EUROPEAN CONSTITUTIONAL "CASE LAW" AS A POSSIBLE CONCEPT OF THE EUROPEAN "LEGAL STATE"

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Abstract: *The European Convention of Human Rights, together with the jurisprudence of the European Court of Human Rights creates a special and entire legal system, which is particularly aimed to cultivation of decisions of bodies of public power in issues of natural and legal persons, or of other power intervention. The current jurisprudence particularly of the European Court of Human Rights undoubtedly shifts the concept of the legal state into the position of quantitative intensity not only of human rights and freedoms protection, but also particularly cultivation of public administration and decision activity of courts. Jurisprudence of the European Court of Human Rights therefore sets not only on enforceability of the European law in member states, but also at requirements of organizational, intervention and decision legal level of activity of bodies of the public power. It is therefore possible to declare and confirm that the concept of the "European Legal State" is a specific European versions of constitutional protection of basic human values.*

Keywords: *European Convention of Human Rights, European Court of Human Rights, jurisprudence, case law, legal state*

I. INTRODUCTION

Ongoing jurisdiction activity of the European Court of Human Rights established, in particular in terms of the continental Europe of the codex type of law, the court creativity of the constitutional-legal nature. This activity also continuously influenced jurisdiction of constitutional courts, as they were established in some constitutional systems. Comparison of style of this creativity, as well as possible individual establishment of institutional nature, enables us consideration, whether this creativity has the elements of modernizing, and eventually also the character exceeding modernizing and modification of the *quasi* constitutional position of European courts or constitutional position of national courts. Therefore it is an additional issue, whether the system of the Council of Europe (eventually also the European Union) enables to confirm, that there is a model of a European legal state as a new constitutional value and the real system of human rights and freedoms protection.

The European continent is the place, where the history of human rights as the constitutional phenomenon began. This history is based on the philosophy ideas of Greek philosophers, the Roman legal phenomenon of the private law, values of Christian respect to human, etc. It may further be established on development of the concept of parliamentarism, on development of the English constitutionality, French revolution, as well as the influence of the developed American constitutionality (after establishment of USA in 1787). The European system of human rights protection is the current achieved value, even in sense of its own, i. e. European internationalization. This system means coexis-

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tence of national constitutional systems and a certain "two-line" European legal order, specifically in systems of the Council of Europe and the European Union.[1] Hence they are two systems of directly enforceable law of the international contractual nature, i. e. the systems of their enforceable protection in member states. Moreover, protection of human rights and freedoms is one of the bases and the inseparable part of the constitutional democracy, as protection of human rights and freedoms is in particular in the system of the Council of Europe, the basic "mission", then this concept is to be considered to be the European constitutional value.[2]

II. INSTRUCTIVE CRITERION OF THE "LEGAL STATE"

If we establish a hypothesis on a statement, that it may be induced that there is a possible concept of an European legal state, on basis of the system of enforceability of human rights protection at the level of European bodies, then the system of the Council of Europe is to be in particular investigated. Nonetheless also the European Union, in particular by the jurisdiction expansion of the Court of Justice of EU (earlier the European Court of Justice) is the system, which legally cultivates the public administration of member states in the direction of human rights and freedoms protection.[3] The system of the Council of Europe, which operates on basis of the Convention of Human Rights and Basic Freedoms, is established in particular at the effect of serving to an individual and at direct applicability of the substantial and the procedural law (in particular this Convention), which are moreover interpreted and also created through an own court, i. e. the European Court of Human Rights. This may be denominated as a *sui generis* constitutional mechanism, i. e. human-rights constitutionality, because this Court then adjudicates states on basis of resolution on breach of the Convention. A decision therein also adjudicates a certain fulfilment. This may be denominated as a *sui generis* European "federal", or *quasi* constitutional court.[4]

Let's base on the premise that the basic thesis of the concept of the legal state is such a hypothesis that a body of the public power, in particular an administrative body or a court institution, are bound by the law (in particular the constitution and the law). This is in particular important in resolution of any personal, political and further rights of humans and legal persons. The court jurisdiction of the pilot and generally binding nature (*case law)* are of course the original English historical phenomenon (as also with the original American version), but they subsequently also became the modern concept of the European continental legal culture. Their protagonists therefore became, as mentioned above, the two lines of the "European Law", i. e. the court jurisdiction of the Council of Europe and the court jurisdiction of the European Union, and subsequently the constitutional or other courts of the member states of both the systems.

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[1] KLÍMA, K. *The Charter and its Realizing in the System of Public and New Private Law (Listina a její realizace v systému veřejného a nového soukromého práva)*. Praha: Wolters Kluwer, 2014, p. 11–16.

[2] See the author in the sub-chapter "Common Constitutional Values of Member States as a Source of the European Constitutionalism (Společné ústavní hodnoty členských států jako zdroj evropského konstitucionalismu"), in: KLÍMA, K. et al. *European Law (Evropské právo)*. Plzeň: Aleš Čeněk, 2011, p. 38 et seq.

[3] Compare thereto KLÍMA, K. et al. *European Law (Evropské právo)*. Plzeň: Aleš Čeněk, 2011, p. 319 et seq.

[4] Ibidem, p. 460 et seq.

