

PUBLIC LAW SECTION

A Treaty¹ of the Constitution for Europe and the starting points for the "European criminal law"

Implications for the Czech penal law European /CPL/ valid currently and in the future
and for the European penal law /EPL/

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CHAPTER I: INTRODUCTION

The following conveyance is based on an extensive worked out pilot study "A dimension of the questions of the criminal justice of the Treaty of the Constitution for Europe and its importance for European criminal law (Europeanization of the Czech penal law *de lege lata*, *de lege ferenda*, i.e. the starting points and trends of the Czech penal law European /CPL/; the foundations of the European penal law based on the treaty of the constitution /EPL/; Austrian experience)". It is therefore limited to some chosen problems of otherwise extensively conceived text, which are thus offered to discussion.

PART I. - THE BASIC STARTING POINTS OF METHODOLOGY AND TERMINOLOGY

The structure of the *theoretical conception* of the material penal law and the procedural penal law, re-

presents the core of the wider term of the theory of penal law both material and procedural, involves as its elements the "functions" of both the penal law sectors, their "essential principles", and even the "penal-law institutes", especially the key or main ones.²

The identical, i.e. a systemic, methodological approach may be chosen even in the relation to the "European criminal law", I presume, or even to the Treaty of the Constitution for Europe (further also "TCE") and its penal law aspects. If the "European criminal law" is in Footnote.8 marked as a term superior to the terms "penal law of Europe" and "European penal law", it is not just a verbal gymnastics.

I grasp European Criminal Law (ECL) as a complex of norms of different legal quality³ (primary, secondary) accepted by the member states and institutions of the European union (further also "EU",

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¹ The nowadays too early "refused" Treaty of the Constitution for Europe is in certain danger. SICHÁ J. in his text: A ridiculed beauty the Treaty of the Constitution for Europe expresses the fact literally very fittingly, LN, XVI, 2005, p. 7.

² Compare in detail KRATOCHVÍL, V. Cesty individualizace trestní odpovědnosti, či konstatování trestní odpovědnosti: hmotně-právní nebo procesně právní problém? Právní obzor, LXXXVIII, 2005, 1. p. 13 and following.

³ JESČEK, H.-H. To the bill of the general part of the new penal code of the Czech Republic. Trestní právo, VIII, 2003, 11, p. 15; the author lectures here about "... the validity of the norms of the European criminal law of various legal nature." And further on about the ways of the creation of the community European law regulations, that state the sanctions without having defined "the European criminal law" in greater details.

"Union") with the legislative authority that are concerned with the intrastate (national) penal law systems of the member states of the EU or that gradually create the penal-law system of the EU itself of a supranational nature.

From the draft definition just mentioned we may derive two fundamental forms of European criminal law, namely national (Czech) penal law European (CPLE) and European penal law (EPL).

The first mentioned, the CPLE, is a national (intrastate) category and thus the outcome of the process of Europeanization (not "europeanization") of the national penal laws of the member states of the EU, the result of their vertical harmonization to the community law of the EC and a horizontal harmonization to the EU law, including the mutual harmonization of the penal laws of the member states.⁴

The second one, on the other hand, i.e. the EPL, should be (could be) an independent supranational category, as a result of the law creating of the institutions of the union.⁵

The theoretical conception of the European criminal law should involve as its components also the functions, its essential principles that it is based on, as well as appropriate penal law institutes. As an element of the broader sense of the term of the theory of penal law the institutions are added.⁶

When projected into the mentioned forms of the European Criminal Law, it will be about functions, principles, institutes and institutions of the Czech pe-

nal law European, and about the same elements of the European penal law.

From the point of view of the PLE it may be important to compare what Czech penal law (both material and procedural) offers, with regard to its functions, principles and institutes, as well as institutions with what in this respect the TCE involves. From the point of view of the EPL it will be appropriate to perform an analysis of the fact, whether and if so, then in what form, the TCE contains the penal law functions, principles, and /or institutes and institutions, even if they are in a rudimentary form.

From one or other aspect the TCE gets into the role of the starting point of the European criminal law, the starting point, which at the same time suggests its developing tendencies (Art. I - 1 par. 1 the process of the communitarization of European law)

PART II. - EXCURSUS: INTRASTATE PENAL LAW AND EUROPEAN INTEGRATION THROUGH THE LENS OF THE TCE

Both penal law sectors as an obvious manifestation and an especially sensitive and severe implement of an assertion of mainly the inner autonomy of the member states of the EU have for a relatively long period of time enjoyed certain preserve from the part of the European integration processes. The practice has basically been holding on and at least till the admission of the TCE will be, due to the nowadays communi-

⁴ The term of harmonization includes according to my opinion in the first place the relation of the national law of the member states of the Union and the laws of EC (i.e. community one, I. Pillar) that rests in the "approximation", "adaptation" of the first one towards the second one, that passes along the vertical, because the national penal law and the level of the law of the EC (and after the admission of the constitutional treaty all the law of the EU?) is /should be a vertical, that is lead through the way of orders / European laws and of the regulations along the line of the supranational European law and national law. On the other hand in the relation of the national law of the member states of the Union a the law of the EU (i.e. a Union one, II. and III rd Pillar intergovernmental), it may be only a horizontal, thus a "harmonization" in the technical, narrower sense; (see even the art. 10 of the Constitution of the CR, that anchors between the intrastate law and the international treaty only an application hierarchy, not concerning the relations). Therefore in the context of the national law on the one hand and the lawful acts of the EC/EU on the other hand may be and also is the term "harmonization" used both in its broader sense, i.e. including not only a vertical (approximation, adaptation), and even the horizontal, thus harmonization in the narrower sense (i.e. the harmonization of the intrastate judicial codes of the member states, that mean, or rather emphasize the process of harmonization of the national rights of the member states of the EC/EU mutually, as a part of the process of implementation of the frame decisions/ European frame laws). See also TIEDEMANN, K. Gegenwart und Zukunft des Europäischen Strafrechts. Zst W, 116, 2004, 4, p. 949 or 955. Further on SATZGER, H. Auf dem Weg zu einem Europäischen Strafrecht, 2001,15, p. 553.

⁵ But not utterly independent of the influence of the penal-law traditions, principles etc. of the member states of the Union. SATZGER, H. Internationales und europäisches Strafrecht. Baden-Baden: Nomos Verlagsgesellschaft, 2005, p. 24 f., talks here about the European criminal law in the narrower (EPL) and broader (PLE) sense. The same SATZGER, H. mentions here the supranational, immediately effective penal law of the EC as the "community penal law" (Gemeinschaftsstrafrecht), that he of course considers the (strongest) form of Europeanization of the penal law, that the member states apply; he gives the term "Europeanization" a broader sense, than is the one in this paper, where it is connected only with the PLE, which is considered more accurate. The thing is that the EPL is not a result of the process of Europeanization, but a result of the legislation activity of the Union, which is relatively independent of the interference of the national legislator. See the quoted author of the Die Europaisierung des Strafrechts. Kohn etc.: Carl Heymans Verlag, 200, Sieber, U. (Hrsg), p. 57 f.

⁶ Besides above mentioned and used structure elements of the "theoretical conception of the penal law" it has been shown as necessary to embody into the structure of the broader sense of the "theory of the penal law" even the institutional element. It means such that includes the penal-law institutions, which in the contrary to the penal-law "institutes", put into practice the penal law (material and procedural) in its dimensions theoretical and practical. In this respect the "institutional" element would of course belong rather into the structure of the theory of the penal law procedural (?). Further to the source cited in the note No 2 should the institutional element be added into the there mentioned structure of the system of the theory of the penal law (A, B, C) as "D". In this text we rank it also as the fourth, therefore under D, see the chap. II, part II.

tarian point of view, which is interconnected to the delegation of the competences of the member state on originally EC, nowadays on EU.⁷

The phenomenon of the PLE⁸ was not understood so urgently, as it had been since the very beginning of functioning of the EC/EU in the cases of the extra-penal law sectors.⁹ The reality though has been distinctly shifted:¹⁰ the penal law has been getting mixed up with the processes mentioned more and more explicitly, and that without any regard to the three-pillar architecture of the EU that has been used up to now, where there is the space for the penal law problems in the broadest sense reserved explicitly in the Third Pillar, the intergovernmental one, unlike the communitarian First Pillar, nevertheless the protection of these values may be subjected to the protection through the means of penal law, according to the principle of the same, thus even the penal-law protection of the member states interests and the interests of the EC/EU, implied in the Art. 10 of the Treaty of the foundation of the European Community,¹¹ see also the Art. 280 par. 2 of the treaty quoted about the same combating frauds that damage the financial interests of EC as well as the financial interests of the member states. For example *Bacigalupo* writes in this connection: "A good reason exists for the hypothesis that the communitarized economy needs also a communitarized economic penal law". At the same time he adds: "EU wants to be something more than just an economic community. Therefore a good reason exists for the implementation of also other European criminal deeds..."¹²

