UNDERSTANDING AND APPLICATION OF PRINCIPLE NON BIS IN IDEM IN THE EUROPEAN COURT OF HUMAN RIGHTS AND LITHUANIAN JURISPRUDENCE

Edita Gruodytė
Vytautas Magnus University
Received 18 January 2011

SUMMARY

The article covers the scientific and legal analysis of the internationally recognized principle non bis in idem – its meaning and application in cases when in practice two branches of law – administrative and criminal law are applied for one offence. The scientific analysis is based on the research and the newest tendencies in the European Court of Human Rights jurisprudence, the overview of the practice of the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania.

KEYWORDS

Principle non bis in idem, criminal vs. administrative liability.

INTRODUCTION

Relevance of the topic. The article 4 of a protocol No.7 of the European Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter The European Convention on Human Rights, or the Convention) determines the principle of non bis in idem which is binding on domestic courts and national public authorities. How that principle is explained and understood by the European Court of Human Rights? How that understanding is applied by Lithuanian national courts? How the court needs to act in cases when the first conviction was made because of a mistake or some new essential facts to the case where found later? Which liability – administrative or criminal has priority in the case when the norm in two codes – Criminal and Administrative is not different in its essential features?
The object of the Research is the content of the non bis in idem principle and its understanding in the European Court of Human Rights jurisprudence and in the practice of Lithuanian national courts.

To achieve the aim further tasks are settled:
1. to analyse the meaning of the principle in the international (The European Convention on Human Rights) and national legal acts (Lithuanian Constitution and Criminal code);
2. to discuss the case – law practice of the European Court of Human Rights (hereinafter – ECHR) in respect of the principle non bis in idem;
3. to analyse the practice of the Supreme Court and the Supreme Administrative Court of Lithuania and to discuss if it corresponds to the practice of the ECHR;
4. to disclose problems related to practical application and to propose possible solutions.

Methodology of the Research. The identified issues are analyzed using both theoretical and empirical methods of scientific research. The following methods were used – systemic and document analysis, linguistic, analytical – critical, the cases-law practice and the doctrine of the courts has been analysed.

UNDERSTANDING AND APPLICATION OF THE PRINCIPLE NON BIS IN IDEM

The principle non bis in idem is one of the fundamental principles of criminal law and procedure established in the International treaties (first of all in the Universal Declaration of Human Rights and Charter of Fundamental Rights) and Lithuanian legal acts.

Necessity to analyse the aforementioned principle originates from the problems while applying and understanding that principle: there are scientific and practical discussions in the context of separation of criminal and administrative liability, the controversial practice of Lithuanian courts and historical changes in the jurisprudence of the European Court of Human Rights while deciding about consequences in the legal cases when the person is actually convicted by national institutions twice for the same act: applying administrative and (usually later) criminal liability. Whether the criminal case should be dismissed avoiding the second conviction or may be there is a possibility to revoke administrative liability and to apply criminal liability? The last problem is especially actual in the cases when there are some technical/ procedural mistakes or if later new essential circumstances, allowing to reopen the case appear. The following problems are analysed in this section of the article.

The article 31 of Lithuanian Constitution declares that No one may be punished for the same crime a second time. Almost the identical formulation is transferred into the Lithuanian Criminal code stating that No one may be punished for the same criminal act twice, which in Commentary on the Criminal Code is explained as the situation when a

---

person who is convicted or acquitted by the effective decision of the court, can not once more be persecuted for the same ground (act) and once more convicted or acquitted.

Article 4 of Protocol No. 7 of the European Convention Human Rights states as follows:

no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

From the wording of the three norms the following conclusions could be done: that there may be only one final conviction or acquittal decision; it clearly prohibits double usage of criminal procedure for the same criminal act what indicates that in the cases where other forms of legal liability (example, administrative, labour, civil, disciplinary) are imposed the principle non bis in idem as if is not violated.

Slightly different meaning is given in the definitions by using a different term for identification of an offence – crime, criminal act, an offence – the last being the widest one. The jurisprudence of European court indicates that the term offence has separate meaning, irrespectively from the meaning which is provided in a certain national state regarding particular offence. The most important is to establish the fact if a particular offence is of a punitive nature. In its’ jurisprudence the Court formulated three criteria allowing the evaluation: domestic classification of the offences; the nature of the charge and the nature and severity of the penalty. As indicates the European Court of Human Rights practice only the last two of them are really important in deciding the fact because it does not matter how the offence is classified in a national law – whether it is an administrative, criminal or even a disciplinary offence – in the meaning of the article 4 of the protocol it is an offence for which a double conviction principle should be applied in cases its punitive nature is found.