A special place in our considerations is to be dedicated to the concept of the "right to fair trial", which became, thanks to the European Court of Human Rights, the conceptional court doctrine with multilevel interpretation, which affected legal systems of member states of the Council of Europe through the activity of in particular their constitutional and supreme courts. The substantial point is nonetheless the fact that for court culture of the European-continental "written law" of the codex type, this meant to specify the relationship to a new source of law, obviously parallel to statutes. We hypothetically acknowledge this and we are able to explain and accept the court jurisdiction of law of the European court institutions, as well as "national" supreme court institutions as the justice sources,[5] Moreover as the sources of constitutional legal nature are concerned.[6] The European Court of Human Rights therein decides on complaints of non-state persons to member states, provided that the complaints are focused against decisions of their court bodies, due to infliction upon human rights and freedoms, as specified by the European Convention. This type of justice control (protection) therefore is the type of protection of the *"supra-constitutionality"*.

The system of the Council of Europe right also in respect to its jurisdiction activity, which develops through court precedents the value context of the Convention, may then be characterized as the European system of constitutional (supra)control. The Council of Europe made in its history numerous decisions and enacted a number of normative documents of the declarations type, which relate, by their contents and the nature, both to the substantial and the procedural law. The content of declarations and the conventions has nonetheless the importantly same principal features as the constitutional regulation of current European constitution democracies. These mostly include the systems of parliamentary forms of government and also of course the *presidency* system (French) or other originals (Switzerland), as they regulate the rights and freedoms of the standard internationally legally recognized catalogue.[7] Each international treaty after the Second World War, which related to rights and freedoms, became then the part of the international potential of the legal regulation of the standard of human rights and freedoms. Therefore, after the Second World War, a certain common international value system of the constitutional type was created.[8]

III. THE COMPLAINT FRAMEWORK OF THE EUROPEAN COURT OF HUMAN RIGHTS

The phenomenon of the Council of Europe undoubtedly accelerates (increases its international value) by the fact that its procedural construction is based on the possibility,

[5] It is generally known that the Convention does not include so wide range of rights and freedoms as the General Declaration of Human Rights and Freedoms, but the activity of the European Court of Human Rights increased the protection of rights even in the area of rights of the so called second generation, the economic and social rights, see KMEC, J., KOSAŘ, D., KRATOCHVÍL, J., BOBEK, M. *European Convention on Human Rights (Evropská úmluva o lidských právech). The commentary. 1st issue.* Praha: C. H. Beck, 2012, p. 98.

[6] See KLÍMA, K. *On Constitutional Law (O právu ústavním*). Praha: Wolters Kluwer, 2012, p. 120 et seq.

[7] See BLAHOŽ, J., BALAŠ, V., KLÍMA, K. *Comparative Constitutional Law (Srovnávací ústavní právo). 5th reworked and supplemented issue.* Praha: Wolters Kluwer, 2015, p. 182 et seq.

[8] See KLÍMA, K. *Constitutional Law* (*Ústavní právo). 4th issue.* Plzeň: Aleš Čeněk, 2010, p. 173 et seq.

according to which natural and legal persons may initiate proceedings of the Court by their complaints. These complaints are therefore focused against decisions of bodies of the public power of a member state and they therefore lead to international legal liability of the state.[9] The European Court of Human Rights therefore verifies the conformity of these decisions with idea values of the Convention. The European Court of Human Rights then considers, in subsidiary way and also in the "ordination" way in respect to constitutionality of member states, the conformity of the decisions, usually of the last court intrastate body, which ends the court process in framework of a member state (therefore enables individual verification of a court issue). Nonetheless if there is a constitutional court within the system and its competences also include resolution of constitutional complaints, then it is also necessary to also address such a court.

The complaints framework has, according to the Convention, the nature of determination petitions, which insist in a complaint requiring determination a specification of a breach of the Convention. If the court system operates on basis of the substantive legal and procedural provisions of the Convention, if it sources from this Convention and interprets it by decisions of an own court, it may be denominated as a constitutional *sui generis* mechanism.

The European Court of Human Rights issues decisions (*adjudicates*) with the emphasis to formulation of court doctrines. The jurisdiction of the European Court of Human Rights influences the legal order of member states, in particular by the fact that it is reflected in various areas of intrastate legal order. The complex of the jurisdiction creates a certain unified legal system established on various (typical) area categories of the nature of:

1. The constitutional law (e. g. in the area of power division, legal state, liability of the public power, independence of the justice, right to fair trial),
2. The administrative law (e. g. in the area of liability for acts from service relationship, inflictions of the authorities of the sanction nature),
3. The criminal law (e. g. in interpretation of classical criminal legal principles (*nulla poena sine lege, nullum crimen sine lege, innocence presumption),*
4. In relation to justice organization – e. g. in relation to realizing of particular procedural principles: arms equality, participants equality, right to defence, right to appellation.
5. It also enters into categories of private law, when it develops the concept of private life, freedom of thinking, family protection, media freedom protection and also the ownership right.[10]

[9] As regards development of the Council of Europe as the control system of human rights protection in Europe, in: GRONOWSKA, B. *Europejski trybunal Praw Czlowieka w poszukiwaniu efektywnej ochrony praw jednotki*. Toruń: Tnoik, 2011, p. 34 et seq.

[10] As regards thereto, please see the concepts of judgements and decisions of the European Court of Human Rights in: KLÍMA, K. et al. *European Law (Evropské právo)*. Plzeň: Aleš Čeněk, 2011, p. 483 et seq.

