ONE CANNOT BE TRIED FOR THE SAME DEED TWICE

NICOLAE GRĂDINARU[*]

Abstract
The principle of applying a single sanction for a single wrongful act.
This principle involves the application of a single penalty for a single wrongful act; who has ignored the rule of law his conduct will meet once for illegal acts, violation of law for a corresponding one legal sanction.
It does not preclude the simultaneous existence of several forms of legal liability for the unlawful act committed by the same person, when the same act is violated several rules of law.
Article 4 of Protocol 7 of the Convention enshrines the "right not to be tried or punished twice", known as traditional „ne bis in idem": "Nobody can be tried or punished by the criminal jurisdiction of the same State for an offense for which has already been acquitted or convicted by a final decision under the law and penal procedure of that State. (...)"
In two cases this will expose the principle settled by the European Courts non bis in idem.

Keywords: *liability, wrongful act, offense, conviction, final decision.*

Introduction

Legal order is not based solely on coercion, but rather its essential feature is that it requires primarily through voluntary compliance with the rules of law, and this aspect is the legal responsibility.

In general sense, responsibility is seen as an obligation to bear the consequences of breaches of rules of conduct and therefore violates or ignores when responsibility.

Legal liability is also seen as a constraint on state power exercised by the individual, as a response to breaches of law, thus making him suffer the consequences of his act default (to repair the damage caused, to undergo a criminal or contravention etc.).[1]

In conclusion, it appears that the complex social relationship of which is the determination of liability under it is that which violates a rule of law, called the action illegal and the penalty is the means by which coercion is performed.

Legal liability is circumscribed branches of law and is linked to other specific rules of each of these branches. Thus, criminal liability shall commit a criminal offense specific, with guilt as provided by law, a penalty called punishment, administrative liability and administrative deviation are characteristic specific penalty, liability for damages available through material creates an obligation, etc. Legal liability principles guiding ideas are those that find their expression in all the rules of law governing the various forms in which that principle is presented.

It envisages common features of all cases of legal rules governing the conditions, how involved various forms of legal liability.

The principles

Of the principles enshrined in the legal literature and results of rules of law include:

a) The principle of employing only legal responsibility under the law.

The principle of legality is a fundamental principle of criminal law. In the area of criminal liability, this rule expresses the principle by which the whole activity of criminal liability of those who violated the law by committing crimes, based on the sole legal basis. The legality of criminal

[*] Senior Lecturer, Ph. D. „Constantin Brâncoveanu" University, (email: gradinaru_fd@yahoo.com).
[1] M. Eliescu - Tort civil liability, Academy Publishing House, 1972, pag. 8-31.

responsibility involves the legality of conviction and the legality of criminal sanctions: "*nullum crimen sine lege*" and "*nulla poena sine lege*".

However, we believe that the legality principle applies to all forms of legal liability, as in every branch of law and the legal liability of any form of legal penalties may be imposed only for illegal acts, whether of crime or civil illegal administrative irregularities.

b) The liability for the acts committed by guilt

This principle requires that any matter of law can be punished only when he is guilty and only within the limits of his guilt. Legal liability occurs because a matter of law failed to comply with legal rules of conduct prescribed for the conduct of several possible just chose the one which violates social interests protected by legal rules. By law, society condemns those of its members who conduct contrary to its interests, and the perpetrators know that their conduct contrary to these interests.

Under this principle, the liability comes only material facts of conduct that is unlawful for the legal facts. It does not affect people's ideas, embodied in acts of conduct, according to the Roman maxim: "*de internis non judiciat praetor*".

The idea of guilt illegal act involving the author's attitude to decide its own behavior and consciousness through the act of violation of its legal norms of conduct.

In principle, tort liability for acts committed by guilt, but, in the Romanian law the presumption of innocence operates illicit offender so that guilt must be proven by the injured party, or by the prosecution for criminal liability. However, the law governing the presumption of guilt in some cases the responsibility of individuals, such as presumption of guilt of the parents for their minor children's actions, which will still protect from liability if they prove that they could prevent injurious act.

c) The principle of personal responsibility

According to this principle sanctions effects occur only on the person who has violated the legal standard, committing the unlawful act.

The extent of liability is determined by personal circumstances of the offender, which is assessed on the occasion of determining the penalty.

