

Transnational *ne bis in idem* principle in the Hungarian fundamental law

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Introduction

According to provisions set forth in Article XXVIII para. (6) of the Fundamental Law of Hungary,

With the exception of extraordinary cases of legal remedy laid down in an Act, no one shall be prosecuted or convicted for a criminal offence for which he or she has already been finally acquitted or convicted in Hungary or, within the scope specified in an international treaty or a legal act of the European Union, in another State, as provided for by an Act.

The provision was entered into the former Constitution effective as of 1 December 2009; similar provisions had not been included earlier in the Constitution.¹

In this study, I discuss European development as the root cause of the accession of the principle into the Constitution, and I also provide a

¹ Act CLXVII of 2007 on the Hungarian Constitution, amending Act XX of 1949, which replaced §57 of the Constitution, para (4), the following provision: "(4) No one shall be declared guilty and subjected to punishment for an offense that was not considered – at the time it was committed – a criminal offense under Hungarian law, or the laws of any country participating in the progressive establishment of an area of freedom, security and justice, and to the extent prescribed in the relevant Community legislation with a view to the mutual recognition of decisions, without any restrictions in terms of major fundamental rights."

brief analysis of the present legal environment, taking into consideration the fact that its transposition into the EU dimension necessitates the interpretation of this constitutional rule. Furthermore, I discuss some of the more significant special legal issues in relation to the envisioning of the principle, and I also give a prognosis of changes in the legal interpretation of the *ne bis in idem* principle.

The scope of interest of a jubilee, which also aims to recognize the new challenges appearing in criminal law systems brought by the globalization of our societies and to develop new proposed solutions for them, includes the assessment of new criminal law institutions which have resulted from EU legal development; as such, examining the actual realization (implementation) of the sui generis fundamental EU principle of *ne bis in idem* in Hungary – which I sincerely hope will be of interest to him and to other readers. Warm-heartedly present my work to you in the Nestor Courakis anniversary celebration publication.

The International (European) Dimensions of Double Adjudication

1. General considerations

The *ne bis in idem* principle,² i.e. the prohibition of double adjudication of the same facts has fundamental legal significance in modern democratic states; its development and history are rooted deeply in law: it was recognized back as far as the 5th BC and its development – or precisely, its establishment was and has continuously been present, more or less – with the exception of inquisition procedures – in European sources of law (as well as in precedent law);³ however, it breathed life for the first time from the ideas of the enlightenment. The prohibition of double adjudication derives from justice and the requirements that restrict state coercion (i.e.: the power of criminal liability); and from the broadest perspective, it may comprise restrictions concerning

² Some authors use the term *non bis in idem*, but *ne bis in idem* is the more widespread name.

³ For historical development, see in particular: Schwarplies 1970. Further analysis, for example: Elek 2012, pp. 140-188.

the whole criminal legal subsystem of a given society.

The principle therefore concerns criminal law and criminal justice in a wider sense, as a whole; and as such, a perpetrator shall not suffer any disadvantage twice in criminal law for the same action. Therefore, the *ne bis in idem* principle in essence provides protection against the unrestricted application of *ius puniendi*, while also protecting the “finality” of judicial decisions in modern constitutional states. The basic premise for this under the scope of individual legal protection is the necessity for protection in the event that a given state has already implemented a given punishment for a particular action (crime), then this need in essence vanishes, and there remains no room for newer enforcement, or at most only if a major or significant interest arises, that would justify breaking through a final judgment.

Strictly speaking, it is to be considered a principle applied during sentencing, which rules out multiple consideration of real (actual) facts in establishing criminal liability (historical facts, circumstances) – both in a positive and in a negative direction.⁴ In a more narrow interpretation, it has a role in internal application of law, and thus its European validity can at most be interpreted in the context that it is construed as being a tradition of criminal law amongst European countries, and is therefore respected and upheld in criminal procedures. It is possible that it will be laid down in statutory regulation,⁵ but it is equally possible that it will remain “only” at the level of judicial practice (discretion) – just as the content of the principle was clarified in position no. 154 of the Criminal Law Department of the Curia⁶ of Hungary formerly established, and later refined in Criminal Law opinion no. 56 BK of the Curia.

In domestic law, the question of finality of decisions, the *res judicata* and *ne bis in idem* principles are closely connected, and mostly stems from the inability to challenge formal legal force – although the signifi-

⁴ Nagy2014, pp. 84-86.

⁵ For example, in Germany: *Strafprozeßordnung*(Criminal Procedure Code) 46. § para (3).

⁶ The High Court of Hungary.

cance of the invariability of *res judicata* (enforceability) of substantive legal force cannot be ruled out either.⁷ An equally important topic in connection with this is the analysis of the identity of acts,⁸ which provides a foundation for implementing the *ne bis in idem* principle by defining the “same act.” Studies on (Hungarian) criminal law and legal practice interpret – *mutatis mutandis* – the identity of acts traditionally, within the context of internal (domestic) law – taking into consideration the fact that trans-nationally enforceable prohibition and opportunity or obligation for its direct application did not exist for too long.

The Development of Transnational *Ne Bis in Idem*

The establishment of the right not to be tried or punished twice is due in part to international human rights efforts, as several international legal instruments contain the prohibition of double (criminal) procedures, including the International Political Covenant on Civil and Political Rights, Article 14(7)⁹ and Article 4 of Protocol 7 to the European Convention on Human Rights.¹⁰

⁷ Vö. Fenyvesi, Herke & Tremmel 2003, pp. 504–507.

⁸ See for example: Tóth 2001, pp. 22-41; Tremmel 2003, pp. 267-272.