IV. MULTILEVEL CONSTITUTIONALISM – MULTILEVEL LEGAL STATE?

Analytic and synthetic activity in the area of the constitutional law enables to settle a certain lecture system of case law, the jurisdiction of the European Court of Human Rights,[11] The overall conception of the jurisdiction represents in particular a certain *conception of the European model of legal state*, and therefore also an European dimension of constitutional and legal systems of member states.[12]

This is in particular the global concept of the so called rule of law, which means that there are certain bases, criterion points of view and principles of access to assessment of behaviour of states and their bodies, in particular the courts, state administration bodies and sanction bodies. These are the doctrinal conceptions of court interpretation of substantial and procedural law. From this point of view, the convention is a "viable document", whereby the so called *evolution* interpretation is appreciated thereby, used by the European Court of Human Rights. The example of this is a concept of the permitted limitations of rights and freedoms guaranteed in the Convention in form of the so called *limitations* clauses.[13]

From the point of view of the systems of the Council of Europe, or in parallel way also of the European Union and of the member states, it may be specified that all their powers are subordinated to certain rules. So the legislative power represented by parliaments is bound by substantive and procedural law (Art. 6 of the Convention in the system of the Council of Europe). This means that the problem of eventual legislative excess of national parliaments may be in double control, both of national constitutional (or supreme) courts and also bodies of the Council of Europe.[14] The bodies of the executive power (administrative bodies, other state institutions, bodies for security, sanctions, prison etc.) are under revision supervision of in particular parliamentary control, administrative justice, ombudsmen, complaint system etc. Liability of the justice power for legal state is then special, which is ensured both by the mentioned administrative justice (control of legality) and particularly by the constitutional justice (control of constitutionality).

V. TESTING AS A CRITERION OF "CONSTITUTIONALITY"

Although the European Convention on Human Rights and Freedoms does not establish the concept of precedent bounding effect (*stare decisis*), the European Court of Human Rights "in order to ensure legal certainty, predictability and equality of law, determined

[11] All "statutory" bodies of the Council of Europe, i. e. the Parliamentary Assembly, Committee of Ministers, as well as the European Court of Human Rights may indicate deviation or breach of basic principles of the system. The same, even though in a different "mechanism" may also be seen in the system of the European Union, e. g. in the so called notification obligation in case of the so called technical standards.

[12] Compare thereto KLÍMA, K. et al. *European Law (Evropské právo)*. Plzeň: Aleš Čeněk, 2011, p. 485 et seq.

[13] See thereto KOSAŘ, D. In: J. Kmec – D. Kosař – J. Kratochvíl – M. Bobek (eds.). *European Convention on Human Rights (Evropská úmluva o lidských právech). Commentary*. Praha: C. H. Beck, 2012, p. 73 et seq.

[14] As regards analytical-synthetic KLÍMA, K. et al. *European Law (Evropské právo)*. Plzeň: Aleš Čeněk, 2011, p. 485 et seq.

by itself the principle of non-variation of the previous decisions."[15] It emphasises in this sense that the Court should be the dynamic body, whose activity should be focused on improvement of the law. The precedent dynamics is therefore focused on cultivation of court activity and jurisdiction of member states. The court therefore chooses new and extraordinary important conflicts situations, both for procedural and eventually for substantial law. The traditional European-continental law is therefore confronted with the Anglo-American type of court precedent source of law. The key issue of its enforceability therefore is the principle of the "rule of law", binding the member states that the intrastate law protects natural and legal persons from arbitrary interventions of bodies of the public administration.

The current European jurisdiction culture of protection of human rights and freedoms is manifested in implementation and acceptance of new interpretation methods, which are mostly inspiring for constitutional courts and they also thereby develop them in various extent. Thereby the traditional (European-continental) principle of the legal state is thereby modernized by application of the concept of the "rule of law."[16] Differently from the rule of law, the concept of the legal state therefore, besides the measure of the quality of the legal order, determines certain requirements for the state itself and its establishment. Particularly the concept of the so called material legal state also includes requirements for division of the power, respecting of basic human rights and freedoms, as well as the guarantee of the right to fair trial.[17]

Modernizing of the European jurisdiction constitutionality is then manifested in a number of new technological procedures, particularly various methods of testing result therefrom. The principle (and also the test) of proportionality particularly verifies the relationship of means and targets, as regards: a) suitability, b) purposefulness, c) mutual relationship of the means and the purpose. The principle of proportionality also defines the material boundary of limitation of basic rights, it therefore relates to the principle of respect to the nature and sense of the basic right as the *sui generis* proportionality. The problem of human rights application in decisions of bodies of public power endeavours to enforcement of these rights in relationships between the public power and an individual, provided that this concept of the so called vertical application of human rights is particularly focused on protection of an individual in relations with the public power. It is also necessary to investigate the so called horizontal application of human rights, because the basic human rights are (of course) also applicable among individuals. Therefore the public authority is expected that it provides a natural or legal person with the adequate (particularly court) protection.[18]

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[15] See KOSAŘ, D. In: J. Kmec – D. Kosař – J. Kratochvíl – M. Bobek (eds.). *European Convention on Human Rights (Evropská úmluva o lidských právech). Commentary*. Praha: C. H. Beck, 2012, p. 75.