The European integration processes do not avoid even the objective tendency that is represented, in my view, by the EPL just being formed. But just with regard to the mentioned nature of the intrastate penal law will the process of the forming of the EPL be a very careful, slow, and because of that a long-term one.¹³

Into this reality enters now the treaty document marked in the title.¹⁴ Through its multiplicity of layers it covers up in a broad take a number of aspects of the European integration among which the dimension of penal law (i.e. both PLE and EPL) is in an important position, though not, as I think, in a key position. Apparently in the spirit of a usually grasped penal law as an *ultima ratio* is in the penal-law dimension in the text of TCE reserved only a relatively narrow space. But it cannot mean a change of *corroboration* of the penal law in the sense of *ultima ratio* through its mere *inferiority*. Besides the mentioned facts, the role of both penal-law sectors will change, because the present three-pillar construction of EU should be in the TCE substituted by the "*monolithic*" construction, thus sweeping away the up-to-now existing difference between communitarian law and the union one.¹⁵ What definitely would not lead to subduing of the importance of the PLE, because the intensity of the Europeanization of national penal law will obviously not be weakened. Therefore it will not be allowed to refuse again and again the repeated and more and more urgent "invitations to the dance", which are being obtained from Brussels. Among undoubtedly most serious in this sense belongs also the TCE. This legal

⁷ ARNOLD, R. Suverenita a evropská integrace. *Evropské právo*, II, 1998, 9, p. 12, or Satzger, H. Die Euripäisierung ... rep. quot. Sub 5, p. 699.

⁸ Analogically to the terms of the "penal law international" and "international penal law" it is possible and necessary to construct new terms for the fast communication; on the one hand "*the penal law European*"; as the intrastate penal law, national, modified through the process of its Europeanization (i.e. europeanized) on the other hand "*the European penal law*" as independently long-termed formed penal law of the supranational nature (i.e. in the form of e.g., European model Penal Code /RE/ or the Corpus Juris /EC/EU). Genus proximus of both terms mentioned represents the term of the "*European criminal law*". On all the mentioned levels the basic classification of the forms of the penal law is projected: "the penal law *material*" and "the penal law *procedural*".

⁹ TOMÁŠEK, M. Evropská ústavní smlouva a suverenita v trestních věcech. *Časopis pro právní vědu a praxi*, No 3/2004, p. 254. TOMÁŠEK, M. Existuje „evropské trestní právo“? No 5/2004, p. 143. German authors pay a long termed and profound attention to the problems of the European penal law: cf. JUNG, H. *Europäisches Strafrecht* (Part I) *Literaturbericht*. *Zst W* 112 (2000), p. 866 or JUNG, H. (Part II) *Zst W* 116 (2004), p. 475.

¹⁰ RENDELING, H. - W., MIDDEKE, A., GELLERMAN, M. (HRSG) *Handbuch des Rechtsschutzes in der Europäischen Union*. München: Verlag C. H. Beck, 2003, p. 766-767; JUNG, H. *Europäisches Strafrecht* (Teil II). *ZStW*, 116, 2004, 2, p. 475: "Eorparecht kann nicht mehr ohne Strafrecht betreiben werden ..." and others (SATZGER, H. re. Cit. sub 5, *Die Euripäisierung* ..., p. 152, 185; *the same author*, the same quotation *Internationales* ..., p. 90). See also Action plan of the Counsel and Commission, through which the *Haag program* about the strengthening of freedom, security and law in the EU, that strengthens the communitarization of the third pillar of the EU is being executed. (Central gazette of the EU from the 12. 8. 2005; 2005/C198/01; *Law bulletin*, 6. 2005, 9.

¹¹ http://europa.eu.int/eur-lex/lex/cs/treaties/dat/12002E/htm/C_200_2325EN.003301.html.

¹² BACIGALUPO, E. Bemerkungen zu strafrechtlichen Fragen des Verfassungsentwurfs. *ZStW*, 116, 2004, 2, p. 327, 328.

¹³ JESHECK, H. - H. rep. cit. sub 3 if I grasped it well, apparently the same thing had the author quote in his mind, when said: "From the long-termed point of view it will be necessary to create *our own European norms (italics V.K.)* that belong to the general part of the penal law, because the application of *the European facts of the cases of the criminal deeds (italics V.K.)*, even if they came into being isolatedly, would not be possible without a general consent about the basic terms, as sympathy, attempt, intention, negligence, factual and legal mistake etc." See also SATZGER, H. *Internationales* ..., op. cit. sub 5, p. 77 f., p. 92., the principle of the protection of the national penal laws.

¹⁴ The treaty about the Constitution for Europe, *Central gazette of the European union*, C 310/1, 16.12. 2004.

¹⁵ Rep. cit szb 9, TOMASEK, M. *Evropská ústavní smlouva*... p. 255.

act in itself defines, as I think, also the frame and the starting points of forming of the EPL, which in itself also represents the penal-law dimension of the TCE.

A sweeping refusal of the "invitation" would not be correct, to put it mildly. A sweeping acceptance of everything what it supposes and offers would on the other hand be objectively very naive, and thus also unacceptable. There is no other way than to set off into the analyses and search, first of all, for factual theoretical solutions.

Not even the fact that the present ratification process of TCE slowed down a little¹⁶ should not according to my mind hinder the professional discussions about important theoretical, and thus also penal-law theoretical aspects of this document. I think it is necessary to approach it at least in the same way as any other not yet accepted and therefore invalid norm complex as *Corpus Juris* for the Protection of the Financial Interests of EU (further also "*Corpus Juris*"), which was and will be subdued to many analyses.¹⁷

Time and energy spent in this direction are surely not to be considered as misused. Just to the contrary, a factual conversation in spite of the real course of the ratification process of TCE, which through its delay paradoxically created for these discussions greater time period, may be rather of use than damage to the matter.

CHAPTER II: PENAL-LAW ASPECTS OF THE TREATY OF THE CONSTITUTION FOR EUROPE – ESSENCE, SURVEY, AND ANALYSIS

PART I. – ESSENCE OF PENAL-LAW ASPECTS OF TCE

From the point of view of the intrastate penal law material¹⁸ and procedural¹⁹ of the Czech Republic all the aspects of TCE in this text are considered as penal-law ones, without any regard to their position in the structure of the system of TCE, that represent the reaction on of criminality on the national, international (i.e. in EU), or even supranational (i.e. from the level of the EU towards the member states) levels, and thus the means of the nature of penal law and penal-procedural law. Otherwise expressed, it is about *instrumentarium of the penal-law nature (material and process one) anchored in the TCE explicitly or only implicitly (further also "constitutional penal-law instrumentarium")*.

The description and analysis in individual parts of the TCE codified penal law instrumentarium may be so far only restrictedly based on the commentator's literature,²⁰ in contrast with the TEC and the Treaty of the European Union (TEU)²¹.

PART II: – A SURVEY (STRUCTURE) OF THE PENAL-LAW ASPECTS OF TCE

We may find constitutional penal-law instrumentarium in the structure of the TCE itself quite sporadically up to somewhat confused. This instrumentarium may be of course arranged also differently if not only a possible research worker but also its consignee should be able to orientate themselves in it quickly and well. As a base of this "other" structure may be used as I think, elements of the above mentioned structure

¹⁶ The actual state may be found on [www http://europa.eu.int/costitution/ratification_en.ht](http://europa.eu.int/costitution/ratification_en.ht).

¹⁷ KRATOCHVIL, V. Tschechische Strafgesetzgebung und Corpus Juris 2000 mit besonderer Berücksichtigung des Wirtschaftsstrafrechts und der Strafbarkeit juristischer Personen. In: KRATOCHVIL, V. LÖFF, M. Wirtschaftsstrafrechts und die Strafbarkeit juristischer Personen. Brno: AUBI No 272, 2003p. 49 f. There is not without interest that the program of the 4th *Modern course of the international penal law – summer school of the European penal law*, that took place by ISISC a other academic establishments in Syrakusy on 2. – 13. 10. 2005; the program is dedicated to the European Constitution and the penal law (it is about the problems and perspectives of the European Constitution / a new constitutional frame, the principles of penal law and the European Constitution, the perspectives of the actual text and possible alternatives of the Constitution, The Document of the basic rights and the penal law/); also the mentioned *Corpus Juris* is on the program of this school, the renowned specialist will take part from the renowned European Universities and research institutions.