⁹ Legislative Decree no. 8 of 1976, Resolution adopted during the 21st Session of the General Assembly of the United Nations on 16 December 1966 announcing International Covenant on Civil and Political Rights under Article 14(7) “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

¹⁰ The publication of Act XXXI of 1993 on the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and its eight supplemental protocols, Article 4(1): “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. “Article 4(2): ‘The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which

In the practice of the European Court of Human Rights (ECHR), the preceding article is referenced on multiple occasions; as a result, the ECHR has had the opportunity to thoroughly examine its content and context from many perspectives.¹¹

The international documents¹² referenced above prohibit being tried or punished twice in the scope of domestic law, and do not stipulate international enforceability. Nevertheless, in general, the widespread view is that the *ne bis in idem* may surface in extradition cases, as the *prohibition of extradition*.¹³ The European Convention on Extradition (1957) regulates it as a relative obstacle to extradition, that is, it provides the framework for refusing extradition up until the other state brings a final judgment (in the proceedings); Council Framework Decision 2002/584/JHA¹⁴ on the European arrest warrant and the surrender procedures between Member States considers it mandatory (absolute) grounds for refusal.

Another important aspect of the emergence of the principle is the (automatic) final closing effect regarding criminal proceedings and decisions carried out in another state, the issue of *res judicata*.

In connection with this, in *the first approach* it could be said that the international enforcement of the principle should rest on the same premises, similar theoretical considerations that were followed in the internal recognition – such as justice and the protection of human rights. However, this is preceded by an entirely different theoretical

could affect the outcome of the case.” Article 4(3): “No derogation from this Article shall be made under Article 15 of the Convention.”

¹¹ For an analysis of the relevant practice of law, see for example: Kadelbach 2006, margin notes: 8-21.

¹² I did not go into detail concerning the European Commission and the former instruments of the Council Regulation (EU), which could not develop into practice due to insufficient ratification rate. In particular, see also: Wiener 2003, pp. 62-68; Ligeti 2004, pp. 63-73.

¹³ For a detailed introduction of extradition, see: M. Nyitrai 2006, pp. 258-390.

¹⁴ Council Framework Decision 2002/584/JHA (2002 June 13) on European extradition and surrender procedures between member states L 190/1, 2002 July 18, 19/6, pp. 34-51.

foundation, which stems from the fact that here primarily the relationship between states is of concern, which is characterized by the international law interdependence of states. This is even so if the position of the person concerned has strengthened on the conventional arena of international cooperation in criminal matters – with the development of the protection of human rights – and has transformed into a third pole of such legal relationships.¹⁵ In the event that the demand for criminal sanction on behalf of one state diminishes as a result of the procedure carried out (final decision), it does not automatically mean the termination of such demands on behalf of other states, since it is far from certain that the other state would view the violation of law in the same manner for a given criminal act, or that the different sanctioning goals stemming from theoretical-philosophical differences would remain within acceptable limits of the other state.

The legal certainty that requires holding closed criminal procedures intact is an interest that exists within a legal system. With regard to relations between states, internal legal certainty is at most a reason of self-reflection; upholding it in any given case can be referenced as maintenance of some international obligation (so-called public order), but is insufficient to provide a basis for obligations of some other state, in the event that the latter remains only within the state's own legal system.¹⁶

This is the reason for justifying general recognition of foreign decisions on a “merely” discretionary basis, i.e. when the state, upon its own discretion, chooses to recognize the criminal procedure conducted and decision ruled in another state. However, this type of solution fails to provide full protection for the involved person, because on one hand, it is possible that certain national regulations do not recognize the enforceability of foreign judgments, and on the other hand, binding to separate decisions, that is, the lack of automatism gives rise to fur-

¹⁵ M. Nyitrai 2002, pp. 122-135.

¹⁶ The international legal issues regarding intervention with the internal affairs of another state are *mutatis mutandis* ignored herein.

ther elements of uncertainty in the system, in which legal protection may flop. Not to mention, the aspect of how expensive it would be to carry out multiple criminal procedures (conducted in multiple countries) and possible punishments, and in addition would also result in unnecessary and unjust parallelism. This, aside from providing an opportunity for infringing individual rights, would also set the stage for possible conflict amongst states, especially in cases where for a given criminal act, if it has transnational elements, the criminal (law) jurisdiction concurrently extends to multiple countries.

EU Development – Criminal Law Dimensions

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

In 1987, in the Convention on the *ne bis in idem* the member states had come to an agreement on enforcement of the principle – but this had not (and to date, still has not) been ratified by all member states.¹⁷

¹⁷ The 1970 Convention of the Council of Europe ran into an even more harsh reception of international enforceability of criminal judgments (ETS 70), but in the present legal situation, it has no significance between and among member states. The Council of Europe may have relevance among non-EU states, but barely half of the states actually ratified it.

In 1990, the Convention Implementing the Schengen Agreement was finally adopted (hereinafter: CISA), which expressly outlined the application of the *ne bis in idem* principle (Articles 54-58), the text of which was taken over and remained nearly unchanged from that of the 1987 Convention.

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

In the time period following the adoption of the CISA, the implementation of the provisions seemed rather insignificant; the position of Art. 54 of the CISA was entrenched when the European Court of Justice was granted preliminary decision-making power concerning the interpretation of the so-called Schengen acquis, following the amendments incorporated by the Amsterdam Treaty in 1999. As such, in the period before this, no international judicial forum existed, which would have provided for the uniform interpretation of the CISA; the courts of the member states themselves interpreted and implemented the principle. The provisions of the CISA are suitable for direct application, i.e. it does not require member state legislation, similarly, Article 54 from this perspective shall not be considered standard that following the implementation of the Amsterdam Treaty, this Article was placed under the third pillar. This means that in the case of a specific criminal procedure, if the judge perceives (or in an earlier phase, the prosecution) that the offense has been tried and other conditions are present, then further continuing the procedure would constitute infringement of EU law, and the judge shall be bound by the provision even if it contradicts the internal criminal law code.

