

The prohibition of reformatio in peius in the light of the principle of fair procedure

Csongor HERKE

Associate Professor, Dr Habil., Head of Department
Department of Criminal Procedure Law and Forensic Science
Faculty of Political and Legal Sciences
University of Pécs, Hungary

Csenge D. TÓTH

PhD candidate, Doctorate School
Faculty of Health Sciences
University of Pécs, Hungary

ABSTRACT

The requirement of the prohibition of reformatio in peius may arise taking into consideration several basic principles of the criminal procedure. In the Hungarian legal system, it is regulated under the procedure of the second instance, the procedure of the third instance, retrial, extraordinary legal remedies and even under some of the separate procedures. In addition to the criminal procedure, the reformatio in peius is regulated according to the law of infractions.

The main principle of reformatio in peius which says that the court of a higher instance can alter a decision of the court of a lower instance to the detriment of the recipient shall be limited in order to let the law somehow balance the disadvantaged position of the accused. This means that the prohibition of reformatio in peius can even be traced back to the requirement for a fair procedure. This paper examines the reasons for the existence of the prohibition of reformatio in peius in the course of the criminal procedure while arguing its connection to the principle of a fair procedure (fair trial).

Keywords: reformatio in peius, constitutionality, principle of a fair procedure

Introduction

According to TREMMEL, fundamental principles have greater significance in criminal procedure law than in substantial criminal law; therefore, they are thoroughly worked out much more¹. This, however, was not like this in the Hungarian codification at all times. IRK stated that the positive criminal procedure law was always defined always by the actual historical ideas². Act XXXIII of 1896 did not list fundamental principles expressis verbis. Jurisprudence has although laid down those basic ideas (FINKEY separated these into fundamental and guiding principles³), which became then fundamental principles. As codification improved more and more principles were formulated. This process was called by TREMMEL “the inflation of principles”⁴. Even in German law the same phenomenon can be noticeable. Nevertheless, another process can be observed that is in contradiction with above mentioned inflation of fundamental principles. According to TREMMEL, it is also a very dangerous tendency when the legislator tries to collect the content or central core of fundamental principles into one or two fundamental principle that have a “system-framing” characteristic, or into so called “guiding principles” (super principles). The criminal procedure is so much more complex process, which includes many factors and actions, than to be compose all organisational and management requirements into some guiding principles. However, even recently there are attempts to create such “system-framing” fundamental principles, or kind of stylish “key concepts” came into the limelight, which seems like to gain a rank of a guiding principle of a super principle. Such key concepts are in the criminal procedural jurisprudence

¹ TREMMEL Flórián: Magyar Büntetőeljárás [Hungarian Criminal Procedure], Dialóg-Campus Kiadó, Budapest-Pécs, 2011. p. 65.

² IRK Albert: A magyar büntető perjog vezérfonala. Pécs, 1931. p. 24.

³ FINKEY Ferenc: A magyar büntető perjog tankönyve. Budapest, 1916. p. 88.

⁴ TREMMEL Flórián: Magyar Büntetőeljárás [Hungarian Criminal Procedure], Dialóg-Campus Kiadó, Budapest-Pécs, 2011. p. 68.

- requirement of a fair procedure (fair trial),
- principle of criminal procedure of a state founded on the rule of law,
- principle of “equality of arms” (Égalité des armes),
- concept of “constitutional criminal procedure”.

The most important element of the prohibition of reformatio in peius is that it is a legal guarantee for the defence to be able to file an appeal without the risk that a judgment might be altered to the detriment of the accused. Therefore, the accused will have confidence that the appeal will not do wrong to his interest. This means that it would be unfair to pass a more detrimental decision, if no appeal was submitted to the detriment of the defendant. So there is a demand for a fair procedure even concerning procedures where the prohibition of reformatio in peius becomes effective.

1. The concept of fair procedure

The main elements of the concept of fair procedure (usually constitutes a right to fair procedure only before a judge, or in a narrower sense, it means just the right to fair trial⁵) is included clearly in Article 6 of the European Convention on Human Rights (Rome, November 4, 1950):

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b. to have adequate time and facilities for the preparation of his defence;
 - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

This right to fair procedure and trial seems to be an active real guiding principle⁶ inasmuch as the case-law of the European Court of Human Rights⁷ mostly concerns complaints regarding Article 6⁸.

