Requirements for Criminal Law

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Abstract

The study is focusing on the rule of law requirements for criminal substantive law. The fundamental aspects of the rule of law guarantees for criminal substantive law gained attention after the change in the political regime. It was in the resolutions of the Constitutional Court in particular where the basic principles that are the indispensable prerequisites of the rule of law started to appear. Resolving the confrontation between legal certainty and equity gave a permanent task for the Constitutional Court after the political changes. Upon examining decisions with criminal law aspects – as well as analysing the German legal practice – the author expresses his opinion of disagreement. Throughout the introduction of fundamental criminal law principles, the author analyses them in details and also synthesizes the consequences resulting from them. In the final part of the essay, the author is looking for an answer whether the expectations that governments should protect their citizens from others by providing legal shelter for them against the actions of unlawfully acting wrongdoers is a criterion of the rule of law principle.

Keywords: *prohibition of analogy, rule of law guarantees in criminal law, legal certainty, justifiable defence, equity, retroactive force (ex tunc temporal scope), ultima ratio*

I. Introduction

The rule of law as a concept first appeared in the German legal literature in the first half of the 19th century (e.g. in the work of Friedrich Julius Stahl, Karl Welcker, Rudolf von Gneist and Robert von Mohl) with the aim to represent the antithesis of the police state symbolizing the dictatorship and to demonstrate that the power structure – including the functioning of the State organs – should be governed by law. In this concept, the basic criteria of the rule of law is the fact that power is also obliged to comply with provisions of law, and to make its functioning transparent and predictable, and to ensure that the rights of citizens prevail. I would note that the principle of the English Rule of law invested with the current meaning by Albert Venn Dicey (Venn Dicey, 1902) also expresses the absoluteness of the rule of law, nevertheless, with regards to the special attributes of the common law in the field of criminal law the concept of Rechtstaat calls for completely different requirements. For this reason, it is necessary to consider the basic facts of the German legal literature in relation to criminal law in the framework of the development of continental law.

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II. The prerequisites of the rule of law in the field of criminal law in the relation of the State and citizens

By the second half of the 19th century in the attitude of citizens, the expectation of the order provided by State organs was gradually substituted by the desire for freedom, which restricts the rights of the executive power. Consequently, the concept of rule of law „prevail in the relation of the State and the citizen, the rule of law is not supposed to protect its citizens from each other. It is not a criterion for the rule of law that the State prosecutes thieves and robbers but it is a criterion that the State provides for its citizens the freedom of expression, of access to information, of assembly and gathering and the freedom of property as well as the security and liberty thereof". (Békés, 2006)[2] I will later come back to the question whether the restriction of the concept of the rule of law to the relation of the State and the citizen in the field of criminal law is still valid or not.

2.1. The Practice of the Hungarian Constitutional Court

From its formation – but particularly in its early years, at the beginning of the 1990s – the Hungarian Constitutional Court paid special attention to defining the prerequisites of the rule of law in the field of criminal law.

During its analyses and examinations – since the products of the legislation of the former dictatorship required conceptual resolutions over and over again – the determination of the substantive and procedural component of the rule of law in the field of criminal law as well as the evaluation of the relation of these two pillars played a crucial part. How one of the prerequisites of the concept of rule of law, the legal certainty, defined as the law and order created by the positive written law, and the fairness are interrelated, thus the rules of the law should meet the exigencies of the society, the requirements of reason and moral.

This question was particularly in the center of interest, when on the 4th of November 1991 the Parliament adopted a law on the renewed beginning of limitation periods of certain crimes[3].

The Constitutional Court declared the law, adopted by the Parliament but not promulgated, anti-constitutional[4].

According to the reasoning of the Constitutional Court „The basic element of the rule of law is legal certainty. Legal certainty requires – among others – the protection of the rights obtained, leaving the realized and concluded legal relations untouched, and the restriction by constitutional regulations of the alterability of the permanent legal relationships originated in the past […] Certain legal relationships and legal facts become independent from the norm they derive from, and they do not follow its fate

[2] Imre Békés: Criminal Law General Part HVG ORAC Lap- Könyvkiadó Kft. Budapest, 2006. p. 46.

