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Ганна Зіновіївна Огнев'юк
Кафедра інтелектуальної власності
Київський національний університет імені Тараса Шевченка
Київ, Україна

ПРАВОВА ВИЗНАЧЕНІСТЬ ТА ПРИНЦИП НЕДОПУСТИМОСТІ ПОДВІЙНОЇ ВІДПОВІДАЛЬНОСТІ: ПИТАННЯ ТЕОРІЇ І ПРАКТИКИ

Анотація. *У статті розглянуто принцип недопустимості подвійного притягнення до відповідальності особи за одне і те саме правопорушення. Визначено, що традиційно цей принцип досліджується як принцип кримінального та кримінально-процесуального права, де існує переважна згода у поглядах на необхідність його дотримання. У статті стверджується, що недопустимість повторного притягнення особи до відповідальності має зв'язок з іншими загальнотеоретичними положеннями. Порушення цієї вимоги веде до розширення дискреційних повноважень державних органів. Подвійна відповідальність формує невизначеність для учасників правовідносин, створює загрозу неоднакового застосування законодавства у схожих чи подібних правовідносинах, що негативно впливає на рівень правопорядку. У роботі були використані такі методи: системно-структурний, метод аналізу і синтезу, у поєднанні з аксіологічним та антропоцентричним підходами. Показано необхідність застосування цього принципу в органічному зв'язку з принципом законності, остаточності судового рішення і обов'язковості його виконання. Доводиться положення, що недопустимість подвійної відповідальності є не тільки конституційним положенням, а і принципом юридичної відповідальності. Наразі існують підстави говорити про можливість застосування його до всіх видів юридичної відповідальності незалежно від галузевої приналежності. Окрім того, цей принцип як складова входить до теоретичної концепції правової визначеності, перебуваючи в органічному зв'язку з іншими його складовими. Практичне значення застосування цього принципу полягає в розмежуванні відповідальності за кілька правопорушень, склади яких наявні в діях особи, від подвійної відповідальності за одне правопорушення. Досягається це шляхом включення принципу недопустимості подвійної відповідальності як структурного елементу до правової визначеності. Таким чином можна прослідкувати його зв'язок з іншими складовими цього принципу та стверджувати, що недопустимість подвійної відповідальності є правилом, що поширюється на всі без виключення види юридичної відповідальності, а не тільки на кримінальну. Теоретичне обґрунтування такого підходу запропоновано автором, а практичні переваги продемонстровані на конкретних прикладах.*

Ключові слова: юридична відповідальність, принципи права, правопорушення, передбачуваність, верховенство права.

Anna Z. Ogneviuk
Department of Intellectual Property Law
Taras Shevchenko National University of Kyiv
Kyiv, Ukraine

LEGAL CERTAINTY AND INADMISSIBILITY OF DOUBLE JEOPARDY: ISSUES OF THEORY AND PRACTICE

Abstract. *The paper considers the inadmissibility of repeated prosecution for the same offence. It has been determined that this principle has traditionally been explored as a principle of criminal and criminal procedural law, which agree on the necessity to comply with it. The article argues that the inadmissibility of double jeopardy is connected to other theoretical provisions. Failure to do so leads to the extension of discretionary powers of public authorities. Double jeopardy creates uncertainty for participants in legal relationships, creates the threat of unequal application of legislation in similar and like legal relationships, which negatively affects the level of law and order. The following methods were used in the work: systematic and structural, method of analysis and synthesis, in combination with axiological and anthropocentric approaches. The necessity of applying this principle in the organic relation to the principle of legality, the finality of the judgment and the obligation to comply with it has been shown. It has been argued that the inadmissibility of double jeopardy is not only a constitutional provision, but also a principle of legal liability. Currently, there is reason to speak of the possibility of applying it to all types of legal liability, regardless of branch. In addition, the theoretical concept of legal certainty includes this principle as a component, which is organically related to its other components. The practical significance of applying this principle is to differentiate liability for several offenses whose composition is present in the actions of a person from repeated prosecution for one offense. This is achieved by including the principle of double jeopardy as a structural element in legal certainty. It is thus possible to trace its relationship to the other components of this principle and to claim that inadmissibility of double jeopardy is a rule that extends to all, without exception, legal liabilities, not only criminal. The theoretical substantiation of this approach is suggested by the author, and practical advantages are demonstrated by specific examples.*

Keywords: legal liability, principles of law, offense, predictability, rule of law.