There are exceptional cases expressly provided by law, vicarious liability occurs when - liability objective, indirect, such as liability of principals for the acts of servants, and artisans of primary school pupils and apprentices for the acts or facts parents for their minor children.[2]

In the case of joint liability, it operates several subjects in person, so the injured can be compensated by any of them, and thus recovered the entire loss, as one who will rise to full compensation for the injury to be able to recover through an action for recourse against the other co-debtors more than what he paid as due to himself, according to his degree of guilt.

d) The principle of accountability for speed

The achievements of legal liability largely depends on the extent and speed of implementation of the principle, which expresses the requirement for accountability to be appropriate, such as failing to produce the effects of repressive and preventive - Educational.

Sanction is the reaction of society through state coercion against illicit act, so it is necessary for punishment to occur in a short time after the date of the deed, as if the coercion does not occur promptly, not longer obtain desired aims, either in the offender, or in relation to society.

Undoubtedly, the timing punish the perpetrator causes a feeling of insecurity in interpersonal relations and social ones, and a sense of confidence in the ability of institutional factors required to ensure law and order[3].

As is known, accountability is not only educative effect, but also lead to restoring the rule of law, impaired by committing illegal acts, and the passage of time can lead to the loss of evidence or

[2] Gh. Mihai, R.I. Motica - Optima justice, ALL Beck Publishing House, Bucharest, 1999, pag.201.
[3] Gh.Mihai - Argumentation and interpretation in law, Lumina Lex Publishing House, Bucharest, 1999.

to determine the real impediments to actually establish the actual state . Therefore, by law, often set time limits for implementation or prescription of the penalty.

e) Principle "*non bis in idem*"

The principle of applying a single sanction for a single wrongful act.

This principle involves the application of a single penalty for a single wrongful act, one that has ignored the rule of law his conduct will meet once for illegal acts, violation of law for a corresponding one legal sanction.

It does not preclude the simultaneous existence of several forms of legal liability for the unlawful act committed by the same person, when the same act is violated several rules of law.

For example, according to art.208 of the Criminal Code, making a movable possession or detention of another person without consent constitutes theft and is punishable by law, intervening criminal liability and, on the other hand, civil law, that protects the holder's ownership, the entitlement to restitution and compensation for damage to property which constitutes a civil penalty.

So the same offense in violation of a rule violation and a rule of criminal law and civil penalties for each branch of law whose rules were ignored accumulate on this path several will and forms of legal liability.

Another example, by committing a traffic offense on the road, but the author be liable for civil criminally liable if he committed a civil wrongful act of another person causing harm. Thus, the violation by the same unlawful conduct as a rule of criminal law and a rule of civil penalties for each branch of law whose rules were ignored accumulate.

Criminal liability can be combined with disciplinary liability in the performance when the employment contract employee commits an act which is unlawful, while a disciplinary offense and a crime, and thus applying both criminal penalty provided by law, as and disciplinary sanction. In these cases no principle in defeat (*non bis in idem*), because it consolidates two types of responsibility of a different nature, which entail different penalties.

Disciplinary liability may be combined with administrative responsibility if the act is unlawful while misconduct and negligence, thereby applying a disciplinary penalty and a sanction.

This principle but excludes the application against the same person, for the same unlawful conduct of two or more sanctions identical in nature: either criminal or civil, administrative or so., since restoring the rule of law violation for each violation requires violated a rule of law applying a single penalty, which depends exclusively on the nature of such legal provision violated.

Therefore, when there is a multiple violation of the rule of law, aimed at legal regulation of different and overlapping occurs two or more of the same kind of legal sanctions that would apply the same person for a single wrongful act, does not violate the principle of applying a single sanction for a single wrongful act.

If a person commits an act that is qualified as a crime, can not be held accountable and administratively for the same offense as an act can not be the same for both offense and offense, the offense is defined as potentially act as a lesser offense than.

In conclusion overlapping criminal liability is excluded administrative responsibility.

This principle is proclaimed in both the civil procedural law and criminal procedural law, the legal texts providing for specific penalties for the same kind of overlapping failure.

The court

One of the main effects of judgments shall cease to be entitled to take legal action in a material way and that preventing a new prosecution for the same offense and against the same person.

Court when the court finds that there is a final and res judicata, it will accept the final solution and will comply with the ban to judge or decide a case is finally resolved. And as it tends to respect this principle, because the final judgments and various 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 established in the European Convention on Human Rights as interpreted and applied solutions CEDO Court.[4]

Article 4 of Protocol 7 of the Convention enshrines the "right not to be tried or punished twice", known as traditional "ne bis in idem ", "No one shall be tried or punished by the criminal courts for committing the same State offense for which has already been acquitted or convicted by a final decision under the law and penal procedure of that State. (…)"

In two cases this will expose the principle settled by the European Courts *non bis in idem.*

In the first case, on 11 November 1999, plaintiff was involved in an incident in which, according to the police report called on the spot, broke a neighbor's door, entered his apartment and punched.

