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Paper synthesis for 2008 (2nd Project year) – objectives and activities

The research activity of the team members focused on the four proposed objectives related to the 2008 phase and on the correspondent activities towards these objectives, as documentation and study, pn the one hand, and as synthesis – papers elaboration, on the other hand.

Thus, **Objective 1**, *Activity 1.1.* (**Prof. univ. dr. Emil Moroianu, project director – Institute for Legal Research within the Romanian Academy**) brought under analyze the federative and confederative constitutional models, with high impact in finding the institutional identity of the communitarian structure configuration, on the federation or confederation model, and surpassing what today is called : "functional functionalism", an analysis over the dynamics of a governance structure and, at the same time, a politico- constitutional approach of the European Union on the perspective of a debate over the sovereignty concept and its evolution in the European political time.

The super positioning of the Communitarian Law towards both national law and legal order imply a repositioning of such a sensitive problem as the competencies transfer on the part of the state towards the Communitarian institutions, based on the subsidiarity principle or, in a more classical approach, of the issues related to the "sovereignty limitation".

The controversial *sovereignty* concept- as key concept in detailing over the super positioning of the Communitarian Law over the national law and of the European institutions over the traditional state configuration- has been analyzed from at least two perspectives, meant to determine an active and permanent polemic in literature. In the first perspective, the sovereignty principle, conceptually associated with the state itself, had been existing as such before Jean Bodin, before this "very savant little bourgeois, of an uncertain origin, jurist and philosopher", theology and forensic expert, wrote his *Les Six Livres de la République*, and because sovereignty is firstly comprehended as State attribute, assigning this positive predicate according to the words existing before facts principle. In such an opinion, given its majority, we can find a prohibited semantic reduction of the *sovereignty* concept to the state itself. But, at the same time, sovereignty is only the result of an assertion related to a note, to a predicate we provide for the state as meaning, an *exterior independence* of the latter one in relation with other political entities of the same range and also, an *interior supremacy*.

Hence, any state shall be characterized, at least historically, as being both independent in the international scene and detaining an internal supremacy by exercising some royal range rights. From the second political and theoretical perspective, sovereignty has conceptually existed before Bodin. Constructing- from a certain ideological motivation and wishing, in fact, to impose a theory of the Christian republic – the sovereignty principle and the theory of a sovereign republic, but with the consequence of eliminating the Christian fundaments on the part of authority itself, Bodin shall affirm that sovereignty itself, in its own concept, is nothing else than the power to issue laws, or, otherwise, the *sovereign's will*, an array power under the normative aspect, of the republic / state. In this sense, sovereignty is "the principle of the profane fundaments of power".

Therefore, the *sovereignty* concept, as associated with the state concept, emerges from J. Bodin's juridical doctrine, hence starting with the XVI-th century, also considering that *state* concept is a modern epistemological creation, anthropologists observing that some societies, which did not know the functional differentiation of the power according to *check and balance* classic formula, as evidenced by Montesquieu and John Locke, did not know (and could not now) the *state*. In a modern formula, the latter ones are non-stately entities. The same for the assumption in which state apparition would have been associated with labor distribution. The majority of researchers bend to the thesis of the state as a modern form of the political *Power, sovereignty* appearing as the logic – methodological instrumental concept through which we distinguish between the fore state era and the state era. Obviously, Bodin's early successor, Charles Loyseau, definitively associate, from him till the modern era, the *state* concept with the *sovereignty* concept. Even if the sovereignty concept has been a stressed debate subject even in the Middle Ages, the conceptual use of the term does not have the same political – juridical meaning with what medieval society understood through the state wise sense of the notion. Carré de Malberg was noting that, in the medieval period, the sovereignty term was rather designating, if comparatively utilized, a certain level of *Power*. Both as adjective (predicate of a notion) and as substantive, *sovereignty and* the *sovereignty* concept express a certain Power that does not admit other superior Power in relation to itself.

Thus, *Beauvaisis Customary*, Beaumanoir, the jurist who edited the aforementioned paper, was noting that "God has this sovereign position as <<sovereign father>>", the sovereign quality of the divinity representing the theological model of the sovereign political quality." In the political – juridical medieval literature was often quoted that "each baron is sovereign in its baronage; the king is sovereign above all in his baronage".

Thus, the *sovereignty* concept epistemologically translates an exclusive imperative that expresses an hierarchical relation, even if, in the Middle Ages, any baron was claiming equality of powers with the monarch, the vassalage ties not excluding the permanent dispute between the baron and the monarch, taking into account the prerogatives that, under *ius gladii*, any feudal has. Still, there is a competition based relation between the monarch and the vassal feudal, similar to the one between Emperor and Pope, as afore formulated by Pope Incocentiu the II- nd, in 1202, in his decree *Per venerabilem*: *cum rex ipse superiorem in temporalibus minime recognoscat* („because the King does not recognize any superior towards himself"). In the XVIII-th century, the term enriches with a juridical and technical sense, expressing not a power type tie, but also a supreme attribute, a singular competence of finally and decisively ruling over a juridical conflict.

A second sense, but richer in meanings than the rater limited meaning from the XII-th century. Another customary, *Orlenois Practices* (middle of the XIII-th century), by which the repartition of the jurisdictional powers among the monarch and his barons is established, states that the royal justice remains the last resort (in the sense of a decision that cannot be attacked in front of another power, either vertically, and consequently hierarchically understanding it, either horizontally, conceiving it, hence the sovereign concept reflecting the monarch's recognized faculty of ruling over a judicial conflict by a definitive decision, since "li roi est souverains, si doit estre sa corz souveraine". (From here the expression " the Court is sovereign……..").

Therefore, for the politic and legal mentality and the appropriate language, the *sovereignty* links to *the sovereign*, meaning the one that, wither as a baron, either as a king, can independently decide in his recognized domination areal. Another mentality over sovereignty, opposed to the modern sense in which we understand the concept, especially starts with J.J.