The historical analysis of the jurisprudence of the European Court of Human Rights shows extended meaning of the principle including as double the application of criminal and administrative liability together for the same act. For example in Franz Fischer v. Austria case the Court holds the following:

The Court observes that the wording of Article 4 of Protocol No.7 does not refer to “the same offence” but rather to trial and punishment “again” for an offence for which the applicant has already been finally acquitted or convicted. Thus, while it is true that the mere fact that a single act constitutes more than one offence is not contrary to this Article, the Court must not limit itself to finding that an applicant was, on the basis of one act, tried or punished for nominally different offences. The Court, like the Austrian Constitutional Court, notes that there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others (,). An obvious example would be an act which constitutes two offences, one of which contains precisely

---

6 Ezeh and Connors v. the United Kingdom, no. 39665/98 and 40086/98, §82, 92, 100-108, 120.Reports of Judgements and Decisions 2003-X.
the same elements as the other plus an additional one. There may be other cases where the offences only slightly overlap. Thus, where different offences based on one act are prosecuted consecutively, one after final decision of the other, the Court has to examine whether or not such offences have the same essential elements.\(^7\)

It is evidentiary that there is no double conviction in cases when two convictions differ in their essential elements which mean that abovementioned Article of Convention is not confined to the right not to be punished twice but extends to the right not to be tried twice. The following conclusion could be made from comparing two ECHR cases: Oliveira v. Switzerland case\(^8\) and Gradinger v. Austria case\(^9\).

In the first one Oliveira while driving her car on a road covered with ice and snow, veered onto the other side of the road and hit two cars and the driver of the last car sustained serious injuries. The person was first punished mistakenly (had no jurisdiction to punish in such cases) by the police magistrate by a 200 Swiss franc fine for failing to control her vehicle. Later Olivera was imposed a CHF 1,500 fine (from which was deducted the amount of the initial fine) by Zurich court for negligently causing physical injury. The ECHR Court held that there was no violation of the Article 4 because in cases concerning a single act constituting various offences (concours idéal d'infractions) one criminal act constitutes two separate offences. ( ..) since that provision does not preclude separate offences (failing to control vehicle and negligent causing of physical injuries), even if they are all part of a single criminal act, being tried by different courts, especially where, as in the present case, the penalties were not cumulative.\(^10\)

In the second case Mr.Gradinger while under the influence of the alcohol (0.8 grams per litre) while driving his car caused an accident which led to the death of a cyclist. First he was convicted in accordance with article 80 of the criminal code for causing death by negligence and sentenced to 200 day-fines of 160 Austrian schillings (ATS) with 100 days' imprisonment in default of payment. Two months later he was also imposed a fine of ATS 12,000, with two weeks' imprisonment in default, for driving under the influence of alcohol pursuant to sections 5(1) and 99(1)(a) of the Road Traffic Act. The Court hold in this case that there was a breach of the article 4 because notwithstanding the fact that the offence provided for in section 5 of the Road Traffic Act represents only one aspect of the offence punished under Article 81 para. 2 of the Criminal Code, both impugned decisions were based on the same conduct- drunken driving.\(^11\)

Therefore the main argument in deciding whether there was a violation of the double conviction principle is the mere fact that two convictions should not be based on the same conduct as it was done in Gradinger case.

\(^{7}\) Franz Fischer v. Austria, no.37950/97, §25, ECHR 2001- II
\(^{8}\) Oliveira v. Switzerland, 30 July 1998, Reports 1998-V
\(^{10}\) §.26-27.
\(^{11}\) § 55
In the Fischer case the situation was very similar to the one in Gradinger.\textsuperscript{12} For the offence Fisher was punished first by a fine of 22,010 Austrian schillings with twenty days imprisonment for a number of road traffic offences and in four months later convicted by the Court under the criminal code of causing death by negligence and sentenced to six month imprisonment. Once again the ECHR court held that there was a violation of article 4 (principle non bis in idem) because in deciding this issue the main fact concerns the relationship between the two offences. In the courts’ opinion on the basis of one act Fischer was tried and punished twice (using administrative and criminal means) for the same act and the applied administrative and criminal norms do not differ in their essential elements.\textsuperscript{13} The same decision was also made in the case of Sailer v. Austria where the person was twice punished (by administrative authority and the court) for driving intoxicated and causing slight injuries to the passenger.\textsuperscript{14}