[3] The text of the adopted law is the following: "Article 1 paragraph (1) On the 2nd of May 1990 the statutory limitation period of crimes committed between 21-Dec-1944 and 2-May-1990, and regulated by the laws in force in this period restarted, especially including capital treason, defined by Article 144 (2) of Act IV of 1978; intentional homicide defined by Article 166 (1-2); bodily harm causing death defined by Article 170 (5), if the state did not prosecute them due to political reasons. Paragraph (2) the punishment imposed according to paragraph (1) can be unlimitedly reduced." The President did not promulgate the law, instead on 16-Nov-1991 he sent it for constitutional review.

[4] Constitutional Court Decision 11/1992. (III.5.) AB.

automatically anymore. Otherwise, every amendment of the provisions of law would trigger the revision of the mass of legal relationships. As a main rule, it follows from the principle of legal certainty that the concluded legal relationships cannot be modified in a constitutional way, neither by legal rules, nor by the annulment of those – even if carried out by the legislator or by the Constitutional Court.

An exception to this principle can only be allowed if another constitutional principle, concurrent with legal certainty makes it inevitable, and it does not result in unproportionate damages compared to its aim. Such an exception can be the revision of criminal procedures closed with a final judgment in favor of the defendant if the procedure had been carried out in conformity with a legal provision which was later declared unconstitutional. This is required by constitutional criminal law. The unfair result of legal relations by itself cannot be a reason against legal certainty[5]. […] As far as respect for concluded legal relationships are concerned, difference cannot be made based on the fact how and when the legal regulations in question became unconstitutional. The legislator with regard to every legal relationship is restricted by the limitations of the retroactive nature of legislation. […] Legal cases considered anti-constitutional could only be prospectively and constitutionally remedied by new legislation.

It is unacceptable […] to waive the fundamental guarantees of the rule of law by referring to the justice required by the rule of law. The rule of law cannot be implemented against the rule of law. Factual and formal legal certainty must have priority over the always partial and subjective justice. […] in most cases the fundamental institutions of constitutional criminal law cannot be made conceptually relative, and it is not conceivable to have any other constitutional rights or tasks considered against them. It is because the guarantees of criminal law already contain the result of a consideration, namely that the risk of the failure of prosecution is being carried by the state. […]

For this reason, the presumption of innocence cannot be further restricted by another constitutional right, neither is it possible to enforce it incompletely at a conceptual level; due to the passivity of the state, at the end of the statutory limitation period the unpunishability obtained automatically takes effect, it cannot be retrospectively ››diminished‹‹ or restored; the requirement of nullum crimen sine lege cannot be replaced by any constitutional task aiming to protect others' rights. […] Any exceptions from the guarantees of the criminal law could only be possible by the obvious waiving of these guarantees, however this is excluded by the principle of the rule of law. […] The guarantees of the rule of law cannot be deprived from anyone by law and order of the rule of law. These are fundamental rights for all of us. Based on the values of the rule of law, not even fair demands can be enforced by neglecting the guarantees of the rule of law. Fairness and moral reason can serve as a basis of punishment for someone who deserves it, the legal basis of punishability, however, must be constitutional. […] In the rule of law the state does not and cannot have unlimited criminal power. It is because public authority itself is not unlimited, either. Due to the fundamental constitutional rights and constitutional freedoms public

[5] According to Constitutional Court Decision 9/1992. (I. 30.) AB: "the requirement of the rule of law concerning the substantive fairness can only prevail within the institutions and guarantees serving legal certainty. The Constitution does not (and may not) provide substantive fairness on a universal basis".

authority can only intervene in individual rights and freedoms upon constitutional authorization"[6].

The aforementioned standpoint of the Constitutional Court relied on the omnipotence of the formal element of the rule of law in the field of criminal law, i.e. the principle of legal certainty, when repealed the law on the renewed beginning of the statutory limitation period, which reasoning is not acceptable. It is a determining, crucial feature of all dictatorships that the group in power and their supporters maintaining the dictatorial system are not brought to account, not even when their actions clearly fall under the provision of criminal law, i.e. their conduct is against the criminal law. The primary reason of the erosion of positive written law, i.e. legal certainty, is the omission of state executives, when their passivity enables offending individuals to escape from being held legally accountable. Considering the fact that throughout the existence of such systems the legal accountability of individuals in power is conceptually impossible, thus following the collapse of the dictatorship it is not only the demand for justice that makes the accountability indispensable, but also the reconstruction of legal certainty can only be achieved in that way. In my view, the lack of prosecution after the political changeover against offending individuals of the dictatorial regime was contrary to the values of the rule of law in the field of criminal law.