INTRODUCTION

The principle of inadmissibility of double jeopardy is fundamental to the institution of legal liability in both the countries of Anglo-American law and the countries of continental law. For the most part, this principle finds its industry disclosure [1; 2], because liability in each of the branches of law has its own peculiarities. In the framework of this study, the task of theoretical understanding of the principle of inadmissibility of double jeopardy as such, which is inherent in legal liability irrespective of its sectoral orientation and substantiates the necessity to include it as an integral part in the concept of legal certainty, is formulated. In practice, the principle of inadmissibility of double jeopardy manifests itself most clearly where the most severe liability is assumed, namely, in criminal law, when a person is prosecuted [3].

The question of the existence of this principle can hardly be considered polemical, because there are few opposing opinions: based on the principles of fairness, proportionality, proportionality of the crime and promptness of prosecution, inadmissibility of re-committing an offence, in a situation where an offender has already been punished logical, the existence of this rule seems to be logical and understandable. However, the legal nature of this principle remains unclear. The author aims to prove the link between the principle of legal certainty and the inadmissibility of double jeopardy.

However, the issue of double jeopardy may arise when the subsequent actions of an offender, to whom the softer punishment had been applied, do not indicate a correction, when the grave consequences of an offence, which were not known at the time, have been identified after the prosecution. In such cases, parties involved in the legal relationship, and most often an injured party, initiate a revision of the decision in order to apply more stringent measures or sanctions, which threatens to prosecute twice a person for one committed offence. Often, the situation is compounded by the fact that, given the individual circumstances and particularities of the a, such actions appear to be fair, and the imposition of double jeopardy is made with reference to legislative rules.

The full application and practical significance of this principle in the relationship of legal liability depends on the understanding of its legal nature, its correct theoretical understanding. Since this principle is at the same time both a principle of legal liability and a constitutional principle, and a constituent principle of legal certainty, it is necessary to analyse it in relation to these concepts.

1. LITERATURE REVIEW

1.1 Principle of inadmissibility of double jeopardy in branch law and legislation

Today, two approaches to understanding the principle of inadmissibility of double jeopardy have been formed – branch and general theoretical. The first examines the operation of a principle within one branch of law, focusing on sectoral features; the second – sees the principle of inadmissibility of double legal liability as a common law basis. According to the provision of the Constitution of Ukraine[1], the principle of inadmissibility of double jeopardy is not limited only by criminal law. However, the vast majority of scientific research relates to it in this field, since in criminal law this principle is most striking.

According to O. Drozdov, "in the case-law of the Court of Justice (European Court of Human Rights), the principle of non bis in idem extends only to the criminal sphere, the boundaries of which the court understands far beyond the national jurisdictions of the member states of the Council of Europe. The ECHR includes certain types of administrative offences to criminal" [4]. Regardless of branch affiliation, the ECHR applies

[1] Constitution of Ukraine (1996). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.

this principle to public-law liability relationships, where the entity is a power authority that creates an increased risk of expanding its discretionary powers.

However, the question of the principle of inadmissibility of double jeopardy is also relevant for private law. The question of the appropriateness of the application of the principle of non bis in idem in economic relations is raised by A. S. Fonova. In business contracts, legal entities provide for a number of sanctions for breach of conditions, in particular, and penalties for late payment. Analysing the case law, the author argues that business agreements often provide for fines and penalties that are the responsibility of one type. In the future, such provisions of the contract are interpreted differently by the courts and in one case, the debtor is ordered to pay both a fine and a penalty, otherwise only one of the foreseen types of liability applies [2]. This problem creates uncertainty for the subjects of the relationship, violates the requirement of predictability, according to which a person must predict the legal result of his legally significant behaviour.

1.2 Principle of inadmissibility of double jeopardy in general theoretical studies

According to N. Parhomenko, "the study of domestic and international experience demonstrates that the principles of legal responsibility are formed on the basis of the principles of law". The scientist pays special attention to the analysis of the principle of legality, considering it as a "special legal principle" and "general law category". "In the criminal, civil, administrative, labour law, the basic requirements of law are enshrined as the principle of legal responsibility, to which the scientist includes, – inadmissibility to prosecute twice for a single offence" [5]. Researching the relation between the general principles of law and the principles of legal responsibility in her thesis, M. Yu. Zadnipryana pointed out that the general principles of law are an independent kind of principles that deserve special attention. They serve as sources of law and help to solve important legal problems and conflicts of law. Summarising the views of modern researchers, it is possible to distinguish the following basic principles that have emerged from the jurisprudence: the right to judicial protection; the principle of equal treatment and non-discrimination; the principle of proportionality; the principle of legal certainty; the principle of protection of legitimate expectations; protection of fundamental rights; the right to protection [6].