¹⁸ KRATOCHVIL, V. A KOL. *Trestní právo hmotné. Obecná část. 3. přepracované a doplněné vydání.* Brno: MU v Brně, 2002, p. 10, 13.

¹⁹ MUSIL, J., KRATOCHVIL, V., ŠÁMAL, P. A KOL. *Kurs trestního práva. Trestní právo procesní. 2. přepracované vydání.* Praha: C. H. Beck, 2003, p. 6.

²⁰ A brief commentary is offered in this direction the articles from ARNOLD, R. *Evropská ústava - první komentář, 1. část, Evropské právo, č. 10/2003*, p. 13 and f. The same one: 2. část, *Evropské právo, č. 11/2003*, p. 11 and f., KRÁL, D., PÍTRVÁ, L., ŠLOSARČÍK, I. *Smlouva zakládající Ústavu pro Evropu – Komentář.* Praha: Europaem, 2004. SYLLOVÁ, J., PÍTRVÁ, L., SVOBODOVÁ, M. A KOL. *Ústava pro Evropu. Komentář. 1. vyd.* Praha: C. H. Beck, 2005.

²¹ BARDENHEWER-RATING, A., GRILL, G., JAKOB, T., WOLKER, U. *Kommentar zum Vertrag über die Europäische Union und zum Grundung der Europäischen Gemeinschaft. 6. Ed.* Baden-Baden: Nomos Verlagsgesellschaft, 2003. *Smlouva o Evropské unii.* MS ČR, odbor EU, Praha, červen, 2004.

of the *theory and theoretical concept* of penal law. The structure thus conceived is created, as it was stated, by functions, basic principles, institutes and institutions, of a penal-law nature, of course.²²

In this sense we may talk about:

- A) penal-law functions²³ of TCE
- B) penal-law principles²⁴ of TCE
- C) penal-law institutes²⁵ of TCE
- D) penal-law institutions of TCE

PART III. – ANALYSIS OF SOME PENAL-LAW ASPECTS OF TCE

A defined extent of this conveyance requires a limitation of the analysis for only some²⁶ aspects of *functions and principles*. It will be about *material law and procedural law* instrumentarium, where on each of these basic law levels even an aspect of *penal-law of Europe (national) and European penal law (supranational)* is being followed if possible.

A) the penal-law functions of TCE

These result first of all from the stipulations about the aims of the Union, Art. I-3 par. 1, 2 that imply their protection. In Art. III-257 par. 1 the TCE closer specifies this *corroborative protective function* and in par. 3 it supplements it with a *securing function*, that is followed by the principles described here through which the functions mentioned are being realized (in details see ad B).

According to the Art. I-3 par. 2 in relation to the support of peace, and the values and well being of the inhabitants of the Union (Art. I-3 par. 1), the Union provides its citizens a *space of freedom, safety and justice without any inner frontiers*. According to the Art. 2 TEU thus ... the connection of the (former) first and third pillar to the common communitarian base is being expressed²⁷, apparently even in the connection with the paragraph 3. Other authors see the substance of the stipulation of the Art. I-3 par. 2 differently: e.g. according to Arnold *“These aims correspond in principle to the contents of the Third Pillar of the European Union.”*²⁸ Weigend, e.g. who at the same time expresses possible doubts of the standing by this promise to the citizens of the Union, is of the same opinion.²⁹ His analysis of the paper quoted is concluded with these words: “... it is necessary to translate the aims thus established as: a lot of (European) law, little of (law) security and even less freedom.”³⁰ As the constitutional frame for the forming of EPL (material) as the TCE has defined is concerned, this should not be further extended.³¹

From the quotations mentioned a certain amount of scepticism and reasonable reserve to the “European criminal-law material”, whether Europeanized (PLE) or Europe alike supranationalized (EPL).

The idea of the European integration is since the times of the king George of Poděbrady remarkable and undoubtedly necessary. Nevertheless, from the point of view of its gradual and long-termed implementation, especially in the last century and nowadays, apparently not everything is or need be that “remarkable” and “necessary”. It is doubly true for the penal-law dimension of the TCE. Here, as I think, it will be reasonable

²² The listed elements of the structure and the theory and theoretical conception of the penal law create an *inner* structure, that is connected with the term “segmentation”. A different nature is ascribed to the structure not only of the theoretical conception of penal law, but of any random term, that is marked as *outer*, for it works with the terminology of the type of “division”, “classification”, “categorization”. The individual kinds, forms of a term, that is the subject of such operation, i.e. e.g. classification, nevertheless show the features of the structure of the system as well, because they are in mutual relations, that makes just this structure out of them; cf. e.g. the system of the kinds of deeds judicially punishable in the form of the tripartition (crime, misdemeanour, offence). The logics (and dialectics) of the “inner” and “outer” structure of a random term does not exclude, *without simply identifying both*, the use of the elements of the inner structure in the role of the criterion of the outer structure, i.e. that it does not exclude the possibility to arrange certain material, term etc on their basis, that is to categorize or classify it. This particular methodological approach has been used at the presentation of the penal-law material contained in the TCE. In more details to the essence of the inner and outer structure of the criminal act cf. KRATOCHVÍL, V. *Trestný čin v československé a české trestněprávní vědě a trestním zákonodárství*. Brno: MU in Brno, 1995, p. 7 and f.

²³ Cf. op. cit. sub 18, p. 16 and f., op. cit. sub 19, p. 11 and f.

²⁴ Cf. op. cit. sub 18, p. 21 and f., op. cit. sub 19, p. 99 and f.

²⁵ Cf. op. cit. sub 18 and 19, of the relevant passage about the individual penal-law institutes.

²⁶ In the full range is this analysis offered in the introductory study, elaborated during the first year of the research intention: “European context of the development of the Czech law after 2004 (the influence of the admission of the CR into the EU of the Czech Judicial Code”).

²⁷ SYLLOVÁ and others, op. cit. sub 20, p. 11. In details see ARNOLD, R. *Evropský prostor svobody, bezpečnosti a práva – k vrcholné schůzce Evropské rady v Tampere 15. – 16. října 1999*. *Evropské právo*, IV, 2000, 1, p. 9 f. To the term of the “European space for freedom, security and law itself in the sense of the Treaty from Amsterdam cf. PIKNA, B. *Evropská unie – vnitřní a vnější bezpečnost a ochrana základních práv (na pozadí boje proti mezinárodnímu terorismu)* Praha: Linde, 2002, p. 22 f.”

²⁸ Op. cit. sub 20, ARNOLD 2nd part, p. 14.

²⁹ WEIGEND, T. *Der Entwurf einer Europäischen Verfassung und das Strafrecht*. *ZStW*, 116, 2004, 2, p. 275, 276, 277.

³⁰ *Ibidem*, p. 302. Further cf. HASSEMER, W. *Strafrecht in einem europäischen Verfassungsvertrag*. *ZStW*, 116, 2004, 2, p. 307.

³¹ WASMEIER, p. 455, in: *Kre3/*, C. *Das Strafrecht auf der Schwelle zum europäischen Verfassungsvertrag* *ZStW*, 116, 2004, 2.

"to be on the alert" for the tendency of the "Brussels institutions" to expand in creating the secondary legal acts of the Union that are concerned both with PLE and EPL, and at their assertion. *Hassemer* aptly talks about the fact, that "... 'The criminal law from above' ... 'claims the criminal law from below' to be criticized and corrected".³²

What will be especially demanding is the finding of an optimal balance between the interests of the EU on an effective recourse of criminality, that concerns the Union itself and also the member states (e.g. Art. III-415, fighting trickery) on the one hand, and the view of the so-called "*structurally justified lack of confidence for the national penal judiciary*"³³ on the other hand. This problem is alike the one, that is, so far unsuccessfully, being solved by the international penal law in relation to the will of the individual states to pursue criminally the particular criminality.³⁴

The chief orientation at searching for the answers to this question should be provided apparently by the main principles that the definition and execution of the authorities³⁵ of the EU are based upon, i.e. the principle of the *entrusting of the authorities*,³⁶ the principle of *subsidiaries* and the principle of *proportionality*.