2.2. The Practice of the German Constitutional Court

In order to reinforce my standpoint, I would like to mention that after the German unification, the criminal accountability of the former leaders of the German Democratic Republic was not a problem at all for German courts and the German Constitutional Court. German courts found guilty several high ranked leaders for intentional murder and sentenced them to long term imprisonment. The judgment was brought in connection with acts committed at the German wall and in the „inner border", when border guards used their weapon against people crossing the border illegally, in order to comply with the command „who violates the border, loses his/her life". After their conviction by court, the defendants turned to the German Constitutional Court. According to the reasoning of the German Constitutional Court „Criminal law established with the guarantees of the rule of law, in principle meet the exigencies of the material justice. It creates a special situation of trust, the prohibition of retroactive effect is based on that. This situation ceases to exist when the State neglects the universally acknowledged human rights by creating grounds for total exemption from criminal responsibility and thus causes the most severe criminal injustice. In this kind of situation, the rule of material justice should be supported against the prohibition of retroactivity effect. […] The concept of the prohibition of retroactivity effect does not prevail when the State encourages its citizens to commit severe criminal injustice and violates the universally acknowledged human rights"[7].

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[6] In the quoted decision of the Constitutional Court, like in other similar decisions of the Constitutional Court, appears the concept of "constitutional criminal law" drafted by András Szabó. In my opinion, this terminology has no substantive meaning, despite of the fact that it was being used by the majority of the legal experts of that period. In my view it only refers to the requirement that the norms of the criminal law – just like every regulation of each branch of law – must be in conformity with the rules of the Constitution.

[7] Imre Békés: Judgement of the European Court of Human Rights in Streletz, Kessler and Krenz vs. Germany case. KJK-KERSZÖV Jogi és Üzleti Kiadó Kft. Budapest, 2004. pp. 63-64.

Afterwards, the convicts appealed to the European Court of Human Rights. The Court found that the German courts had not violated the European Convention on Human Rights when „they interpreted the legal rules of the German Democratic Republic in force at the time of the commission of the act according to the principles of the rule of law.

It is obvious from these decisions that persons who had committed the most severe crimes between 1944 and 1990 without being prosecuted, could have been convicted in a manner in accordance with the conditions of the rule of law of the criminal law.

III. A Principles of the Rule of Law in the Field of Criminal Law

3.1. Principle of Legality

In the continental legal system, the principle of legality is of utmost importance in the area of criminal substantive law, bearing in mind that all other criminal law principles are based on the principle of legality. The essence of the principle is reflected in Act XXXI of 1993 on the promulgation of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and its eight additional protocols. Article 7 of the Act provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. I would like to point out here that the principle of legality is not a prerequisite for the rule of law. "In the precedent-based Common-law legal systems, not every offence has a written law attached to it. There are precedents which are several hundred years old, and this "law created by the judge" are in force in place of statutory provisions”[8].

3.1.1. With regard to the rule of law, one of the principles of substantive legality, namely the principle of *nullum crimen sinus lege*, plays a decisive role. "If we look back at the history of criminal law, we can see that as a result of considering the effects of the nullum crimen sine lege principle the work of Cristoph Carl Stübel and Anselm Feuerbach in the early 19th century brought the factual element of the crime to the fore. According to this clarification, the act to be punished does not generally infringe the legal order by constituting an unlawful act, but only if it constitutes a precisely defined factual element of the crime. [...] Only the criminal law consisting of criminal acts defined as an element of the crime corresponds to the nullum crimen sine lege principle. [...] A free and loose regulation, which is possible for example in private law, where judges can make their decisions within a wide margin of discretion, is not acceptable in criminal law because of the nullum crimen sine lege principle”[9].

