THE RIGHT OF NOT BEING JUDGED OR PUNISHED TWICE FOR THE SAME DEED ACCORDING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract:

The principle of applying a single penalty for a single unlawful act is also provided by the European Convention on Human Rights.

This principle involves the application of a single sanction for a single illegal act; the one who disregarded by his behavior, the rule of law will be responsible only once for the wrongful act, for a breach of the law corresponds to only one legal sanction.

The principle does not exclude the possibility of the simultaneous existence of multiple forms of legal responsibility for the unlawful act committed by the same person, when by the same unlawful act are violated several rules of law.

Article 4 of Protocol no.7 of the European Convention for human rights devotes "the right of not being judged or punished twice", known under the traditional name of "ne bis in idem": "No one can be criminally prosecuted or punished by the jurisdiction of the same State for committing the offense for which he has already been acquitted or convicted by a final judgment according to the law and penal procedure of that State.(...)"

In this matter we will expose two situations that were solved by the European courts regarding the "ne bis in idem" principle

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The legal order is not based solely on constraint but rather its essential feature is that it imposes primarily by voluntary compliance with the rules of law, and this aspect is related to legal responsibility.

In its general sense, responsibility is seen as an obligation to bear the consequences of the breach of rules of conduct, therefore when it violates or disregards responsibility.

Legal responsibility is also regarded as a constraint of state power over the individual, as a reaction to the breach of the rules of law, thus making it bear the predetermined consequences of his deed (to repair the damage caused, to submit to a criminal or contraventional penalty etc.) (Michael Eliescu, 1972).

In conclusion we can say that in the complex social relation that has an ending point in establishing responsibility, the reason being the deed by which a rule of law is violated, called illicit deed and the penalty is the instrument by which constraint is realized.

Legal responsibility is circumscribed to the branches of law and is related to the specifications of the subject of the regulation of each of these branches.

Therefore, specific to criminal liability is to commit an act considered to be a criminal offense with guilt as required by law and a penalty called punishment; characteristic to administrative responsibility is the administrative offense and the specific penalty; the material responsibility, generates an obligation for compensation, etc.

The principles of legal responsibility are those guiding ideas that find their expression in all the rules of law that regulate different forms under which this legal institution is presented.

They have the common features of all the legal rules that regulate cases, conditions, the ways in which different forms of legal responsibility intervene.

From these principles enshrined in the legal literature and resulting from the rules of law, are:

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a) The principle of commitment to legal responsibility based solely on the law.

The principle of legality is a fundamental principle of criminal law. In the criminal responsibility field, this principle expresses the rule, after which the whole activity of prosecuting those who violated the law by committing offenses, is solely based on the law. Legality of criminal responsibility involves the legality of criminal offenses and the legality of criminal sanctions:"nullum crimen sine lege" and "nulla poena sine lege".

However, we believe that the principle of legality applies to all forms of legal responsibility because in any branch of the law and in any of the forms of legal responsibility there may be applied legal sanctions only for illegal acts, whether it is crime, illicit civil or administrative misconduct.

b) The principle of responsibility for the deed committed with guilt.

This principle requires that any subject of the law to be sanctioned only when he is guilty and only in the limits of his guilt. Legal responsibility intervenes because a subject of the law did not follow the conduct prescribed by the rules of law and because out of more conduct possibilities he chose the one that violates the social interests protected by rules of law. Trough law, the society condemns those members that have a behavior opposite to their interests, and the offenders know the fact that by their behavior they are opposite to these interests.

According to this principle, legal responsibility interferes only for material behavior deeds, meaning, by the legal deeds with illicit character. It does not have incidence over people's ideas, non materialized in conduct acts, according to the roman adage: : "*de internis non judiciat praetor*".

The idea of guilt implicates the offender's attitude to decide about his own behavior, as well as the conscience of violating the rule of law by his conduct act.

