UNIVERSAL JURISDICTION AND THE PRINCIPLE OF NE BIS IN IDEM

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Abstract
Universal jurisdiction was defined as "the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct." Professor Randall, in his seminal work on universal jurisdiction, opined that the theory of universality "provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offence and the nationalities of the offender and the offended."Universal jurisdiction is considered a tool for promoting greater justice, but the rights of the accused must be protected. One of the most important guarantees is the principle of ne bis in idem, which protected persons against multiple prosecutions for the same crime. The main legal consequence of the application of ne bis in idem in most systems is the prohibition and inadmissibility of subsequent prosecutions on the same facts blocking effect).The national ne bis in idem principle is established as an individual right in international human rights legal instruments, such as the International Covenant on Civil and Political Rights of 19 December 1966, in Article 14(7). At the regional level, Article 8(4) of the American Convention of Human Rights (1969) and Article 4 (I) of the Seventh Protocol of the European Convention of Human Rights merit mention. In Europe, the ne bis in idem principle is enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985, which prohibits the initiation of a second trial for the same offence when final judgment has been imposed upon a person by a court of a contracting party.

Keywords*: "universal jurisdiction", "the principle neb is in idem", "domestic recognition", "double jeopardy".*

Universal jurisdiction was defined as "the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct.[1]" Professor Randall, in his seminal work on universal jurisdiction, opined that the theory of universality "provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offence and the nationalities of the offender and the offended."[2]

Universal jurisdiction is considered a tool for promoting greater justice, but the rights of the accused must be protected. One of the most important guarantees is the principle of ne bis in idem, which protected persons against multiple prosecutions for the same crime. The main legal consequence of the application of ne bis in idem in most systems is the prohibition and inadmissibility of subsequent prosecutions on the same facts blocking effect).[3]

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In Europe, the ne bis in idem principle is enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985, which prohibits the initiation of a second

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[1] Roger O'Keefe, Universal Jurisdiction Clarifying the Basic Concept, 2 Journal of International Criminal Justice 735, 734 (2003).

[2] Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 Texas Law Review 785, 788 (1988).

[3] De La Cuesta, José Luis, General Report, Concurrent National and International Criminal Jurisdiction and the Principle "ne bis in idem", International Review of Penal Law, 2002, 3e/4e trimesters, 707-736.

trial for the same offence when final judgment has been imposed upon a person by a court of a contracting party.

A. On the constitutional level, the Fifth Amendment to the United States Constitution contains the principle of ne bis in idem expressly. Article 39 of the Japanese Constitution clearly establishes that no person "shall be placed in double jeopardy" and, according to the general interpretation, this includes double jeopardy both in procedural law and in substantive law.

The German Constitution, in article 103(3), clearly states that no persons may be punished for the same act more than once. In Spain, although the 1978 Constitution does not explicitly proclaims the principle ne bis in idem, the Constitutional Tribunal has declared since 1981, that it is a direct consequence of the legality principle of Criminal Law (Article 25). In Croatia, in article 31 paragraph 2 of the Constitution of the Republic of Croatia establishes that "no one may be tried anew nor punished in criminal proceedings for an act for which he has already been acquitted or sentenced by a final court judgment made in accordance with the law."

In fact, all countries consider the ne bis in idem principle as a principle that is recognized at the domestic level. This basic right is directly applicable only with respect to judgments of domestic courts. The most frequent legal basis for the domestic recognition of the principle ne bis in idem, is simple statutory law, on a customary basis in Finland or in the Penal Code such in France, the Netherlands, Sweden. In Belgium, France, Germany, Romania, Italy, Hungary, Spain, Croatia Turkey it is recognition in the Code of Penal Procedure and in Spain, in other legal texts.

B. Recognition of the ne bis in idem effect of foreign res judicata at the national level is not very frequent. Except the relevant treaty expresses a prohibition, countries do not recognize a ne bis in idem blocking effect to foreign decisions, such in Germany in case of judgment of a court outside the European Union and admit a double prosecution and punishment.

In Germany, there is a distinction between foreign judgment of a Court inside and outside the European Union. Concerning foreign judgments of courts outside the European Union, if the convicted person has been punished abroad for the same act, the foreign punishment shall only be credited towards the new one to the extent it has been executed. This is the principle of accounting or deduction, mitigation or remission recognized in Japan, too. However, the public prosecutor's office may dispense with prosecuting an offence committed on foreign territory if the defendant has a sentence for the offence was already executed abroad and the sentence which is to bee expected in Germany would be negligible after taking the foreign sentence into account.