The European Court of Human Rights heard complaints concerning fair trial not only in criminal cases but also in other legal disputes (disciplinary affairs, damages etc.). This shows that this “fairness postulate” becomes primarily the “super principle” of the criminal procedure, but in the meanwhile it constitutes a “general procedural minimum” that is necessary to adjudicate every major legal dispute. The sub-title “fair procedure as an universal principle” in KIRÁLY’s textbook⁹ emphasizes that firstly a competent, independent and impartial

⁵ FENYVESI Csaba – HERKE Csongor – TREMMEL Flórián: Új magyar büntetőeljárás. [New Hungarian Criminal Procedure] Dialóg-Campus Kiadó, Budapest-Pécs, 2004. p. 63.

⁶ KARDOS Sándor: Gondolatok a tisztességes eljárásról. [Thoughts about a fair procedure] In: HOLÉ Katalin – KABÓDI Csaba – MOHÁCSI Barbara (szerk.): Dolgozatok ERDEI Tanár Úrnak. ELTE, Budapest, 2009. pp. 200-224.

⁷ BALLA Lajos – KARDOS Sándor: A tisztességes eljárásról a strasbourgi bíróság gyakorlatában. [Fair procedure in the light of the practice of] Bírál Lapja, 2005/1. 34-53. o. és 2005/2. pp. 40-53.

⁸ BERGER, Vincent: Case Law of the European Court of Human Rights. The Round Hall Press, Dublin, 1989.

⁹ KIRÁLY Tibor: Büntetőeljárás jog. [Criminal Procedure Law] Osiris, Budapest, 2003.

tribunal shall hear the case, however, other elements which are listed in Article 6 1.¹⁰ (Adequate time, publicity) complete this requirement and in Article 6 2. and 3. they explain the meaning of fairness in detail.

This introduction of fair procedure as a “universal principle” expresses clearly that the other requirements, which constitutes elements of fair procedure, furthermore, which complete or explain its meaning, are nothing but the generally accepted and known fundamental principles of the criminal proceedings in a classical sense¹¹. The “universal principle” is practically a selection of fundamental principles, “package of fundamental principles”, that holds together and represents-as a quasi guiding principle (super principle) - the European minimum requirement for calling someone to account. On the other hand, in such case, it would be better to call it a package of fundamental principles than simply a fundamental principle. According to the examination of the case-law of the European Court of Human Rights it is obvious that “fair trial” basically summarizes the requirements for such administration of justice that precisely includes the predominant or even complex prevalence of the criminal procedural fundamental principles regarding its organization and operation.

Beyond these classic fundamental principles, the principle of fair procedure gives prominence to questions concerning timeliness, drawing out the conclusion of cases and proportionality. BÁN¹² reinforces the same conclusion since he analyses the presumption of innocence as an important element of fair procedure and points out that there is significant difference between the justness and fairness of the procedure. The content of fairness can be explained according to the case-law of the European Court of Justice because Article 3 of Protocol 9 said that interpretation and explanation of the Convention belong to the tasks of the European Court of Human Rights.

2. The principle of constitutionality and the principle of procedure.

Accordingly, the existence of the principle of ne bis in idem and the prohibition of reformatio in peius is justified by another element (principle of fair procedure) of a state founded on the rule of law. According to FRISCH, it would not be fair to make more detrimental decision concerning the defendant for the lack of an appeal against the defendant since this would cause a difficulty for the him to decide whether to file an appeal or not and this would put him in a “risky situation”. Besides, this could mean a chance to impose a (heavier) punishment, whereas, if he had not filed an appeal the decision could not have been more detrimental (because this would have been precluded by res judicata of the judgment of first instance)¹³. So, FRISCH also refers to the principle of fair procedure by this, he expresses a requirement of a fair and constitutional criminal procedure regarding the prohibition of reformatio in peius.

The fundamental principle of a constitutional criminal procedure (constitutionality), according to DÖRR, is a principle having specific dogmatic contents¹⁴. In compliance with this opinion, the principle of constitutionality is a direct connecting guiding principle, which is not expressed clearly in an actual legal sentence by the legislature. Starting from giving a positive legal form to something, the principle of constitutionality can only be determined carefully due to the great variety of its possible contents (so called fundamental constitutional approach). According to this approach, if the Constitution only outlines the principle of constitutionality then it does not contain any detailed definite order and prohibition, so it would necessitate a precise definition. Pursuant to such an integrated constitutional approach, the principle of constitutionality is essentially a generic term which concerns only certain normative guarantees provided by constitutional law (so called summarizing constitutional approach). According to HESSE, the positive legal form of the Constitution is comprehensive, and therefore there should not be place for conclusions concerning a positive principle of constitutionality beyond universalness¹⁵.