In principle, the responsibility occurs for the act committed with guilt, however, in the Romanian legal system operates the presumption of innocence of the offender, so that guilt must be proven by the injured party, or by the prosecution in case of criminal responsibility. However, in some cases the law regulates the presumption of guilt, by the responsibility of individuals, for example the presumption of guilt of parents for their minor children's actions, which may, however, protect themselves from liability if they prove that they could not prevent that injury.

c) The principle of personal responsibility

According to this principle sanctions effects occur only on the person who violated the rule of law , by committing the wrongful deed .

The extent of the liability is determined by the personal circumstances of the offender , which is appreciated by the opportunity of determining the penalty.

There are exceptional cases expressly provided by law, when the responsibility for someone else's crime intervenes- objective , indirect liability, such as the offenders' responsibility for acts of the suspected, of institutors and artisans for pupils and apprentices' deeds or parents for their minor children's actions (Gheorghe, Mihai, Radu Moțica, 1999).

In case of solidary responsibility , it operates in the person of more subjects , so that the injured can be compensated by any of them , thus recovering all the damage , after which the one that gave rise to full compensation for the damage to be able to recover through a recourse action against the other debtors everything he paid over what he owed himself, according to his degree of guilt.

d) The principle of accountability celerity

Achieving the goal of legal responsibility depends greatly on the implementation of the principle of celerity, which requires that the accountability is to be made appropriately so that the penalty to produce its suppressive and preventive- educational effects.

Sanction is society's reaction through state constraint force for the wrongful act , so it is necessary that the punishment to occur within a short period of time after the offense was committed, because if coercion does not occur promptly, there are no longer obtained the expected results, neither in relation to the offender, nor in relation to the society.

Undoubtedly, the delay of the perpetrator accountability causes a feeling of insecurity in interpersonal relationships and social ones, as well as a sense of distrust in the ability of the institutional factors required to ensure the rule of law (Gheorghe Mihai, 1999).

As you know , accountability has not only an educational effect, but also leads to restoring law order, impaired by committing the illicit deed , and the passing of time can lead to the loss of some evidence or to determine real impediments in establishing the actual state. That is why, by law, there are often set prescription or time limits for the implementation of the penalty.

e) The “non bis in idem” principle

The principle of applying a single penalty for a single illegal act.

This principle involves applying a single sanction for a single illegal act; the one that has ignored the rule of law by his conduct will be responsible only once for the wrongful act, for a breach of the law is matched by only one legal sanction.

The principle does not preclude the simultaneous existence of multiple forms of legal liability for the misconduct of the same person, when by the same act there are violated several rules of law.

For example , according to Art.208 of the Penal code, taking a movable object from the possession or detention of another person without consent, is theft and is punishable by law , intervening criminal liability and on the other hand, civil law , which protects the right to property of the owner, is given the right to restitution and compensation for damage to property which constitutes a civil penalty.

So violation by same offense, of a rule of criminal law and a rule of civil, the penalties for each branch of law which were ignored, also accumulate this way several forms of legal responsibility.

Another example, by committing a road traffic offense, the author is criminally liable but also civilly liable, if he committed a civil wrongful act causing injury to another person. This way, violating by the same unlawful conduct both a rule of criminal law and a rule of civil law, the penalties for each branch of the law’s rules which were ignored are to be cumulated.

Criminal liability may be combined with disciplinary responsibility when in the execution of the employment contract, the employee commits an unlawful act which at the same time means misconduct and crime, and therefore applying both the punishment provided by the criminal law, as well as a disciplinary sanction. In these cases the principle stated is not defeated (non bis in idem), as it accumulates two types of liability of a different nature , which involve different penalties.

Disciplinary liability can be also combined with administrative liability , if the unlawful act is at the same time misconduct and misbehavior , thereby implementing a disciplinary sanction and a contraventional sanction.

This principle excludes the possibility of applying to the same person for the same unlawful conduct of two or more sanctions, identical in nature: either criminal or civil , or administrative etc.; because restoring the violated order of law, demands for each violation of legal rules, the applying of a single penalty, the nature of which depends exclusively on the nature of the legal norm that was violated.