The extension of powers of the CJEU launched the development of interpretation regarding the article; it can be concluded that the CJEU stood in support of the autonomous interpretation of Article 54 of the CISA, as per in its own context, whilst providing it international enforceability and significance at the fundamental law level, with which the *ne bis in idem* has formed into a quite powerful tool in the protection of individual rights. The teleological interpretation applied most frequently by the CJEU ensures the enforcement of the community (EU) fundamental freedom; this is the means by which the free movement of EU citizens can be fulfilled. The mutual trust enshrined by member states in the criminal justice systems of one another is a critically important premise in this legal system, which must prevail even if no factual reason for the trust can be established (improper procedural practices, forced dysfunctions such as lack of personnel, less developed systems of newly acceded MS, etc.).¹⁸

Then in 2009, a new milestone was reached and the principle had now been drafted as a basic (fundamental) right, in Article 50 of the Charter of Fundamental Rights of the European Union under the title "Right not to be tried or punished twice in criminal proceedings for the same criminal offence". The article states: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law." The wording of text of the provision differs from Art. 54 of the CISA, but it can nonetheless be said that the application of specific regulations for the provision of the Charter on fundamental rights were established by the CISA, in a way that it also implies the appropriate limitation of Article 50 of the Charter. This however is only true if the scope of the two provisions overlap one another, i.e. the criminal procedure is such that it is conducted by a member state under so-called harmonized criminal laws ("within the Union in accordance with the law"). For cases falling outside of this

¹⁸ In connection with judicial practice of the CJEU and the interpretation that has developed, see: Karsai 2015, pp. 123-132.

scope, for example, simple homicide, in which more than one state may have jurisdiction (e.g. if a Hungarian citizen murders a German person in Austria¹⁹), the Charter – in principle – shall not be applied, while the CISA can be enforced.²⁰

EU Development – Outside the Scope of Criminal Law Dimension

Originally, in community law, the *ne bis in idem* principle was considered a general legal principle,²¹ and was advanced to the level of fundamental rights by the Charter. The principle gained particular significance in EU law in relation to community law violations in regard to (especially competition law) parallel sanctions. More specifically: it can presently be concluded that what is lacking the most is full enforcement. As a rule, in the event of such an infringement, parallelism in action on behalf of the community (Commission) and member state (competition) authorities sanctioning shall not be excluded, the CJEU only mandates that the fines imposed elsewhere be included.²² This means that a procedure before the Commission is considered “foreign” even though – where appropriate – the offending act shall be sanctioned to a full extent, and thus the sanction requirement in full should vanish in full, rather than the application of the appropriation principle.

In connection with this, four reasons can be outlined in support of the *ne bis in idem* principle:

1. It is in the interest of the individual, to not be punished more than once for the same act (legal grounds);
2. Free movement;
3. The legitimacy of the legal system and that the uniform enforcement of competition law requires *ne bis in idem* (legitimacy

¹⁹ The active personality principle, the territory principle, and the passive personality principle each separately establish jurisdiction in all three countries.

²⁰ On the relationship between the two treaties, see also: Karsai2015, pp. 133-135.

²¹ Its origin can be traced to the decision ruled in the 7/72 Boehringer Mannheim v Commission case 1972. December 14); see also: Liebau 2005, pp. 92-94.

²² Kadelbach 2006, margin note no. 23.

grounds)

4. The rule of law of prosecuting infringements and condition of effectiveness, which also requires the prevalence of *ne bis in idem* principle (discipline grounds).²³

The definition of *ne bis in idem* within EU law is in close connection with issues on parallel sanctions regarding infringement of *community* (especially competition) *law*.²⁴

In the area of competition law, this principle prohibits the Commission from undertaking a procedure a second time on any business entity for any such anti-competitive practice for which the Commission has already imposed sanctioned in a former and final decision, or for any practice which in connection with the absence of responsibility (liability) has been proven. The ECJ (General Court) has drafted the conditions for the application of the *ne bis in idem* principle in competition law and consistently holds itself to this foundation. As such, the *ne bis in idem* is applicable (i.e. serves as a barrier to new sanctions) if the facts are identical, the violation of law is identical, and the protected legal interests are identical.²⁵ The competition law content of the principle is not part of this analysis, but it is worth highlighting that here “the same act” also means identical legal interests, and in this regard, the ECJ came under criticism,²⁶ precisely due to different interpretations of Article 54 of the CISA. In the *Toshiba case* Kokott, Advocate General, openly stated that “[t]o interpret and apply the *ne bis in idem* principle so differently depending on the area of law concerned is detrimental to the unity of the EU legal order.”²⁷ Hence in the scope of the

²³ Nazzini 2014, pp. 4-5.

²⁴ Detailed analysis see for example: Liebau 2005.

²⁵ C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P és C-219/00 P, Aalborg Portland et al v Commission; C-17/10 Toshiba Corporation et al v Úřad pro ochranu hospodářské soutěže (2012 February 14).

²⁶ Nazzini 2014, 17-18.p.; Rosiak 2012, pp. 111-135.

²⁷ “To interpret and apply the *ne bis in idem* principle so differently depending on the area of law concerned is detrimental to the unity of the EU legal order. The crucial importance of the *ne bis in idem* principle as a founding principle of EU

criminal law interpretation of *ne bis in idem* the similarity of legal interests is expressly ruled out by the ECJ as a factor²⁸ to be considered when determining the existence of a same act, while in competition law violations, this is a conjunctive requirement. Personally, I see no contradiction in this matter, because the available toolkit for criminal prosecution and its application in the case of determining administrative law infringements rests on very different foundations (narrow legality principle, principle of culpability), even in the existence of common traits (e.g. state coercion, exercising public power, rules of conduct set forth by legislation, etc.). It is further important to note that the wording of CISA addresses counterparties, and concerns relations between two member states when trying to settle the *ne bis in idem* issue, thus it does not regard relations between any *supranational* organization and a member state.

