Observations on the *ne bis in idem* principle in light of the European Court of Human Rights' Judgment: *Milenković v. Serbia*

Goran P. Ilić *

Abstract

This paper dealt with problems of the ne bis in idem principle as one of the basic human rights in criminal proceedings. First, the author analyzed the practice of the European Court of Human Rights in correlation to the concepts of bis and idem. Special attention was devoted to different approaches taken in the interpretation of the concept of the identity of offence (idem), whereby the judgments of the Grand Chamber in the cases Sergey Zolotukhin v. Russia and A. and B. v. Norway were studied thoroughly. After that, the jurisprudence of the Serbian Supreme Court of Cassation and Constitutional Court was portrayed. Then ensued a critical analysis of the Milenković v. Serbia judgment. Based on it, the conclusion was drawn that the guarantees anticipated in Article 4 of the Protocol No. 7 and the states' obligations based on Article 2 and 3 of the European Convention on Human Rights (ECHR) must be considered as parts of a whole and interpreted so as to promote inner compliance between different provisions of the ECHR. The author deems that in the case Milenković v. Serbia apart from the in substance connection, existed a sufficient temporal connection. Namely, in the concrete case there was no res iudicata at the moment of raising the indictment, so the applicant was not in suspense that the criminal charge would be disputed in front of the competent court, while the length of the proceedings itself did not surpass the criteria of a reasonable duration. In the end, the author raised the question to what extent it will be possible to limit digressing from the criterion established in the case Zolotukhin on tax sanctions, especially if having in mind that the criterion adopted in the judgement A. and B. v. Norway was to a large extent discretionary, thus, appropriate to create further uncertainties in the area belonging to the „core" of human rights.

Keywords: *ne bis in idem, a criminal proceedings, the European Court of Human Rights, the European Convention on Human Rights, the Supreme Court of Cassation, the Constitutional Court.*

Introductory notes

The rule *ne bis in idem* dates from institutions of the Roman law, which discuss the legal validity and the ruled matter. *Orificius' senatus consultum* states that ruled affairs are considered effective *(quae iudicata... rata meneant)*, while one of Ulpian's maxims goes even beyond that, because it establishes that the ruled matter is found to be the

* Full-time Professor at the Faculty of Law, University of Belgrade, and a justice of the Constitutional Court, e-mail: *gilic@ius.bg.ac.rs.*

truth *(res iudicata pro veritate accipitur)*.[1] The maxim *not twice about the same*[2] in criminal matter represents the principle of the criminal procedural law, and is frequently raised to the level of basic human right in constitutional and provisions of international documents. *Ratio* of the *ne bis in idem* principle lies in the fact that it prevents the state to apply the *ius puniendi* on the defendant who was prosecuted in the same criminal case or who was sentenced. Apart from that, the principle is an expression of the public interest that the criminal proceedings should end with an effective judgement which is considered to be true (*res iudicata pro veritate habetur).* Given that the effective judgements as a rule cannot be contested by filing legal remedies, the *ne bis in idem* principle contributes to the legal certainty.[3]

When it comes to international documents on human rights which contain the *ne bis in idem* principle, the International Covenant on Civil and Political Rights[4] and the Protocol No. 7 (November 22, 1984) along with the European Convention for the Protection of Human Rights and Fundamental Freedoms[5] should be mentioned. Given that the detailed analysis of the *ne bis in idem* principle seeks answers to questions about the extent of the protection that could include the prohibition on re-trial or only the impossibility of re-punished, with the types of "final" decisions and their makers and the criterion by which the identity of the offences is established, that kind of approach would surpass the scope of this paper. That is why the analysis in the following lines will primarily be oriented towards the problems that relate to determination whether there is a identity of the offence.

1. Conditions for the *ne bis in idem* principle application

Two major questions, related to the concepts of *bis* and *idem,* must be answered when it comes to fulfilling conditions for the *ne bis in idem* principle application.

1.1. The concept of *bis*

The concept of *bis* as a condition for law application from Article 4, Paragraph 1 of the Protocol No. 7 refers to the type, the maker and quality of the decision with which

---

[1] G. P. Ilić, M. Majić, S. Beljanski, A. Trešnjev, *Komentar Zakonika o krivičnom postupku*, The eighth amended edition, Službeni glasnik, Beograd 2015, 78.

