have the High Representative, an European Minister of Justice, the adopted formula is not a progress but a continuation of the inter-institutional cooperation model in the area of freedom, security and justice, defined as further normative system by framework decisions. In this context, we can state that the role of the provisions of Article 82 of TFEU, in the spirit of harmonization of differences between legal systems of the Member States, suggests as procedural instruments framework decisions, issued by the Parliament and the European Council, in order to unitarily determine minimal criteria for mutual recognition of judicial decisions on the one hand as well as to equalize the police and judicial cooperation procedures. In this regard, there is, according to the doctrine, a lack of clarity in the tools commonly used as well as in regulations issued for this purpose, the European institutional system bureaucracy feeling the difficulty of finding some solutions that would aim a harmonization of areas of common interest for Member States established by the Treaty of Lisbon. (Kokott- the advocate general , 2004 in Case C-105/3 Pupno c.Maria Criminal Procedure, Rec.2005, pI-05285)

Authors such as Henry Labayle, concluded that the Union's legislative expansionism continues in repressive matters too, and here we consider the mechanisms of criminal liability, if correctly corroborating between two articles of the Treaty on the Functioning of the European Union, namely the provisions of Article 3 the 2nd paragraph with reference to Article 67 paragraph 3. Thus, if Article 3 states that the European Union is a territorial area that offers its citizens an area of freedom, security, freedom and justice without borders, in the final part of the 2nd paragraph of article 3 of the TFEU there are already outlines of repressive instruments needed to be regulated in order to ensure free movement of persons, the Union being obliged to implement legal mechanisms to control the external borders of the European union space, regarding the asylum, immigration and crime prevention on the two phenomena. Article 67 the third paragraph strengthens the legal basis of creating repressive apparatus of the Union on conduct that violates the compliance report induced to Europeans and all other matters of law that circulate or operate in this area of freedom and security. In this manner, this article make reference to measures to create all legal mechanisms of criminal liability of legal issues affecting the European legal order and by default the rights and fundamental freedom protected by the European Convention on Human Rights, which became part of the union law.

The effective measures to be taken to prevent any type of crime manifested in the European legal space including the racism, xenophobia and terrorism, are not just to improve the cooperartion between the judiciary and criminal prosecution of national states, members of the European Union, the mutual recognition of criminal sentencing, decisions given by any European member state, but also to bring closer the national legislation. It is estimated that in this context the principle of subsidiarity is gaining ground with respect to differences between legal systems of the Member States, bearing the imprint of national custom and tradition of each of them. This evolution of the application of the subsidiarity principle enacted by Article 5 of TEU, seems an alternative to the phenomenon of regulatory harmonization.

We consider that the implementation of the principle of subsidiarity does not generate a confrontation with the judicial nationalism current as long as national parliaments are effectively exercising the mechanism on the judicial control established by the Protocol on the application of the principle of subsidiarity and proportionality introduced by the Treaty of Amsterdam and reformed by the Lisbon Treaty, enacted by the Treaty of Amsterdam, reformed by the Treaty of Lisbon, provided the compliance of an obligation from the part of the Commission to prepare a Green Paper before proposing legislative acts, which proves obtaining national approvals and the consultation with civil society. Based on the protocol reforming by the Lisbon Treaty, the national Parliaments, in respect of the legislative projects promoted by the Commission can exercise twofold monitoring:a). they have a right to object when legislation is drafted. They can thus dismiss a legislative proposal before the Commission if they consider that the principle of subsidiarity has not been observed, b) national Parliaments may also contest a legislative act before the Court of Justice of the EU if they consider that the principle of subsidiarity has not been observed; note-see website europa.eu/legislation consulted on 14/03/2015..