The principle has the following criminal law consequences:

– notwithstanding the provisions of national law, the *ius cogens* criminal acts give rise to criminal liability,

– only a legal provision at the top of the domestic legal source can make a conduct – an act or omission – a crime,

[8] Imre Békés: Criminal law – General Part. HVG ORAC Lap- és Könyvkiadó Kft. Budapest, 2006. Pp. 50.

[9] Béla Pokol: Criminal Law Theoretical Analysis Rejtjel Kiadó. Budapest, 2016. pp 58-59.

– the criminalization of an act must already be determined by a law before it is committed,

– no criminal liability can be established for any conduct that was not illegal at the time of the crime,

– a crime can only be committed by an act that corresponds to the legal definition of crime,

– the court can establish criminal liability only for a conduct which corresponds to the statutory definition of the crime,

– if, under the new law in force at the time of the adjudication, the act no longer constitutes a crime, the application of the new law is mandatory.

3.1.2. The second principle of substantive legality is the principle of *nulla poena sine lege*. "A typical derivation of the rule of law is the principle of "no punishment without law", which addresses an aspect of the requirement of predictability, namely the need to warn people in advance that certain types of acts will lead to punishment"[10].

The basic elements of the principle are as follows:

– only a legal provision at the top of the domestic legal source can establish a criminal legal consequence,

– the court may only apply such criminal law consequences that were already assigned by law to the crime prior to the time of the commission,

– in determining the penalty, the court is obliged to comply with the relevant provisions of law regarding the imposed penalty or the applicable measure, i.e. its nature, length or extent must always be determined in accordance with the law,

– if the new criminal provisions in force at the time of the assessment of the crime punishes the crime more severely, the new law does not apply,

– if the new criminal provisions in force at the time of the assessment of the crime provides for a milder penalty, the new law shall apply.

I would like to point out that though the principles of nullum crimen sinus lege and nulla poena sine lege " are not inextricably linked, yet, their origin coincides"[11].

3.2. Prohibition of Retroactive Application of More Severe Criminal Provisions

In continental criminal law, the principle of legality gives rise to the requirement of prohibiting the retroactive application of the more severe criminal provisions. The main rule of criminal law in the continental legal system is that one may only be prosecuted and punished in accordance with the law in force at the time of the offence[12]. Thus, the principles of nullum crimen sine lege and nulla poena sine lege

[10] Aubert V. The Rule of Law in „The Rule of Law", issue 1 pp. 62.

[11] József Földvári: Hungarian Criminal Law Osiris Kiadó, Budapest, 2003 pp. 35.

[12] A classic example of the breach of the principle is the "lex van der Lubbe" case. Marinus van der Lubbe, arrested in the Bismarck Hall of the German Parliament (Reichstag) building, which was set on fire on 27 February 1933, admitted the crime during his interrogation. When the Reichstag was set on fire, the Penal Code allowed for life imprisonment for intentional arson. On 28 February 1933, the Secretary of State Ludwig Grauert proposed the introduction of a state of emergency in Prussia, which was extended to the entire German Empire at the request of Minister Wilhelm Frick. The legal consequence of this was that it became possible to impose the death penalty for acts threatened up to that point with life sentence. The law, which entered into force on 29 March 1933, extended the emergency provisions to offences committed between 31 January 1933, and 27 February 1933, on the basis of which it became possible to impose the death penalty.

clearly define the temporal scope of the criminal provisions which, according to the doctrine of the classical school, "assume that the perpetrator was aware of the provisions of criminal law effective at the time of the commission of the criminal offence, but behaved in violation of that law [...] and must therefore bear the adverse consequences of his/her unlawful conduct, even if at the time of the sentencing the norm in force at the time the offence was committed has changed and the conduct is no longer punishable or it contains more favorable provisions for the perpetrator."[13]

However, the prohibition of the application of the *ex-tunc* principle is not universally valid any more, i.e. the retroactive application of the criminal law is not prohibited even in the rule of law; on the contrary, it is expressly stipulated as a prerequisite, but only if the act is no longer a criminal offence or is subject to a milder sentence. As the Constitutional Court has pointed out: "In addition to the explicit prohibition of retroactivity, the requirement of the application of the more favorable rule in sentencing derives from the requirement of the rule of law"[14].