¹⁰ DOBROCSI Szilvia: A tisztességes eljárás elve, mint a büntetőeljárás egyik alapvető követelménye. [The principle of a fair procedure as a basic requirement of the criminal procedure] *Collega*, 2005/2. pp. 122-126.

¹¹ FENYVESI Csaba – HERKE Csongor – TREMMEL Flórián: Új magyar büntetőeljárás. [New Hungarian Criminal Procedure] Dialóg-Campus Kiadó, Budapest-Pécs, 2004. p. 65.

¹² BÁN Tamás – BÁRD Károly: Az Emberi Jogok Európai Egyezménye és a magyar jog [European Convention on Human Rights and the Hungarian law], *Acta Humana*, 1992. évi 6-7. szám.

¹³ FRISCH, Wolfgang: Das Verschlechterungsverbot – Grundfragen und neue Entwicklungen. *Juristische Arbeitsblätter*, 1974.p. 91.

¹⁴ DÖRR, Dieter: *Faires Verfahren*. 1984. p. 5.

¹⁵ HESSE, Konrad: *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*. Heidelberg, 1998. point 184.

However, according to KUNIG, orders that are not defined directly by the Constitution can be traced back to the fundamental rights considerably¹⁶.

Starting from the special guarantee the principle of constitutionality serves as a general and systematic fundamental principle¹⁷. In such way the principle of constitutionality can be expanded and explained. Due to the openness of the concept of constitutionality the requirement for a fair procedure can become a guiding principle, which hereby will gain status as provided for by constitutional law. Judicial legal protection, which is justified by the principle of constitutionality, is protected by specific stipulations of constitutional law. These special stipulations of the Constitution, like e.g. guaranteeing the independence of the judiciary, do not exclude the possibility to deduce further fundamental principle from the general principle of constitutionality.

Notwithstanding, many argue with letting the principle of a fair procedure to become a guiding principle, they rather think that it should be incorporated into the principle of constitutionality¹⁸. It is also questioned whether the principle of a fair procedure is grounded enough to gain a meaning like other procedural fundamental principles. DÖRR said, as a counterargument to this idea, that damages of the principle of constitutionality cannot be avoided without constitutional complaints¹⁹. The affected person may enforce the objective violation of constitutional law (and by doing so, he can enforce the principle of a fair procedure), if he can prove the violation of fundamental rights.

The enforcement of the objective violation of constitutional law is nothing else but an intervention to the general freedom of action. However, the violation of the principle of a fair trial itself, as an element of objective constitutional law, cannot give rise to file a constitutional complaint. During a criminal procedure the order of a coercive measure entailing the deprivation of personal freedom means an intervention into the right to personal freedom. This cannot cause problem until the coercive measure entailing the deprivation of personal freedom was ordered according to the rules of the Criminal Procedure Code (hereinafter, CPC) and the defendant is sentenced to a punishment entailing the deprivation of personal freedom at the end of the procedure that includes the coercive measure entailing the deprivation of personal freedom, which was ordered during the procedure. However, if the rules of the Criminal Procedure Code are not complied with when the coercive measure is ordered then questions will be raised concerning constitutional law, even if the defendant is validly sentenced to a punishment entailing the deprivation of personal freedom for a longer term than the term of the former coercive measure. Likewise, it can raise questions, if the coercive measure entailing the deprivation of personal freedom was ordered lawfully but the defendant was validly acquitted or the imposed punishment does not entail the deprivation of personal freedom (fine), or maybe only for a shorter term than the term of the coercive measure entailing the deprivation of personal freedom, which way ordered during the procedure.

The influence to the status as a fundamental principle, according to DÖRR, shall be consistent with the objective constitutional law²⁰. This also means that the criminal procedure ending up in the imposition of a fine must be in conformity with the objective criminal law and the principle of constitutionality, even if it lead to the order of a coercive measure entailing the deprivation or limitation of personal freedom. It still cannot be stated that the objective constitutional law, and therefore the principle of a fair procedure could become a fundamental principle.