[2] The attitude of the Supreme Court of United States is that the *Double Jeopardy Clause* includes three separate constitutional guarantees: the protection against re-prosecution for the same crime after charges are dropped, the protection against re-prosecution for the same crime after receiving a sentence and the protection against receiving multiple sentences for the same crime. C. Byrne Hessic, F. Andrew Hessic, „Double Jeopardy as a Limit on Punishment", *Cornell Law Review* Vol. 97 1/2011, 49. However, in accordance to the doctrine of „the double sovereignty", the prohibition on the double punishment does not represent a hindrance for that same person to be on trial for the same offences in front of the federal and court of the federal unit. V. Bajović, „Načelo ne bis in idem", *Kaznena reakcija u Srbiji IV deo* (Ed. Đ. Ignjatović), Pravni fakultet Univerziteta u Beogradu, Beograd 2014, 240, 241.

[3] D. S. Rudstein, „Prosecution Appeals of Court-Ordered Midtrial Acquittals: Permissible Under the Double Jeopardy Clause?", *Catholic University Law Review* Vol. 62 1/2012, 103, 104; J. A. E. Vervaele, „Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?", *Utrecht Law Review*, nº 4/2013, 212.

[4] Ratification Law on the International Covenant on Civil and Political Rights, *Official Gazette of SFRJ*, nº 7/71.

[5] Ratification Law on the Convention for the Protection of Human Rights and Fundamental Freedoms with additional Protocols and Amendments – ECHR, *Official Gazette of SCG – International Contracts* nºs 9/03, 5/05 and 7/05-corr. and *Official Gazette of RS – International Contracts,* 12/ 10 and 10/15.

the proceedings ended. When it comes to the type of the decision, a release or a conviction are mentioned, which can be understood as an acquittal or an conviction judgment. Since it is about the meritorious decisions which resolve the criminal case, the withdrawing of the public prosecutor from the prosecution cannot be equal to them, hence there is no place for the application of Article 4, Paragraph 1 of the Protocol No. 7.[6] The question of how should one act in case the public prosecutor withdraws from the prosecution after the defendant fulfills all the obligations set by the prosecutor should also be asked.[7] Considering that it is a situation where there is no conviction, it is questionable whether the evaluation on a penal character of a certain measure or obligation would be enough to draw a conclusion about the impossibility of prosecution for the same offence.[8]

The acquittal or the conviction judgment must be „final", i.e. *res iudicata.* In the procedural doctrine the „finality" of court decisions is related to the possibility of filing the remedies, or more accurately for stating ordinary remedies. The trait of the „finality" of a judgment is gained when it cannot be refuted with a ordinary remedy or when no further ordinary remedies were available. Similar to that, it was cited in some explanations of certain provisions of the Protocol No. 7 that the „finality" of a judgment indicates that no further ordinary remedies are available-cannot refute it or when the parties have exhausted such remedies or have missed the deadline for their submission.[9]

1.2. The concept of *idem*

The next legal aspect from Article 4, Paragraph 1 of the Protocol No. 7 refers to the interpretation of the concept of the identity of offences (*idem*). The disorganization of

---

[6] *Smirnova and Smirnova v. Russia*, 46133/99 and 48183/99, 2. 10. 2002; *Harutyunyan v. Armenia*, 34334/04, 7. 12. 2006. Related to that, see the case *Marguš v. Croatia* (4455/10, 27. 5. 2014, §§ 120, 123, 126, 140, 141) in which the European Court of Human Rights considered the possibility of conducting a new criminal proceedings after a „final" judgment was reached and the indictment was rejected due to amnesty. J. Omejec, *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava strazburški acquis*, Novi informator d.o.o., Zagreb 2013, 1234.

[7] Unlike the European Court of Human Rights that did not give any statements on that matter, the Court of Justice of the European Union gave a positive answer to this question. One of the key arguments in the case *Gözütok and Brügge* (*Hüsein Gözütok and Klaus Brügge*, Judgement of the Court, 11 February 2003, Joint Cases C-187/01 and C-385/01, §§ 28-30) was that it is about the decision of a public authority which is according to provisions of the national law a part of the criminal law system. By making the mentioned decision, the public prosecutor meritoriously examined the circumstances of the concrete case, thus the *argumentum a contrario* withdrawal of the public prosecutor from the prosecution in which that examination is absent cannot be perceived as „an final ending to a proceedings" (*Filomeno Mario Miraglia*, Judgement of the Court, 10. March 2005, C-469/03, §§ 28-36). On the decisions of the Court of Justice of the European Union related to the *ne bis in idem* principle see Z. Burić, „Načelo ne bis in idem u europskom kaznenom pravu – pravni izvori i sudska praksa Europskog suda", *Zbornik Pravnog fakulteta u Zagrebu*, 3-4/2010, 824-842; T. Bravo, „Ne Bis In Idem as a Defence Right and Procedural Safeguard in the EU", *New Journal of European Criminal Law*, Vol. 2 4/2011, 398, 399.