Rousseau, the opposition being between the *judiciary* conception of the sovereignty and the modern one, the *legislative* one. The medieval conception over sovereignty is far from the idea of a unique and efficient public power, of an exclusive competence. This shall later determine Kelsen to assert that the constitutional order of the Middle Ages has been built as a decentralized legal order, but without a precisely localized center meaning this unifying power which is sovereignty in the modern state. For the Middle Ages, in the European political practices, sovereignty presents only the meanings of *double relation* of *power* and *judiciary power,* which generates within the respective time the *sovereignty rights expression*, as a general and unlimited attribute of the monarch, often the result of a military forced oppression of his barons' sovereignty.

Hence, by the Brétigny Treaty (1360), Carol the Great immersed within its sovereignty a series of royal attributes, considered even in the today's Public Law doctrine as being the essence of sovereignty: *ius belli*, *ius iudicii* etc. However, these rather represent attempts of introducing in the Public Law language of that time of the determinant concepts of the imperial Roman law, but without their full immersion. As an example, the utilization in the medieval politic, juridical and diplomatic language of the *sovereignty* concept in its Imperial Roman sense of *summa potestas*, although the Middle Age historians note that King Carol the IV-th has proclaimed himself in 1368 as "senior sovereign of the ……..country", but still in the sense of highest and last jurisdiction level towards his vassals, hence failing to surpass the medieval political and juridical mentality.

Hence, the thesis upon which the sovereignty concept was encountered before Bodin appears as improper. Of course, the French jurists from the first half of the XVI-th century, like Grassaille, Seyssel or Chasseneuz, gave certain merits in substantiating the modern Public Law on the sovereignty principle, but the justification of their thesis was the supremacy of the monarch within the state, based on the Divine Law as fundament of his prerogatives. Hence, the grand jurist Charles Du Moulin admitted the absolute character of sovereignty, substantiating the royal power on the divine investiture, identifying, like his predecessors, *sovereignty* with *monarchic absolutism,* which assigned a principle, so well known and quoted in the Public Law medieval papers: *Rex Franciae est in regno suo tanquam quidam corporalis Deo* ("The King of France, in his Kingdom, is like God in corporality"). An identification that logically does not exclude the recognition, at least formally, of a certain constitutional order of the power absolutism, its limits being subscribed to *the vows* and *to the state assent principle*. Bodin achieved the big leap to the modern sovereignty concept, by understanding that sovereignty is not the principle of the authority within the state, but the principle of State from where all the powers come; for Bodin, the sovereign (and his sovereignty, exercised either directly, either indirectly) actions only for substantiating and conserving the Republic (the state), as sovereignty is the principle of the state. For Bodin, sovereignty is based on law, which implicitly makes the *sovereignty state* a *welfare state* (in Bodin's terminology „un *État de justice*"). Jean Bodin marks, in the history of sovereignty as a concept, the debut of the individualization principle regarding the historic peoples, of the construction of the political state territoriality and of political modernism in general, this process being continued by Thommas Hobbes, with his *Philosophical Rudiments of Government and Politics* (1642), resuming the expression of the conceptual sovereignty system in his *Principes fondamentaux de la philosophie de l'État* and *Du citoyen,* by which Hobbes inaugurates, for the modern era, the state philosophy.

In other terms, if Bodin resorted to a legal construction for understanding the sovereignty concept and principle, Hobbes builds up a *more philosophic* sovereignty concept, establishing in

politics, as professor Gérard Mairet was stating, a revolution very alike with the one established by Galilei in Physics, a paradigm transposition towards a new interpretative and explicative model, buildable on three pillars: a) the principle of the human fundament of law; b) semantics of a founding myth; c) the construction of the grand political character of modernity and contemporaneousness – the people. For Hobbes, following Bodin, the *positive law*, law in force, is the expression of the sovereign that makes us of his power. As immanent form of the civil human existence (in the Roman sense *de civis*), with his political determinant and significance, law is the condition of civilization, "playing", for achieving such an aim, a double function: moral and pragmatic, in the service of justice and peace (social peace). The law hence resumes and expresses the essence of state, meaning the *union* of individuals within the same political body and their *subordination* towards the same norm/ norms. What is very interesting at Hobbes is that law, as expression of the sovereign power, has only the role to repress, sanction the guilt, without aiming at achieving justice. *Law does not express the just. The just,* as value, is only a procedure of sovereignty, since it is law what the sovereign wishes to be and the sovereign's wish is the law.

Hobbes, by sustaining the thesis that the State is a profane state, relinquishes, as landmark, any divine norm and, in these conditions, the landmarks of the just are nor the divine values and norms, but the sovereign's will, and the law hence gets a profoundly profane nature. The sovereign shall be the only one empowered in setting what is and what is not legitimate: the law being a *lexis*, a code, the sovereign is the one that establishes such a code, imposing the current and official definition of the speech / language terms.

Moreover, the *sovereignty* concept is treated in relation with the *state*, as state specific and essential element only by the Dutch Krabbe and Kelsen, abandoning the point of view of an anthropomorphist theory of legal scholastic, which built up the Law by a savant technique of the legal fictions. From such a perspective, the *sovereignty* concept, meaning the alliance between *property* and will, has been based on the political and juridical trinity, meaning: a) personality, b) hierarchy of will, c) ownership. Although in the modern classic theory the titular of the property right is the king and then the nation, the rench Revolution in 1789, following Locke's theory, transfers the subjective property right from the king to the nation, without observing that the ownership was still a revenue of the Crown.

The revolutionary theory that prepared the year of 1789 and especially J. J. Rousseau's juridical theory established sovereignty as being the expression of three fundamental elements: *a*) indivisibility; *b*) imprescriptibly; *c*) inalienability. And, these three sovereignty determinations do only represent consequences of the *crown sovereignty theory*. For analyzing the classical doctrine, our study made distinctions between the German School (Gerber, Jhering, Laband şi Jellinek) and the French School (J.J. Rousseau and A. Esmein, the latter one being also the author of the national sovereignty delegation theory, which we evaluate for further consideration within the study), hence between the *German positivist theory* and the *French positivist theory,* both orientations presenting common features, like the juridical positivism and the voluntary positivism (both opposing, almost equally, to the English School of Public Law (Austin, Ansem, lord Brougham). By rejecting the national sovereignty, the English scholars establish the sovereignty concept as analyzed through the theory of the Parliament sovereignty. Reiterating the differences between the German School and the French School in our sovereignty related discussion, one should observe that, for the German scholars, the *State* is *a priori* a legal person. Hence, the Law emerges from the will of State, sovereignty belonging to the state as a person. At the same time, for the French scholars, the State is *a posteriori* the juridical expression of the

nation, as the nation existed before the state and the State and the Law develop from the nation; hence, sovereignty belongs to the Nation (based on the Nation – Person theory).