EU Development – Where the Dimensions Meet

In this subject matter, the relevant constellation of the prohibition of double adjudication is perfectly summarized by Kis, broken down into four independent and different possible versions, depending on whether the legal bases of the sanction are provisions of EU (commu-

law which enjoys the status of a fundamental right means that its content must not be substantially different depending on which area of law is concerned. For the purposes of determining the scope of the guarantee provided by the *ne bis in idem* principle, as now codified in Article 50 of the Charter of Fundamental Rights, the same criteria should apply in all areas of EU law.” Opinion of Julianne Kokott Advocate General, 2011 September C-17/10.sz. Toshiba Corporation and its partners, point 117.

²⁸ On one hand, literature in the field of law does not find this autonomous definition of the ECJ to be justified, therefore it would be particularly worth considering the narrowing standpoint, according to which in the adjudication of the same act, the identity of the subjects of law shall only be taken into consideration and accepted in the case of individual subjects of law, while in the case of collective – thus values of given societies (states) and even in more specialized legal subjects, these differences (in the application of Art. 54 CJEU) shall be considered. See: Némedi2015.

nity) law or national law, or *supranational law*, or whether a national authority is exercising sanctioning powers, or if criminal liability is given in connection with a particular violation of law.²⁹

Here, I do not wish to analyze all of these; in order to achieve the aim of this present work, it is sufficient to merely examine the one – central – issue of whether or not the prohibition of double adjudication– with regard to administrative sanctions – in light of new trends concerning the criminal nature of the prohibition must be reinterpreted.

As a starting point, it can be stated that neither the TEU nor the TFEU define the nature of the sanctions; but for example, the main “code” of the competition law framework, Article 23 of 1/2003/EC sets forth that sanctions threatening competition law infringements shall not be of criminal law nature. Competition law regulation of the EU is a functional and effective scheme; in addition to the competition authorities, the Commission also has jurisdiction over the implementation of competition laws, thus it has competence to directly impose fines on market players for infringements at the EU level. However, theoretically, this gives rise to the question of whether the imposed sanctions are to be considered punitive, and if so, is the result of this that the member state cannot initiate criminal proceedings following the sanction of the Commission or vice versa? Published literature references on competition law recognize the criminal law nature of some competition law sanctions;³⁰ however, the theoretical consequences stemming from these have yet to be formulated. In the *Bonda case* the ECJ adopted the approach consistent with criteria dictated by the European Court of Human Rights; the Court carried out its examination of whether a sanction imposed in the scope of the common agricultural policy would result in exclusion from receiving aid in the future is criminal in nature or not (overlapping of criminal penalties). However, since the ruling declared that it was not, there was no need

²⁹ Kis 2014.

³⁰ Nazzini 2014, p. 3; Kis 2014.

to apply the *ne bis in idem* principle.³¹ And so our important question was not answered: following a “criminal” sanction imposed by the Commission a – possible – member state criminal procedure can or cannot be carried out? In my view this could otherwise not be recognized, because it would give rise to the situation that if in the scope of a punitive sanction criminal nature would be established, then it would trigger a “sudden” other criteria of (defining) the same act concept, i.e. a narrower scope of application (three conjunctive conditions), and to a wider – and thus on other legal grounds – blocking parallel procedures to a greater extent.

Content of the Principle as Set Forth in the Fundamental Law of Hungary

1. Acknowledgment as a fundamental right

Whilst for example Article 103(3)³² of the Basic Law for the Federal Republic of Germany clearly outlines the *ne bis in idem* principle as a fundamental right, in Hungary, due to the lack thereof of provisions in the former Constitution on the prohibition, the principle could only be inferred from the rule of law (legal certainty) principle and the fundamental law concerning human dignity, which emerged from branch of law codifications indirectly, through norms established for enforcing the ban. In terms of formality and aspects of guarantee, the legal solution currently in effect is more appropriate, according to which the Fundamental Law itself expressly provides for the prohibition. As previously determined and noted, the international and European development, the enforcement of the right not to be prosecuted or punished twice has *gained acceptance as a fundamental right* in both internal and transnational context. Therefore, the principle as set forth in the Fun-

³¹ C-489/10 Lukasz Marcin Bonda (2012 June 5); see: Lacny-Szwarc 2012, pp. 170–174.

³² Basic Law for the Federal Republic of Germany, Article 103(3) ‘Niemand darf wegen derselben Tat auf Grund der allgemeinen Strafgesetze mehrmals bestraft werden.’

damental Law of Hungary shall be considered a fundamental (basic) right, which also establishes the right as a subjective right,³³ and “provides for the opportunity to directly exercise this right”.³⁴

The “official” explanation of the Fundamental Law notes that in view of the possibility for applying punitive-type sanctions, the Fundamental Law highlights certain basic criminal law- and criminal procedural legal safeguards. Under these, the Fundamental Law sets forth that no one shall be prosecuted or convicted for a criminal offence for which he or she has already been finally acquitted or convicted. As a general rule, it requires the criminalization of acts under Hungarian law and holds laws of other states relevant only in the event that any international treaty or action taken by the European Union gives rise to obligation for Hungary in the course of judicial decision declaring guilt and imposing punishment taking consideration. The wording is similarly narrow with regard to double adjudication and the prohibition of double punishment in other member states as well (*ne bis in idem* principle).”

The principle – as formerly discussed – comprises the Charter of Fundamental Rights of the European Union, and for this reason, it is an equally important legal step that the Hungarian constitution recognizes this, even though the Charter contains no implication necessarily requiring this. In any event, from the perspective of the application of instruments for protecting fundamental rights, this shall be considered the best available solution.