The general fundamental statements relating to ex tunc effect prohibition are as follows:

– crime must be prosecuted in accordance with the criminal law in force at the time it was committed, the latter changes are indifferent,

– no criminal liability can be established for conduct which was not against criminal law in nature at the time of its realization, and it is not possible to apply a legal sanction more severe than the one contained in the substantive criminal law norm due to the commission of a delict/tort, which, at the time of the conduct being against criminal law, was not yet part of the Criminal Code,

– the prohibition does not relate to standards which entered into force after the commission of the crime, and which eliminate the penalization of the act committed, or to legislation which allows for a lighter judgement,

– only apparently is shown the item burdening the defendant that does not preclude the initiation of criminal proceeding and judgement for the act which, at the time of commission, constitutes a criminal offense solely on the basis of generally recognized rules of international law, whereas international ius cogens, as I have already mentioned, provides a basis for criminalization independently from the provisions of domestic law.

3.3. The Ultima Ratio Nature of Criminal Law

The theorem reflects the requirement that for resolving various conflict situations primarily norms of other branches of law should be used. In other words, it is an essential condition for the creation of a criminal law threat that its creation is necessary, i.e. there should be no more lenient way of protecting the right. Given that criminal law also provides the possibility of causing a legal disadvantage which no other branch of law allows, criminal legal consequences can only be applied if the legal protection provided by other branches of law are not sufficient means for protecting the rule of law. Therefore “Criminal law is the ultima ratio in the system of legal

[13] Zsigmond Kiss: Issues of retroactivity in the light of the provisions relating to the temporal scope of the Criminal Code. Faculty of Law and Political Science of the Pázmány Péter Catholic University Budapest, 2000 p. 161.

[14] Constitutional Court Decision 11/1992. (III.5.) AB.

liability. Its social function is to be the sanctioning keystone of the legal system as a whole. The criminal law sanction, the role and purpose of a punishment are to maintain the integrity of law and moral norms when sanctions of other branches of law no longer help […] It is a substantive requirement that the law maker may not act arbitrarily when determining the conduct to be punished. The need to criminalize any conduct must be judged by a strict standard: the use of criminal law instruments, which inevitably restrict human rights and freedoms in order to protect different life situations, moral and legal standards, is only justified in an absolutely necessary case and to a proportionate extent, if the protection of state, social, economic objectives, values, which are constitutional or traceable to the constitution, is not possible in any other way"[15].

The rule of law requirements arising from the nature of ultima ratio are therefore that

– to resolve conflict situations in society primarily branches of law out of criminal law should be used,

– in the event of an infringement, legal integrity must be ensured by the application of legal sanctions governed by other branches of law,

– only such conduct can be declared contrary to criminal law in the interest of which the establishment of criminal law protection is unavoidable,

– the criminal threat should be proportionate to the risk to abstract society of the conduct declared to be unlawful.

All these requirements show the legislator that criminal legislation must not be arbitrary, neither in criminalising nor in determining the criminal consequences. Thus, it is not possible to expand the scope of crimes without limitation, even if sometimes the ruling power sees the criminalization of unwanted conduct as the only possible way to solve this problem. If the legislator nevertheless does so, it not only infringes the principle of the ultima ratio, but also devalues criminal law by criminalizing minor acts. However, in addition to necessity, the requirement of proportionality must also be taken into account in legislation, therefore, if codification of criminal law becomes essential, the legislator must determine the legal consequences to be imposed on the perpetrator of the crime, taking into account the danger of the crime to society. The latter requirement must, moreover, be enforced by the law enforcement when considering the specific case. „The provisions of the Criminal Code for the imposition of sanctions should be seen as a coherent system in which the relevant rules are applied with respect to each other and in a complementary manner. From a constitutional point of view, the purpose of the normative provisions on the assessment of penalties is to enable the punishment of offenders proportionately and according to the circumstances of the offence"[16]. The requirement of proportionality therefore plays a role both in relation to the risk to the abstract society, which contributes to general prevention, and in relation to individualisation for special prevention.