E. Kozubra notes that "the impossibility of bringing to justice twice for the same offence directly refers to the inability to apply twice the same type of legal liability for the same offence. This principle does not exclude the possibility of imposing on the person additional types of legal liability" [7].

Some researchers of the branch application of this principle have indicated that this principle of legal liability is linked to legal certainty. In particular, as noted by N. Kovtun and A. Zorin, "the non bis in idem rule in procedural terms partly coincides with the principle of the stability of a judicial act that has entered into force, and therefore also acts as a substantive element of legal certainty" [8]. In doing so, they linked this provision to the principles of law.

Proponents of this approach refer to the case law of the European Court of Human Rights, pointing to the ne bis in idem principle being linked to the rule of law, legality and justice. This rule is an integral element of legal certainty according to the practice.

2. MATERIALS AND METHODS

The main method used was the method of analysis and synthesis. Its application was based on the fact that individual manifestations of inadmissibility of double jeopardy in civil, commercial, tax, criminal law should be analysed by defining their common features. These common conditions for the application of the principle of double jeopardy should be systematised and distinguished by their scope and the degree of interrelation with other legal principles. This method allows to separate repetitive and regular, stable and constant from casual, variable, unstable, particular. By rejecting the latter, it is possible to form regularities and find their theoretical explanation. This method was used in the article to form a general picture of the frequency and spread of the application of the principle of non bis in idem in the branch law and the laws of its application. Formed on the basis of the synthesis of individual elements of the provision, it was possible to prove the general theoretical value of this rule for legal liability. The application of an axiological approach has made it possible to conclude the value of considering inadmissibility of double jeopardy through the prism of legal certainty, since its inclusion as a component element in this theoretical concept gives grounds to establish a relationship between the principle of inadmissibility of double jeopardy, the rule of law and freedom of human rights.

The aim of this article is to analyse the content of the principle of inadmissibility of double jeopardy as part of the principle of legal certainty, as well as to prove its importance as a general principle of legal responsibility.

In addition, the systematic and structural method was also used. Thanks to it, the article focuses on the disclosure of the relationship between the principle of legal certainty and the principle of legal liability non bis in idem, the thesis of the general legal nature of this principle is presented and substantiated. It is stated that the inadmissibility of double jeopardy serves stability, predictability and predictability in law, creates confidence in the efficiency of the legal system on the part of citizens, ensures their legitimate expectations.

3. RESULTS AND DISCUSSION

3.1 Correlation between the principle of legal certainty and the principle of inadmissibility of double jeopardy of a person for a single offence

The inadmissibility of double jeopardy is closely linked to the task and purpose of legal liability, among which the punishment of an offender is only one factor in the row. It is the legal responsibility of an offender to suffer the adverse effects of his behaviour, to compensate for the harm and to refrain from such action. While at the national level, in the first place, liability serves as a means to restore the existing

state of an offence, to restore the disturbed law and order, to return legal relations that have gone "beyond" into a legal and lawful direction. And only the means to achieve this goal are the penalties and sanctions provided by the relevant industry standards. The absence of such a broad view of legal liability and the action taken against it by the principle of the inadmissibility of repeated prosecution leads to the extension of this principle across different legal branches, to its analysis solely within the scope of industry specificity.

The inadmissibility of double jeopardy takes into account the relationship with other theoretical provisions, correlating legitimate conduct and liability in the event of its violation. An offender is affected by the negative consequences of misconduct, and even when it is not physically possible to repair the disturbed state, he compensates for the losses. As a result of such actions the possibility of continuation of legal relations in the legal course is provided, different, but the best way for the individual situation is chosen. In this situation, double jeopardy creates the risk of uncertainty, because having variability of types of liability combined with the unpredictable use of the respective types, a person cannot fully realise in advance either the gravity of his offence or imagine the size and extent of the negative consequences that he will suffer. Having a large number of variations gives a person a false idea that liability can be avoided, or at least it will not be subject to more severe alternatives. Finally, the possibility of applying simultaneously two types of liability extends the discretionary powers of law enforcement agencies, which can apply such types of liability at their discretion, freely interpreting the provisions of the law, to create the presumption of unequal application of law.