Such a State theory generates two principles: *1*) national sovereignty principle; *2*) sovereignty delegation principle, both with disproportionate senses in the today's polemics regarding the possible reconfigurations of the EU as a legal person and regarding the reports between European Institutions and the Member States. Krabbe and Kelsen determine a change of paradigm. It is true, Krabble stops to an opposition between the *Law sovereignty* and the *State sovereignty*. But analyzing the *sovereignty* concept as a nation *itself* and *as such,* Kelsen launches another progress in deepening the theory and notion of sovereignty, by studying the legal logic of the concept, by issuing a new hypothesis regarding sovereignty, by relieving the own function of the sovereignty concept within the legal theory.

For Kelsen, sovereignty stopped being and cannot be considered as an exclusive state attribute, but sovereignty is an attribute of the International Law (*droit des gens*), surpassing the classical limits imposed by the positive law and the state law. Together with Kelsen, the sovereignty problem becomes and imposes itself as a problem of the legal unity, for scientifically systemizing the Law. Sovereignty, in the Kelsenian paradigm, is a *logical element* that offers to a part of the positive law a foremost character over the other positive law subsystems. Hence, it is logical for sovereignty to be assigned as a predicate of the Public Internal Law (internal legal order) in order to reach an unique source of competence norms, sovereignty being, as a conclusion, a *criteria,* a synthetic principle in establishing the hierarchy of different systems / orders of positive law, for introducing the logical and theoretical unity of law through a common value.

Such a new paradigm influences the European/communitarian construction doctrine, especially from the perspective of the super positioning efforts of the Communitarian Law over the constitutional political and juridical efforts, for remodeling the institutional structure of the European Union. It's the situation of the discussed Lisbon Treaty, which tries to save the Treaty for establishing a Constitution for Europe.

The historical and legal study of the sovereignty concept, besides its theoretical weight, is important for understanding the actual senses of the flux-reflux efforts in issuing a more realistic strategy towards the EU configuration as a legal person and towards understanding the ties between the European legal and political order as a legal person and the autonomy and sovereignty of the national institutions thereto. In a short speech, on the occasion of the Academic Meeting opening – 8-9 May 2000 (Brussels, the 50th anniversary of the Declaration of 9 May 1950), professor Henry Schermers (University of Leiden) was asserting that:
„*Souveraineté* n'est plus une notion absolu. Un nouveau mot entrait dans notre vocabulaire: supranationalité. La Deuxième Guerre Mondiale nous a démontré le danger du nationalisme, le danger de concentration tous les pouvoirs en des gouvernements nationaux". ("Sovereignty is no longer an absolute concept. A new word entered our vocabulary: supra nationality. The Second World War has proved the danger of nationalism, the danger of concentration of the power within the national government"). And eulogizing Robert Schuman's personality, professor Schermers added: "Schuman nous a offert une nouvelle option: une alternative, c'est-à-dire la division de la souveraineté". ("Schuman has offered us a new option: an alternative, meaning the division of sovereignty").

Hence, an enthusiasm, an optimism, perfectly justified by a history, sometimes sinuous, of the post war reconstruction of an integrator Europe, economical wise and nevertheless, political wise, of an Europe leaded to a federalist model. In 1947, Coudenhave-Kalergi Count,

encouraged by the spiritual state of USA at that time, had launched the idea and the appeal towards the US citizens for the creation of the United States of Europe; thus, the European federalist unification had become one of the objectives of the American Policy.

In his conclusions, the Swiss Politolog of a Serbian Origin, Dusan Sidjanski was noting: „Le fédéralisme m'apparaît comme la forme d'organisation des communautés multinationals la plus apte à unir les Ètats en créant des grands éspaces économiques, à sauvgarder leurs identities et à respecter leurs diversités. Un fédéralisme qui permet de gérer ces tendencies, parfois opposées mais convergentes, qui peuvent s'enrichir mutuellement dans une Union aussi complexe qu'adaptable". (The federalism seems to me like the most appropriate form of multinational communities' organization in order to create the big economic spaces, to safeguard their identities and respect their diversity. A federalism that allows the enhancement of those tendencies, opposed but convergent, the can mutually enrich in a both complex and adaptable Union".

One should not forget especially the works of the 1966, April 27 – 29 in Liège, when professor Louis Cartou, from an optimistic position, specific to those years, was considering that „l'union douanière et l'union économique achevées, conduisant à la federation politique disposant de competences nouvelles, nottement dans les domains de la diplomatie et de la défance[1]", which logically would lead to the political independence of the communitarian organs. It has been argued, emotionally but also from pragmatic political reasons, that the three Communities would rather follow a functionalist model, more than a federalist or con federalist model.

From the political perspective, are well known the Declaration regarding the Future of Europe (annexed to the Nice Treaty). Then the Laecken Declaration (Belgium, 2001), that leaded to the creation of the Convention on the Future of Europe, under the baguette of the former French President and also President of the European Movement, Valery Giscard d'Estaing. And all culminated with that **Projet de Traité instituant une Constitution pour l'Europe (Constitutional Treaty Draft)**, presented in 2003, June 20, to the European Council in Thessaloniki, Greece. A draft of a Constitutional Treaty „inspirée par la volonté des citoyens et des Etats de l'Europe de batir leur avenir commun"[2], this treaty going to institute an European Union „à laquelle les Etats members conferment des competences pour atteindre leurs objectifs communs"[3], in the terms of Article 1, Title I (*Définition et objectifs de l'Union*)[4].