The principle of a fair procedure, as deduced from the principle of constitutionality, constitutes an element of objective constitutional law. If the right to a fair procedure is restricted because it is suitable only for the control that exists in the system and for the definition of function f rights, according to HEUBEL it can be necessary to explain the fundamental principle in the light of legal theory and practise²¹. The concept of a fair procedure demands the improvement of constitutional values on the maximum level possible. According to KRETSCHEMER,

¹⁶ KUNIG, Philip: Das Rechtsstaatsprinzip – Überlegungen zu seiner Bedeutung für das Verfassungsrecht der Bundesrepublik Deutschland. Tübingen, 1986.p. 457.

¹⁷ SCHMIDT-AßMANN, Eberhard: *Verwaltungsverantwortung und Verwaltungsgerichtsbarkeit*. Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, 1976.

¹⁸ GEPPERT, Klaus: Zum „fair-trial-Prinzip“ nach Art. 6 Abs. 1 Satz 1 der Europäischen Menschenrechtskonvention. JURA, 1992. 597. o.; ROXIN, Claus: *Strafverfahrensrecht*. München, 1998. commentary on section 11.

¹⁹ DÖRR, Dieter: *Faires Verfahren*. 1984. p. 143.

²⁰ DÖRR, Dieter: *Faires Verfahren*. 1984. p. 144.

²¹ HEUBEL, Horst: *Der „fair trial“ – ein Grundsatz des Strafverfahren? 1981*. p. 59.

the principle of a fair procedure demands in certain cases the amendment of positive law to such an extent that it could guarantee a procedure, which aims to achieve the minimum level of constitutionality²².

In Germany the concept of a fair procedure concerning criminal procedure arose in a decision of 1969²³. This decision assured the defendant that he shall not be only the object of the procedure, but his legal status shall include the active procedural right, which is expressed in his capacity to influence the course and result of the procedure in order to protect his own rights. It is difficult to find out which procedural fundamental principles have essential significance regarding a fair procedure. It is characteristic to the right to a fair procedure, as a fundamental principle of a state founded on the rule of law, that it is defined only partially by the Constitution, it does not include certain orders and prohibitions, and therefore, it needs to be given a positive form. The extent of a constitutional fundamental principle needs to be determined carefully since it is the task of the legislator to specify the feasible normative regulation.

The elements of a fair procedure can be found in Article 6 of the European Convention on Human Rights that poses the minimum requirements of this guiding principle. It can be seen from these minimum requirements, that these basically are the other already accepted fundamental principles of criminal procedure law. However, it also has some other elements that are not really criminal procedural fundamental principles but they are acknowledged by several states as procedural maxims and they are also active requirements of the Hungarian legal system. So, e.g. the principle of a fair procedure is violated when the court hears a witness without a specific reason in a case that is not specified by law while the defendant and the defence are not present, since the court interferes with conducting the trial in accordance with principle of a fair procedure. The requirement for a fair procedure is not only rest with the courts but every other authority shall act accordingly, indeed even the penal institutions shall keep it in mind. So, e.g. another requirement is based on the principle of a fair procedure, namely the defence counsel shall be appointed ex officio and at the state's expense (in serious cases), if the defendant cannot pay for the defence counsel he chose. The defendant shall have the right to a fair and constitutional procedure during the procedure of execution, just like during the basic procedure. This right can arise for example when involuntary medical treatment is ordered since it should be justified to let the defendant have a defence counsel at the occasional supervision of the involuntary medical treatment.

The right to conduct the procedure within a reasonable time ("to speed up" the procedure adequately) can be traced back to the principle of a fair procedure. However, the extension of the reasonable time of the procedure only means in most of the legal systems that it constitutes a mitigating factor and the punishment, which is imposed as a result of the procedure, is reduced, and it means a (conditional or dispositive) procedural obstacle just in few cases. Therefore, e.g. Article 153 (2) of the German Code of Criminal Procedure (German Code of Criminal Procedure) says that the procedure can be terminated, if the requirement of a reasonable time is violated.