[16] KOSAŘ. D. et al. *Constitutional Law (Ústavní právo). Casebook*. Praha: Wolters Kluwer, 2014, p. 37.

[17] Compare thereto in: KLÍMA, K. *Comparative Constitutional Law (Ústavní právo srovnávací)*. Praha: Metropolitan University Prague Press, Wolters Kluwer ČR, 2020, p. 269 et seq.

[18] Ibidem, ad "Jurisdiction of the European Court of Human Rights as the Source of the European Human-Rights Constitutionality" ("Jurisdikce Evropského soudu pro lidská práva jako pramen evropské lidsko-právní ústavnosti"), p. 182, in: KLÍMA, K. *Comparative Constitutional Law (Ústavní právo srovnávací)*. Praha: Metropolitan University Prague Press, Wolters Kluwer Prague Press ČR, 2020, p.180 et seq.

Further modern methodology of testing of inflicts upon human rights used by the European Court of Human Rights is the concept of the so called *limitation clauses* and further types of limitations of human rights and freedoms. This concept of the Council of the sense of the Convention and Supplements therefore implies the following limitation clauses: 1. Standard limitation clauses (Articles 8 to 11 of the Convention), 2. Modified limitation clauses, 3. Common limitations for more rights, 4. Immanent limitations. Various types of these clauses establish relativity of human rights, which particularly means that the human rights are not illimitable. The European Court of Human Rights therefore applies in deciding on complaints, the so called five-step-test (in relation to Articles 8 to 11 of the Convention), according to the following criteria: a) is the case covered by this Article (?), b) was there an infliction upon the mentioned right of the applicant (?), c) was this infliction in compliance with the law (?), d) did this infliction pursue at least one of the legitimate targets (?) and (e) was this infliction necessary in the democratic society (?).[19]

The standard limitation clauses are established at the so called legitimate targets of the inflictions of the public power. These are also the generally acknowledged values of the constitutional systems, which are reflected in functions of the public power. They include both the values directly constitutionally established, as well as those formulated by the jurisdiction doctrine. So the following are determined as the legitimate targets of limitations in Article 8 of the Convention (right to respect to private and family life): public safety, economic welfare, health protection, moral protection, protection of rights and freedoms, etc.

VI. THE EUROPEAN CONCEPT OF THE PROTECTION OF SUBSTANTIAL CONSTITUTIONAL RIGHTS – THE LIFE, PERSONAL FREEDOM, PRIVACY AND OWNERSHIP

From the point of view of the constitutional substantive law, in particular the right to life, is established by the Convention as the preferred European dominant of the "supra-constitutional character". The right for life binds member states with the requirement in the so called vertical and horizontal concept. Therefore the member states may not, on one part, cause (or permanently cause) breach of such a right by themselves, but they are also obliged to dedicate all the care to cases, when such behaviour occurs, either in public law relations or private law relations. In the first mentioned situation, the so called establishment (superior) relationships of the state and natural or legal persons subordinated by public law, and in the second case, the relationship is then based on equality of the position of the participants.

From the point of view of the procedural relationships, in all procedural relationships of the public law regulated by the law, the bodies of the public administration shall always investigate, whether all procedural conditions of the given proceedings determined to in-

[19] Compare in KOSAŘ, D., VYHNÁNEK, L., KÜHN, Z., ANTOŠ, M. *Constitutional Law (Ústavní právo). Casebook., 1. vyd. Praha, Casebook, I.*, Praha: Wolters Kluwer CZ, 2014, p. 100 et seq.

vestigation of an event related to deprivation or loss of life were fulfilled, i. e. in particular whether the investigation was held duly and in a way corresponding to the importance of the event.[20]

Defence of each person against illegal violence in the area of the so called horizontal rights, realizing of legal apprehension or prevention of an attack of a detained person are considered to be the behaviour focused against life by use of force. In the area of vertical influence, these include realized actions of the bodies of public administration for the purpose of suppression of disorders and revolt. The conceptions prohibiting torture, inhuman or humiliating treatment, in particular guarantees that the state must guarantee conditions compatible with acknowledgement of human dignity, when their behaviour may not exceed the unavoidable level of duress and made pressure. The Convention does not permit any limitation of this right and therefore it is an absolutely illimitable right.

The right to freedom and personal safety according to Art. 5 of the Convention is one of the most used provisions within the activity of the European Court of Human Rights, as well as constitutional courts of member states. While these values (freedom and personal safety) are acknowledged as guarantees of the state during inflictions upon freedom of an individual, both from part of bodies of public administration and in relationships with other persons. The Convention itself determines the areas of permitted intervention, when the freedom may be intruded.[21] In framework of permitted ways of intervention, the Convention requires in particular legitimacy and its compliance in application the intrastate law by the state bodies. Legality of depriving of freedom requires the requirement of compliance with the respective procedural procedures of a particular state. The public administration is also liable for due investigation of an issue, provided that vigour of the process of the public administration must be made, while protection of values is respected, also in measures of the public power in prevention and reagency against callousness of terrorism.[22]

The right to respecting of private and family life (Art. 8 of the Convention) prohibits the state bodies to inflict upon private and family life, residence and correspondence. The law, which permits this, must be, according to the Court, particular, certain and shall regulate not only the circumstances, but also the exact way of the infliction upon privacy. There further is a crucial issue of necessity of such a measure and its proportionality in relation to the particular situation. According to the Court, the private life includes both physical and moral integrity, as well as the area of internal thinking of a human, as well as family relationships.[23] The freedom of movement and stay according to Art. 2 of the Sup-

[20] See thereto in more details the jurisdiction execution of this concept in the Czech Republic in: WAGNEROVÁ, E., ŠIMÍČEK, V., LANGÁŠEK, T., POSPÍŠIL, I., et al. *Charter of Basic Rights and Freedoms (Listina základních práv a svobod). The commentary*. Praha: Wolters Kluwer, 2012, p. 186 et seq.