Therefore, when there is a multiple violation of the rule of law , covering different legal rules and there is no overlapping of two or more legal sanctions of the same kind, which would apply to the same person for a single illicit act, does not violate the principle of applying a single penalty for a single illegal act.

If a person commits an act that is qualified as criminal, he will not be held administratively responsible for the same act, because an offense can not constitute at the same time both a criminal act and an offense; the offense is defined as being an act with less danger than crime.

In conclusion overlapping criminal liability with administrative liability is excluded.

This principle is proclaimed both in civil procedural law but also the criminal procedural law, by the legal texts providing for the practical impossibility of overlapping penalties of the same kind.

One of the main effects of the courts' final judgments is extinction of the right to legal action in material sense and preventing prosecution of the same offense and the same person.

When the court finds that there is a final judgment and with a judged matter authority, it will accept the final solution and the prohibition to judge or decide a case completely solved. And thereby tends to respect this principle , because the final and various judgments, sanctions can not be different or the same kind by one or more courts.

We believe that the approach should take into account the rights under the European Convention on Human Rights as interpreted and applied in the solutions of the ECHR Court [Law no.30/1994 regarding the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome on the 4th of November 1950) and of the Additional Protocols to this Convention, published in Of.M.no.135/31.05.1994].

Article 4 of Protocol 7 of the Convention enshrines the " right not to be judges or punished twice", known as traditional "non bis in idem": "No one may be pursued or punished again in criminal proceedings under the jurisdiction of the same State for committing the offense for which he has already been acquitted or convicted by a final judgment under the law and penal procedure of that State.(...)"

In this matter we will expose two cases, solved by the European Courts on the non bis in idem principle.

In the first case, on the 11th of November 1999 the applicant was involved in an incident in which , according to the report filed by the police that was called on the spot, he broke the door of a neighbor, broke into his apartment and punched him.

Following the police report, the Mayor of Gabrovo, fined the applicant for disturbing public order, with 50 leva (25 euro). The sanction became final, not being challenged in court.

Subsequently, the prosecutor began prosecuting, and prosecuted him for trespassing, battery and other violence. Gabrovo District Court acquitted him for trespassing and sentenced him for assault and other violence to imprisonment for 18 months. The solution was maintained on appeal by the Gabrovo Court and on recourse by the Supreme Court of Justice of Bulgaria.

In the European Court, the applicant complained under Articles 6 of the Convention and 4 of Protocol no. 7 of the Convention (which guarantees the right not to be trialed or convicted twice for the same offense - ne bis in idem).

The Court, in its judgment of 14th of January 2010, found the violation of both articles.

Regarding Article 4 of Protocol 7 at the Convention, the Court has shown that:

- sanctions imposed on the applicant by the Mayor of Gabrovo can be considered as having a "penal "character, for the autonomous purposes that the Convention accords to this notion , given that , on the one hand , the prohibition imposed by the violated legal text addresses all persons and that on the other hand , the purpose of the sanction is to punish and prevent committing similar acts in the future;

- there is identity between the facts that were at the origin of the sanction and the ones that generated the criminal case brought against the applicant , regardless of the legal definition of that law gives about the offense , respectively to the two offenses;

- there was a doubling of the proceedings against the applicant, given that criminal proceedings were preceded by its sanctioning , being final by not being appealed.

In conclusion, the applicant had been "condemned " in the administrative procedure (contraventional) that must be treated as a " criminal trial " in the autonomous sense of that term from the Convention. After this " conviction" became final, against the applicant had been filed another criminal charge which concerned the same behavior and essentially the same facts. Considering that art . 4 of Protocol 7 of the Convention prohibits both the prosecution and conviction of a person for acts that had already led to the application of definitive criminal sanctions , the Court found a violation of this Article by Bulgaria.