A bit controversial court practice is in Lithuania. Example, in the case 2k-863/2001 of the Supreme Court of Lithuania held that there was no violation of a double conviction principle. The woman was walking with her dog in the street without muzzle and the dog caused less serious body injuries to the 11 years old child. The woman was first punished by an administrative fine for the violation of rules for breeding and holding of animals. Later she was convictioned in accordance with the article 115 of the Criminal code for the negligent corporeal injury- the imprisonment sanction of nine month was imposed. The Supreme Court of Lithuania decided that criminal liability was imposed correctly and it has priority under the administrative one. The mere fact that the person was convicted under the Administrative law offences code was not a basis to terminate a criminal case, because such a possibility is not foreseen in the criminal procedure code. The court made a suggestion that in such a case the problem of double conviction could be solved by applying the 23rd section of an Administrative law offences code, i.e. by appealing (challenging) an administrative sanction.\textsuperscript{15}

In the case 2k-322/2003 the Supreme Court of Lithuania decided for the convicted person and dismissed the case because of the double conviction. The person S. N. was first imposed administrative sanction in accordance with article 41 of the Administrative law offences code for the violation of Labor safety norms and the sanction of 700 litas was imposed. Later the person was also convicted in accordance with article 141 of the Criminal code for violation of labor safety requirements which caused serious consequences and imprisonment sanction of one year and six months was imposed. The Supreme Court of Lithuania held that there was a violation of a double conviction principle because both legal norms coincide in several aspects: both foresee the liability for violation of labour safety norms. The main difference, that the criminal article establishes additional features in comparison with the administrative norm: if it could cause or caused difficult consequences

\textsuperscript{12} Fischer while driving under the influence of alcohol- hit the cyclist making him fatal injuries and gave no assistance.

\textsuperscript{13} \textit{Franz Fischer v. Austria}, no.37950/97, §29, ECHR 2001- II

\textsuperscript{14} Sailer v. Austria, no. 38237/97, ECHR 2002-II.

\textsuperscript{15} I.Š.S. v State, The Supreme Court of Lithuania (/2001, No. 2k-863).

\textsuperscript{16} S.N. v. State, the Supreme Court of Lithuania (2003, No.2k-322).
such as accident or emergency. The last case as if formally corresponds to the basic rules of the jurisprudence in European Court of Human Rights, but some doubts remain as to the result of the case. Dismissing the case because of a mistake is a violation of the principles of a justice and a legal certainty because usually for such factual consequences a perpetrator is punished by an imprisonment sanction. The correct decision would be to apply criminal liability and to suggest reopening an administrative case in accordance with the 23rd section of the Administrative law offences code ‘Renewal of administrative offences cases’. The section is rather broad and foresees many grounds for renewal. Related to the analysed issue are two basis: emerged other circumstances, which were not known while making decision in the case and which show, that a person is not liable or made heavier or easier offence than the one for which the person is punished, or which prove that the punished person is not guilty or contrary – was acquitted but is guilty. The second basis - if a substantial breach of procedural or material law having influence for illegal decision was made.

The jurisprudence of the Supreme Court of Lithuania is changing and in more recent cases- 2k-686/2007 and 2k-102/2008 the Court changed its’ practice in connection with the changes made by the European Court of Human Rights. In both indicated cases the persons made some violations of driving rules and caused physical damages to third persons. At the beginning in both cases it was initiated pretrial investigation regarding criminal liability and later the cases were dismissed and administrative penalties provided. Later the criminal pretrial investigation was renewed and in both cases it was admitted that criminal cases were dismissed because of a mistake. The Supreme Court of Lithuania held that in accordance with the contents of the decisions of the European Court of Human Rights, in cases where in accordance with a national law for the offence only a criminal procedure is possible, while earlier imposed administrative sanction was provided because of a mistake or because new circumstances having important meaning for qualification of an offence appeared, non bis in idem principle does not mean illegality of a criminal procedure. In such a case it is suggested to revoke an administrative sanction in accordance with the procedure foreseen in the 23rd chapter of the Administrative law offences code.

Procedurally it is suggested to make a final decision in a criminal case and only than initiate a liquidation of an administrative liability, because in the practice of Lithuanian administrative courts there is no possibility to dismiss an administrative case if only a criminal investigation started. The question of legality of an administrative sanction could be raised in accordance with the chapter 23 of the Administrative law offences code only when criminal conviction decision is in force. There remain certain doubts whether such a procedure does not breach such legal principles as a legal certainty and if really technically it could be applied in all the cases-having in mind short terms of limitation in the Administrative law offences code and rather long limitation terms in criminal procedure.

CONCLUSIONS

1. The principle *non bis in idem* means that a person can not be tried twice. The main criterion in deciding if the principle is violated is a test if a certain offence is of a punitive nature. The fact is determined using two basic criteria: the nature of the charge and the nature and severity of the penalty. Domestic classification of the offence makes no sense.