3.4. The Requirement of the Clarity of Criminal Law

The importance that norms need to be well-defined already occurred in Cesare Beccaria's works, when he explained "The greater the number of people who

[15] See: Constitutional Court Decision 30/1992. (V.26.) AB.
[16] Constitutional Court Decision 13/2002. (III.20.) AB.

understand the sacred law code and who have it in their hands, the less frequent crimes will be, for there is no doubt that ignorance and uncertainty concerning punishments aid the eloquence of the passion"[17]. Laws, however, can only be "held in the hand" if they are accessible. "Predictability is the most important requirement a norm has to fulfil. The first prerequisite of predictability is accessibility, including accessibility in a physical sense"[18]. It is a fundamental requirement for the criminal law governed by the rule of law that crimes should only be defined by the law, whereas it is also a requirement that when criminalzing certain acts, legislation should define the prohibited or expected conducts as precisely as possible, so that they could be adhered to by anyone; the laws "need to be precise, easily interpretable"[19]. It is namely an indispensible prerequisite of conducts complying with norms that the requirement of clarity for norms should be fulfilled; in other words, the content of norms could unambiguously be unfolded by using one of the interpretation types. Due to the rule of law requirement that norms need to be well-defined, laws have to be clear, free of contradictions and easily comprehensible, i.e. the codification of laws should aim at wording criminal law provisions in a simple way, following the rules of the Hungarian language. The exact terminological unity, in other words, the precise definition of technical terms is an equivalently important requirement. When the definition of prohibitions or requirements set forth by criminal law have incomprehensible, inaccurate, different or even contrary meanings, those whom the norms are addressed to cannot determine what kind of conduct is expected of them, what kind of conduct they are to follow. According to expectation of criminal law governed by the rule of law, "provisions which describe conducts prohibited by threat of sanctions need to be definite, clearly defined and formulated. It is also a constitutional requirement that the legislative intent concerning the protected legal object and criminal conduct has to be clearly expressed. It has to present unambiguous messages about cases when an individual is considered to violate criminal law. At the same time, it has to restrict the possibility of arbitrary interpretation of law for those who apply it. It needs to be examined, therefore, whether the range of sanctioned conducts specified by the legal definition of crime is not too wide, whether it is sufficiently clear-cut"[20].

3.5. Prohibition of Analogy Incriminating Perpetrators

The prohibition of drawing analogies is a fundamental principle in criminal law. Several authors (for example József Földvári, Miklós Kádár, György Kálmán) completely dismiss the idea of using analogies, but analogies violate requirements of the rule of law only if they in their completeness are used for a conduct that does not match a legal definition of a crime. In such a case there is in fact a legally regulated and unregulated situation, and by using a legal analogy the applier of law, considering that the decisive elements are the same and disregarding that the secondary circumstances

[17] Cesare Beccaria: Crimes and Punishment. Academy Publishing House, Budapest, p. 62.

[18] Balázs Gellér: Textbook on Hungarian Criminal Law. Volume I. General Part. Hungarian Official Journal Publisher, Budapest, 2008. p. 56.

[19] István Kónya: The State's criminal justice power. National Institute of Criminology-Pázmány Péter Catholic University Faculty of Law and Political Sciences, Budapest, p. 318.

[20] Constitutional Court Decision 30/1992. (V.26.) AB.

are different, extends the scope of the norm to an act which is not regulated by the norm, i.e. by the law. "This, however, means that although the applier of law is aware of the legislative intent expressed by the law as well as of the fact that the legislator's intent undoubtedly must not have covered that situation, he/she still applies the provision of law to the unregulated situation. In this way, the applier of law basically gives the provision of law a broad interpretation. Based on the principles of nullum crimen sine lege and nulla poena sine lege, which are acknowleged and highly valued by the continental law system, the use of analogies resulting in the extension of criminal liability or of the scope of criminal liability is impossible by definition in criminal substantive law"[21].

3.6. Ne bis in idem principle

The principle prohibiting dual criminality is equally applicable to all fields of criminal law in the widest sense, namely to criminal substantive law, procedural criminal law as well as to the enforcement of punishments. It manifests the requirement in criminal substantive law that if the legislator has already given consideration to a particular circumstance, the applier of law cannot consider it as well. Thus, for example, when a sentence is imposed, the fact laying basis for the mitigated case of the crime cannot be considered as a mitigating factor, nor can the modus operandi which establishes the aggravated case of crime be regarded as an aggravating factor. The prohibition of dual criminality thus aims to prevent that importance would be attached to an already considered fact or circumstance.