[21] For example by the principle that even a minor may be deprived of freedom for purposes of education supervision.

[22] As regards interpretation of the so called limitation clauses, KOSAŘ, D. In: J. Kmec – D. Kosař – J. Kratochvíl – M. Bobek (eds.). *European Convention on Human Rights (Evropská úmluva o lidských právech). Commentary*. Praha: C. H. Beck, 2012, p. 99 et seq.

[23] Compare thereto e. g. the decision of the European Court of Human Rights in the issue of Khan v. United Kingdom (2000). In: *hr-dp.org* [online]. 4. 10. 2000 [2022-01-14]. Available at: <https://www.hr-dp.org/files/2013/09/11/CASE_OF_KHAN_v._THE_UNITED_KINGDOM_.pdf>.

plementary Protocol No. 4, represents the integral part of the general freedom. Firstly, these include the right to determination of homeland, as well as the right to freely cross the boundaries, freely stay and settle at any place, the choice of residency, freedom of residence, freedom of travelling, prohibition of depriving of citizenship, prohibition of prevention of return to the homeland.

On basis of the Supplementary Protocol No. 1, each natural or legal person is entitled to peacefully use their property. The mentioned person may be deprived of the property only in case of public interest and under conditions determined by the law. It results from the Convention, that each infliction upon the ownership right must be in compliance with the law, while guarantee of the ownership right does not prevent the states to deprive a private person of the ownership, but only in the public interest. Intervention of the state into private area of the ownership must therefore respect reasonable relationship of proportionality among requirements of the general interest of the society and the need of protection of basic rights of an entity.

VII. PROCEDURAL VERSION OF THE "EUROPEAN LEGAL STATE"

Decisions of the European Court of Human Rights are mostly focused on the issues of the court process and not only the issues of the substantive law. The right to fair trial dominates in its jurisdiction, which means development of procedurally legal guarantees of enforceability of rights and freedoms. Considering the fact that in Article 6 par. 1 of the Convention, all the issues are concentrated in the principle of "access to court", the Convention establishes the procedural legal guarantees of enforceability of rights and freedoms in the conception of the functional court system. Thereby certain autonomous public law function of administration of justice are conceptually confirmed and therefore the idea of special and independent bodies of the public power, i. e. courts, is synthesised. The conception of the Convention then develops the model of quality court process established on thorough realization of certain principles typical for the court procedure and the right of each natural or legal person to effective legal means of remedy guaranteed by Article 13 of the Convention to everyone, whose rights and freedoms were breached. The Convention hereby imposes the member states to provide, at the intrastate level, the persons with effective legal tools to effective application of their breached rights at an intrastate body. It is therefore up to particular constitutional systems, how they organize their system of court power in order they achieve their obligation. The remedy must be in particular effective, i. e. means able to stop or remedy infliction or malpractice of a body of the public power etc. The state must be eventually able to provide reasonable replacement (satisfaction) for the breach. The concept of effective means may also be understood as the summary of various remedy means one after another.[24]

[24] Compare thereto the decision of Leander v. Sweden (1978). In: *legislationline.org* [online]. 26. 3. 1987 [2022-01-14]. Available at: <https://www.legislationline.org/download/id/3521/file/Case_of_Leander_v_Sweden_1987_en.pdf>.

The right to fair trial is, in sense of the concept of the fair trial according to the European Court of Human Rights, applied both to court issues of civil and administrative law, as well as to issues, which are the subject of the criminal procedure. Gradual cultivation of particularly court procedure in doctrines of the European Court of Human Rights contributed to development of the conception of the legal state, level of legality of the court process and division of the justice power from the legislative and executive power. The Court thereto guarantees the right to the possibility of the subsequent control of the decision of a court of the first instance, the principle of equality of arms, deciding within the so called reasonable time. Reasonableness of the time of deciding of a court (so called reasonable time) means that circumstances and reasons of time complications of duration of the process, both on part of justice bodies and on part of the participants in the proceedings are excluded. The public power is thereby only liable for delays caused by state authorities (of the preparation criminal procedure, by court, etc.) and not for delay circumstances, which were caused by another participant in the process (e. g. a criminally prosecuted person).

VIII. THE CRIMINAL LINE OF THE "EUROPEAN" RIGHT TO FAIR TRIAL

The overall concept of the case law of the European Court of Human Rights is thereby, as it is concentrated in the process of the public power against a human person, in particular focused on protection of such a person against repressive parts of the state competent on basis of the law. Within the doctrine of the European Court of Human Rights, these include in particular the reasonableness of any decision of the state power, whereby the freedom of an individual is restricted – i. e. custody, detention, execution of the sentence and other types of detention decisions of the state. The Court also guarantees the right to legal help, already in the preparation criminal proceedings, the right to reasonable time of preparation of defence and further measures, which should guarantee professionalism of the defence.