2. In cases when the person was convicted twice for the same offence using administrative and criminal liability the main test used by the European Court of Human Rights- whether or not such an offence has the same essential elements. In a case it has – it is a violation of the principle.

3. If a person is convicted twice because the first conviction was done by some technical mistake, or because of a newly established factual basic of a certain case, the ECHR and also Lithuanian national courts allow correcting of the mistake. Usually in such cases a person first needs to be convicted the second time using criminal means, and only if a valid court decision is in force an administrative conviction may be revoked.

LITERATURE

BOOKS


LEGAL DOCUMENTS

The Republic of Lithuania Criminal code, Žin. (2000, No.89-2741).
*S.N. v State*, The Supreme Court of Lithuania (2003, No. 2k-322).
*Ezeh and Connors v. the United Kingdom*, no. 39665/98 and 40086/98, §82, 92, 100-108, 120.Reports of Judgements and Decisions 2003-X.
*Franz Fischer v. Austria*, no.37950/97, §25, ECHR 2001- II
*Sailer v. Austria*, no. 38237/97, ECHR 2002-II.
SANTRAUKA

PRINCIPO NON BIS IN IDEM SAMPRATA IR TAIKYMAS EUROPOS ŽMOGAUS TEISIŲ TEISMO IR LIETUVOS JURISPRUDENCIJOJE

Straipsnyje analizuojamos šiandienos baudžiamojo ir administracinės atsakomybės atribojimo problemas. Visų pirma atskleidžiama principo non bis in idem samprata atsižvelgiant į nacionalinius ir tarptautinius teisės aktus (Lietuvos Respublikos Konstituciją, Lietuvos Respublikos baudžiamajį kodeksą, Europos žmogaus teisės konvenciją). Vėliau, pasitelkiant Europos žmogaus teisių teismo jurisprudenciją, atsakoma į esmės į klausimą, kad žmogus nubaustas už ta pačią veiką du kartus. Pasireiškia Europos žmogaus teisių teismo jurisprudencijoje sukurtas testas: nacionalinė pažeidimo klasifikacija, kaltinių ir paskirtos baudų prigimtis ir sunkumas, toliau tik du paskutiniai požymiai turi lemiamą reikšmę vertinant, ar buvo pažeistas dvigubo nubaudojo draudimo principas. Tais atvejais tai, kad ši principo samprata atsižvelgiant į nacionalinius ir tarptautinius teisės aktus, patobulina teisės apskaičiavimą, nes teismas įvertina, ar buvo pažeistas dvigubo nubaudojo draudimo principas. Tais atvejais, kai žmogus nubaustas nuteistu atveju administracine tvarka ir nuteistu atveju baudžiamojo teismo, tačiau, kad tiek administracine, tiek baudžiamojo patiria situaciją, kurios yra rūpėja naudojusios administracine tvarka, o vėliau patiria nauja aplinkybę arba suklydinas ir nustatomas, kad administracinis teismas nubaudojo administracine tvarka. Šia straipsnio analizė įteikia galimybę išsiaiškinti padarytas klaidas remiantis Administraciniujų teisės kodekso 23(2) skyriumi – „Administracinių teisės pažeidimų bylų atnaujinimas“. Tokios praktikos siūlo laikytis ir Europos žmogaus teisių teisimas, tada Lietuvos Respublikos Teismos procedūriniu vienareiškiškai nurodo, kad administracine nubaudo užgalią panaikinti tik po to, kai asmuo buvo pripažintas kažkuo ir buvo nubaustas administracine tvarka. Štai tai buvo aktyvaus Lietuvos teismo argumentacija, kad tas principas, kuris atlieka administracijos teismo veiklą, tačiau, kad asmuo turi būti perkvalifikuotas į baudžiamąją tvarką, kartu su administraciniu priskiriami atsakomybės įteikimų atveju. Tačiau, kad ši straipsnio analizė įteikia galimybę išsiaiškinti padarytas klaidas remiantis Administraciniujų teisės kodekso 23(2) skyriumi – „Administracinių teisės pažeidimų bylų atnaujinimas“. Tokios praktikos siūlo laikytis ir Europos žmogaus teisių teisimas, tik Lietuvos Respublikos Teismas procedūriniu vienareiškiškai nurodo, kad administracine nubaudo užgalią panaikinti tik po to, kai asmuo buvo pripažintas kažkuo ir buvo nubaustas administracine tvarka. Štai tai buvo aktyvaus Lietuvos teismo argumentacija, kad tas principas, kuris atlieka administracijos teismo veiklą, tačiau, kad asmuo turi būti perkvalifikuotas į baudžiamąją tvarką, kartu su administraciniu priskiriami atsakomybės įteikimų atveju.