IV. Requirements of Criminal Law Governed by the Rule Of Law in Relation to Individuals

The already presented statements are based on the theoretical starting point that the requirements of criminal law governed by the rule of law shall prevail in the relation between the State and the individuals. In other words, protecting its individuals from others, providing protection against persons' unlawful conducts in legislation and the application of law are not criteria of the rule of the law.

In my view, while totalitarian features characterized power structures in the western part of Europe at the end of the 19th century and in Middle-Eastern Europe until the end of the 20th century, applying the emphatic elements of the rule of law to the relation between the State and the individuals was indispensable. As a result of social-political changes, however, nowadays even the protective function, namely that criminal law shall protect the established social, economic and state order, the individuals' person and rights, shall be regarded as one of the tasks of criminal law governed by the rule of law.

The same conclusion was drawn by several European legal scholars in the middle of the last century. When analyzing the concept of legal certainty (rettsskkerhet), which is one of the pillars of the rule of law, the Norwegian Johs Andenaes explained that "Two things need to considered in relation to rettsskkerhet. First, the protection of individuals' rights against other individuals. Second, the protection against the

[21] Ervin Belovics: Criminal Law I. HVG ORAC Publishing House Ltd., Budapest, 2017. p. 80.

arbitrary use of state power and against the abuse of such a power"[22]. As Vilhelm Aubert notes "For a criminal lawyer it is natural that the protection of life and property against unlawful attacks should also be included here"[23].

All this means that the legal definitions of crimes in the special part of the Criminal Code should cover the conducts threatening or infringing the mentioned interests and values, and the state shall ensure the right to protection if it is not able to protect its individuals. Establishing the framework of the latter is of special importance because in this context it can be made clear whether the legislator intends to protect the interests of the person acting against the law or the interests of the person trying to avert such an act.

V. Conclusion

A fundamental characteristic of criminal law governed by rule of law is that principles whose existence state organs, in particular legislative bodies and bodies applying law shall guarantee, prevail. These principles constrain legislation and prevent the arbitrariness of the judiciary. In the 21st century, however, the rule of law is intended not only to constrain the legislative and judiciary power, but the protective function shall also prevail in the relations among individuals.

References

1. Andenaes, J., Grunnlov og rettsskkerhet. Michelsens Insitut, Bergen, 1945.
2. Aubert V., The Rule of Law in „The Rule of Law", issue 1.
3. Aubert, V. The Rule of Law, in Rule of Law Journal, Issue 1.
4. Beccaria, C., Crimes and Punishment. Academy Publishing House, Budapest.
5. Békés I., Criminal Law General Part HVG ORAC Lap- Könyvkiadó Kft. Budapest, 2006.
6. Békés I., Judgement of the European Court of Human Rights in Streletz, Kessler and Krenz vs. Germany case. KJK-KERSZÖV Jogi és Üzleti Kiadó Kft. Budapest, 2004.
7. Belovics, E., Criminal Law I. HVG ORAC Publishing House Ltd., Budapest, 2017.
8. Földvári, J., Hungarian Criminal Law Osiris Kiadó, Budapest, 2003.
9. Gellér, B., Textbook on Hungarian Criminal Law. Volume I. General Part. Hungarian Official Journal Publisher, Budapest, 2008.
10. Kiss, Z., Issues of retroactivity in the light of the provisions relating to the temporal scope of the Criminal Code. Faculty of Law and Political Science of the Pázmány Péter Catholic University Budapest, 2000.
11. Kónya, I., The State's criminal justice power. National Institute of Criminology-Pázmány Péter Catholic University Faculty of Law and Political Sciences, Budapest.
12. Pokol, B., Criminal Law Theoretical Analysis Rejtjel Kiadó. Budapest, 2016.

[22] Andenaes J. Grunnlov og rettsskkerhet. Michelsens Insitut, Bergen, 1945. p. 86.
[23] Aubert, V. The Rule of Law, in Rule of Law Journal, Issue 1., p. 62.