Because, as stated in Art. 1 (2), Title I from the Treaty draft, „L'Union est ouverte à tous les Etats européennes qui respectent ses valeurs et qui s'engagent à les promouvoir en commun"[5]. Still… although the draft was expressing the "peoples' will", some of the peoples opposed to the ratification process by utilizing efficiently the political and juridical instrument of referendum (the Dutch, French and more recently the Irish cases) or by postponing s*ine die* a certain popular decision (UK Case). In the Romanian doctrine, professor Dumitru Mazilu considers that the federalist model, as imagined by the Constitutional Treaty Draft, leaded to a new moment of stagnation within the European construction and imposed the Reform Treaty (Lisbon Treaty). Same wise, we could assert that, in the Romanian doctrine, the Lisbon moment

[1] "The customs union and the economic union would lead to a political federation with new competences, especially in the diplomacy and defense fields".
[2] "inspired by the will of the citizens of the States of Europe of building upon their common future"
[3] "Where the Member States confer their competencies for achieving their common aims"
[4] (Definition and objectives of the Union).
[5] The Union is open to all the European States which respect its values and engage to their common promotion"

stands as a constant and active presence. Or key-issues of the European Construction under a particular angle, like the national sovereignty issue and the *Kompetenz der Kompetenz* principle, or the national identity problem in a new configuration system in Europe, of a federalist type. Moreover, the whole construction of the European Communities and further of the European Union has been marked by a double confrontation, more or less visible, both at the communitarian – institutional level and within the intergovernmental reports among the EU/European Communities Member States and at the infra decision making level, meaning the civic structures and organizations, militant towards the European integration – we are talking about the European Movement (Mouvement Européenne), with its headquarters in Brussels, among the federalists and the con federalists, when the scholars of the functionalist theory are in a certain inferiority and rather represent some kind of compromise among the first orientations.

A confrontation doubled, in its turn, by a confrontation among the Euro- optimists and Euro-skeptics. It's interesting to see, for the moment at the empirical level, a certain fear, even in the university environments in the former Communist countries, as Romania, a certain panic wise position, based on which the European integration would be synonym with the transposition of the Eastern European Societies from a totalitarian regime to another …Soviet Union. Basically, this reflects a severe fault of all governors after 1989, in the Romanian case, in failing to prepare the population for understanding what Romania's accession means, with both its positive and negative effects, resulting from such a political act. Moreover, the accusation lays also to the fact that a certain democratic ideal is missing from the Union, hence suffering from a democratic deficit, since the way t citizens participate in the democratic reality of the union is not clearly stated; this democratic deficit, at least for the Eastern states the adhered to the Union reflects in fact the democratic deficit of the societies that passed from the communist totalitarian regimes to a still insufficiently consolidated democratic regime towards the democratic value on the part of the population. We should also stress that the mistrust in still very abstract categories, like the European citizenship, the Eu as federative or con federative structure, or other notions and concepts, is based a certain fear towards losing the cultural identity of the nation, taking into account a certain recrudescence of the nationalism even in the Central European States. On these grounds of political fears, some juridical reservations are being built. A certain citizens' frustration towards the justice way of functioning, opposed to their immediate expectations regarding this, stressing the cultural opposition between the collective mental of the masses and the one of the professionals regarding justice, especially based on certain weaknesses of the judiciary, passing itself through full reposition efforts towards other principles and values, in a democratic occidental societal type.

We assert, with all respect towards the publicly expressed positions, that the "voluntarist –visionary stage of the European construction, based on the political will and on enthusiasm" did not come to an end by rejecting by referendum the Constitutional Treaty draft by the population in the Netherlands, France or Ireland. The communitarian construction has passed before through crisis moments. We'd rather take into account the fact that, the citizens' political- juridical mentalities (a heterogeneous population in terms of instruction, preparation for the future, with different economic interests, with different beliefs and especially with diverse interests regarding the traditional values of the national identity) cannot keep abreast with the political and economic realities, do not observe clearly enough the objective trend of the institutional and political history of the Communities / European Union; moreover, the negative vote in such referendums translate certain dissatisfactions towards the national and local officials rather than towards the communitarian policies of the EU institutions. It's also under observation the fact

that, the political culture deficit and certain emotional positions can affect the objective logic of the EU Accession history, on a more comprehensive and challenging context, the one of globalization. The integrator character of the Western economies and the nowadays real existence of an EU internal market objectively lead to a political and institutional reconfiguration of Europe, to a new way of understanding the ties between the EU and the Member States and cannot block the transposition to a federalist European structure, rather than to a con federalist one. We don't consider we're facing an absolute opposition between the essential role of the market (by passing to the EU Internal Market, the common markets in fact become local markets) and the political integration thesis, based on the solidarity principle.

In the end, 85% of the Constitutional Treaty Draft provisions had been and are in force, and only 15% from the same document represent the undertaking of new obligations for the peoples and the EU states. The Treaty text was reasonable itself, establishing in principle certain rights, stipulated by Constitutions and the constitutional practices in the Member States, the simplification and the reform of the EU institutions appearing as a necessity. If we mention the French case, a poll (TNS – Sofres Agency) indicates that 62% of the French believed that the results of the 2005 referendum have weakened France's position in Europe, and 85% of the French respondents affirmed they're favorable towards the continuation of the European Construction. Many observers deem the EU future cannot be otherwise than federalist, since the federalist model only can guarantee, from the constitutional perspective, equal right, enlarged autonomy and the possibility of effectively participating in the European forums, national sovereignty envisaging more and more its fictive feature. For observation, the Lisbon Treaty, in the new Art. 4, stipulates the equality of the Member States in front of the treaties, and also their national identity, inherent to their constitutional and politic fundaments and inclusive with reference to their local and regional autonomy. This respects states' essential functions, especially the ones that imply their territorial integrity, the public order and the national security. The new text especially stipulates that the national security remains the exclusive responsibility of each state, hence the member state maintaining one of its essential features, meaning defense and security enforcement. On the other hand, the new text reiterates and Public International Law principle regarding states' equality towards international treaties, hence the Lisbon Treaty is, essentially, an international agreement concluded in written among states (in here, the EU Member States), governed by the International Law; the term *"treaty"* is defined in Art. 2 (1) letter *a*, of the Vienna Convention on the Law of the Treaties (23rd of May, 1969). It's also to mention that the text of the new Art. 4 of the Lisbon Treaty stipulates the *public order*, in the meaning of *internal public order*, being the faculty of the state itself in determining the content of this internal order, in agreement with its internal normative system. Definitely, a certain legal order is and shall, *more teoretico*, be in line with the new Art. 2 under the Lisbon Treaty, meaning the preservation in each Member State internal legal system of the certain values: human dignity, freedom, democracy, equality, rule of law, human rights, including the right of the persons belonging to national minorities, pluralism, tolerance, justice, solidarity, equality among men and women. Since any treaty in force (and the entry into force of this Treaty is another problem) ties the parties and shall be executed with good faith (*pacta sunt servanda principle and de bona fide execution principle),* since any party in an international treaty cannot invoke its internal disposition for justifying a failure in executing an international treaty (art. 26 and 27 of the 1969 Vienna Convention), since these values proclaimed in the Lisbon Treaty are also stipulated by the European Convention on Human Rights and Fundamental Freedoms – ECHR- (Rome, November 4th, 1950), ratified by Romania (Law no. 30/May 18, 1994), taking