The TCE entrusts the sector of space, freedom, safety and justice to the *shared* authority of the EU and the member states (Art. I-12/2, Art. I-14/2 ltr j)). The extent to which the member states can or do execute the authorities depends on the extent to which the EU did not execute them or decided not to execute them. It seems that in the formulation of Art. I-12/2, the last sentence, there is one more principle having been encoded, namely the principle of briskness, or one may say a quasi-principle "*who is about to win*". If, that is to say, the EU decided to execute its authority in the objective sector in the extent that eliminates the execution of the authority of the member states, and would really do so (as the faster one), such autho-

riety would become not a shared one, but de facto an exclusive one. To avoid this it has been accepted that the executions of the authority in this sector are regulated through the mentioned principles of *subsidiaries* and *proportionality* ones (Art. I-11/1. 3. 4. See also *The protocol on using of the principles of subsidiaries and proportionality*). The principle of subsidiaries "... is the only barrier against the expansion of the activities of the Union".³⁷

The principle mentioned should be able to hinder the structurally explained lack of confidence of the EU to the national judiciary (i.e. they should not be pushing forward with the execution of the authorities immediately there where it is first of all necessary to grant confidence and space to the national criminal justice) and if the execution of the authority of the EU should be applied, i.e. strictly in the limits of subsidiaries, then at the same time only proportionally. Through this the interest of both the EU and the member states should be guaranteed in the effective recourse of the specified kinds of criminality.

In the connection with the principle of subsidiaries the one who critically opposes the construction of the shared authority is *Hassemer*. He in fact confirms my certain worry mentioned above about the existence of the implication of the TCE expressed quasi-principle "*who is about to win*", when he says: "We may expect only little good for the penal law material and penal law procedural in the European practice from such a construction (Art. I-12 par. 2, Art. I-14 par. 2 ltr j) of the TCE. Such division of authorities is rather hindering for the applied subsidiaries... *The Union may occupy the space of (freedom, security, and justice), practically any time they may want to /italics V.K.*). It will not be possible to fulfil the promise of the order of subsidiaries, when it is not possible to ward off the danger of indefinite division of authorities to be shifted."³⁸

The reality of such risks may be unfortunately only

³² Op. cit. sub 30 HASSEMER, p. 319.

³³ SCHÜNEMANN, FUCHS, p. 452, in: *Kre3/, C. Das Strafrecht auf der Schwelle zum europäischen Verfassungvertrag*. ZStW, 116, 2004, 2.

³⁴ Ibidem, p. 452-453.

³⁵ SYLLOVÁ ET AL., op. cit. sub 20, p. 9.

³⁶ The Czech translation of the Proposal of the Treaty of the foundation of the Constitution for Europe (European Convent, 13. 6. - 10. 7. 2003, presented to the chairman of the European Council in Rome 18. 7. 2003 works in the contrary to the text of the TCE with the term "competence" In regard to the context in which the different terms are being used in the text of the Proposal and even in the TCE, I think that the matter-of-factly correct will be the category of "authority" and not "competence" (Proposal). If the EU should derived its functioning from the member states in the sense of the TCE (art. 1/1, of the Proposal, art. I-1. TCE), then we may talk only about its authorities to found, change or cancel the rights a obligations of the members of the EU and their citizens by using the proper measures (art. I-3, para %), which authority for the individual sectors of such functioning will be committed to the Union by the original subject, i.e. the member states. See also SYLLOVÁ, J. and others op. cit. sub 20, p. 31.

³⁷ See also ARNOLD, R. *Evropská ústava: základní dokument pro budoucnost*. Právní rozhledy, XII, 2004, 9, p. 319. ARNOLD, R. *Evropská ústava - první komentář*, 2. část, op. cit. sub 20, p. 15; in the context with the share authorities he differentiates between the *cumulative system* of the authorities and their *alternative pursuit*; the advantage of the law of the Union is manifested here, according to his opinion, as the advantage of *application (dispensation V.K.)* of the law of the Union, not as an advantage of its *creation*. This differentiation, that is derivable from the, art. 1.-6 and art. I-12 para 2. of the TCE through the explanation only with difficulties, should not be too overvalued, namely in the connection of the dispensation of the shared authority and a quasi-principle of "who wins".

³⁸ Op cit. sub 30, HASSEMER, p. 315-316.

confirmed, which is documented by the existing normative production of the "Brussels institutions" in the sector of secondary law not only in the frame of the Third Pillar.³⁹ I think these risks have quite clear contours rather in the penal law procedural, less in the penal law material, even if even there it will be good to be watchful. It is so not only through the execution of the shared authorities in themselves, which means through the "who is about to win" from the point of view of the application, but also through the nature of the legal acts created and accepted by the Union to imply the shared authority in the space of freedom security a law, namely in the sector judicial cooperation in penal matters (part III., heading III., chapter IV., par. 4). Those are just the *European laws*, eventually also *European frame laws*, through which the Union may define the regulations essentially of only penal procedural nature (Art. III-270 par. 1). Unlike this, the Union may step into the sector of penal law material only through the *European frame laws* (Art. III-271 par. 1, 2,) that represent the instrument of a "lower rank" than the European laws are. But even the European frame law here applied may have straight effects, "...if the criteria of its straight effect are fulfilled".⁴⁰

In this there is reflected on the one hand the aspect of the EPL, that is formed in the sector of the penal law procedural through the European laws, on the other hand it is the view of the PLE, that originates for both of the penal-law sectors from European frame laws. The potential superiority of the supranational European penal law *procedural* in relation to the law material, that is given through the legislative exclusiveness of the first towards the second one, that follows from the nature of secondary resources, that create this law, will probably bring objective pressure on the gradual, even if slow, formation of the European penal law *material*. The state when the penal procedure might be supranational in the far future of the European region, where the penal law material will be essentially only national, even if Europeanized, would obviously not be sustained in the long term. Though at the same time it does not mean that this procedural-material parallel should be pushed through on the level of all (thinkable) kinds of criminality, as it is counted with in the special parts of the penal laws of the member states of the EU. The idea of limited possibilities of harmonization in the sectors that come under the part III., heading III., chapter IV has here its inalienable position.

Through the words of the stipulation Art III-257

par. 1 the Union creates the space for freedom, security, and law *at respecting the essential rights and different law systems and traditions of the member states*; according to the quoted commentary to the TCE, it is on the one hand the future limited possibility of harmonization of the whole sector covered by the chapter IV that is emphasized in this way, on the other hand it newly points to the observation of the essential rights.⁴¹ I agree with such interpretation explicitly emphasizing the limitation mentioned. The observation of the essential rights, obviously in the sense of part II of the TCE, is to be grasped here not only as a partial aim followed by the Union, but also as a necessary corrective at the forming of the legislation regulations aimed against such forms of criminality that through their nature demand such instruments to which the essential rights are especially sensitive.

In the general and special parts of the penal law material it will therefore be possible to harmonize reasonably, and if we have a vertical on mind, to form the supranational penal law only in the limits of the consensus that follows from the *points of the inter-sections of different law systems and traditions of the member states*. The overstepping of these imaginary limits might be dangerous, if not self-destroying, for the EU.

With the stipulation par. 3 Art. III-257 there is connected, as has been said, the function *securing*, i.e. the function that guaranties the fulfilling of the essential function of protection (Art. I-3 par. 2). A high level of security should be guaranteed first of all, as follows from the diction of par. 3., where principles here named should secure it, e.g. the principle of the mutual recognition of judicial decisions in penal matters).

Further on we may rank the contents of the Art. I-9 par. 1, 2 among the functions. In par. 1 the Union states the its obligation to recognize the rights, freedom and principles contained in its part II (Charter of Basic Rights of the Union, further on "CBRU"). The stipulation of the par. 2. declares the obligation to access to the European agreement of human rights and basic freedoms protection (further only "EAHRBF"). Both may be grasped as a *human rights* function. The mentioned documents essentially define the subject of the penal-law protection, which is where the EU is *aimed to* as well, and what the TCE thus adopts, and should *act* for.

Some questions are arisen by the fact that the CBRU and EAHRBF through their contents in the text

³⁹ Even the word of a playwright (KURAS, B. Jako psa ke kandelábru. Praha: Baronet, 2005, p. 100-101) expresses this fact very appropriately even if with some exaggeration. It would not be fair not to add that one of the tasks of the TCE is to make this up to now complicated code a little more transparent. It is a question though whether a up to what measure we will be successful in the end.