In the second case , by judgment of the 11th of December 2008 the Court of Justice (ECJ) ruled in Case C-297/2007 Staatsanwaltschaft Regensburg / Klaus Bourquain , and set the ban to be tried twice for the same offense applies where a conviction could not ever be executed directly.

According to the ECJ, "this interpretation seeks to prevent a person from being prosecuted for the same acts in several Contracting States following the exercise by it of the freedom of movement".

In Case C 297 /07 , regarding a request for pronouncing a preliminary ruling under Article 35 EU from the Landgericht Regensburg (Germany), made by decision of 30th of May 2007, received by the Court on the 21st of June 2007, in the criminal proceedings against Klaus Bourquain [By decision of 11 December 2008 the Court of Justice (ECJ) ruled in Case C-297/2007 Staatsanwaltschaft Regensburg / Klaus Bourquain, and determined that the prohibition to be prosecuted twice for the same offense also applies for a conviction which could never be executed directly.

According to the ECJ, "this interpretation seeks to avoid that a person to be prosecuted for the same acts in several Contracting States resulting from the exercise by it of the right to free movement].

The reference application for a preliminary ruling concerning the interpretation of Article 54 of the Convention for implementing the Schengen Agreement of 14th of June 1985 between the Governments of the Benelux Economic Union , the Federal Republic of Germany and the French Republic on the gradual abolition of checks at common borders [JO 2000, L 239, p. 19, Special edition, 19/vol. 1, p. 183), signed in Schengen (Luxemburg) on the 19th of June 1990 (called „CAAS")].

The request was made in the context of criminal proceedings in Germany on the 11th of December 2002 against Mr Bourquain, a German national, in terms of the crime of murder, while criminal proceedings for the same facts, by a judicial authority of another State against the person mentioned had already been solved on the 26th of January 1961 by a decision of conviction in absentia.

The legal framework

Under the first Article of the Protocol about integrating the essence of Schengen in the the European Union, annexed to the Treaty on European Union and to the Treaty for establishing the European Community by the Treaty of Amsterdam ('the Protocol'), 13 Member States of the European Union including Germany and the French Republic, are authorized to establish enhanced cooperation between themselves in the areas covered by the scope of the Schengen essence, as it is defined in the Annex to the Protocol.

From the Schengen essence, thus defined includes, in particular, the Agreement between the Governments of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on June 14,1985 [JO 2000, L 239, p. 13, Special edition, 19/vol. 1, p. 177] and CISA.

Under Article 2 second (1), second sentence, of the Protocol, the EU Council

adopted on May 20, 1999 Decision 1999/436/EC for determining , in accordance with the relevant provisions of the Treaty of establishment of the European Community of the Treaty on European Union, the legal basis for each of the provisions or decisions which

constitute the Schengen essence [JO L 176, p. 17, Special edition, 19/vol. 1, p. 107]. Article 2 of that decision in conjunction with Annex A to it, results that Articles 34 EU and 31 EU were designated by the Council as the legal basis of Articles 54-58 of the CISA.

Under Article 54 of the CISA, which is a part of Chapter 3, entitled "Application of the ne bis in idem " in Title III of the Convention, entitled "Police and security ": “A person whose trial has been finally disposed of in a trial by a Contracting Party may not be prosecuted by another Contracting Party for the same acts provided , where a sentence has been pronounced , it has been enforced, is being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

From the information concerning the date of entry into force of the Treaty of Amsterdam, published in the Official Journal of the European Communities of the 1st of May 1999 (OJ L 114 , p 56) , it appears that the Federal Republic of Germany has made a declaration under Article 35 (2) EU accepting the Court's jurisdiction to act in the manner laid down in Article 35 (3) letter(b) EU.

The facts in criminal proceedings and the preliminary question

On the 26th of January 1961 in Bône (Algeria), Mr Bourquain , engaged the French Foreign Legion, was sentenced in absentia to death penalty by the Permanent Military Tribunal for the eastern zone of Constantinoise, guilty of desertion and intentional homicide.