In Finland, it is recognize the ne bis in idem effect of all foreign res judicata without regard for the state of origin. In other countries, the law provides criminal proceedings after a final judgment has been rendered by a foreign court, entailing an acquittal, dismissal of the charges or conviction, if punishment has been imposed, followed by complete enforcement, pardon and in Belgium also amnesty or lapse of time, such in the Netherlands. In Croatia, although the ne bis in idem principle is recognized as obligatory only at the national level, with regard to the prosecution of criminal offenses committed abroad pursuant to the universality principle, criminal proceedings will not be initiated if the perpetrator has served the full sentence imposed on him in a foreign state or if he has been acquitted by a final judgment or pardoned in a foreign state; similary, if the statutory limitation has expired under the law of the state where the crime was committed. The perpetrator may be prosecuted for the second time in Croatia if he was sentenced by a final judgment in a foreign state, but did not serve the full sentence. In this situation, the perpetrator is not punished twice as the time previously spent in detention or prison will be included in the sentence pronounced by the domestic court for the same criminal offense.

In the United Nations ad-hoc tribunals, Article 10 of the International Tribunal for the former Yugoslavia Statute and the Article 9 of the International Criminal Tribunal for Rwanda Statute must be respected as concerns the principle of ne bis in idem.

C. In the Netherlands, the recognition of foreign res judicata is entirely independent from the prospective basis of criminal jurisdiction. In general, such in Germany, the principle of ne bis in idem

applies regardless of the principle according to which a domestic or a foreign court or authority exercises its jurisdiction. The ne bis in idem blocking effect of a foreign judgment is entirely the same, whether it derives from the state loci delicti or from a state which has exercised universal jurisdiction.

But in the Netherlands this egalitarian approach is open to criticism. One could imagine that a state might wish to shield a person, by starting criminal proceedings in his absence and next, due to lack of evidence, acquit him. The Statutes of the ad-hoc tribunals for Rwanda and the former Yugoslavia, the International Criminal Court provide for exceptions to the ne bis in idem rule in case of sham trials.

In Croatia, concerning crimes against international law foreseen in the Criminal. Code, the ne bis in idem principle has been disregarded entirely because of the incorporation of the universality principle within a provision regulating the protective principle. Croatian legal doctrine has criticized this approach and has considered it as erroneous. About the international crimes, the ne bis in idem principle limits the exercise of universal jurisdiction. In Finland the Penal Code makes it possible to exercise universal jurisdiction even in cases for which a prior foreign judgment has been handed down.

D. The principle ne bis in idem guarantees apply to a same person that risks being prosecuted or punished again for the same fact. For the application of the blocking effect of ne bis in idem in international context, the conditions are:

1) The European Court of Justice recognized in several cases, that is really difficult to asses the congruity of facts for the purpose of ne bis in idem within the transnational context. In the Van Esbroeck case[4], the issue of what amounts to the same facts was raised for the first time. In this case the accused had been convicted in one state for importing drugs and was subsequently prosecuted in another state for exporting the same amount of drugs. The Court held that in doing so, the ne bis in idem principle was violated:

a) "the relevant criterion for the purposes of the application of that article of the Convention implementing the Schengen Agreement is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

b) punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States to the Convention implementing the Schengen Agreement are, in principle, to be regarded as "the same acts" for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts."

In the Van Esbroeck case, the Court of Justice continued this road.[5] In the criminal proceedings against Kraaijenbrink, the problem was whether the accused could be convicted in Belgium of laundering money coming from drug transactions after she had been convicted in the Netherlands of receiving and handling of money deriving from illegal drug transactions.[6] According to Advocate General Sharpston, the different legal qualifications do not prevent regarding this as falling within the same set of facts.[7]

In Germany, the prohibition of a second trial for the same acts is not limited to the same provision of substantive criminal law, but encompasses all the historical circumstances during the commission of the crime (prozessualer Tatbegriff).

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[4] European Court of Justice, 9 March 2006, C – 469/2003, criminal proceedings against van Esbroeck.

[5] European Court of Justice, 28 September 2006, C – 150/2005, Van Straaten against the Netherlands and Italy.

[6] European Court of Justice, 5 December 2006, C – 367/05 criminal proceedings against Kraaijenbrink, Opinion of Advocate General Sharpston.