³³ The term subjective legal rights refers to those rights that are directly enforceable through the norm, i.e. in order for the rights to be enforced, no other legislation is necessary or needed. If this norm is the Constitution, then it's a fundamental right that's in question. The right to subjective rights on the other side, necessarily establishes obligations (if nothing else, the n an obligation to refrain or generally an inaction disclosure obligation as well), while it assumes the mechanism for enforcement, i.e. legal protection. Cf. Balogh & Schanda 2001, pp. 26-27; In more detail: Gárdos-Orosz 2009, pp. 387-432.

³⁴ Balogh & Schanda 2001, p. 27.

2. *The subjects and obligors of the fundamental rights*

With regard to protection of fundamental rights, it is important to discuss the question of whether *legal persons* shall be considered subject to protection against double adjudication, i.e. does the law extend to protect them (alongside natural persons). Hungarian criminal law sets forth that a criminal procedure may be initiated, specifically Act CIV of 2001 holds that a criminal proceedings may be utilized against legal persons; in such a case, the legal person subject to the proceedings shall be viewed as the “person” against whom the procedure is initiated – which has no effect on parallel proceedings initiated against the natural person as the perpetrator. The general opinion holds that legal persons shall not be excluded from practicing fundamental rights, except in cases where due to the nature of given fundamental rights, the subject cannot be a legal person.³⁵ The formerly enforceable dogmatic approach gained further endorsement under Article I) para (4) of the Fundamental Law.³⁶ The right that stems from the right not be tried and punished twice, under which the subject involved shall only be prosecuted one time, shall not be considered inherently connected to human beings (natural persons) as the core, and therefore, legal persons shall be able to exercise this right as well. At the same time, with this restriction the general fundamental legal capacity of legal entities shall be denied, which basically means that in some cases, they are provided the rights necessary to exercise fundamental rights.³⁷

The obligor to fundamental rights is the state,³⁸ which satisfies its

³⁵ Balogh & Schanda 2001, p. 32; Gárdos & Orosz 2009, 402, p. 35.

³⁶ Article I(4) of the Fundamental Law: “Fundamental rights and obligations which by their nature apply not only to man shall be guaranteed also for legal entities established by an Act.”

“Legal entities established on the basis of an act of Parliament shall also have these fundamental rights, and they shall also be bound by those obligations which, by their nature, are applicable not only to human beings.”

³⁷ Gárdos & Orosz 2009, 404, p. 36; Balogh & Schanda 2001, p. 33.

³⁸ In this context, the general question of whether the entity to a fundamental right can or cannot be a legal person is not raised (so-called *Drittwirkung*), since

duty to provide protection by establishing coherent regulatory standards, special legal norms system to ensure compliance with this prohibition. In specific cases, this primarily appears on the level of criminal procedural regulations – which I shall analyze in the following section. Furthermore, the state operates those legal institutions and forums that ensure the legal protection of basic rights of those subject to the law, if any such rights should be violated. In the scope of its objective so-called institutional protection obligation, the state shall actively establish the protection; but with regard to *ne bis in idem* its scope of obligations is necessarily limited, as the actions of the state do not need to extend to such cases,³⁹ which would mean not direct enforcement of fundamental rights against the state as carrying out such criminal procedures are barred on the basis of the very definition of the state's monopoly. In the event that someone nevertheless continues a "criminal procedure" against the subject of fundamental rights, it would not be the institutional protection obligation stemming from the fundamental rights obligation that would be applicable, but instead traditional criminal law protections originating from paras (1) and (2) of Article IV and para (1) of Article XXVIII (vigilantism, other criminal acts) shall be relevant.

3. Restricting the fundamental right

The *ne bis in idem* principle, recognized as a fundamental right, is restricted by the Fundamental Law itself,⁴⁰ where it provides that right "with the exception of extraordinary cases of legal remedy laid down in an Act." In this context, the legislature expressly determined the borders of limiting the application of double adjudication, which can

carrying out the criminal procedure and enforcing the criminal justice needs of society – *ius puniendi* – is a state monopoly, and may under no circumstances be taken into the hands of an individual.

³⁹ Specifically on objective institutional obligations see: Gárdos & Orosz 2009, pp. 408-412, 58-70; Balogh & Schanda 2001, p. 44.

⁴⁰ Specifically on restriction of fundamental rights, see: Gárdos & Orosz 2009, pp. 412-431; Balogh 2013, pp. 133-145.

thus only be those cases that are regulated by law and only those types of cases that involve exceptional legal remedies. With this regulatory solution, the conflict of laws in fundamental rights issue is addressed and resolved: any such interest that may justify a breakthrough of *res judicata* (exception cases of legal remedy) may be enforced over the prohibition of double adjudication. In drafting the specialized legal regulation, the legislature shall also take into consideration the substantive vulnerability of any restriction, thus with regard to ensuring that the procedural regulations actually achieve the objectives of the restriction, it must provide that “the importance of the objective pursued and the infringement of basic rights in this interest are proportional to one another”.⁴¹ As such, determining which cases are those of extraordinary legal remedy shall not be subject to the discretion of legislators (so as to avoid fraud and drafting legislation that infringes fundamental rights); which – if any doubt arises – must meet the assessment test criterion developed under the maturation of Hungarian constitutionality. This assessment test is comprised of three elements: (1) necessity (whether or not the reason for restriction is acceptable), (2) capacity (whether a less severe legal instrument exists, viz. one that does not violate any fundamental right), and (3) proportionality (whether the magnitude of the restriction is proportional to the pursued objective).⁴² This is laid down in para (3) Article I of the Fundamental Law, “The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of such fundamental right”.⁴³

⁴¹ 30/1992 (V.26) . Decision of the Constitutional Court, ABH 1992, 171.

⁴² Gárdos & Orosz 2009, p. 416.p., Balogh & Schanda 2001, pp. 44-46.

⁴³ For the critical position in connection with this, see: Chronowski 2013, pp. 167-168.