Article 61 of the Constitution of Ukraine states: "No one may be prosecuted twice for the same offence. A person's legal responsibility is individual"[1]. Such a provision imposes a duty on the state to fully, comprehensively and accurately investigate a case, obliges parties to a dispute to prove their legal position carefully and in a timely manner, taking a responsible role in the investigation of a crime or other offence. According to the literal translation of the Latin sentiment, which became the embodiment of the relevant legal idea, – non bis in idem – one answer is enough. This means that the injured party or state must once be charged and demand that an offender be held accountable for his or her actions. Such a principle is found in procedural law, it is consistent with the principle of the finality of a judgment, ensuring its lawfulness and binding enforcement. These provisions serve to maintain stability and the rule of law, emphasise the predominant role of the regulatory function of law, and create safeguards for the transformation of law into a means of legal and political struggle. An analysis of the procedural principles shows that, determining the equal procedural status of the parties, regulating the sequence of court cases, the limits of judicial proceedings and the legal

[1] Constitution of Ukraine. (1996). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.

status of court decisions, they are built with the knowledge that this is the only opportunity to bring a violator to justice. Accordingly, all necessary legal and procedural remedies should be provided to an individual.

Regardless of branch affiliation, the ECHR applies this principle to public-law liability relationships, where the entity is a power authority that creates an increased risk of expanding its discretionary powers.

At the same time, studies of the positive aspect of legal responsibility encourage researchers to analyse more closely the relation of particular sectoral manifestations of legal responsibility with general theoretical principles and provisions, such as legality, equality, rule of law, legal certainty. Scientific approaches to the study of legal liability in recent years have, in principle, turned to the study of positive liability, not negative, which reduced responsibility solely to the application of sanctions. As V. E. Golubovskyi notes "positive liability is a measure of demanding self and others, a deep understanding of the interests of the state, society, conscientious and active fulfilment of civic duty. It is determined by the real socio-legal status of the subject, that is, this approach is more promising because it fills legal liability with positive content" [9]. If to consider liability from these positions, it is impossible to avoid the connection of legal liability and general principles of law.

In author's view, a narrow understanding of the operation of this principle, which is mentioned in the context of exclusively criminal law, is unjustified, as evidenced by examples of other branches of law (relevant scientific approaches are presented in the literature review). In our opinion, such a contradiction arises because of the lack of proper elaboration of the provision on the inadmissibility of double legal liability [10]. In fact, this provision should be considered not only a legal prescription, but also a principle of legal liability (irrespective of one of the branches of law), which as part of the theoretical concept of legal certainty, a principle most closely related to the institution of legal responsibility.

The principle of legal certainty is defined as "a set of requirements for the organisation and functioning of the legal system in order to ensure above all stable legal position of the individual by improving the processes of law-making and enforcement" [11].

One of the problematic aspects of the inadmissibility of double jeopardy is the application of this provision to legal persons. On the one hand, given the equality of status of subjects in private legal relationships, both individuals and legal entities have the equal right to claim the inadmissibility to held liable for one offence. On the other hand, the provision of the Constitution of Ukraine, which contains this rule, is included in the section "Rights, freedoms and responsibilities of the individual and the citizen"[1]. And this is a direct reference to an entity to which this right applies. In civil and economic relations, there is a problem in applying property sanctions for breach of obligations, and in such cases legal entities rightly refer to the need to follow the same ap-

[1] *Ibidem*, 1996.

proaches in the same legal relations with their counterparties – individuals. Contrary to the statement about the possibility to apply repeated liability to legal entities in view of Art. 61 of the Constitution of Ukraine[1], which applies exclusively to the rights and freedoms of individuals, the provision on the inadmissibility of double jeopardy extends to legal entities. The theory of legal certainty provides an explanation for this phenomenon, pointing to the obligation to apply it to both legal entities and individuals when applying legal liability to them. The thesis about the impossibility of unambiguous solution of this problem by the norms of the branch law and about the possibility and necessity of a deeper legal theoretical discussion has already been advanced by Ukrainian scientists [12].

Today, the constant mention of the principle of the rule of law, and more rarely, of legal certainty as its constituent, in the context of solving almost every theoretical problem of legal science is a popular phenomenon [13–15]. At the same time, general legal principles, such as the rule of law, freedom, recognition and protection of fundamental human rights, equality must be specified in normative acts of general character, in industry norms, and find their application in court practice [16–18]. Therefore, the study of the origins of the principle of double jeopardy has an organic connection with other, more extensive legal principles, and without establishing such a connection meaningful understanding of the rule on double jeopardy is truncated and incomplete. Its contents are revealed by M. I. Kozubra – "the inability to bring to justice twice for the same offence directly refers to the inability to apply twice the same type of legal liability for the same offence. This principle does not exclude the possibility of imposing on the person additional types of legal liability" [7].