into account that the EU adheres to the ECHR (Art. 6 para. 2, Lisbon Treaty), taking also into account that the rights, freedoms and principles stipulated by the Chart of Fundamental Rights, adopted on December, 7th, 2000 (which has an equal value with the treaties), we can draw the conclusion that, at least for Romania's case, state should not modify its function of defense and public order enforcement and in defining and determining this concept of internal public order, the state is only limited by the Convention, its additional protocols and by the jurisprudence of the Strasbourg Court, the national state sovereignty (as stipulated by Art. 1 in the Romanian Constitution) remaining intact, moreover in the conditions in which, the Romanian state and the Romanian people, as real beholder of the state sovereignty, understood to integrate within the EU. The provision according to which the member state fully undertakes the public order preservation and the defense of the national security is not opposed to the new art. 27 letter c, 7 of the Lisbon Treaty, implying that, in case a EU member state would face a military aggression within its territory, the other Member States have the obligation of granting support and assistance by all available means, in conformity with Art. 51 of the UN Charter.

It's not, for sure, an immediate or spontaneous military intervention, lacking to seek agreement of the aggressed state and without a legal decision of the concerned EU institutions. It is true, a certain meaning regarding an action understood as military appears in the text of art. 188 **R** in the new Title VII (*solidarity clause*), stipulating that the Union and the Member States take action together, in the spirit of solidarity, in the hypothesis a member state encounters a terrorist attack or in the case of a natural or provoked catastrophe. In a situation like this, the Union mobilizes all the available instruments, inclusively the military means allocated by the Member States, but upon request on the part of the political authorities in the respective Member States, remaining for the other states to coordinate their actions within the Council. Given the common interests of the peoples and EU Member States, the latter ones convened to complement the economic and social provisions of the Union with cohesion and mutual support provisions, for such situations, taking into account that in a context marked by the gradual and quick globalization of the human activities, regardless of the domain, any military aggression against the member state affects economy, resources of any kind, population security and not only of the aggressed state, but also affects the common EU interests as such, the interests of the European peoples as they are, based on their free will, part of the Union.

*Considering that the Common Security and Defense Policy is part of the EU Common Foreign and Security Policy, art. 27 (the former art. 17) stipulates the possibility for the Union to get a military and civil action capacity, for achieving peace safeguard, conflict prevention and the strengthening of the international security, according to the UN Charter principles, which means that the member states shall place at the EU's disposal military and civil capacities, aiming at creating the European Defense Agency. In our opinion, this aligns to the provisions of art. 118 al. 1 and al. 5 of the Romanian Constitution, as revised in 2003, and with art. 148 of the same document (the EU accession)***.**

Hence, the national sovereignty principle – even, as we can see, its juridical fiction feature are already ion scene – is observed by these provisions of the Lisbon Treaty. Under such aspects, the Lisbon Treaty (Treaty on the Functioning of the EU) is in conformity with the classical model of treaties and agreements or other international conventions. It is also true that such a treaty does not express the will and the interests of the leaders, does not represent only an intergovernmental agreement/convention/treaty, but it's the clear result of the EU peoples' will, which is easy to understand for the ones who followed and are receptive towards the activity of

the most interesting civic European forum – the European Movement, but also the activity of other pan European organizations.

The recognition of state sovereignty is recognized, although not expressly, resides in the fact that, based on art. 69 al. 4 of the Second Chapter, through a *per a contrario* interpretation, Member States are not granted with full material competence in geographically delimitating their frontiers, in agreement with the International Law norms, although such geographical frontiers are only imaginary frontiers, conserving only a political history. Nevertheless, the most interesting text of the Lisbon Treaty (from the perspective of any positive discussion regarding the sovereignty of Member State) is the new art. 35, mainly paragraphs 1, 2, 3 and 5.

Any member state can decide, based on its constitutional provisions, to withdraw from the Union. If before the entry into force of this text, a Member State, once entered into the EU, could not, in principle, withdraw (it had to undertake such a profound integration process that the withdrawal eventual perspective could not have been an issue), by the new text of the Lisbon Treaty the state, remaining sovereign, can withdraw at any time, the text of art. 35 para. 1 following the same content of art. 54 a of the 1969 Vienna Convention on the Law of the Treaties; hence the Union, in its fundamental text and reiterating the Public International Law norms, respects the peoples' and Member States' sovereign will. This provision is meant either to settle certain susceptibilities, either to induce the character of international organization with regional vocation or to stress that the European Union is being constituted on a con federative model? It is the sign of an EU leading to the confederation model, where every state has the freedom to withdraw from the lax constitutional structure of a confederation of sovereign states? There are still textual arguments that still seem to indicate a federal structure of the EU, and a detailed lecture of the Lisbon Treaty seems to indicate a calculated ambiguity: by this treaty, the EU seems like a hybrid between a federation and a confederation, as a bi-constitutional regime. The federalization direction regarding the EU functioning is being announced by art. 1 of the chapter entitled **Common Provisions**: the Treaty organizes the EU way of action and determines the domains, limits and conditions of exercising its competencies. One first aspect, from this point of view, is the text of art. 4 (former art. 3), that stipulates the principle of competence sharing between the EU and the Member States, in the sense that any other competence, not assigned to the Eu through the treaties belongs to the Member States. And art. 5 stipulates attribution of competences, according the subsidiarity and proportionality principles.