Following the police report, Mayor of Gabrovo to the applicant a fine for disturbing the public order of 50 leva (25 euros). The sanctions became final, not being challenged in court.

Subsequently, the prosecutor began criminal and prosecuted for trespassing, battery and other violence. Gabrovo District Court acquitted him for trespassing and battery and other violent convicted to imprisonment for 18 months. The solution was Gabrovo Court upheld on appeal and the appeal by the Supreme Court of Justice of Bulgaria.

The European Court, the plaintiff alleged violations of Articles 6 of the Convention and 4 of Protocol. 7 to the Convention (which guarantees the right not to be tried or convicted twice for the same facts – *ne bis in idem*).

Court in its Judgement delivered on 14 January 2010, found violations of both articles.

Regarding Article 4 of Protocol 7 to the Convention, the Court stated that:

- contravention penalty imposed by the Mayor of Gabrovo applicant can be considered as having a "criminal" in the autonomous meaning of that term which the Convention accords, given that, on the one hand, violated the prohibition imposed by the legal text is addressed to all persons and that, on the other hand, the purpose of punishment is to punish and prevent the future commission of similar acts;

- there is identity of facts between those who rise to the penalty for minor offenses and that those who have caused criminal proceedings against the applicant, regardless of the legal definition of domestic law gives offense, that the two offenses;

- there was a doubling of legal proceedings against the applicant, given that criminal proceedings were preceded by sanctioning its contravention, which became final by neapelare.

In conclusion, the applicant had been "convicted" in the administrative proceedings (contravention) to be treated as a "criminal" autonomous meaning of that term in the Convention. After this "conviction" became final, had been brought against him in another criminal indictment which concerned the same conduct and essentially the same facts. Given that art. 4 of Protocol 7 to the Convention prohibits both the prosecution and conviction of a person for acts which have already led to the imposition of a permanent criminal penalties, the Court found a violation of this article to Bulgaria.

In the second case, the Judgement of 11 December 2008 the Court of Justice (CJCE) ruled in Case C-297/2007 Staatsanwaltschaft Regensburg / Klaus Bourquain, and that the prohibition from being tried twice for the same act also applies to a conviction which could never be enforced directly.

According to the CJCE, "this interpretation seeks to ensure that a person is prosecuted for the same offense in several contracting states resulting from the exercise by it of the right to freedom of movement".

[4] Law no.30/1994 Law on ratification of the Convention on Human Rights and Fundamental Freedoms (signed in Rome on 4 November 1950) and of the Additional Protocols to the Convention, published in the Official Gazette no.135/31.05.1994.

In Case C 297/07, regarding a reference for a preliminary ruling under Article 35 EU Landgericht Regensburg (Germany), by decision of 30 May 2007, the Court received on 21 June 2007, criminal proceedings against Klaus Bourquain.[5]

Reference for a preliminary ruling concerns the interpretation of Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and France on the gradual abolition of checks at common borders.[6]

The request was made in criminal proceedings brought in Germany on 11 December 2002 against Mr Bourquain, a German national, in terms of murder, while the criminal proceedings initiated for the same acts by a judicial authority in another Member contractor against the person had already mentioned, on 26 January 1961, by a conviction in absentia.

Legal

First Article of the Protocol integrating the Schengen acquis within the European Union annexed to the Treaty on European Union and the Treaty establishing the European Community by the Treaty of Amsterdam (hereinafter "the Protocol"), 13 Member States of the European Union including Germany and the French Republic, is authorized to establish enhanced cooperation between themselves in areas covered by the scope of the Schengen acquis as defined in the Annex to this Protocol.

Since the Schengen acquis thus defined, in particular, the Agreement between the Governments of the Benelux Economic Union, the Federal Republic of Germany and France on the gradual abolition of checks at their common borders signed at Schengen on 14 June 1985 and the CAAS.

Under Article 2 (1) second paragraph, second sentence of the Protocol, the EU Council adopted on 20 May 1999 Decision 1999/436/EC establishing, in accordance with relevant provisions of the Treaty establishing the European Community Treaty on European Union, the legal basis for each of the provisions or decisions constituting the Schengen acquis. In Article 2 of this decision in conjunction with Annex A thereto, that Articles 34 EU and 31 EU were designated by the Council as the legal basis of Articles 54-58 of the CAAS.