Ensuring stability and predictability, clarity and unambiguity in qualifying actions as unlawful is a prerequisite for ensuring that the principle of inadmissibility of double jeopardy for a single offence is valid. These provisions are a manifestation of the principle of legal certainty in the legal responsibility of different branch areas.

3.2 Case law of referring to the principle of inadmissibility to held a person liable twice for a single offence

Due to the non bis in idem principle in law enforcement, there is a problem of delimitation of the duality regarding the qualification of an act (when it is possible to simultaneously qualify different offences and necessary to choose the correct one) from the cases where the actions of a person contain two or more separate offences, each of which may be qualified separately. For example, a road accident resulting from a traffic violation entails administrative and civil liability for the harm to the lives and health of the victims' property. In the actions of an offender there is at once a composition of several offences, even before those provided by different branches

[1] Constitution of Ukraine. (1996). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.

of law. Liability comes for each offence, even though they are all related to one life situation [19–21]. In this situation, to invoke the principle of inadmissibility of double jeopardy is incorrect, since the composition of the offence is different and a person will be prosecuted only once – more precisely he once will be responsible for each committed offence. This situation should be distinguished from cases where a person is tried to prosecute twice for the same offence.

For such a delimitation, international judicial institutions use the actual composition of the offence as a basis, as in the case of Sergei Zolotukhin v. Russia. This approach implies, in particular, that the issues of whether the charges were the same were established to a greater or lesser extent on the basis of the assessment of facts than on the basis of the formal comparison of essential elements of the charge [22]. Therefore, the question is whether the offence was properly qualified, or if there was no qualification during competition of the composition of the two offences, and instead, a person was charged with committing several offences, while his actions presented a composition of only one offence.

In the case of Igor Tarasov v. Ukraine, the court proceeded from the fact that the legal qualification of a procedure under national law alone cannot be the sole criterion for the application of the non bis in idem principle [23; 24]. During the trial of Tarasov's acts of hooliganism, it was established that they were qualified as hooliganism with aggravating circumstances and as intentional causing moderate bodily harm, and the person was accordingly twice held liable.

Answering the question whether the offences for which the applicant had been prosecuted were the same, the interpretation of the non bis in idem principle similar to the case of Sergei Zolotukhin v. Russia was applied. This principle should be understood as prohibition of prosecution or trial in a second offence, if they stem from identical or substantially the same facts. With regard to the individual case of Mr. Tarasov, the court found that both proceedings at the national level concerned the applicant's behaviour at the same place at the same time interval and, therefore, the facts that twice led to the applicant's liability were inextricably linked between themselves, in both court proceedings the same facts as those in the first trial were concerned. The Court found that the following actions violated the principle of non bis in idem.

Although in the case-law of this court, the principle of non bis in idem relates to criminal liability, it is clear that, by applying this principle, the courts have to differentiate between offences, the liability for which is provided by different branches of law: criminal, administrative, tax, labour, etc. Therefore, in interpreting this right, it is necessary to go beyond the sphere of criminal law and talk about the principles of legal liability and the principles of law as such. The non bis in idem rule in ECHR practice is closely linked to legal certainty. Because any ambiguous and fuzzy interpretation of a rule of law in the context of legal liability is detrimental to the principle of legal certainty and the protection of a person's legitimate expectations.

4. CONCLUSIONS

The general principles of law, proclaimed as broad concepts, are specified in legal rules and are manifested, in particular, in legal responsibility. This is justified because in the context of legal responsibility such universally accepted values as human rights, equality, freedom, justice can be endangered. The non bis in idem rule applied in case law, including the ECHR, has a sound theoretical background and the need for its application is generally not called into question. However, the prevailing approach to understanding it as a branch principle is narrowed and limits its meaning. The inadmissibility of double jeopardy is regarded as a component of legal certainty – a general principle of law, which in turn has a close connection with the rule of law. In order to ensure the inadmissibility of double jeopardy, it is necessary to consider other elements of this principle, namely, stability and predictability, clarity of legal orders, legality. Therefore, the principle of inadmissibility of holding a person liable for a single offence is legally certain in close relation and should be interpreted on the basis of the factual circumstances of the case in compliance with other general principles of law. This approach gives the inadmissibility of dual responsibility as a component of the legal certainty of the anthropological dimension. This requirement of legal certainty can be applied to all types of legal liability, to legal and natural persons equally.

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Anna Z. Ogneviuk
PhD (Law), Assistant
Department of Intellectual Property Law
Taras Shevchenko National University of Kyiv
01033, 60 Volodymyrska Str., Kyiv, Ukraine

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