Para. 2 of art. 5 stipulates even more, in the sense that the Union does not action in other ways than within the limits attributed by the Member States through the treaties, for achieving the objectives stipulated by the treaties themselves. (The content of these paragraphs have similarities with the US Constitution). However, the same art. 148 in the Romanian Constitution in force allows, in the conditions of a law adopted by the Parliament in the common meeting of the two Chambers and with a certain stipulated quorum, the transfer of certain competences towards the EU institutions and the exercising in common, with the other Member States, of certain competences as stipulated in the constitutive Treaties of the Communities / European Union. A second aspect is constituted by the provisions of art. 10, Title IV, which stipulates that the member States, who wish to constitute among themselves an *enhanced cooperation* within the non exclusive EU competencies may exercise these competencies by enforcing the correspondent treaty provisions, within the limits and in agreement with the stipulated procedures. These forms of enhanced cooperation aim the achievement of the EU aims, the safeguard of its interests and the strengthening of the accession process. Such enhanced cooperation forms represent, in subtext, a significant step for the federalization of the EU, at least

for a number of member states, especially for the ones belonging to the *Euro Group*. Pragmatically speaking, we face a bidirectional organizational model towards the EU: **1.** a federative EU, with legal personality and comprising all the Member States; **2.** a federation of the European states within the EU, comprising the Euro Group member states that manifest their strong w ill towards an enhanced cooperation, that can accelerate the profoundness of their economic, politic and social integration. In other terms, the Lisbon Treaty reiterates the thesis of a "two speed" Europe. The capitalization of the research within this objective is being realized through an article, accepted for publishing in "**Revue International de Droit compare"**.

Regarding Objective 1. *Activity 1.2.* (**II-nd degree scientific researcher, dr. Tudor Avrigeanu; scientific researcher, drd. Ion Ifrim –** both **from the Institute for Legal research of the Romanian Academy**), meaning the recordation of the Romanian Criminal Law and Procedural Law to the exigencies of the EU Criminal Law, the main investigation direction, based on the Criminal dimension of the project, aimed at the realization of a comparative analysis of the **stage reached by the reform of the Criminal Law in Romania.**

The research included activities based on the configuration of the general part of the Criminal Law in the Romanian Criminal Code in 1968 (still in force), in the so-called new Criminal Code from 2004 and in the ante project of Criminal Code, as published by the Ministry of Justice in 2007, all these from the perspective of the actual level of international knowledge and of the legislative evolutions registered in the EU space.

These activities are materialized, in part, in the elaboration of a study, in collaboration, by **dr. Tudor Avrigeanu, M.iur.comp.** (**Institute for Legal Research within the Romanian Academy, member of the grant team**) and **dr. Johanna Rinceanu, LL.M.** (**Max-Planck-Institut für ausländisches und internationales Strafrecht**, Freiburg, Germany) and designated for publication "*Zeitschrift für die gesamte Strafrechtswissenschaft*", one of the most renowned international publications on Criminal Law, included in the ***ReferenceGlobal*** international database.

The study is actually in its finalization stage, meaning the reciprocal analysis of the sections elaborated by each author and their coordination towards obtaining a homogeneous material.

Taking also into account the general editorial plan of the Auslandsrundschau section, based on the coordination of the aforementioned Max Planck Institute, which also endorsed the publication of the material, we estimate the apparition of this study in one of the second stage (April- June 2009) or third stage of the magazine (July – September 2009). The second main direction envisages the analysis of the theoretical fundaments of the Criminal Law on the perspective of the totalitarian experience in Europe of the XX-th century and of the reconstruction of a Criminal Law within a democratic state after the collapse of the German national-socialism and of the European communist regimes. The study is entitled *Social Danger and Duty Infringement as Basic Concepts of Criminal Law* and is designated for publication in "American Journal of Comparative Law" (publication with *ISI* quotation and included in the ***HeinOnline*** international database).

The main idea of the study consists of evidencing the corruption of certain fundamental Criminal Law theoretical concepts by the totalitarian ideologies and the necessity of an in-depth study of the leading mechanisms towards the total alteration of the original conceptual sense in totalitarianism and towards the *de plano* rejection of the distorted concepts in post –totalitarianism.

The investigation undertaken, till now, leaded to the demonstration of the identity related to these mechanisms in the particular case of Germany and of Eastern Europe and to the underlining of the advantages that the conceptual restoration of social danger and breach of the fidelity obligation towards the rule of law within their original frame, emerging from the Natural Law theories in Europe in the XVII – XVIII-th centuries would imply towards issuing an unitary European Theory

in the Criminal Law; a final section, whose editing is presumed to end till the fall of 2008, envisages the ties among the Criminal policies models, presently practiced within the European continent and the ground theoretical models in the European legal tradition of the Natural Law, especially the Hobbsenian theoretical model and the Kantian theoretical model. Based on the peer review evaluation conclusions and on the necessity of certain amendments imposed by this evaluation towards publication, we estimate *the possibility of acceptance for publication of this study* by **the first half of 2009.**

The third and last direction of investigation aims the possibility of establishing the Criminal Law as a possible configuration factor of the European identify, possibility whose analysis shall be sensitively lessened by the results obtained through the two undertaken research directions. A study on the juridical significance of the *European identity*, a concept still under theoretical clarification so far and comprising the national establishing of the welfare state based on the individual freedom. Presently in the form of a first summary editing, this study shall be finalized and sent for publication at "Studia europaea" (***CEEOL*** International Database) by March, 15, 2009. The same deadline is estimated for the finalization of a replica-article to a study recently appeared in "Criminal Law and Philosophy" (***Springer*** International Database), envisaging the differentiation between an EU Criminal Law and the Criminal Law *within* the EU, article whose documentation stage shall be finalized by Nivember 2008, the final form being finalized by the first half of 2009. Both materials are being elaborated by Dr. Tudor Avrigeanu, M.iur.comp. (Institute for Legal Research, Bucharest, member of the Research Team) and drafted as systemic development of a conception that assumes the correlation of the integrate study regarding the Criminal Policies models, as designed and enforced today in the EU space, with the analyze models regarding the political present and future EU architecture.