According to DÖRR, the principle of a fair procedure means nothing but the fact that an unexpected event, which is caused by the court, cannot surprise the defendant²⁴. The command of a fair procedure means a procedural protection of trust. In particular, trust is a characteristic element of equity²⁵. If the participant of the procedure accepts the reasoning of the court then the court cannot conflict with its former decision. It can be traced back to the principles of the procedure that the court is bound (trustily) by the reasoning of the former judgment. And if the protection of such trust is a characteristic of a fair procedure then we can declare that the principle of constitutionality includes the protection of trust in the same way. This also guarantees the trust concerning legislative bodies and the judiciary. Only the protection of the trust of the citizens, which is worth to be guaranteed, allows the prejudice of constitutional principles within certain limits since the soundness of the actions of the state is a very important aspect of a state founded on the rule of law. Such protection of trust was created by the prohibition of *reformatio in peius* in the criminal procedure: the defendant can trust that his legal status will not change to his detriment. This fact of trust, as a direction for the authorities, connects the defendant to punishment, which can be imposed the appellate courts, through legal remedies.

²² KRETSCHMER, Joachim: *Das strafprozessuale Verbot der reformatio in peius und die Maßregel der Besserung und Sicherung*. Berlin, 1999. p. 71.

²³ See: Decision No. BVerfGE 26, 66 (71) of the Federal Constitutional Court of Germany

²⁴ DÖRR, Dieter: *Faires Verfahren*. 1984. p. 153.

²⁵ GEPPERT, Klaus: *Zum „fair-trial-Prinzip“ nach Art. 6 Abs. 1 Satz 1 der Europäischen Menschenrechtskonvention*. JURA, 1992. p. 597.

A significant element of the requirement of a fair procedure is the equality of arms between on the one side, the prosecution and on the other side, the defendant and his counsel²⁶. The principle of equality of arms is valid concerning the principle of fair procedure, which says that both sides shall have the same (and adequate) opportunity to make comments during the court procedure and none of the sides can be favoured o the other²⁷. this did not gain importance the Anglo-Saxon procedural law, which is based on the debate of the two sides, but it shall also be enforced in the continental European criminal procedure that the principle of equality of arms must be included within the principle of a fair procedure. The prosecution and defence shall have the same possibilities to influence the criminal procedure, provided that any of them would have the advantage over the other. According to KRETSCHMER, the requirement of a fair procedure serves the protection of the defendant and guarantees the presumption of innocence – until sentencing - especially through the requirement of equality of arms²⁸.

The requirement of equality of arms does not necessitate the presence of the defence counsel during the procedure of substitute private prosecution (section 242 (1) d) of the Hungarian CPC) because the substitute private prosecutor is represented by a lawyer. However, it can be deduced from the constitutional requirement of a fair procedure that if legal representation is obligatory concerning to one “party” then the other “party” should have a legal representative as well (although this statement cannot be accepted since legal representation is not obligatory for the substitute private prosecutor, if the substitute private prosecutor is natural person having a higher examination in law). The principle of equality of arms does not require equalizing the differences, which are characteristic to the procedure, between the prosecution and defence²⁹. Due to the examples mentioned regarding the equality of arms it can be proved that the Defendant’s rights are properly protected by certain detailed regulations. The rights of other participants to the procedure do not have to be evened up similarly because of the principle of equality of arms. The command of equality of arms necessitates the similar treatment of prosecution and defence. Basically the equality of arms is nothing but the equal distribution of risks, and in constitutional law it is the manifestation of the requirement of equality. This raises the question whether the prohibition of reformatio in peius complies with the command of a fair procedure, furthermore, with the equal distribution of risks as concluded from the principle of equality of arms. If the answer is yes then the prohibition of reformatio in peius during a criminal procedure means that the principle of a fair procedure is expressed in an act of the Parliament.

According to SIEBERT, the prohibition shall help the one-sided assistance of the defendant in order to counterbalance the natural differences between positions and arms³⁰. Pursuant to his point of view, the prosecution – as a bearer of the state’s authority- should not be allowed to put institutional, personal and psychological pressure on the defendant during the preparation and course of the criminal procedure. If the prosecution files an appeal in the interest of substantial justice it still does not have the same risks as the defendant. Namely, if the appeal of the prosecution is successful then this does not result in the same psychological stress situation than the result of the appeal of defence concerning the defendant. So the prohibition of reformatio in peius has another function, to wit, it shows a way out for the defendant from a psychological dilemma and further the enforcement of equality of arms to a little extent.