The hereinabove means that within the conception of the "European" fair trial, the so called minimum standard is guaranteed, which means that the states are not prevented to provide higher level of protection of rights and freedom, in particular in the area of criminal law. The Convention ensures a certain protection shield for those, whom the tools of the criminal law are aimed against, i. e. in particular the persons accused of criminal activity. The interpretation of the criminal law by the Court did not in that prefer neither continental (inquisition) nor Anglo-American (accusatory) way of leading of a criminal process. It is possible to agree that the concept of the European Court of Human Rights importantly contributes to certain convergence between both types of the court criminal procedure.[25] The statement is during that based on the presumption that just the contradictory principle of equality of arms is according to the European Court of Human Rights

[25] See this in more details KOSAŘ, D. In: J. Kmec – D. Kosař – J. Kratochvíl – M. Bobek (eds.). *European Convention on Human Rights (Evropská úmluva o lidských právech). Commentary*. Praha: C. H. Beck, 2012, p. 573.

the nature of the right to fair trial, and therefore also the base of the justice.[26] In this sense, the task of the Court always is to decide whether the complained proceedings, considered as a whole, was fair according to the Convention. The Court hereby investigates, whether the process complies with the principles of justice, which are *de facto* the principles of the constitutional nature and are also really enforced within the constitutional systems of the states of the Council of Europe.

IX. IS IT POSSIBLE TO IMPLY CERTAIN UNION CONCEPT OF THE LEGAL STATEHOOD?

The Court of Justice of EU (earlier the European Court of Justice) is a distinct animator and the link updating the founders treaties (now the Treaty of Lisbon of the European Union). It may be declared that the contribution of the Court in the history to development of not only the integration, but also to original aspects of rights and freedoms of citizens of the European Union. There is a number of earlier so called *community* decisions, which changed the principles of the community law[27] and changed the nature of the Community and the Union in the direction to a federation. Decisions not only intervened in relationships among bodies of the Community and the member states, and thereby it completed the institutional balance, but it also publicly legally intervened particularly into the area of social rights. The Court, without any doubts, also further extends as well as expands.[28]

The expansion concept of the activity of the Court was also enabled by methods of interpretation of establishment (founders') treaties. The intrastate courts usually base on the language interpretation, when the natural meaning of words is considered.[29] The language interpretation of agreements is nonetheless burdened by their generality and unclear formulations. The Court therefore relays in particular on teleological interpretation, which analyses the provisions on basis of their purpose or target.[30] Use of teleological interpretation enables the Court to "fill" the gaps in the founders' treaties and also in the secondary law and to adapt them to the development of the European integration, whose targets were gradually developed from purely economic into areas such as environment, social protection or human rights. It is obvious that the Court, in certain aspects, interpreted the treaties very freely,[31] sometimes it partially went against their wording.[32] The Court undoubtedly several times went above the limits given it by the treaties, when it referred to the maintenance of the rule of law in the European Union.

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[26] As regards the provision of Article 6 of the Convention, the European Court of Human Rights used, for the first time, the concept of the "fair trial" as the right to fair trial in the judgement of Golder (1975), A-26.

[27] The concept "community" is derived from the French "Le droit communautaire" (the community law) as the Law of the Community (i. e. of the European Economic Community).

[28] It may be now reminded the December (2014) statement of the Court of Justice of EU on impossibility of accession of the European Union into the Council of Europe.

[29] See thereto KLÍMA, K. et al. *European Law (Evropské právo)*. Plzeň: Aleš Čeněk, 2011, p. 36.

[30] The Court investigates the context of each provision of the community law and it interprets it in the light of the community law as a whole, therein it acknowledges the targets of the community law and its actual development, see thereto Cilfit v. Ministry of Health (1982), ECR 3415, point 20.

[31] See thereto 22/70 Commission v. Conseil /ERTA) 1971.

[32] See the decision of Reyners v. Belgium (1974), ECR 631.

The procedures of the Court sometimes were not generally values-neutral, but they participated in the decisive extent in intensification of the integration. In which sense do we therefore see the concept of the modernizing elements in the activity of the Court of Justice of EU in the tradition of the European Court of Justice? The Court undoubtedly reacted to the needs of development of freedoms of movement of persons, goods, services and capital, provided that thereby it importantly entered also in the human-legal area of citizens of member states of the European Union.[33]

X. THE CONTINENTAL EUROPEAN CONSTITUTIONAL JUSTICE AS A NEW PHENOMENON OF THE CONCEPT OF THE LEGAL STATE

Undoubtedly, a special role in development and therefore in support of the European concept of the legal state, is fulfilled by the top national justice institutions in form of supreme courts or particularly constitutional courts as specialized bodies of the constitutionality protection.[34]

Within the continental legal culture of the written constitutional codex law, the regulatory statistics of the written text induces the need of update of the constitution. It is nonetheless necessary to see that each constitution has two entirely different parts of the subject of the regulation, which are organizing of the constitutional power on one part, and therefore constitutional norms of organizational establishment nature, respectively then the normatively different catalogues of basic rights, political freedoms and rights of economic, social and culture nature.[35]

The creative activity of particularly the constitutional courts mostly has a positive effect in completion of the values system of the state, in particular in the direction of self-restriction of bodies of the public power, if they decide on rights of citizens or legal persons. In this sense, the justice creation of the law has features of modernism and therefore it fulfils the sense of convergence of the written constitutional law (also of the *dual* European above-standard in form of parallel operation of both the systems of the Council of Europe and also the system of the European Union) and the jurisdiction creativity of the top court, which is also able to affirm the continuously developed concepts of the European legal state.