Referring to **Objective 2 (EU normative instruments and their hierarchy based on their legal force)** *Activity 2.1.* (Editing a unitary theory of the law sources based on the report between the EU legal order and the national legal order - **prof.univ.dr. Emil Gheorghe Moroianu, Project Director**), the research base was the axiom – proposition that the fundamental norm (ground norm) is the "last rationale" for validating the normative order. This is how Hans Kelsen was entitling his second title- assertion in the 59th chapter (*Logical problems about Grounding the Validity of Norms*) (English edition, 1991). Of course, the ground norm, Kelsen added, is a fiction type norm, wither it's about a positive moral, wither a legal system, but it's important to understand that the inferior range norm shall be validate by reporting to a norm/multitude of norms of a superior range, because a superior norm/multitude of superior norms is/are created in agreement with certain procedures prescribed by the ground norm as being, the latter ones, a primary constitution. Conclusion of a whole life dedicated to comprehending the law in its logical pureness, Kelsen's paper asserts that the normative legal order constitutes a system, characterized not by norms *coordination*, but by the *subordination/super ordination* relation among the elements- norms of the system.

The fact that the validity of the inferior norm is based on the validity of the superior norm assigns the situation according to which the inferior norm corresponds to the superior norm. The whole legal monism, as analyzed, funded and argued by Kelsen, his whole theory on the preeminence of the International Law over the national law expresses its pertinence only by admitting as premises- axioms of the aforementioned thesis. The order of the legal order existentially imposes a coherence of the normative system on the perspective of normative validity, following the path of an almost mathematical deduction, as the only possibility for relieving the law as a normative system by any extra systemic reasons, meaning by excluding the ideological grounds.

The Kelsenian normativism is hereby faced as capacity of establishing the normative internal positive systems, as modality to avoid the juridical anarchy internationally, as control technique regarding the constitutionality of any act of juridical will that aims to be a law, that aims to impose or allow, recommend or liberalize. Of course, in any theoretical approach regarding the European Communities/The EU, the problem of EU Law sources and the hierarchy of the EU norms has a special place in the debate. Hence, as established, the Communities/EU paradox consists of a fruitful ambition of building an internal legal order by means of certain legal techniques based on the constitutive treaties, constitution - treaties (Paris and Roma), that configure primary sources, fundamental sources, rule generators, norms generators, on the one hand; on the other hand, the secondary sources, derived, comprising norms, fundamental rules of law, in other terms, fundamental sources that express the mutual agreement of the Member States and secondary sources that express the acts issued by the competent organs as established by the European treaties (Louis Cartou's terminology).

Nevertheless, in doctrine and practice, the importance of hierarchy principle towards the derived law is strongly envisaged, as a distinction between the *first level of derived law* and *second level of derived law*, assuring the enforcement of the measures prescribed by the first range law. If in certain national normative systems there is a distinction between the *law* and the *law enforcement decrees*, in the EU legal system the distinction is to be made among the *ground regulations* (within the direct enforcement of the treaties) and the *execution regulations* (adopted either by the Commission empowered by the Council, wither by the Council itself).

Still, the problem of the legal norm validity, the whole Kelsenian issue, started to arouse a more and more active interest in the EU debates, starting with the Intergovernmental Conference regarding the pertinence of EU norms hierarchy, in 1996, as effect of the Maastricht Treaty authors' efforts regarding institution a certain hierarchy in the EU normative system, different than the classic classification of the EU law sources.

Things are a little complicated also by today's proliferation of atypical facts, by a conceptual dilution of the *directive* concept and hereby an older proposal could me materialized thereto, a proposal from 1991, made within the European Parliament, in the sense that *directive*, as normative act, with its well precised characteristics, to conceptually and functionally surrender in front of the *EU Law*, a concept that is more in line with the Kelsenian hierarchy principle. We're used, in the legal field, to utilizing legal fictions, real myths with great technical and pragmatic utility. But a Kelsen type hierarchy, by introducing the *validation* concept as a working instrument is essentially aimed to the rejection of certain aspects that can favorite disorders within the system.

In agreement with the institutive EU Treaties/Communities Treaties, a certain control modality among the treaty stipulations and the international agreements/conventions negotiated by the Community/Union is envisaged, in order to grant compatibility among both parties in the equation. Logically, if such a convention/agreement does not respect the compatibility principle, then the ground text/the treaty shall be revised. The Court of Justice ruled over several situations on the incompatibility issue, but in practice, the renegotiation/re drafting of such an agreement was preferred. By such a renegotiation, when it takes place, the order and coherence are being reestablished, but the non-validation aspect still remains unsolved.

It was Luxemburg's based Curia masterpiece in informing and penalizing incompatibility. The Court merit is incontestable, in restructuring jurisdictionally the multitude of norms that compose the EU legal system, this being, as we consider, a meritorious effort, related and complementary to the will effort in stressing the teleological interpretation in

understanding the normative product of the competent authorities- organs of the Communities/of the EU.

The Pertinence of the Communities/EU acts imposes, as showed in the doctrine, a rationalization with respect to the nomenclature of the communitarian acts with legislative character, efforts being aimed and needing to be aimed at a clearer conceptual distinction between *law source, act* and *norm*. If the *act* is some kind of legal vehicle, the *norm*, according to Hart and Austin, is *prescription, order or commandment*, or, in Kelsen's refined terminology, norm is an *interpretative-volitional scheme.*

Hence, the legal force is owned by the legal norm and hierarchy, in the Kelsenian sense, is a supra ordination/subordination in relation with the legal force; in doctrine, we speak about the classification of the EU Law as a *sum of legal acts* (utilizing the term in its generic sense) and not about a *classification of the EU norms*, hence the hierarchy principle, regarding the EU Law, shall acquire a recognition in its entireness.

In Kelsen's opinion, the hierarchy of legal norms in relation with the ground norms confers each norm a certain legal force, which grants a stately society its feature of welfare state. Validation is the method of inducing the order and coherence in the normative system, which is not equal to the multitude of the normative acts. It's not the denomination of the legal act that confers legal force to the provisions comprised thereto, but the legal force of the norm/norms that lead to the denomination of the legal act/acts.