4. *The core of the fundamental right*

With regard to the interpretation of the core (the essence) of the fundamental right – following in line with the interpretation of the formerly mentioned reasoning – one of the most important questions is to decide just exactly how to interpret the concept of “no one shall be prosecuted or held guilty for such a criminal act.” The wording of the Fundamental Law clearly implies a conjunctive relationship between the two aspects (use of the word “and”).

In the first interpretation, the provision of the Fundamental Law prohibits even the initiation of a new criminal procedure, and thus shall be viewed as a *procedural barrier* that can be enforced if in legislation, starting a criminal procedure appears as a barrier, with which protection of the fundamental rights of the involved persons is ensured.

Under the second interpretation, the core of the fundamental right is much narrower, i.e. for any same act in which a final judicial decision (conviction) or acquittal has been brought, carrying out a criminal procedure *and a (newer) conviction* for that same act shall be prohibited. In this interpretation, initiating and carrying out a procedure alone would not be prohibited, but a trial carried out in such a manner shall not result in conviction. Conviction – as opposed to acquittal – is a decision determining guilt, where the court establishes guilt if it is determined that the criminal act was committed and is punishable.⁴⁴ However, this interpretation would bring the court to the unacceptable position in which it would have to immediately terminate the procedure

⁴⁴ Under Hungarian procedural law, in the judgment establishing guilt the Court either imposes a penalty or releases the offender on probation, assigns restitution work, or reprimands the offender – or, the Court may withhold imposing punishment. If the court orders probation supervision, the judgment (sentence) comprises the rules of conduct as ordered by the Court (cf. Criminal Procedure Court §330). In the event that a civil claim has been submitted, it shall also be addressed in the judgment – therefore, the judgment establishing (criminal) guilt includes this as well (the Court either upholds the civil claim or rejects it, or it may forward it to another legal path) (cf. Criminal Procedure Court §335).

when the notion of guilt develops. Therefore, this cannot be maintained. Thus, the first interpretation shall prevail, which widens the core of the fundamental right, but on the level of special legal procedural regulation, the interpretation can be appropriately justified.

The fundamental right prohibition or requirement presents a conjunctive relationship between carrying out a newer criminal procedure and a new conviction, which means that the Fundamental Law in itself does not prohibit the initiation of a parallel - or a newer procedure, whilst it does prohibit a newer or second guilty conviction.

In my view, an essential characteristic must also be noted - regulation under the Fundamental Law also prohibits carrying out an *infringement of law procedure* (regulatory offence) for any (same) criminal act for which a criminal procedure has already been carried out against a given person in another state.

Blocking Decisions of non-Hungarian Courts⁴⁵

The final decision establishing guilt or acquittal not only applies to decisions brought in Hungary, but can be those of other states as well – including those made in the scope of international treaties or a legal action of the European Union. This wording suggests that Hungary may enter into such an international treaty with another state, in which it recognizes the *ne bis in idem* principle with regard to decisions reached in that specific state as well. Whilst the question of what legal framework shall be required concerning this recognition based on international treaties is not part of constitutional regulation, upholding the internal transformation shall not be excluded (see also: recognition of foreign judgments). However, it is important to highlight that concerning the scope determined by action on behalf of the European Union, internal legal transformation is only possible (and necessary) if the questioned legal action requires it; therefore, in this manner, the legal fate of foreign final decisions shall be dependent upon the recognition

⁴⁵ For the effects of categorization of foreign decisions (judgments) see: Karsai 2015, pp. 104-108.

of their legal sources – other procedural regulations are needed for EU-related and for non-EU related, other international matters. This is not prohibited by the Fundamental Law.

Regulation under the Fundamental Law sets forth the blocking power of derived from other decisions of final acquittals or convictions, but with regard to the European Union, uncertainty remains concerning the interpretation of the wording. The wording, according to which for a given criminal act “determined in the scope of legal action of the European Union” acquittal has been granted or a conviction has been ruled, leads to some confusion in resolving the exact content of the rule.

The grammatical interpretation does not contain reference to EU member states, but rather implies the existence of other legal conditions which are defined by the legal action. The EU legal actions by definition are not the results of secondary legislation (directives, laws, etc.), so here, the rule would be referring to such legal actions which in connection with determining criminal liability, could contain conditions for rules on final acquittal (or convictions).

On the horizon of interpretation, we may also come across the Fundamental Law only recognizing the blocking power in the event that it is contained within the EU legislative act itself, so for example harmonization directive regarding factual elements would stipulate that for the given, the *ne bis in idem* principle shall be enforceable. However, the existing legislation (laws) does not follow this logic.

I also would not consider it unrealistic that the “EU legislative act” wording does not refer to the legal interpretation, but rather in general to EU sources of law. In such a case, the CISA and the Charter on Fundamental Rights can be involved in the interpretation. And furthermore, if along the lines of following this interpretation, we were to combine the text blocks as well, and the paragraph is read together as “determined in the scope of legislative act of the European Union in another state” then the Fundamental Law does nothing but provide clarification: based on EU regulation, the *ne bis in idem* principle exists (CISA and Charter on Fundamental Rights), and within is jurisdic-

tional power, i.e. the principle shall be enforced with its conditions between the states (=member states) applying it.