In application of the French Code of Military Justice for the Army, the military court considered it proved that, on the 4th of May 1960, while trying to desert on the Algerian Tunisian border , Mr Bourquain shot dead another legionnaire, also of German nationality, who wanted to prevent desertion .

Mr Bourquain, a refuge in the German Democratic Republic would not have learned of the notification of the judgment in absentia, and the sentence imposed by the judgment considered to be given in adversarial proceedings could not be executed.

Mr Bourquain was afterwards not the subject of criminal proceedings nor in Algeria or in France. Moreover, in France, all offenses committed in connection with the war in Algeria was amnestied by the laws mentioned above. In contrast, Germany has been initiated an investigation against him for the same offense and , in 1962, an arrest warrant was sent to the authorities of the former German Democratic Republic , which rejected it.

In late 2001, it was discovered that Mr Bourquain lived in the area of Regensburg (Germany). On 11 December 2002 , Staatsanwaltschaft Regensburg (Regensburg floor) sent him to trial for murder, to the court, for the same acts under Article 211 of the German Criminal Code.

Accordingly, by letter dated 17 July 2003, the court requested information from the Ministry of Justice in France, in accordance with Article 57 (1) of the CISA, to determine whether the decision of the Permanent Military Court of the eastern zone of Constantinoise , pronounced on 26 January 1961 prevents the commencement of criminal proceedings for the same offense in Germany , given the prohibition on double prosecutions referred to in Article 54 of the CISA.

The Prosecutor's Office of the Military Tribunal in Paris responded to this request for information , stating in particular the folowing:

" The decision rendered in absentia on January 26, 1961 against [Mr Bourquain] has the force of res judicata. The decision of death penalty conviction became final in 1981. Since in the French law , the prescription of the sentence execution in criminal cases is 20 years , the judgment can not be enforced in France."

The referring court asked the Max-Planck-Institut für ausländisches und internationales Strafrecht (Max Planck Institute of international criminal law and comparative criminal law) an advisory opinion concerning the interpretation of Article 54 of the CISA in the circumstances of the main proceedings. In the opinion of the 9th of May 2006 , the institute concludes that although enforcement of the conviction in absentia was excluded because of procedural peculiarities of the French law , however, in the main

proceedings , the conditions for applying Article 54 of CISA are met and therefore can not be released a new criminal proceeding against Mr Bourquain. The same institute, in response to the request for additional comments, maintained its position in the letter of the 14th of February 2007.

Landgericht Regensburg , considering that Article 54 of the CISA could be interpreted as meaning that , in order to prevent another criminal pursue in a Contracting State, the first conviction in a trial conducted in the territory of another Contracting State should have been executable at a certain moment in the past, decided to suspend proceedings and to refer the following question:

" A person whose trial has been finally disposed of in a trial by a Contracting Party may be prosecuted in another Contracting Party for the same acts, if the penalty imposed on him could not ever be executed according to theState legislation that he has been condemned in?"

It should be added that, in any event, Article 58 of the CISA authorizes the Federal Republic of Germany to apply broader national provisions on the ne bis in idem . Thus, it allows Member States to apply that principle to judicial decisions other than those covered by Article 54 [To be seen in this matter, the Decision form the 11th of February 2003, Gözütok şi Brügge, C-187/01 And C-385/01, Rec., p. I-1345, point 45].

With regard to the preliminary question

The preliminary question ruling under Article 35 EU - Schengen Agreement – the Convention for implementing the Schengen Agreement - Interpretation of Article 54 - Ne bis in idem - Conviction in absentia - res judicata - The condition of non-executing the punishment.