The introduction of the complex hierarchy principle (Anselmek) leads to the metamorphose of the *Communities/of the EU* in a *Legal Community /EU*, as stated, in 1989, by professor V.J. Rideau.

As per **Objective no. 3** (state control over the frontiers and over immigrants in the conditions of the European security Space creation) *Activity 3.1.* (Romanian legislation regarding movement of foreigners and asylum in the EU policies context) (**prof.univ.dr. Emil Gheorghe Moroianu, project director, Institute for Legal research within the Romanian Academy; univ. lector drd. Ina Raluca Tomescu, Constantin Brancusi University, Targu Jiu, Romania)**, the research undertaken in 2008 envisaged the consequences of the Convention on the Application of the Schengen Agreement over the legal regime of the foreigners, by researching the way in which the Romanian legislation in force is consistent towards the latter one, on the one hand, and the Schengen Agreement, the Geneva Convention in 1951 (ratified by Romania in 1991), the New York Protocol in 1967, Dublin Convention in 1990 and Council Regulation (CE) nr. 2725/2000 regarding the establishment of Eurodac on fingerprints comparison in order to apply the Schengen Agreement. Also, the research aimed the mode of elaboration of a common asylum policy, especially the Common European Asylum System, elaborated after the Tampere meeting (October 1999) of the European Council.

Hence, the research analyzed the normative acts in force, especially the positive /negative correlation of Law no, 122/2006, document that makes use of uniform EU law terms and expressions, transposing in the Romanian legal order the content of Council Directive nr. 2001/55/EC, and also of the Council Directive nr. 2004/83/EC. The evaluation regarding strengths and weaknesses in aligning our legislation with the international legislation and especially with the European legislation in this field has been realized by studying more that 170 normative acts issued by the Romanian and EU authorities, plus the jurisprudence in the field.

Achievement of **Objective 4.** (Competition Law in the jurisprudence of the European Court of Justice and its impact over the Romanian legislation) *Activity 4.1.* (Harmonization of the Romanian Commercial and Competition Law with the EU Norms. Procedures) and

Activity 4.2. (Critical legislation overview and *de lege ferenda* proposals), realized by **prof.univ.dr. Emilia Mihai** – Faculty of Law, Western University, Timisoara, Romania and **scientific researcher, PhD candidate, Mihaela Berindei,** Institute for Legal Research within the Romanian Academy**)** envisaged the European policies of consumer protection and the harmonization of the Romanian legislation and jurisprudence to the EU acts, the critical analyzis of the Romanian legislation with *de lege ferenda* proposals, team's research being focused by the extremely actual problematic of the **abusive clauses in the Romanian Law**, following the implementation of the EU acquis, especially by transposing Council Directive 93/13/CEE on April 5, 1993, regarding the abusive clauses in the contracts concluded with the consumers, aiming at new visionary approaches over contracts and their ways of settling. The directive did not reach, via Law 193/2000 regarding the abusive clauses of the contracts concluded between traders and consumers, on a fertile legal ground, taking into account a legal order still tributary to the same dogma, where doctrine did not resonate with the values proposed at the EU level. At the same time, the adoption of Law no. 193/2000 only a politically assumed obligation explains both the truncated and superficial way of transposing the EU legislation and the resistance manifested towards the assimilation of its spirit in the internal legal order. In our opinion, there are two main theoretical aspects that induce barriers in immersing the contractual model involved in the abusive clauses law: contractual equilibrium issue and good faith issue, as autonomous juridical techniques.

The Romanian Law firstly envisages the individual consumer, natural person, estranging from the EU model which has a minimal character and extends its incidence to the collective consumer, meaning the natural persons groups constituted as associations. Although by an regrettable inadvertence the Romanian legislative authorities did not take over, in the *"trader"*definition, the EU detail that the latter one's activity can be public or private, we deem that the protection level, granted by the national law, cannot be inferior to the one involved by the EU Law. Council Directive 93/13/CEE respected the legal tradition of the Member States and, by para. 2 art. 4m excluded from int area of application the clauses regarding the correspondence between price and remuneration, on the one hand, and the services and goods provided in exchange, on the other hand, hence excluded the legal institution of lesion. This exception has been taken over by States in the legislative process of transposition of the respective Directive. The Romanian legislative authorities before the EU Accession skipped it but, at the same time, literally took over the significant disequilibrium criteria. Since this omission signifies a more severe consumer protection and since a *contra legem* interpretation is prohibited, we have to admit that Law 193/2000 is the catalyst that introduced in the Romanian legal order the contractual equilibrium principle and lesion as grounds for contracts annulment.

While the Romanian Law took over from the EU directive the alignment of the significant disequilibrium to the good faith exigencies, the French Law omitted it. Since the Positive Law Romanian system (as its spirit itself) is so much related to the French one, it's strongly necessary to find the explication of these different attitudes of the national laws, but not before clearing the sense of the good faith term in toe EU definition. The doctrine has alleged that, apparently, the "good faith" reference only adds a gaucherie to the already confuse character of the directive text. Extrapolating the already known linguistic inadvertences of the EU legislative authorities, a first addition appears as necessary: the abusive clauses directive introduced and imposed the good-faith principle in the EU Law, in the conditions this was not known by the Common Law and Scandinavian legal systems.

For the abusive clauses inserted in the standard pre formulated contracts or within the general sales conditions practiced by the traders, the Romanian Law does not seem to offer solutions. It creates the impression that is not even apt to aim at achieving a mass contractual justice, which was Carbonnier's dream. The explanation consists in the omission to address the imperative content of para. 2 and 3, art. 7 of the 93/13/CEE Directive. Consequently , we should again resort to the primate of the EU Law over the national law and complete the failures of the Romanian Law towards the EU Law.

N.B. Based on the comprehensiveness of the research undertaken by our team, we solicited to the Romanian Academy leadership the agreement for establishing, within our institute (Institute for Legal research "Andrei Radulescu") an European Law Center of Studies. By notification no. 3493, issued by the Romanian Academy Secretary General, Acad. Păun Ion Otiman, the Romanian Academy Presidium approved, in its 30th of July 2008 meeting, the establishment of the aforementioned Center.

Project Director,
prof.univ.dr. Emil Gheorghe Moroianu