Furthermore, in connection with the content of the fundamental law, the question remains of whether procedures of exceptional remedy can be enforced if a final decision was brought in another country. Raising this question is significant because in the development of EU law, the strengthening of European *territoriality*⁴⁶ served as one of the catalysts of the transnational recognition of *ne bis in idem*, based on which geographical area of states provide one “jurisdiction”, thus having significance with regard to legal remedies as well. Therefore, it is conceivable that in the procedure of reaching a final decision for a given case, it would be Hungary where, for example, new evidence is available, which – only in a domestic constellation – would serve as a basis for a new trial. It must therefore be decided if by reason of new evidence (or other facts supporting exceptional remedies) there’s possibility for breaking through “transnational *res judicata*”, and thus for initiating a newer procedure, and also whether the “entry” for Hungarian exceptional remedy procedures can or cannot be a foreign decision. It seems somewhat doubtful to me that the Hungarian legal remedy forums would be capable and able to overrule procedures and decisions of a foreign state – typically conducted in a different language – regardless of which state we are talking about. This of course is true for any other (foreign) courts as well. Because of this, the fundamental right aspect should rather pursue regarding only decisions of Hungary, and as such, the legal capacity of foreign decisions – even if well-founded – should not be broken through by Hungarian courts, but rather by the Hungarian justice system providing assistance in the application of the system of tools available through the cooperation of European criminal law authorities, by aiding the courts of the state ruling the final decision in the possible exceptional remedy proceeding.⁴⁷

⁴⁶ Karsai 2015, p. 87.

⁴⁷ See in detail: Karsai 2015, pp. 129-133.

Special Law Replications

1. *The current situation*

The fundamental rights and guarantees listed in constitutions, which also define the exercising of criminal power, are there to serve as the self-discipline of state power; it is the special law regulations (besides international obligations) that ensure the existence of accountable limits established by fundamental rights, in accordance with the obligation of institutional protection. Guarantees not specifically mentioned in the constitution may also be ensured by special laws – by considering dogmatic, historical, rule of law, etc. aspects – however, as Szomora states, “it is the legislation of constitutional level which may ensure that regulations raised to constitutional level – due to their safeguarding nature – shall come to a life of their own, and shall become independent of the theory and terminology of substantive and procedural criminal law during legal interpretation.”⁴⁸

Including the principle of *ne bis in idem* in the constitution and the content thereof will bring about changes in special law legislation, or, if the necessary changes will not be introduced by the lawmakers, it will be the enforcement bodies that, during legal interpretation, will have to adjust the interpreting horizon of special law regulations according to the constitutional content. Looking at the text of the substantive and procedural regulations in effect it is quite actual that the principle of *ne bis in idem* will come to a life of its own, i.e. its constitutional content – yet – independent of special law theory will expand. The next stage of this process will obviously be the expansion of the dogmatic interpretation matrix of the relevant special law regulations, at which point, again, we cannot talk about independent content, rather the – lucky – incorporation thereof into special law theory. But that is yet to come, so it is worth examining now in depth where it will be necessary to reconsider the meaning of substantive and procedural criminal laws.

The systematic discussion of the special law replication of *ne bis in*

⁴⁸ Szomora 2013, pp. 259-260.

idem seems to be the most simple on the basis of the distinction between the branches of law (legal basis): the substantive *ne bis in idem* must be distinguished from the procedural one. The constitutional rule clearly refers to the procedural *ne bis in idem*, or rather just an aspect thereof, the prohibition against double jeopardy, to be exact. The prohibition of other double evaluation elements (of substantive nature) may not be considered fundamental rights according to the Fundamental Law, those – if necessary – still can and must be deducted from the requirement of legal certainty and the principle of legality.

The procedural *ne bis in idem* is realized through the provisions showing the occurrence of the legal effect of a matter judged, a *res judicata* in a procedure, therefore the Hungarian Criminal Procedure Act links the fact of final and binding conviction to the prohibition of continuation of procedure in every stage of the procedure. The legal effect of *res judicata* is defined by Section 6 through the initiation of the criminal procedure; by Section 174 through the refusal of denunciation; by Section 190 through the termination of investigations; by Sections 267 and 332 through the termination of the procedure by the court; and by Section 373 through the power of the second instance court to repeal the decision of the first instance court. It also serves as the grounds for revision if there are more than one final and binding convictions based on the same act of the accused (Section 408). In close connection to the above, compensation shall be awarded for coercive measures depriving the accused from his freedom, if the investigation or the procedure during the trial stage is terminated based on *res judicata* (Section 580).

Filling the constitutional principle with actual content will justly raise the question how different the interpretation of the above mentioned sections of the Criminal Procedure Act will be, or how much it will be required to follow a different interpretation thereof. The fact of final and binding decisions in Hungarian procedural practice only referred to decisions taken in Hungary, there was not a legal requirement or a procedural mechanism based on which – even if there was information referring thereto – convictions made abroad should have been taken into consideration. Quite the contrary. The previous Criminal

Code and Act XXXVIII on international criminal assistance – still in effect – declare that although foreign decisions may have legal effect in Hungary, it is only true if an acknowledgement procedure for evaluation to this effect is carried out first. This means that “final and binding decisions” according to the Criminal Procedure Act are (were) only meant in a domestic legal context.

The picture, however, is different from May 1, 2004, when Hungary joined the European Union, and when, as explained in subsection 2.3., by the direct application of Article 54 of the CISA final and binding decisions made in member states had to be (should have been) included in all of the above mentioned provisions.

Including this EU legal construction in the Fundamental Law made that clear to the enforcement bodies on one hand, and on the other hand, provided an own legal protection mechanism to it. So in legal enforcement the interpretation that final and binding decisions include both the ones made in Hungary and in other member states shall be followed. A final and binding decision on the same act committed in another member state shall block the Hungarian criminal procedure, and, if not taken into account, shall give rise to a constitutional complaint in domestic law.