⁴⁰ SYLLOVÁ, J. and others op. cit. sub 20, p. 401. To the direct effectiveness of the regulations cf. ESD 1970, 825, 837-Rs. 9/70, "Laberpennig", (cit. according to Satzger, H. Internationales..., op. cit. Sub 5, p. 83). This judicial practice is nevertheless disputable, writs *Cromme, F. Verfassungsvertrag der EU. 2. Aufl. Baden-Baden: Nomos Verlagsgesellschaft, 2003, p. 131.*

⁴¹ SYLLOVÁ, J. and others op. cit. 20, p. 378-379.

of the TCE itself duplicate approach to the "human rights material", especially in the case when the EU fulfils their program obligation mentioned in the paragraph 2.⁴²

Not always the "duplicate holds on". The stubborn duplicity may even work in a counterproductive ways because it may make one the "duplicate" ones unwillingly redundant. At the same time it is necessary to acknowledge that the planned access of the EU to the EAHRBF is to guarantee an individual the right for the individual complaint to the European Human Rights Court against the acts of the organs of the Union.⁴³

In spite of the doubts mentioned the TCE profiles, its character and importance in the area of the penal law European as well as European penal law, because the problems of the basic human rights and freedoms is traditionally closely connected to the aspects of penal law, especially the procedural ones, whether on the national, international or (future) supranational levels.

Pars II of the TCE – Charter of the basic rights of the Union⁴⁴ – suggests the functional aspects in general in the *preamble*.

It does so in the first place through declaring the *common values*, which mean *human dignity, freedom, equality, and solidarity* its fundament; *it is based on the principles of democracy and the law respecting state* as on its fundament. Hand in hand with this declaration goes the attribution of the Union to the *keeping and developing* of these common values. It is possible without any doubts to grasp as its aimed heading, which means functioning in the direction mentioned; the so-called *functional anthropocentrism*.

The penal-law character of thus defined functional approach of the CBRU shows its preamble at least through the fact that it places the individual (the citizen of the Union) for whom it creates the mentioned

space for freedom, security and justice into the centre of its activity. To reach this aim it considers it necessary to *strengthen the protection* of the basic rights, which obviously means also the means of the penal-law nature.⁴⁵

In the literature in this connection we may read: "Anthropocentric character of the Charter is manifested in the fact that *all (italics V.K.)* protection stemming out of the basic human rights must be effective in relation to the individual."⁴⁶ According to others "... embodying of the Charter into the judicial system of the EC/EU will mean creating of the 'European space for human rights' (*italics V.K.*), that is functioning as the basic element for the building and functioning of the European space for freedom, security, and justice"⁴⁷

In the connection of the basic human rights the quoted Arnold⁴⁸ talks also about the so called *positive protection function*, that should consist in the activity of the EU, or the member state, that is directed to the real assertion of such rights⁴⁹; the passive abstention from the interference into the rights of the individual would not be enough. The author quoted alerts us to the problems that could emerge at the moment when the anchoring of the basic human rights into the Charter (now into the CBRU) would be grasped just in the sense of the positive protective function mentioned. The risk of these problems he apparently sees in the possible overstepping of the authorities of the EC/EU, which happen just at the assertion of this function of the Charter. (CBRU).

B) penal-law principles of the TCE

Part I of the TCE mentions in the Art. I-5 par. 2 the principle of the *loyal cooperation* of the Union and the member states, which "... is quite new."⁵⁰ Loy-

⁴² The worries of this type were voiced already during the Convent and the negotiations about the TCE; cf. SYLLOVÁ, J. and others op. cit. sub 20, p. 24.

⁴³ In more details see e.g. *Bo/3e, M. Der Beitritt der EG zur EMRK aus der Sicht des Strafrechts. ZRP, 2001, 9, p. 402 sqq.*

⁴⁴ The predecessor of the Charter, i.e. the Charter of the Basic Rights of the EU (2000), is considered to be "...a pre-constitutional document with a great influence upon the supranational, as well as national judicial codes.. The Charter represents the expression of the tendency towards respecting the law and its superiority over the political decision making ..." (ARNOLD, R. European Charter of the basic rights and freedoms (in Czech). *Evropské právo, V, 2001, p. 7, 10*); others see it as "...the seed of the future integral system of the protection of human rights on the level of the Union." (SISOVA, N. Human rights in the intentions of *acquis communautaire* (in Czech). *Evropské právo, VI, 2002, 6, p. 5*; SISOVA, N. Dimensions of the protection of human rights in the EU (in Czech). Praha: Aspi, 2003, p. 56 sqq).

⁴⁵ PIKNA, B. The system of the protection of the basic rights in the European Union a its genesis (in Czech). *Právník, CXLI, 2002, 11p. 1197.*

⁴⁶ ARNOLD, op. cit. sub 44, p. 10.

⁴⁷ PIKNA, B. The Charter of the basic rights of the European Union and its judicial and factual dimension (in Czech). *Právník, CXLII, 2003, 1, p. 37.*

⁴⁸ ARNOLD, R. The Charter of the basic human rights of the EU (in Czech). *Evropské právo, V, 2001, 4, p. 7-8.*

⁴⁹ SCHNITZ, TH. Die EU – Grundrechtscharta aus grundrechtsdogmatischer und grundrechtstheoretischer Sicht. *Juristen Zeitung, LVI, 2001, 17, p. 842-843.* "The Charter of the basic rights of the EU focuses on the authorities of the Union and on the member states at the assertion of the law of the Union." The same at PIKNA, op. cit. sub 45, p. 38-39, who adds that the member states are not bound by the Charter, if the matter concerns purely national matters.

⁵⁰ SYLLOVÁ, J. and others op. cit. 20, p. 17. It is not that new, see the art. 10 SES.

alty at the cooperation the quoted commentary sees through interpretation in two levels: both among the member states and even between them and the Union, which is to be welcome.⁵¹

The mutual respect and the mutual help of the member states in the penal problems are necessary, if the steps in this direction should ever be of use. Here the demand of loyalty, that should be mutual without any doubts, is in effect, as is defined in the TCE.

A little bit differently, this is shown on the level of the relation: member states contra Union. The stipulation quoted talks about both the mutual respect and mutual help between the Union and the member states. At the same time through the commitments to fulfil all the suitable general and special measures to the fulfilment of the obligations, implied in the TCE, or that result from the activities of the Union, or facilitates the Union to fulfil their commitments, burdens the members states one-sidedly. I would see as a more fitting designation of the principle discussed, at least in this extent, as "*a principle of the loyalty of the member states towards the Union*".

A partial settlement of this one-sidedness, according to my opinion, is offered only by the mutual respect that is besides the mutual help a part of the principle given. The stipulation of the paragraph 1 Art. I-5, the second sentence that describes the obligation of the Union to respect the basic functions of the member states might be such a corrective of the one-sidedness mentioned.

The commentary to the TCE quoted ousts the one-sidedness of the loyalty mentioned so, that the indicated *two*-sidedness of the cooperative loyalty is shifted in the way of interpretation, also with the reference to the particular judicature of the European Law Court /ELC/, to the level of *multi*-sidedness.⁵² The compound lexeme *The member states (italics by V.K.) makes all suitable both general and particular measures to the fulfilment of the obligations that are implies ...according to the source quoted "...also rests on the obligation of the organs of the EU to provide the member states with all possible help, so that they could fulfil the task of securing of the application and effectiveness of the EU justice."⁵³ These interpretations of the principle of loyal cooperation in the sense of Art. I-par. 2 unnecessarily complicated and could have been avoided with help of a more straightforward*

formulation of the text of the TCE itself, respecting even a judicature of the ELC.⁵⁴

The principle of the loyal cooperation falls on both material and procedural laws, what is confirmed by the stipulations of the TCE, documenting the particular forms of cooperation. The penal process shows traditionally a slight prevalence. An obvious importance of the described principle both for the PLE and the EPL results from them.

An indolent fulfilment of this principle among the member states at the implementation of the European frame laws (PLE, Art. III-270 par. 2) could complicate e.g. an assertion of mutual admissibility of evidence at the factual police and judicial cooperation in criminal matters on the international grounds. The consequences of such slowing of the criminal proceedings are obvious, especially if it concerned some kinds of criminal activity that may escalate easily; see Art. III-271 par. 1. On the other hand an exaggerated activism of particular legislative organs of the Union at creating the penal law (EPL) and its assertion in the frame of shared authorities might weaken the supervision of the European penal law "from below" and through this e.g. weaken the effective influence of the EPL, because of having been created without the necessary cooperation of the member states.

