Freedom, Security and Justice within the European Union

- with special emphasis on criminal justice issues

Prof. Dr. Karsai Krisztina, DSc

University of Szeged; Faculty of Law

MODULE 3

Legal Innovation within AFSJ: Ideas and Solutions

Reading Lecture 5

Prohibition of Double Adjudication or Punishment

1. In this lecture you will learn about…

- the human right context of double jeopardy (common law countries) or prohibition of double punishment (civil law countries – in Latin: ne bis in idem),
- the development of transnational prohibition and
- the consequences of European developments in this regard.
-

Learning time – approximately 3 hours

2. The prohibition of double punishment – an intro

Read the text!

a perpetrator shall not suffer any disadvantage twice in criminal law for the same action

The ne bis in idem principle, i.e. **the prohibition of double adjudication of the same facts** has fundamental legal significance in modern democratic states; its development and history are rooted deeply in law: it was recognized back as far as the **5th BC and its development** – or precisely, its establishment was and has continuously been present, more or less – with the exception of inquisition procedures – in European sources of law (as well as in precedent law); however, it breathed life for the first time from the ideas of the enlightenment. The prohibition of double adjudication derives from justice and the requirements that restrict state coercion (i.e.: the power of criminal liability); and from the broadest perspective, it may comprise restrictions concerning the whole criminal legal subsystem of a given society. The principle therefore **concerns criminal law and criminal justice in a wider sense, as a whole;** and as such, a perpetrator shall not suffer any disadvantage twice in criminal law for the same action. Therefore, the ne bis in idem principle in essence provides protection against the unrestricted application of State power, while also **protecting the "finality" of judicial decisions** in modern constitutional states.

What are the reasons to accept / guarantee the prohibition of double punishment?

- preventing the state from using its power to wrongly convict innocent persons
- avoiding the financial and emotional damages of multiple prosecutions
- binding the state itself to decisions of the judiciary persons
- a perpetrator shall not suffer any disadvantage twice in criminal law for the same action

The basic premise for this under the scope of individual legal protection is the necessity for protection in the event that a given state has already implemented a given punishment for a particular action (crime), then **this need in essence vanishes**, and there remains no room for newer enforcement, or at most only if a major or significant interest arises, that would justify breaking through a final judgment. Strictly speaking, it is to be considered a principle applied during sentencing, which rules out multiple consideration of real (actual) facts in establishing criminal liability (historical facts, circumstances) – both in a positive and in a negative direction.

no second adjudication

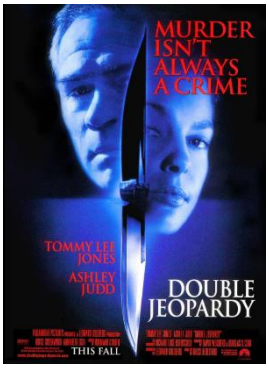
no second punishment

no execution twice

if once decided / if once executed

§

It is possible that it will be laid down in statutory regulation, but it is equally possible that it will remain "only" at the level of judicial practice (discretion). In domestic law, the question of finality of decisions (the so-called res judicata) and ne bis in idem principles are closely connected, and mostly stems from the inability to challenge formal legal force – although the significance of the invariability of res judicata (enforceability) of substantive legal force cannot be ruled out either.



In common law countries this rule has different name, this is the double jeopardy rule. The exciting movie from 1999 contains, however, many confusions and misleading information about double jeopardy – but still it is worth to watch.[1]

Why is it misleading? Check it in the video lecture No 9

[1] https://www.imdb.com/video/vi2813968665?playlistId=tt0150377&ref_=tt_ov_vi

3. Development of the transnational dimension

Read the text!

The establishment of the right not to be tried or punished twice is due in part to international human rights efforts, as several international legal instruments contain the prohibition of double (criminal) procedures, including the International Political Covenant on Civil and Political Rights, Article 14(7) and Article 4 of Protocol 7 to the European Convention on Human Rights. In the practice of the ECtHR, the preceding article is referenced on multiple occasions; as a result, the ECtHR has had the opportunity to thoroughly examine its content and context from many perspectives. The international documents referenced above prohibit being tried or punished twice in the scope of domestic law, and **do not stipulate international enforceability (or transnational validity)**. Nevertheless, in general, the widespread view is that the ne bis in idem may surface in extradition cases, as the prohibition of extradition. The European Convention on Extradition (1957) regulates it as a relative obstacle to extradition, that is, it provides the framework for refusing extradition up until the other state brings a final judgment (in the proceedings); Council Framework Decision 2002/584/JHA14 on the European arrest warrant and the surrender procedures between Member States considers it mandatory (absolute) grounds for refusal.

Think on the very disadvantageous situation: if the transnational validity is not given, theoretically and traditionally every state has / had the right to punish the person for the same act by existing jurisdiction.

originally the person (and his/her interests) did not appear in interstate relations

Another important aspect of the emergence of the principle is the (automatic) final closing effect regarding criminal proceedings and decisions carried out in another state, the issue of res judicata. In connection with this, in the first approach it could be said that the international enforcement of the principle should rest on the same premises, similar theoretical considerations that were followed in the internal recognition – such as justice and the protection of human rights. However, this is preceded by an entirely different theoretical foundation, which stems from the fact that here primarily the relationship between states is of concern, which is characterized by the international law interdependence of states. This is even so if **the position of the person concerned has strengthened on the conventional arena of international**

cooperation in criminal matters – with the development of the protection of human rights – and has transformed into a third pole of such legal relationships.