Under Article 54 of the CAAS, which is in Chapter 3, entitled "Implementing *ne bis in idem*", Title III of the Convention, entitled "Police and security"

„A person against whom a final decision was rendered in a trial by a Contracting Party can not be prosecuted by another Contracting Party for the same acts provided that, where a sentence was pronounced, it have been enforced, is being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

For information concerning the date of entry into force of the Amsterdam Treaty, published in the Official Journal of the European Communities, 1 May 1999 (OJ L 114, p. 56) that the Federal Republic of Germany made a declaration under Article 35 (2) EU accepting jurisdiction to decide the manner prescribed in Article 35 (3) (b) EU.

The facts in criminal proceedings and the question.

On 26 January 1961 at the Bone (Algeria), Mr. Bourquain engaged in the French Foreign Legion, was sentenced to death in absentia by the Permanent Military Tribunal for crimes of Constantine the eastern zone of desertion and intentional homicide.

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[5] By Decision of 11 December 2008 the Court of Justice of the European Communities (CJEC) ruled in the case C-297/2007 Staatsanwaltschaft Regensburg/Klaus Bourquain, and found that the prohibition against being tried twice for the same act also applies in the case of a conviction which could not ever be executed directly.

According to the CJEC, "this interpretation seeks to avoid that a person is prosecuted for the same acts on the territory of several Contracting States after exercising his/her right to move freely."

[6] JO 2000, L 239, p. 19, Ediție specială, 19/vol. 1, p. 183), semnată la Schengen (Luxemburg) la 19 iunie 1990 (denumită „CAAS").

The application of the French Code of Military Justice for the Army, the military court held it proved that, on 4 May 1960, while trying to desert on the Algerian / Tunisian border, Mr. Bourquain shot dead another Legionary all of German nationality, who tried to prevent defection.

Lord Bourquain, refugee German Democratic Republic had not learned of the decision notice given in absentia and given the punishment imposed by the decision considered in adversarial proceedings could not be executed.

Bourquain Lord did not subsequently prosecuted or Algeria, or France. Moreover, in France, all in connection with war crimes in Algeria were given amnesty by the laws mentioned above. In contrast, Germany has opened an investigation against him for the same facts and, in 1962, a warrant was sent to authorities in the former German Democratic Republic, which rejected.

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

In these circumstances, by letter dated July 17, 2003, the court of France Ministry of Justice requested information in accordance with Article 57 (1) of the CAAS to determine if the decision of the Permanent Military Tribunal of Constantine the eastern zone, delivered on 26 January 1961 to prevent the commencement of criminal proceedings in Germany for the same offense, given the prohibition of double prosecution, under Article 54 of the CAAS.

Prosecutor's Office Military Tribunal in Paris responded to this request for information, indicating in particular the following:

„Judgement rendered in absentia on 26 January 1961 against [Mr Bourquain] has power *res iudicata*. The decision to sentence to death penalty has become final in 1981. Since the French law, the limitation of the sentence in criminal cases is 20 years, the decision can not be enforced in France."

That court asked the Max Planck Institut für ausländisches und internationales Strafrecht (Max Planck Institute for international criminal law and comparative criminal law) an advisory opinion on the interpretation of Article 54 of the CAAS in the circumstances of the main proceedings. In the opinion of 9 May 2006, the institute concluded that, although enforcement of the conviction in absentia was not possible because of procedural peculiarities of French law, however, in the main, the conditions under Article 54 of CAAS and therefore can not be triggered new criminal proceedings against Mr Bourquain. The same institute, in response to the request for additional comments, and maintained its position in the letter of 14 February 2007.

Landgericht Regensburg, holding that Article 54 of the CAAS could be interpreted as meaning that in order to prevent a new proceedings in a Contracting State, the first conviction in a trial conducted in the territory of another Contracting State shall have been performed at a given moment past, decided to stay proceedings and refer the following question:

„A person against whom a final decision was rendered in a trial by a Contracting Party may be prosecuted by another Contracting Party for the same acts, if the sentence was never applied could not be enforced under the laws State in which he was convicted?"

It should be added that in any case, Article 58 of the CAAS authorizes the Federal Republic of Germany to apply broader national provisions on the principle *ne bis in idem*. Thus, it allows Member States to apply this principle to judicial decisions other than those falling within the scope of Article 54.[7]

Conclusions

Question referred under Article 35 EU - Schengen Agreement - Convention implementing the Schengen Agreement - Interpretation of Article 54 - Principle ne bis in idem – Conviction in absentia - res judicata - non-punishment condition.