The TCE then counts on the *general principles of law* of the Union, that are created by the basic rules guaranteed by the EAHRBF, and of the rights that result of the constitutional traditions that are shared by the member states of the EU, Art. I-9 par. 3. Thus a number of traditional basic rights (human and civil ones) find their ways into the TCE, through their existence they legitimised the basic principles of law, thus even those of the "*penal law nature*",⁵⁵ through which we get "the treaty-constitutional-European" confirmation in the form of the "general principles of law" in the Union. We have to differentiate between the principles just mentioned and the "general principles of law", that are shared with the judicial orders of the member states, which belong among the sources of European law,⁵⁶ but the principles mentioned in the Art. I-9 par. 3 represent the fundament out of which this law arises (Art. 6 par. 2 of TEU). Notwithstanding such differentiation we have to take into account the fact that both the "principles" are one way or the other connected to the basic elements

⁵¹ SYLLOVÁ, J. and others, op. cit. 20, p. 15-16.

⁵² Ibid, p. 18.

⁵³ Ibid, p. 18-19.

⁵⁴ This is not the only example of a wrongly written text of the TCE; e.g. the complicated and may be surprising explanation of the art. I-6, ensuring the assertion of the advantage of the law of the EU for the law national only from the point of view of the application, dispensation, not from the point of view of its creating could have been avoided through a simple change: the word they "should" could have been shifted behind the word "Union". See ARNOLD, R. European Constitution – the first commentary, 2nd part, (in Czech), Evropské právo No 11/2003, p. 15.

⁵⁵ Cf. reference No. 24.

⁵⁶ TICHY, L. ARNOLD, R., SVOBODA, O., ZEMÁNEK, J., KRÁL, R. Evropské právo. 2nd ed. Praha: C.H. Beck, 2004, p. 230.

of a man and a citizen coming from national milieu, i.e. from the constitutional traditions that are shared with the member states, as well as from the judicial codes of the member states. As a result of this they meet in such extent.⁵⁷

The "treaty-constitutional European" confirmation of the traditional penal law principles via and in the form of the general principles of law of the Union is without any doubt important both from the point of view of the PLE and the EPL. In the first place the solid and profound base is *confirmed*, out of which the penal rights of the member states of the EU arise anyway, which is logically true even for the PLE of the states mentioned. It is so obviously because the existing members of the EU are the signatories of the EAHRBF at the same time. In the second case this confirmation should *guarantee* the corresponding and optimal base, the starting point of the EPL. The thing is that just the agreement of the general principles of the Union mentioned should represent that minimal point of intersection of the initial values as one of the *conditio sine qua non* of the formation of the EPL.

From the point of view of the PLE the TCE does not bring anything new. From the point of view of the EPL to the contrary the TCE means not an insignificant starting point for its forming. The important methodological demand of the creating of law is being fulfilled: the inner harmony of the individual parts of the rule of law, i.e. the simple law with the constitutional law. The same should be in effect even on the level of European treaty "constitutional law", as well as the supranational EPL formed on its base.

The principles, according to which the authorities of the Union are being *defined* and by which their *execution* is being controlled, are gathered in the stipulation Art. I-11 par. 1: the *principles of the commitment of authorities, subsidiarity and proportionality*, that play the key role from the point of view of the penal law; cf. ad A) of the part, to which it refers.

The importance of these principles for the ECL is surprisingly not too sharply differentiated, if we look upon them through the optics of the PLE and EPL. From the point of view of the PLE the principle of the commitment will be in play in such extent, to which the member state and the Union will share the authorities in the room of freedom, security and law (Art. I-14 par. 2 ltr j)). And when the authority has been "divided" this way, then the execution of such shared authority in this room cannot avoid the principles of subsidiarity and proportionality. Only in their boundaries the activities that the Union carries out, esp. the

legislative ones (i.e. through the *European frame law*), follow then on the intrastate penal law and Europeanize it. But of course only in the measure that follows the aim of the Union on the level and in the process of harmonization of the intrastate penal laws that are respected at the same time. Thus not in the form of some "Europeanization" at any price. From the point of view of the EPL the only thing that is changed is that the legislation act of the Union will work in the milieu of shared authorities in the sense of Art. I-14 par. 2 ltr j) *European law* (e.g. Art. III-270 par. 1 ltr a), Art. III-273 par. 1 et al.) and limited again as for its acceptance and passing through the principles of subsidiarity and proportionality.

Many articles of the part II of the TCE (CBRU), especially the stipulation of the heading VI concerned with "Judicature", take the nature of principles in the context of penal law and penal procedure material.

Note: Even here we realize the prevalence of the principles of penal-procedural nature.⁵⁸ It is given through the traditionally close connection between the constitutional and penal laws procedural already at the intrastate level; personally I see this connection as a penal proceedings in the form of "litmus paper" of the degree of the constitutionality (in use).⁵⁹ Similarly it may be probably applied even for the TCE as an internationally -law constitutional document on the one hand, and the penal laws of the member states (PLE) as well as even for the "embryonic" EPL on the other.

The principle of the *equality before the law* – Art. II.80, exceeding the boundaries of both penal law *procedural* and *material* are of an introductory nature.

In the *procedural* sense it may be grasped as an equality of the participants of penal proceedings, what the Czech penal law guarantees through the equal rights and duties of e.g. the accused ones, and the other subject of the penal process. It has been being done in the harmony with the Art. 37 par. 3 of the Charter of the Basic Rights and Freedoms (further: "CBRF"). The so called "favor defensionis" that help the legislator to balance the really existing unequal positions of some subjects of the penal proceedings are not in any contrast with what has been said above, e.g. in the unequal relation of the public prosecutor contra the accused person the law of the "last word" of the accused one, that only he/she has, fulfils the function of "favourization".

From the point of view of the *material* law it will be first of all about an equal position of the perpetrators of the crimes before the penal code at the level of

⁵⁷ Ibid, p. 231-232.

⁵⁸ ŠTURMA, P. The Charter of the basic rights of the European Union. AÚCI, 2004,1-2. p. 101. ŠIŠKOVÁ, N. The first completed catalogue of the basic rights of the European Union – the Charter. (in Czech) Právník, CXL, 2001, 6, p. 598.

⁵⁹ Further see e.g. PLATZGUMMER, W. Grundzüge des österreichischen Strafverfahrens. 8. Aufl. Wien, New York: Springer, 1997, p. 3 (penal process as an applied constitutional law); ROXIN, C. Strafverfahrensrecht. 22. Aufl. München: C. H. Beck, 1991, p. 9 (the penal law procedural as "a seismograph of the constitution of the state"); SCHROEDER, F.-CH. Strafprozessrecht. Aufl. München: C. H. Beck, 1997, p. 28 (criminal code as a "procedural law" of the constitution).

their guilt (the signs of the body of the crime are the same for everybody). In the level of punishment it is to the contrary about how to create lawfully the same space for all the perpetrators, of course such that in its frame it would be possible to individualize maximally the meted out sanction. The constitutional buttress of equality in the sense of the material law is offered in Art. 4 par. 3 of CBRF.

Only thus understood equality before the penal code may guarantee justice reliably from the point of view of *guilt* and *punishment*.

The *penal procedural* principles are offered in Art. II-107, about an *effective law protection before the court*, i.e. even the penal one, as well as about a just lawsuit (i.e. even the penal one).

Note. The text of the TCE mentions here the right for an effective protection ... etc., and not explicit principles; we can find identical terminology e.g. in Art. 36 par. 1, 2 CBRF. On the other hand it is not unusual to read a collocation: "a principle of the right for (e defence) ..." that is used especially in textbooks.⁶⁰ The thing is that a number of procedural principles, as e.g. the principle of a regular lawsuit is from the point of view of CBRF in the position of the basic human right (Art. 8 para2.). It is not any different according the CBRU. This is why the term "principle" of the right is being used in this text, e.g. for the court protection etc.⁶¹

For the penal dimension of the principle of "the right to an effective law protection before the court" the genesis of the art II-107 par. 1 CBRU (i.e. Art. 13 EAHRBF) is important.⁶² Its penal-law connotation demanded that it was applied from ECourTHR as linked to the Art. 6 par. 1 EAHRBF, that anchors the demand of an objective trial, where the legitimacy of a penal accusation should have been decided. An independent application of the Art.13 quoted did not encounter the question of the violation of the rights of the penal law nature.⁶³ In the TCE should this penal "shade" be manifested in the link of the paragraphs 1 and 2 of the Art. II-107, for in the last mentioned one we may find also the principle of the right for a fair trial, thus including the trial that is conducted by an independent court. The genesis of the principle discussed that we have mentioned implies the right for the court protection as it is dealt with in the Art. 36 par. 1 CBRF and is implemented through its stipulations (§ 2 par. 1, 8 through 11) by the Czech penal process-code (further on "p.p.c").