The specialized constitutional justice is the European phenomenon, which was initiated on Kelsen's conception bases by the federalization of the Austria (after the First World War in 1920) and also the autonomy of the Zakarpattia Ukraine in framework of the newly established Czechoslovakia (by the Constitution of the Czechoslovak Republic of 1920). The development after the Second World War means gradual development of the constitutional justice with the expansion of new powers of the constitutional courts in relation

[33] "Famous", i. e. precedent decision resolving the conflict between the *Germany and France, Cassis de Dijon*. See the decision 120/78, SbSD 00649, 1979.

[34] The statement on the so called constitutional liability, see KOSAŘ, D., VYHNÁNEK, L., KÜHN, Z., ANTOŠ, M. *Constitutional Law (Ústavní právo). Casebook I.*, Praha: Wolters Kluwer CZ, 2014, p. 93.

[35] As regards the meaning of the so called constitutional precedent law, the author ibidem, p. 218 et seq.

to the institutions of the democracy.[36] After the domino effect of the disintegration of the mode of one political party in the so called post-socialist countries, the programming return to the democratic constitutionality was linked to return to the legal state and therefore to entry into the system of the Council of Europe as the guarantee European system of human rights and freedoms protection. As a guarantee of functioning of the general justice and enforceability of rights, they should be ensured by the top supervision of newly established constitutional courts, including inclusion of the institute of constitutional complaints into the complex of powers of constitutional courts. The specialized constitutional justice therefore tended to two crucial functions in the society, which were in relation to a newly set competition democracy to care for its compliance activity with the constitutional *cautelas*. The substantial mission of the constitutional justice also became the intention to make, from the constitutional right to fair trial, the procedural guarantee of the protection of particularly natural persons against institutions of executive or also justice power and their eventual excesses. While the "supervision" over compliance with the institutes of the constitutional democracy (constitutionality of the parliament legislation, elections, direct democracy, territorial self-governance etc.) has public legal political-power nature, then the amount overloading of constitutional courts by constitutional complains leads them to searching for selective methodology of choice.

Development of the specialized constitutional justice nonetheless leads to continuous change of position of the constitutional court in the division of the power. The constitutional court is "inserted" into the system of division of the power. And as the current parliamentary democracies are established on the model version of the so called parliamentary form of government, then the parliamentary opposition uses the option to propose contra-constitutionality of legislative acts (mostly of governmental law proposals) at constitutional courts. And the constitutional courts thereby are the only institutions, which could cancel such acts. The division of the power then in fact achieves the *"dualism"* nature and the constitutional courts may also achieve the nature of a certain political arbitrator. The mission of the constitutional courts to the "third power" itself, i. e. in respect to jurisdiction activity of "general" courts, is then special (regardless of they may be denominated by specific names in the constitutional systems). In connotation to the jurisprudence of the European Court of Human Rights, the constitutional courts monopolize the interpretation conception role in interpretation of the intrastate law, not only in respect to general courts, but also in factual specification of barriers for the parliament of the legislation (future laws).[37]

In relation to investigation of the activity of the constitutional courts (in particular of the so called new democracies), it is necessary to link a new historical phenomenon in the form of a crucial role of constitutional courts for division of the power with the fact of direct acceptance of the source in form of the jurisdiction of the European Court of Human

[36] As regards thereto, see BLAHOŽ, J. As Regards Development of the Concentrated and Specialized Constitutional Justice after the Second World War (K rozvoji koncentrovaného a specializovaného ústavního soudnictví po 2. světové válce). *Právník*. 1993, Vol. 132, No. 12, p. 1029.

[37] In synthetic and summary way, see JIRÁSKOVÁ, V., SUCHÁNEK, R. *Constitutional Law in the Jurisdiction of the Constitutional Court (Ústavní právo v judikatuře Ústavního soudu)*. Praha: Linde, 2007.

Rights by national constitutional courts. Particularly immediate acceptance of the jurisdiction of the European Court of Human Rights after establishment of two independent states in form of the Czech Republic and the Slovak Republic meant not only a new type of a source of law, but also takeover of the key jurisdiction conceptions of the European Court of Human Rights, of the entirely precedent nature, in particular of the so called right to fair trial. The Czech justice very quickly and gradually took over as the "matter of course" the key theses (*tragende grunde*?) from the reasoning of judgements of the European Court of Human Rights, which factually have (in the Czech legal order) the same level of the normative binding effect as particularly the own constitutional norms and laws.[38] As regards the constitutional systems of member states of the Council of Europe, the importance of the jurisdiction of the European Court of Human Rights insists in cultivation of the decision activity of general courts, as well as in development of legal statehood with impact to restriction of the so called "arbitrariness" of the bodies of the public (state) administration.