[7] Decision of 11 february 2003, Gözütok şi Brügge, C-187/01 şi C-385/01, Rec., p. I-1345, pct. 45.

By this question, the court asks, essentially, whether the principle *ne bis in idem*[8] enshrined in Article 54 of the CAAS is applicable in the case of criminal proceedings in a Contracting State for the facts on which a final decision has already ruled against a defendant in the trial by another Contracting State, even if the sentence was never applied could not be enforced under the laws of the State in which he was convicted.

It should be noted, on the one hand, as the Commission stated in its written observations, that, in principle, a conviction in absentia can be within the scope of Article 54 of the CAAS and can therefore constitute a procedural bar to the commencement of new procedures.

First, the actual wording of Article 54 of the CAAS that judgments in absentia are not excluded from its scope, the precondition for the implementation of this Article 54 is only that there has been a final decision in a trial by a Contracting Party.

Secondly, it should be noted that Article 54 of the CAAS is not subject to harmonization or approximation of criminal laws of the Contracting States in respect of judgments rendered in absentia.[9]

In these circumstances, Article 54 of the CAAS, applied to the case of a decision by default, given in accordance with national legislation of a Contracting State, or to an ordinary decision, necessarily implies the existence of mutual trust with the Contracting States their criminal justice systems and the acceptance by each state of the application of criminal law in force in the other Contracting States, even where their national law enforcement would lead to a different solution (see this Gözütok and Brügge, cited above, paragraph 33).

How many Member States have argued, and the Commission in their written comments, should be checked conviction in absentia by the Permanent Military Tribunal for the eastern zone of Constantine's "final" within the meaning of Article 54 of the CAAS, taking into account the impossibility of enforcement of the penalty determined by the requirement imposed by French law to pursue if he were to reappear in absentia, a new trial, this time in his presence.

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

Should be added that, although Law no. 68 697 French amnesty consequence that its entry into force, Mr Bourquain crimes not subject to any penalty, the effects of that law, as described in particular Articles 9 and 15 of Law no. 66,396, can not be interpreted as meaning that there is an initial decision under Article 54 of the CAAS.

Judgement rendered in the absence of the person concerned must be considered final within the meaning of Article 54 of the CAAS, must determine whether the condition of execution 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 first conviction the penalty imposed could not be directly enforced.

In these circumstances, the answer to the question that the principle *ne bis in idem* enshrined in Article 54 of the CAAS applies to criminal proceedings brought in a Contracting State for the facts on which a final decision has already ruled against a defendant in the trial by another Contracting State, even if the laws State in which he was convicted, the sentence was never applied could not be directly enforced, due to features such as those of the main procedural.

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[8] Decision of 11 february 2003, Gözütok şi Brügge (C-187/01 şi C-385/01, Rec., p. I-1345), Decision of 10 martch 2005, Miraglia (C-469/03, Rec., p. I-2009), Decision of 9 march 2006, van Esbroeck (C-436/04, Rec., I-2333), Decision of 28 september 2006, van Straaten (C-150/05, Rec., p. I-9327), Decision of 28 september 2006, Gasparini (C-467/04, Rec., p. I-9199), Decision of 18 june 2007, Kretzinger (C-288/05, Rep., p. I-6441), and Decision of 18 july 2007, Kraaijenbrink (C-367/05, Rep., p. I-6619).

[9] Decision Gözütok şi Brügge, pct. 32.

Thus, the court said, the principle *ne bis in idem*, enshrined in Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and France on the gradual abolition of checks at common borders signed at Schengen (Luxembourg), 19 June 1990, applies to criminal proceedings brought in a Contracting State for the facts on which a final decision has already ruled against a defendant in the trial by another Contracting State, even if the laws of the State was convicted, the sentence was never applied could not be directly enforced, due to procedural features such as those in the main proceedings.

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- By Decision of 11 December 2008 the Court of Justice of the European Communities (CJEC) ruled in the case C-297/2007 Staatsanwaltschaft Regensburg/Klaus Bourquain, and found that the prohibition against being tried twice for the same act also applies in the case of a conviction which could not ever be executed directly.
- According to the CJEC, "this interpretation seeks to avoid that a person is prosecuted for the same acts on the territory of several Contracting States after exercising his/her right to move freely."
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