We conclude that the development of a common policy in the repressive matter is still marked by sensitivity shown by state actors in the desire of preserving national competences, manifested by Member States to maintain their own internal public order and national security established by principle and enshrined in Article 72 of TFEU. by which the European Member States, either by the Commission or the European Council can propose the adoption of rules for an objective and impartial assessment, aiming to enforce the principle of mutual recognition, which facilitates mutual trust and avoiding of certain existing nationalist fears (Christine Kaddous et Bernard Dubey, Helbing Lichtenhahn, Bruylant, L.G.D.J. 2010., M.Buzea,2012 - rept.ugal.ro,Conference Proceedings–Gala i, 20th–21st of April 2012 Year IV, No. 4, Vol. I-2012 75 See how Spain is concerned about its internal security as well as about the Strait of Gibraltar or German perseverance to control the number of nationals entering the German territory, their right to work and to a certain level of payment in their domestic space;) We appreciate that the parthis respect, born of the need to create the Schengen area, is the one given by the mutual evaluation policy, on equal footing, (Jegouzo Isabelle, 2003, La creation d un mecanisme dun mecanisme devaluation mutuelle de la justice,corollaire de la reconnaissance mutuelle, in De Kerchove Gile/Weyembergh Anne (ed),,Securite de la justice : enjeux de la politique exterieure de lUnion europeenne (,,Editions de lUniversite de Bruxelles),p.147-156)

We believe that if achieving a certain analogy with private international law on how to resolve a potential conflict of laws in a national judicial space, related to a legal relationship of private law, bearer of a cross-border element, we can extend the solution on the European area level, saying that we can create a common procedural criminal law.(Noul Cod penal. Comentarii pe articole,T Toader, MI Michinici, A Cri u-Ciocînt , M Dunea, Editura Hamangiu 2014)

In this European procedural system, a decisive role could be played by the Court of Justice, as a court of judicial control and the Civil Service Tribunal, as a court of first instance, by possibly becoming competent courts to rule based on the law of the forum, determined by reference to citizenship of civil servant or a public office holder who committed acts of corruption affecting the financial security and interests of the European Union.

Currently, the Lisbon Reform Treaty gives a new vision to the role of the European Court of Justice in Luxembourg, based on the idea that the institutional mechanisms of the European Union can not function effectively in the absence of a jurisduc ional mecanism and the right to have access to justice and effective process for both state actors as well as individuals, as enshrined in the European Convention on Human Rights.

Thus, by the provisions of Article 275 of TFEU, the European Court of Justice may submit a referral to review the legality if European regulatory acts and the restrictive measures taken by them on the natural or legal persons according to the second chapter, Title Vof TFEU under the conditions set by Article 263 of TFEU.

The author of the study believes that, in the light of the provisions of Article 263 of TFEU, the European Court of Justice plays a dual role, that of European Constitutional Court and of European administrative court, if we consider the settlement

of the complaints filed by natural and legal persons claiming actual violations of their rights through European regulatory acts.

The need for jurisdictional review, as a guarantee that Member States will fulfill their assumed obligations, is manifested by legal instruments created by the provisions of Article 258 of TFEU which provides that, in the event that a Member State will not comply with the endorsement of the European Commission, it may refer to the European Court of Justice which, if finding an infringement of the obligations assumed under the European treaties,will penalize that State. At the same time the provisions of Article 259 and Article 260 paragraph 1 and 2 of TFEU creates, in compliance with a previous referral procedure of the European Commission, the possibility to refer to the European Court of Justice for failure to comply with the assumed Community obligations by any Member State, even if the passive attitude of the Commission showed no position, without issuing any endorsement forcing the guilty state to pay a lump sum on a date specified in that decision.

In this context, the European Court of Justice, became the authority that provides the correct interpretation of the Community law and thus the correct transposition of EU rules in national legal systems.

Creating the *procedure of preliminary questions* by the legal framework outlined in paragraph 3 of art. 267 of TFEU make possible that, either individuals or even the national court can seek the views of the European Court in Luxembourg on the way of the interpretation and application of the Community rules. We believe that this type of judicial mechanism makes possible to adjust certain non-compliances of the national legal system with the Community rules, the national judge by the option of applying the Community rules. According to the provisions of Article 20, second paragraph, of the Constitution of Romania, the national judge may apply an European regulation if the national rule is contrary to the European law, except of the most favorable national law. Authors such as Claudiu D ni or believe that by this procedure, meaning that the national judge chooses the rule which shall not affect the right or fundamental freedom of the individual, being also protected by the European Convention on Human Rights, a constitutional review is performed, without prejudice to the sphere of competences belonging to the Romanian Constitutional Court, based on constitutional provisions as well as on Law no. 47 of 1992 on the powers of the court.) and the exemption from the obligation of the national state by procedures promoted by natural or legal persons who claim the violation of fundamental rights and freedoms to the European Court of Human Rights in Strasbourg (A.E.Franz, 2013)

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