The creativity of the constitutional courts thereby entered into normative bases of new constitutional democracies. It is thereby possible to ask, where are the reasons of interpretation intensity of the constitutional courts and which is the place of their creativity in the system of the representation democracy. Let's make a basis of the fact that the law created by courts of the precedent type of the English or USA model are present in the continental Europe since 1960s. Analogously, also in the so called post socialist countries, the vision was confirmed that only specialised constitutional justice is the authentic expert to the constitution. And considering unlimited options of the legislator to regulate any material issue by the law, the constitutional court must, as regards the complained law, directly adjudicate, what is understood by a certain constitutional principle. The constitutional court nonetheless shall as regards interpretation also enter into branch legislation. If the court control of constitutionality then includes the institute of constitutional complaints of natural and legal persons, the so called conventional right (of the Council of Europe) to fair trial is applied as the option of non-state entities to use the European Court of Human Rights and its doctrines to defence of private law reasons and interests in court way and subordinate their procedural issue to the European quasi-constitutional dimension.[39]

In relation to the court control of constitutionality, it is also necessary to consider the criterion of the court dimension in relation to incidental control of constitutionality of the "private-law nature". These therefore are the resolution of constitutional complaints of natural and legal persons. The phenomenon of constitutional complaints influences the behaviour of constitutional courts, both in number and procedurally. It is linked to the prior court process (particular procedures of usually all court instances). We thereby

[38] See thereto SUCHÁNEK, R., JIRÁSKOVÁ, V. *The Constitution of the Czech Republic in Practice (Ústava České republiky v praxi)*. Praha: LEGES, 2009.

[39] If we declare here normative creativity of constitutional courts, then the phenomenon of the French Constitutional Council (Conseil Constitutionnel) cannot be omitted. See thereto in excellent way in the monograph GIBA. M. *Court Control of Constitutionality in France (Súdna kontrola ústavnosti vo Francúzku)*. Bratislava: Wolters Kluwer, 2017.

set an hypothesis in sense, which the constitutional dimension of a legal conflict, i. e. of such a conflict to constitutional *cautelas*, insists in, in order the applicant is even able to "have access" to the procedure itself at the constitutional court?

Review of constitutional complaints by the constitutional court is as regards numbers, the most often competence of constitutional courts.[40] Is it even possible to find out a method of selection choice (accessibility) of the issue to solution by a constitutional court? It is of course necessary to respect personal "legal philosophy" of the judge, the reporter, his/her theoretical invention, ability of abstraction, prior practice in legal professions, but also the task of his/her assistants, who prepare the case. Let's make a basis of the fact that the material of the constitution is in principle without subject limitations and searching of its constitutional dimension is mostly illusory. Nonetheless we acknowledge that an individual issue comes to a constitutional court in a way of ordinary and extraordinary means and therefore the criterion of requirements of the so called right to fair trial apply, in context of the dispositions of the European Court of Human Rights in interpretation of Article 6 of the Convention. The so called substantive law is not preferred, then rather excluded. Therefore, if the judge, the reporter, should justifiably assess fair consideration of the issue by the general court and must in particular assess the level of contradictoriness of prior proceedings (investigation, appellation review, extraordinary appellation, cassation petition in administrative justice, etc.). This relate to assessment of proofs at courts, their provability, etc. Selectivity of the process of the court therefore unambiguously prefers criminal law issues, as the activity of the bodies of the criminal sanctions mostly intervenes in the natural legal substance of a human and his privacy.

Anyway, the constitutional courts also in their minimized intervention in the causal substance of constitutional complaints remedy the contra-constitutional excesses in vertical and in principle of two-instance justice. There are also *sui generis* legislators. The type cases, as well as important part of the reasoning of their decisions achieve the nature of binding legal system, together with the "written" law. Therefore the constitutional rules and rules included in the laws.

XI. CONCLUSION

The Convention, together with the jurisprudence of the European Court of Human Rights creates a special and entire legal system, which is particularly aimed to cultivation of decisions of bodies of public power in issues of natural and legal persons, or of other power intervention. Even the European Court of Justice once confirmed that the basic rights are the part of (then) so called community law and their protection is to be guaranteed. Adoption of the Charter of Rights of EU (2009) then has the synthetizing and integration nature and the binding principles for the secondary law issued by bodies of the

[40] There are 6 sections each with 3 judges, within the structure of the Federal Constitutional Court of the Federal Republic of Germany, which resolve five thousand of petitions per year, provided that they mostly include the constitutional complaints (there were approx. 200 thousand of petitions in years 1951 to 2017).

European Union. As the secondary law then develops the human-legal protection, it may also be applicable at national courts.[41]

The "Case Law" in particular of the European Court of Justice is the phenomenon, which is inseparable from the original "classical" idea of the so called legal state, which is that each behaviour of a state power would be a strict compliance with the letter of the law. Therefore that competences, applicability and particularly the decision procedure would have in the system of the codex law of the European-continental type strictly legally given dispositions and these dispositions are thoroughly adhered by the bodies particularly of the state administration. The current *jurisprudence* particularly of the European Court of Human Rights undoubtedly shifts the concept of the legal state into the position of quantitative intensity not only of human rights and freedoms protection, but also particularly cultivation of public administration and decision activity of courts. Jurisprudence of the European Court of Human Rights therefore sets not only on enforceability of the European law in member states, but also at requirements of organizational, intervention and decision legal level of activity of bodies of the public power. It is therefore possible to declare and confirm that the concept of the "European Legal State" is a specific European versions of constitutional protection of basic human values.

[41] For example directive on race equality (No. 2000/43/EC) or directive on equal treatment at work (No. 2000/78/EC).