[7] De La Cuesta, José Luis, "Concurrent National and International Criminal Jurisdiction and the Principle ne bis in idem", International Review of Penal Law 2002 3e/4e trimester, 707-736.

2) Penal orders (Strafbefehle) prohibit in Germany the initiation of a second trial once the order has entered into force, if no objections have been lodged in time.

As to the character of the decisions that may bar a new penal proceeding in general, there is an absolute prohibition of a second trial after a final acquittal or a final conviction. Only decisions adopted as a definitive termination of proceedings or a final answer on the merits of the case qualify.

Another question is that of determining if judgments determining the end of proceedings due to a procedural impediment, and the termination of proceedings by the public prosecutor, even when a court consents, have or do not have a ne bis in idem effect. The European Court of Justice decided that: "The ne bis in idem principle laid down in Article 54 of the Convention implementing the Schengen Agreement also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the public prosecutor of a member state discontinues criminal proceedings brought in that state, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor."[8]

In the Miraglia case, the European Court of Justice has established that Article 54 does not apply when the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another member state of European Union against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.[9] The European Court of Justice in the Miraglia case, has established that Article 54 does not apply when the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another European Union state against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.[10]

Another question is whether the sentence has been enforced. In Kretzinger the issue came up whether a suspended sentence must be regarded as enforced, or is actually in the process of being enforced, as meant in Article 54. The Court stated that "In that respect, it must be noted that, in so far as a suspended custodial sentence penalises the unlawful conduct of a convicted person, it constitutes a penalty within the meaning of Article 54 of the Convention implementing the Schengen Agreement. That penalty must be regarded as "actually in the process of being enforced" as soon as the sentence has become enforceable and during the probation period. Subsequently, once the probation period has come to an end, the penalty must be regarded as 'having been enforced' within the meaning of that provision."

In case of final judgment rendered by a foreign court entailing conviction, if punishment has been imposed, the sentence must have been enforced completely for the application of the ne bis in idem effect. In cases of only partial execution, the principle of deduction enters in force, allowing a further prosecution and a new punishment. In the context of the European Union, article 58 of the Schengen Convention enjoins the courts to deduct any period of deprivation of liberty served on the territory of another party from a sentence handed down in respect of the same offence.

E. One of the most important exception to the ne bis in idem principle is in the case of sham trials. One can imagine cases of abuse of criminal proceedings in foreign states, for example a state might wish to shield a person, by starting criminal proceedings with the sole purpose of shielding the perpetrators (sham prosecution). In Croatia an exception to the ne bis in idem principle has been envisaged, namely, for exercising universal jurisdiction over gross human rights violations. When proceedings in another state have been conducted contrary to internationally recognized standards of a fair trial, criminal proceedings may be initiated in Croatia against the same perpetrator and for the same crime with the approval of the Chief State Prosecutor. This is not possible with regard to the

[8] European Court of Justice, criminal proceedings against Gözütok and Brügge, Judgment of 11 February 2003 (C – 187/01; C – 385/01).

[9] European Court of Justice, C – 469/03, criminal proceedings against Miraglia.

[10] European Court of Justice, 10 March 2005, C – 469/03, criminal proceedings against Miraglia.

International Criminal Court. In Hungary there is no special regulation for preventing sham trials, but due to the fact that the foreign judgment must submitted to a process of recognition of equivalence by the Metropolitan Court, this court must examine if foreign proceedings are consistent with the principles of due process of law.

References

- De La Cuesta, José Luis, General Report, Concurrent National and International Criminal Jurisdiction and the Principle "ne bis in idem", International Review of Penal Law, 2002, 3e/4e trimesters, 707-736
- European Court of Justice, 9 March 2006, C – 469/2003, criminal proceedings against van Esbroeck
- European Court of Justice, 28 September 2006, C – 150/2005, Van Straaten against the Netherlands and Italy
- European Court of Justice, 5 December 2006, C – 367/05 criminal proceedings against Kraaijenbrink, Opinion of Advocate General Sharpston
- European Court of Justice, criminal proceedings against Gözütok and Brügge, Judgment of 11 February 2003 (C – 187/01; C – 385/01)
- European Court of Justice, 10 March 2005, C – 469/03, criminal proceedings against Miraglia
- Roger O'Keefe, Universal Jurisdiction Clarifying the Basic Concept, 2 Journal of International Criminal Justice 735, 734 (2003)
- Kenneth C. Randall, Universal Jurisdiction under International Law, 66 Texas Law Review 785, 788 (1988)