By this question , the national court asks , essentially, to establish if the ne bis in idem principle enshrined in Article 54 [The Court ruled on seven occasions this principle: Judgment of the 11th of February 2003, Gözütok and Brügge (C 187/01 and C 385/01, Rec., ECR I 1345), Judgment of the 10th of March 2005, Miraglia (C 469/03, Rec., ECR I 2009), judgment of the 9th of March 2006, van Esbroeck (C 436/04, Rec., I-2333), judgment of the28th of September 2006, van Straaten (C 150/05, ECR ., ECR I 9327), judgment of the 28th of September 2006, Gasparini and others (C-467/04, Rec., p. I-9199), Judgment of the 18th of Jully 2007, Kretzinger (C-288/05, Rep., p. I-6441), and judgment of the 18th of Jully 2007, Kraaijenbrink (C-367/05, Rep., p. I-6619)] of the CISA can be applied to criminal proceedings instituted in a Contracting State for facts on which there has already been a final judgment against the defendant in a lawsuit in another Contracting State, even if the penalty imposed on him could not ever be enforced according to the laws of the state in which he was convicted.

It should be noted, on the one hand , as the Commission pointed out in its written observations that, in principle, a conviction in absentia may fall within the scope of Article 54 of the CISA and can therefore constitute a procedural impediment to the opening of new procedures.

First, the very wording of Article 54 of the CISA we can see that the judgments in absentia are not excluded from its scope , the precondition for the application of this Article 54 is only that there has been a final judgment in a trial by a Contracting Party.

Secondly, it should be noted that under Article 54 of the CISA is not subject to harmonization or approximation of the criminal laws of the Contracting States in matters of default judgment [The procedures for fighting criminal action, Gözütok and Brügge, cited above, paragraph 32].

In those circumstances, Article 54 of the CISA , applied either to a judgment in absentia delivered in accordance with the national law of a Contracting State or in an ordinary judgment, that necessarily implies the existence of a sense of mutual trust of the Contracting States in their criminal justice systems and the acceptance by each state to the

application of criminal law in force, in the other Contracting States even when the application of their national law would lead to a different solution (see , to that effect Gözütok and Brugge , cited above, paragraph 33).

As contended by several Member States and the Commission in their written observations there must be verified in what manner the conviction in absentia by the Permanent Military Tribunal for the eastern zone of Constantinoise is ' final' within the meaning of Article 54 of the CISA , given the impossibility of enforcement of the penalty determined by the requirement under French law to carry out , where failing to reappear , a new trial , this time in his presence.

It is clear that the Prosecutor's Office of Military Tribunal in Paris, without making any reference to the fact that the offenses committed by Mr Bourquain were amnestied in 1968, notes that the sentence against him became final in 1981, before the onset second criminal proceedings in 2002 in Germany.

It should be added that although French Law no. 68 697 of amnesty has as consequence the fact that, since the entry into force, the offenses committed by Mr Bourquain can not be sanctioned by effects of that law, as described in particular in Articles 9 and 15 of Law no. 66 396, they can not be interpreted as meaning that there is no longer an initial decision in the Article 54 of the CISA.

Judgment in the absence of the person concerned must be considered final for the purposes of Article 54 of the CISA, it must be established if the condition on the enforcement referred to in that Article, namely that the penalty can not be enforced , and where , in any time in the past , even before the amnesty or prescription , the sentence imposed by the first sentence could not be directly enforced.

In those circumstances, it must answer to the question that the ne bis in idem principle enshrined in Article 54 of the CISA applies to criminal proceedings instituted in a Contracting State for the facts on which a final decision has already ruled against the defendant in a process in another Contracting State, even if, under the laws of the state where he was convicted, the sentence that was imposed could not have been directly enforced because of some procedural features such as those in the main proceedings.

Therefore, the court said, the principle of ne bis in idem principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement of the 14th of June 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at common borders, signed in Schengen (Luxembourg) on the 19th of June 1990, applies to criminal proceedings instituted in a Contracting State for facts on which a final decision has already ruled against the defendant in a lawsuit in another Contracting State even if by the laws of the state in which he was convicted, the sentence was imposed not have been directly enforced, due to procedural features such as those in the main proceedings.

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