The legal certainty that requires holding closed criminal procedures intact is an interest that exists within a legal system. With regard to relations between states, internal legal certainty is at most a reason of self-reflection; upholding it in any given case can be referenced as maintenance of some international obligation (so-called public order), but is insufficient to provide a basis for obligations of some other state, in the event that the latter remains only within the state's own legal system. This is the reason for justifying general recognition of foreign decisions on a "merely" discretionary basis, i.e. when the state, upon its own discretion, chooses to recognize the criminal procedure conducted and decision ruled in another state. However, this type of solution fails to provide full protection for the involved person, because on one hand, it is possible that certain national regulations do not recognize the enforceability of foreign judgments, and on the other hand, binding to separate decisions, that is, the lack of automatism gives rise to further elements of uncertainty in the system, in which legal protection may flop. **Not to mention, the aspect of how expensive it would be to carry out multiple criminal procedures (conducted in multiple countries)** and possible punishments, and in addition would also result in unnecessary and unjust parallelism. This, aside from providing an opportunity for infringing individual rights, would also set the stage for possible conflict amongst states, especially in cases where for a given criminal act, if it has transnational elements, the criminal (law) jurisdiction concurrently extends to multiple countries.

4. EU development

Read the text!

An acceptance **among the sovereign states can therefore only be required if the theoretical-philosophical kinship or similarity is given** and if – obviously on the basis of this – some international norm (or perhaps international customary law) specifically, expressly prescribes this. This type of development is evident in the European Union. **The binding regulation between European states was established in 1990**, although the declaration of theoretical-philosophical kinship followed only much later, in 1999 at the Tampere Summit, with reference to the principle of mutual trust. The strengthening of trust in general with regard to the legal order of the other member states had led the path toward recognizing that the prohibition should be regulated at a supranational level, since in this way, the factors of injustice arising from differences national regulations and practice could be rectified.

In 1987, in the Convention on the **ne bis in idem** the member states had come to an agreement on enforcement of the principle – but this had not (and to date, still has not) been ratified by all member states. In 1990, the **Convention Implementing the**

Schengen Agreement was finally adopted (hereinafter: CISA), which expressly outlined the application of the ne bis in idem principle (Articles 54-58), the text of which was taken over and remained nearly unchanged from that of the 1987 Convention.

"Article 54 - A person whose trial ***has been finally disposed*** *of in one Contracting Party* ***may not be prosecuted*** *in another Contracting Party* ***for the same acts*** *provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."*

Specifically, the issue highlighted here is that the European enforcement of the ne bis in idem principle is of fundamental significance in EU (union) law, because exercising **the right to free movement of persons** can only be effectively observed if a perpetrator can know that once his trial has been finally disposed of, after having been prosecuted and sentenced and following the imposition of a penalty in one member state, or in the event of being acquitted upon a final judicial decision, he may freely move in the Schengen **area without having to fear criminal prosecution because the said criminal act** under the laws the latter state is considered a different crime (act).

5. Double adjudication

Watch the video lecture No 9!

6. EU development II.

Read the text!

The mutual trust enshrined by member states in the criminal justice systems of one another is a critically important premise in this legal system, which must prevail even if no factual reason for the trust can be established (improper procedural practices, forced dysfunctions such as lack of personnel, less developed systems of newly acceded MS, etc.).

Then in 2009, a new milestone was reached and the principle had now been drafted as a basic (fundamental) right, in **Article 50 of the Charter of Fundamental Rights of the European Union** under the title "Right not to be tried or punished twice in criminal proceedings for the same criminal offence". The article

Then in 2009, a new milestone was reached, and the principle had now been drafted as a fundamental right.

states: *"No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law*." The wording of text of the provision differs from Art. 54 of the CISA, but it can nonetheless be said that the application of specific regulations for the provision of the Charter on fundamental rights were established by the CISA, in a way that it also implies the appropriate limitation of Article 50 of the Charter.

This however is only true if the scope of the **two provisions overlap one another**, i.e. the criminal procedure is such that it is conducted by a member state under so-called harmonized criminal laws ("within the Union in accordance with the law").

For cases falling outside of this scope, for example, simple homicide, in which more than one state may have jurisdiction (e.g. if a Hungarian citizen murders a German person in Austria), **the Charter – in principle – shall not be applied, while the CISA can be enforced.**

7. Reasons for accepting the transnational validity of the principle

Analyse the text above!

In the text above, identify the reasons why it is essential – for the integrated societies of the EU – to accept the transnational dimension of the prohibition of double adjudication.

1. _____
   _____
   (human right aspect)

2. _____
   _____
   (internal market and 4 freedoms aspect)

3. _____
   _____
   (mutual trust aspect)

4. _____
   _____
   (legal certainty within the legal order)

5. _____
   _____
   (cost effectiveness aspect)

8. Questions for review

1. What is double adjudication (punishment)?
2. Which are the main reasons for accepting its transnational validity?
3. Since when has it functioning between the EU MS?
4. What is the significant difference between the requirement of not being punished twice provided by the ECHR and the CFR?
5. What is the CISA?

Further reading

Karsai Krisztina: TRANSNATIONAL NE BIS IN IDEM PRINCIPLE IN THE HUNGARIAN FUNDAMENTAL LAW. 2017 223-239.p.

The long version of the paper can be found under

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009257

This teaching material has been drafted at the University of Szeged and supported by the European Union. Project identification number: EFOP-3.4.3-16-2016-00014

SZÉCHENYI 2020
HUNGARIAN GOVERNMENT
European Union
European Social Fund
INVESTING IN YOUR FUTURE