The principle of "the right for a process-fair trial" (par. 2 Art. II-107), includes without any doubt even the criminal procedure, at least because in is derived from the Art. 6 par. 1 EAHRBF. In the extent of the first sentence this principle corresponds to its traditional formulations in other documents: Art. 6 par. 1 EAHRBF, Art. 38 par. 2 CBRF. The penal process-code comprises the actual warranties of this principle in the form of procedural principles in § 2 par. 4, 5 and others.

While the right for the fair trial has been endowed by a single and quite brief paragraph, the creators of the TCE were much more thorough at the regularization of the law for a regular administration in the Art. II-101. In its par. 2 the constituent parts of this law are given, that would be decent to repeat even in the case of the right for the fair *penal* trial. In this respect the CBRU is unbalanced out of the reasons that are quite obscure.

The standard procedural principles of the *presumption of innocence* and the *right for a defence* are presented in Art. II-108.

In the paragraph 1 the stipulation mentioned the defined principle of the "presumption of innocence" is derived from Art. 6 par. 2 EAHRBF, which as well as the International Pact of the Human and Political Rights (further on "IPHR") in Art. 14 par. 2 defines this key procedural principle in a *positive* way; similarly it does Art. 40 par. 2 CBRF. The stipulation of § 2 par. 2 p.p.c. to the contrary "...does not comprise any positive expression of the presumption of innocence, but a *ban of presumption of guilt* (italics V.K.)"⁶⁴ This is considered to be a weaker warranty than the presumption of innocence.

The principle of "the right for a defence" - para2 Art. II- 108 - also "copies" EAHRBF, namely its Art. 6 par. 3. To this principle in intrastate matters corresponds to Art. 40 par. 3. While the TCE, EAHRBF, and CBRF construct this principle in the first place from the point of view of the *contents*, i.e. they point out what specific rights the defendant has, the penal process-code goes through the construction of *warrants*. It does not say through what is the accused one equipped from the point of view of his/her defence, but it states the warrants in the form of obligation of instruction an obligation of the authorities active in the criminal proceedings to enable the accused one the assertion of the rights for defence (§ 2 par. 13 p.c.). The real defence rights are named afterwards in fur-

⁶⁰ See e.g. op. cit. sub 19, p. 117.

⁶¹ Similarly also ŠIŠKOVÁ, N. op. cit. sub 58, on p. 599 considers the procedural judicially state warrants contained in the chapter VI of the Charter the core of the human rights, where each of the warrants of the human rights is a principle in itself.

⁶² PIKNA, B. European Union - the inner and outer security and the protection of the basic rights (on the background of the international terrorism) , (in Czech). Praha: Linde, 2002 p. 162; to the relation of the art. 6 para1 and the art. 13 EAHRBF see p. 163. SYLLOVÁ, J. and others op. cit. 20, p. 152.

⁶³ GOMIEN, D. Short guide to the European Covention on Human rights. Strasbourg: Council of Europe, 1991, Czech translation, MALENOVSKY, J. A brief handbook of the European arrangement on the human rights. p. 37.

⁶⁴ REPÍK, B. European arrangement on the human rights and the penal law. (in Czech) Praha: Orac, 2002, p. 175.

ther stipulations, that do not have the nature of the procedural principles (cf. § 33 of the p.c.) The rights for defence do not change substantially in all the mentioned sources as for their contents is concerned.

Art. II-109 is "essential" from the point of view of the material law, as it comprises the principles *nullum crimen, nulla poena sine lege praevia*, including exceptions from them as well as the principle of *adequacy of the size of the punishment to the criminal deed*.

The classical principle of the "legality of the criminal act and the punishment", that is completed with the principle of "the ban of retroactivity of the penal code in malam partem", or the order of retroactivity of the penal code *in bonam partem*, in the case of meting out the punishments, again draws from the EAHRBF, the Art. 7. In these consequences it is not quite clear, why the TCE pinpointed the order mentioned only in the relation to the punishments and not in relation to the base of the penal responsibility itself, i.e. to the criminal act. For even for this the order of retroactivity "in favour" is being applied. This is absolutely clearly stated in the Art. 39 and even Art. 40 par. 6 CBRF, as well as in the penal code (further on "p.c.") in the § 3 par. 1 and in the § 16 par. 1 behind the semicolon. The fact that as the TCE does also even the IPHR in the Art. 15 is not an argument.⁶⁵ Where the exception from the ban of retroactivity to the burden is concerned (para 2), which means the retroactivity admissible in this sense (not ordered), nothing is allowed in this respect neither from the CBRF nor from the Criminal Code.⁶⁶

The principle of *adequacy of the criminal acts and punishments*, "is anchored in the common constitutional traditions of the member states and in the judicature of the Judicial Court of the Community"⁶⁷. In this respect the TCE follows the EAHRBF, even if the EAHRBF does not explicitly express the principle of the adequacy of the punishment. "Nevertheless it is about the principle that runs through the whole Treaty. The

judicature of the Court (ECourtHR), eventually the Commission, has brought it to the light."⁶⁸

Art. II-110 illustrates the principle *ne bis in idem*⁶⁹ or the right not to be accused or criminally pursued twice for the same criminal deed/act. Even if this principle is traditionally linked to the criminal, eventually to other trial, its dimension of the material law cannot be entirely ignored.

From the point of view of the *trial* it guarantees the legal security in that sense, that the same person will not be after the authorized final verdict in his/her criminal matter, that states the obstacle to the matter finally decided (*exceptio rei iudicatae*), whenever again criminally prosecuted, unless the meritorious decision mentioned in the set procedure (i.e. the extraordinary correction measure) has been cancelled.

From the point of view of the *material law* carries out the function of a warrant of the legal security in the way that the same person will not be after the authorized final verdict in his/her criminal matters as for the guilt and the punishment are concerned *punished again*⁷⁰, unless the meritorious decision mentioned in the set proceedings (i.e. extraordinary corrective) has been cancelled. The penal-law nature of the principle *ne bis de idem* may show itself as the principle of "the ban of double evaluation and scoring" of one and the same fact of a certain nature, i.e. as a ban of its double scoring as from the point of view of the guilt of the perpetrator and his/her punishment (§ 31 par. 3 p. 1.)⁷¹ This article has its independent material law importance only from the point of view of the guilt (so called apparent concurrence of the criminal deeds)⁷² and from the point of view of the punishment (the principle of incompatibility of punishments)⁷³.

The extent of the ban of the double recourse for the same thing depends on whether the ban is based on the double recourse of the act (deed), as it is in the CR (§ 11 par. 1 ltr f, g) and h) of the p.p.c.,⁷⁴ or the criminal act, out of which apparently stems the judicature of the ECourtHR⁷⁵ T; see the explanation of

⁶⁵ SYLLOVÁ, J. and others op. cit. 20, p. 154.

⁶⁶ This question is in the Czech practice a little more complicated, for against the ban of the retroactivity in *malam partem* is the opinion, according to which the retroactivity to the burden of the culprit is possible, see e.g. op. cit. sub 18, p. 85.

⁶⁷ SYLLOVÁ, J. and others op. cit. sub 20, p. 154.

⁶⁸ REPÍK, B. op. cit. sub 64, p. 65.

⁶⁹ PIPEK, J. The principle *ne bis in idem* in the competition with the jurisdiction. (in Czech). *Trestněprávní revue*, III. 2004, 4, p. 98. SATZGER, H. op. cit. sub 5, *Die Europaisierung ...*, p. 685.

⁷⁰ Ibid p. 102-103: "The double punishment is in fact directed to the material law and defines this obstacle that hinders the meting out of the next punishment. The double prosecuting is directed to the penal proceeding and there already into the penal pursuing itself and thus even in its reason ... and is an obstacle of the penal proceeding itself."

⁷¹ KRATOCHVÍL, V. et al., op. cit. sub 18, p. 34-35.

⁷² Ibid p. 45.

⁷³ Ibid. P. 55.

⁷⁴ MUSIL, J., KRATOCHVÍL, V., ŠÁMAL, P. and others op. cit. sub 19, p. 7.

⁷⁵ RŮŽIČKA, M., POLÁK, P. Over one of the decisions of the Supreme Court, that refers to topic of the "ne bis de idem" from the point of view of its international and home aspects. Public prosecutor office, III, (in Czech) 2005, 6, p. 9. This conclusion is not plain, because at least the matter of Gradinger v. Austria the ECourtHR was based not on the identity of the judicial qualification, but the identity of the deed. (see KMEC, J. op. cit. sub 76, , p. 23, No 2, p. 21.)

the Art. 4 of the Supplementary Protocol No 7 to the EAHRBF (further on "Supplementary Protocol")⁷⁶ in the causal report, that concerns the criminal act⁷⁷, as well as to the TCE.