The prosecution, which must independently take part in the enforcement of legal regulations as an institution of the state, is obliged to act in the interest of substantial justice. In the meanwhile, the prosecution is also bound by legality and objectivity. These obligations, however, do not burden the defence. If the prohibition of reformatio in peius did not exist, event the appeal that was filed by the defendant could ensure the fundamental principle of substantial justice (which is overridden by the prohibition of reformatio in peius concerning the principle of constitutionality). While the prosecution tries to realize the aims of substantial justice, the defendant (defence) is freer in making a decision since his only aim is to get a decision, which is more favourable and lighter for him during the appellate procedure. However, he does not have to bear the risk of a disadvantage. The prohibition of reformatio in peius suggest a psychological pressure on the side of the defendant since without

²⁶ TETTINGER, Peter J.: Fairneß und Waffengleichheit. 1984. p. 20.

²⁷ KOHLMANN, Günter: Waffengleichheit im Strafprozeß? In: Festschrift für Karl PETERS. 1974. p. 311.

²⁸ KRETSCHMER, Joachim: Das strafprozessuale Verbot der reformatio in peius und die Maßregel der Besserung und Sicherung. Berlin, 1999. p. 76.

²⁹ SCHNEIDER, Hartmut: Grundprobleme des Rechts der Akteneinsicht des Strafverteidigers. JURA, 1995. pp. 337-340.

³⁰ SEIBERT, Claus: Zum Verbot der Schlechterstellung (§§ 331, 358, 373 StPO). Monatsschrift für Deutsches Recht, 1954. p. 340.

such prohibition the defendant should fear that the sentence of the judgment of first instance will be increased, so the prohibition of *reformatio in peius* compensates the defendant's situation in respect to the prosecution, and serves the principle of equality of arms as a component of the requirement of a fair procedure. The prohibition of *reformatio in peius* guarantees for the defendant that no essential disadvantage will surprise him during the appellate procedure. This rule prevents the defendant to feel like he is imposed another punishment because he filed an appeal. Therefore, the prohibition of *reformatio in peius* is the expression of equality of arms – based on the principle of equity- during the criminal procedure.

MEYER-GOßNER even shows that if the court of second instance had possibility to intervene in the former judgment, then this would mean that the court of first instance, which is bound by the enforcement of the objective justness of substantial law, passed a wrong judgment. The results of such possibility, though, cannot be devolved upon the defendant³¹. He thinks that the prohibition of *reformatio in peius* forbids concluding consequences that are detrimental to the defendant from the legal mistake, which was made by the court, if an appeal was filed only in favour of the defendant. Notwithstanding, the classification of the prohibition of *reformatio in peius* as an element of fundamental principle of a state founded on the rule of law does not result in a situation where the law does not guarantee an order (in gradualness), which is originated in the several-levelled organisational system of courts. The law guarantees the protection of rights but not against the judge³². This brings up the question what if the gradualness of court is not a constitutional requirement, then the element of the prohibition of *reformatio in peius* that depends on this is not constitutionally grounded. If a procedural action makes a several-levelled legal way for someone, then it should also be constitutionally established. Otherwise it would be possible to not to obey constitutional elements from the beginning of the procedure of second instance.

Conclusion

Despite the counterarguments, the prohibition of *reformatio in peius* is in compliance with the real values of the Constitution due to the principle of constitutionality. The constitutional characteristic of the prohibition of *reformatio in peius* implies that it is against other constitutional fundamental principles and this shall be compensated. It can be laid down as the result of speculations that the criminal procedural provisions of the prohibition of *reformatio in peius* have a constitutional rank, and represent an element of the principle of constitutionality. The prohibition of *reformatio in peius* can be traced back to the basic concept that is laid down by the principle of a fair procedure. The prohibition of *reformatio in peius* is more than a favour that is given by the legislator to the defendant since it is limited by constitutional legislation and its probable restrictions can be measured especially by the fundamental principles of constitutional law. The extent and interpretation of the prohibition gain great importance when the prohibition of *reformatio in peius* is traced back to the principle of constitutionality.

It can be told that the dogmatic ground of the prohibition of *reformatio in peius* is found in the principle of a fair procedure. The legislator obeyed the guiding principle implied from the command of equity by issuing the prohibition of *reformatio in peius* in a criminal procedural provision. This command is only a principle of interpretation for procedural law.

³¹ MEYER-GOßNER, Lutz: Einstellung des Verfahrens und Verschlechterungsverbot. In: GÖSSEL, Karl Heinz – KAUFMANN, Hans (szerk.): Strafverfahren im Rechtsstaat. Festschrift für Theodor KLEINKNECHT. München, 1985. pp. 287-292.

³² HESSE, Konrad: Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland. Heidelberg, 1998. p. 337.