Here I will not study the legal and factual conditions of becoming aware of the foreign final and binding decision and the possible procedural actions for that, but let me note that the establishment of the transnational *ne bis in idem* and the paradigm shift related to the transnational legal effect mechanism of the member states’ decisions (see blocking of criminal procedures, taking recidivism into account, etc.) brought about and makes it essential to further develop and use the European Criminal Records Information System (ECRIS), and to make sure it operates in accordance with the new requirements of the principle of mutual acknowledgment and the prohibition of double jeopardy.⁴⁹

⁴⁹ The purpose of creating the European Criminal Record Information System – according to Council Framework 2009/315/JHA – is to organize the electronic ex-

The Identity of Acts in Transnational Relations

According to Section 6 (4) of the Criminal Procedure Act, the “blocking” effect of final and binding decisions shall also be applicable if the act committed by the accused realizes more than one criminal offense, but the court – in line with the classification given by the prosecution – does not convict the accused for all the offenses that could be established according to the facts described in the indictment. In such cases no further indictment is possible for a sub-act that was included in a criminal offense already decided on, but was not part of the facts determined in the final and binding decision; according to Section 408 (1) a/2 of the Criminal Procedure Act the case shall then be open to revision [Criminal Uniformity Decision No. 6/2009. BJE]

Among the practical cases of the natural unit, especially among those of continuity, *delictum continuatum* and *delictum complexum*, there may be some where the commitment of a sub-act abroad will require the examination of the transnational validity of the identity of acts.

And it is necessary in cases where a final and binding decision has already been made for certain sub-acts in one state but new information and evidence is produced which shows that those sub-acts form a unit with sub-acts committed in another state. For Hungarian authorities acting in criminal procedures it may come up as a question, for example, if there is already a final and binding decision in another country on certain sub-acts of an offense investigated and/or tried in Hungary, or, what to do if it turns out only after making the final and binding decision in Hungary that there are other sub-acts of the given criminal offense that were committed abroad and have not been examined by the authorities during the criminal procedure.

Such expansion of the transnational *ne bis in idem* has already happened then, and the enforcement bodies will have to deal with it, considering that the relevant cogent norms (the CISA, the Charter of Fundamental Rights and the Fundamental Law of Hungary) are quite clear

change of information of criminal records between member states and to promote the preservation of such information. See decision in Case C-25/15 (Balogh Case).

about the legal consequences.

Means of Legal Protection

It is an important question in relation to provisions of the Fundamental Law that if the prohibition is broken, how one can seek justice in law, and how the institutional protection of the state can be enforced against such infringement. The answer to the latter is quite simple, because the obligation of institutional protection appears in special law regulations (see also Section 3.2.), also expanding the interpretation matrix of the Criminal Procedure Act to the final and binding decisions made in other member states.

The enforcement of fundamental rights is ensured for individuals by domestic laws, criminal procedure itself provides that too, and by including it in the Fundamental Law, it is also possible to file a constitutional complaint if a court decision was made by infringing a fundamental right.

It is to be pointed out here that if the relevant provisions of the Charter of Fundamental Rights and the CISA are not fulfilled, these instruments do not provide private individuals with a substantive reference, because the Court of Justice of the European Union does not have the power to provide legal assistance to private individuals in such cases. The member states, however, are obliged to enforce the above rules as a consequence of the principle of loyalty of the member states and the legal basis character of the provisions referred to above. Hungarian legal regulations meet that requirement in the interpretation framework described above. If the Hungarian courts fail to follow the new interpretation though, the Commission (or another member state) may initiate infringement proceedings against the Hungarian state because of non-compliance with EU obligations.

Including the principle in EU law also provides some legal protection, the Hungarian enforcement bodies are also bound by the obligation to interpret domestic laws in line with EU law, and the priority and direct effect of Article 54 of the CISA would also make direct implementation possible. As it is obvious that the text of the Hungarian

Criminal Procedure Act can splendidly be interpreted as conforming to EU law, Hungarian courts are not “forced” to directly apply the CISA. In case of doubt the Hungarian court can turn to the CJEU for legal interpretation, i.e. for giving the relevant EU laws in the context of the Hungarian Criminal Procedure Act. If the requirements of the Fundamental Law and the EU law are not fulfilled during the court procedure either in the interpretation of the rules or when choosing the applicable law, such incorrect practice may only be remedied by the above mentioned infringement proceedings which provide a systemic criticism to it. This, however, does not provide the individual being prosecuted with actual legal remedies.

The Future

The principle of *ne bis in idem* does not eliminate the parallel conduct of criminal procedures in the current legal environment; it can only prevent further decisions after the final and binding (substantive) closure of a procedure. Therefore the EU lawmakers shall be the ones to find the solution for conflicts of (or rather, overlaps between) jurisdictions.

The only achievement the EU could come up with in this area since 2005 is that member states shall consult about which state should conduct the criminal procedure, but if consultations are unsuccessful, parallel procedures may continue.⁵⁰ In my view, an all-European solution will not be long in coming,⁵¹ because failing that, considering the provisions of the CISA and the Charter and the “first come, first served” principle arising there from, a “criminal procedure contest” may evolve between the member states, in which all of the affected member

⁵⁰ Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings. In the Hungarian Criminal Procedure Act see Section 190 (1) i) on the reasons for terminating investigations; and Sections 267 (1) m) and 332 (1) h) on the reasons for terminating the proceedings by the court.

⁵¹ For details on the related necessary power concentration see: Burchard 2015, pp. 26-32.

states will endeavor to conduct their own procedure first.⁵² Or – in theory – it may allow for the delaying of the procedure and as a consequence, the decision of the other member state becoming final and binding also in cases where possible sanctions are quite different. This means that such “competition” makes *forum shopping* objectively easier for authorities, which would definitely infringe individuals’ rights, particularly when *forum shopping* is taking the direction of repression.

Another effect of such competition can be that mutual assistance in providing evidence would also be jeopardized. All in all, it is essential that an effective structure is developed in this field that would also be able to protect individual rights.⁵³

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⁵² Obviously, from among traditional forms of co-operation, the handover of criminal procedure is possible, but the theoretical situation described here may only take place if the criminal procedure – for any reason whatsoever – has not been handed over to the competent authority of the other state.

⁵³ A detailed analysis of the theoretical solutions is given by Sinn 2012, pp. 597-616.

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