In the first case is decisive the deed de iure, i.e. a summary of factual circumstances that are relevant from the point of view of the penal law (the factual state of affairs – § 2 par. 5 of the p.p.c.), that was the subject of the first criminal prosecution, namely without any respect to its penal-law qualification. In the second case on the other hand the legal qualification of the deed de iure as a criminal act is important. The connection of the principle of the ban of a double recourse to the deed leads to *narrowing* of its range, because the preceding authorized decision about the deed, without any regard to its legal qualification, bans under the mentioned procedural conditions the new deciding about the deed, namely under a different legal qualification. The protection before the double recourse is thus relatively strong and from the point of view of the accused one relatively wide. Thus created space for the rehearing in the same matter is therefore relatively narrow, for it makes the prosecution of the same deed, qualified as a different criminal deed, impossible.

If the principles mentioned are made dependent only on the legal qualification of the act (deed), thus a criminal act, it creates a broader space for repeated decision making, because it thus enables to recourse the same deed, if it shows the characteristic features of the fact of the case of some other criminal act than the one in the previous proceedings. The protection before the double recourse is here to the contrary relatively weak and from the point of view of the accused one relatively narrow. The mentioned aspect of

the principle of *ne bis in idem* belongs among the most disputable ones.⁷⁸

In the Czech legal milieu this principle is offered in the first place in the Art. 40 par. 5 CBRF. Its diction, to the contrary of the diction of the Art. II-110, does not explicitly point out the ban of double punishment; it is restricted to the ban of double criminal prosecution only. This article therefore, when explained in the way recommended in literature,⁷⁹ covers even the mentioned punishment.

With the reference to the stip. § 11 par. 1 ltr j) of the p.p.c. and to the Art. 10 of the Constitution, it is possible to apply this principle directly even based on the Supplementary Protocol. It will be the case when about a offence (of the penal-law nature, § 50 Bill No 200/1990 of the code, of offences) had meritoriously decided the administration authority in the first place, when about the same deed that has been afterwards qualified as a criminal act, decided consequently even the Court.⁸⁰

The catalogue of the principles concentrated in the CBRU from the point of view of the penal law carries on an obvious stamp of the EAHRBF. In spite of this it falls behind its standard in some respect. It has been recommended to the Charter of the Basic Rights of the EU already earlier, to accept into its contents especially "the right for the substitution of the damage in case of an illegal sentence", as well as "the ban of imprisonment for debts."⁸¹ It is necessary to insist on such recommendations. Above their frame I would state at least one recommendation: "the right for justification of the court decisions in the penal matters". Even if this law has not been explicitly stated by the EAHRBF, because it has been derived from the principle of the right for the fair trial,⁸² it should be part

⁷⁶ To the Protocol itself cf. e.g. REPÍK, B. op. cit. sub 64, p. 247 ff. further KMEC, J. To some aspects of the principle of *ne bis in idem* in the light of the judicature of the European Human Rights Court. (in Czech) *Trestní právo*, 3, 2004, 1, p. 21 f., 2, p. 20 f., § p. 16 f., otherwise see PIKNA, B. op. cit. sub 62, p. 167, SYLLOVÁ, J. and others op. cit. sub 75 p. 4–11.

⁷⁷ RŮŽIČKA, M., POLÁK, P. op. cit. sub 75, p. 7.

⁷⁸ PIPEK, J. op. cit. sub 69, p. 100 f.

⁷⁹ PIPEK, J. op. cit. sub 69, p. 103: "... it is correct to use the term double 'pursuit' ". This term comprises in itself the whole complex of unfavourable consequences, that it should hinder, namely both the pursuing itself and the result, (the punishment V.K.), from the point of view of *ne bis in idem*.

⁸⁰ RŮŽIČKA, M., POLÁK, P. op. cit. sub 75, p. 10; REPÍK, B. OP. CIT. sub 64, p. 248; as well as the verdict of the SC from 22. 7. 2004, sp. zn. 11Tto 738/2003, which legal sentence says: "It is a violation of the principle *ne bis in idem* in the sense of the art. 4 of the Protocol No 7 to the Arrangement and protection of human rights and basic freedoms, if the accused one was prosecuted and convicted for the same deed, that was as an act of penal-law nature earlier dealt with by a relevant administration authority in the proceedings of an offence, that ended in a final verdict, through which was this act of the accused one judged as an offence, if it did not come to the cancelling of this decision of the administration authority. In such case the stipulation of the § 11 para 1 ltr. j) p.p.c. together with the stipulation of the art. No 4 of the Protocol No 7 to the Arrangement of the protection of the human rights and basic freedoms makes the prosecution inadmissible. If, in spite of this, the accused was prosecuted for the same deed, for which he/she had been already punished (or acquitted) in an administration proceeding, and if such prosecution ended in a final verdict in the matter itself in the sense of § 265a para 2 p.p.c., the reason for an appeal is through this accomplished according to § 265b para 1 ltr e) p.p.c." to hinder the violation of the principle *ne bis in idem* and with regard to only the facultative authority to stop in the cases mentioned the prosecution in the sense of § 172 para 2 ltr. B) p.p.c., the authorities active in the criminal proceeding are obliged to stop such prosecution that is based on the Supplementary protocol in the reference to the § 11 para 1 ltr. J) p.p.c. The thing is that in the § 172 para 2 ltr. B) p.p.c. something else is stipulated than in the Supplementary protocol, therefore the proceeding according to the Constitution (Art. 10) will be asserted.

⁸¹ ŠIŠKOVÁ, N. op. cit. sub 58, p. 599.

⁸² REPÍK, B. op. cit. sub 64, p. 152.

of the CBRU all the more, as the Art. II-101 par. 2 ltr c) counts on its explicit induction.

The importance of the discussed principles of the CBRU for the PLE and EPL is obvious. In the first place the classical penal-law principles of the laws are being confirmed as treaty-constitutional, so the process of their Europeanization should not create any problems. In the second place the mentioned principles men a reliable starting point for the forming of the EPL.

The TCE offers a number of penal-law principles even in the part III, head. III, chap. IV (The Space for the freedom, security, and law). It is possible to name selectively just e.g. the Art. III-270 par. 1, that comprises a new principle of the *mutual recognition of verdicts and court decisions* as a base for the *judicial cooperation in the penal matters*⁸³, and the principle of *approchement of the legal regulations of the member states* in the sectors mentioned in the par. 2 and in the Art. III-271.⁸⁴ It is about a minimal horizontal harmonization of the penal law regulations, that enable the acceptance of the intrastate corrections, that conserve or introduce a higher degree of protection of the persons; the Art. III-270 par. 2 ltr a) states a *mutual admissibility of the evidence among the member states*.

CHAPTER III: CONCLUSION

A necessary fragmentary description and analysis of the selected *functions* and *principles* of the TCE of the penal law nature do not justify any essential conclusions. Therefore we may only partially conclude that the selected functions and principles of the TCE in the relation to the PLE may and in an effect should act first of all as *limits* of the process of Europeanization of the penal law in the CR, i.e. its harmonization (see reference No 4), namely with reservations or recommendations to some of the principles (loyal cooperation, subsidiary).⁸⁵ To what extent the Czech penal law correction corresponds in its level with the requirements of the TCE, in that extent it enables the harmonization.

The TCE that is looked upon as a "placenta" of the possible future EPL proves to be not only a mere idea, a wishful thinking, not to be put in effect in the future. The fact is that the "delivery" apparently would not pass without difficulties. The question is where the process of the European integration may come to in the law in general and in the penal law especially, namely the supranational one.⁸⁶

⁸³ SYLLOVÁ, J. and others op. cit. sub 20, p. 401, where there is further stated: "The conclusions of the council of the EC in Tampere in October 1999 explicitly stated, that the principle of the mutual recognition of the verdicts must be the pillars of the judicial cooperation in the frame of the Union."

⁸⁴ The text of the art. III-270 para 1, as I think, is not precise. It comprises the judicial cooperation in the penal matters of approchement of the legal regulations of the member states, even if such harmonization is the supposition of the cooperation and not the part of it.

⁸⁵ SCHÜNEMANN, B. Grundzüge eines alternativ-Entwurfs zur europäischen Strafverfolgung. ZStW, 116, 2004, 2, p. 391.

⁸⁶ TIEDEMANN, K. Gegenwart und Zukunft des europäischen Strafrechts. ZStW, 116, 2004, 4. p. 954, 957. VOGEL, J. Licht und Schatten im Alternativ-Entwurf zur europäischen Strafverfolgung. ZStW, 116, 2004, 2, p. 423.