[8] It is worth mentioning that in the cases *Gradinger* (*Gradinger v. Austria*, 15963/90, 23. 10. 1995, §§ 9, 55) and *Oliveira* (*Oliveira v. Switzerland*, 84/1997/868/1080, 30. 7. 1998, § 11) the European Court of Human Rights evaluated the fulfillment of conditions for the application of Article 4, Paragraph 1 of the Protocol No. 7 in light of the proceedings which ended with the decisions made by non-judicial bodies. In both cases the penal character of the sentenced sanction was a decisive condition for the application of Article 4, Paragraph 1 of the Protocol No. 7.

[9] Rapport explicatif au Protocole nº 7 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales, § 22.

the legal regulation, the extension of court decisions dispositive on the elements that are not included in the legal norm[10] and the autonomous character of the „criminal charge" concept in the jurisprudence of the European Court of Human Rights[11] are undoubtedly reasons that can lead towards the conclusion that a certain offence can simultaneously consist of characteristics typical of two identical or two different types of „criminal" offences.[12] That can have, for consequence, a parallel conduction of the proceedings in front of the same or different courts, as well as a later initiation of the proceedings for a „criminal" offence that „matches" with the previously finally judged offence. Although certain authors when considering the concept of *idem* take into account the existence of the identity of the protected property, the perpetrator and the victim of the „criminal" offence,[13] the key issue that should be addressed is whether the identity of the offence should be evaluated with the help of factual or legal criteria.

The jurisprudence of the European Court of Human Rights so far testifies that there has been some wandering related to the evaluation whether it is the same offence. First, in the *Gradinger*[14] case the emphasis is put on the „same behavior" *(idem factum)* no matter how it was legally qualified in the national law. A change in the attitude occurred in the *Oliveira*[15] case, and the new approach consisted of the apprehension that one punishable behavior can include two different „criminal offences. So as to justify the new point of view from which the existence of the identity of a offence would be analyzed, the European Court of Human Rights pointed out that in the *Gradiner* case*,* unlike in the *Oliveira* case*,* the degree of alcohol abuse of the applicant was judged in a contradictory manner by the two different jurisdictions.

Despite the shifted point of view, it remained unclear which criteria helped to determine whether one punishable behavior contains two or more „criminal" offences. That is why the European Court of Human Rights in the case *Franc Fischer v. Austria*,[16] after bringing to mind that Article 4 of the Protocol No. 7 does not exclude the possibility of multiple prosecutions in case of when same conduct constitute several offences *(concours idéal d'infractions),* highlighted that it was necessary to consider „essential elements" of the offence so as to determine whether the *ne bis in idem* principle was violated. The criterion on „essential elements" is basically the evaluation whether the two offences matches in the essential factual elements. Considering the uneven treatment of the European Court of Human Rights in cases that ensued with the problems of the „same offence",[17] there was a legal uncertainty that was incompatible with the basic right in Article 4, Paragraph 1 of the Protocol No. 7.

---

[10] E. Ivičević Karas, D. Kos, „Primjena načela ne bis in idem u hrvatskom kaznenom postupku", *Hrvatski ljetopis za kazneno pravo i praksu* 2/2012, 559, 560.

[11] About the meaning of the „criminal charge" concept see David Harris (*et al.*), *Law of the European Convention on Human Rights*, Second edition, Oxford University Press, Oxford 2009, 205-210.

[12] In this paper the notion of „criminal" offence is used in accordance with the autonomous meaning which has in jurisprudence of European Court of Human Rights.

[13] S. Trechsel (*With the assistance of* S. J. Summers), *Human Rights in Criminal Proceedings*, Academy of European Law European University Institute, Oxford University Press, Oxford 2005, 391-394.

[14] *Gradinger v. Austria*, §§ 54, 55.

[15] *Oliveira v. Switzerland*, §§ 26-29.

[16] *Franc Fischer v. Austria*, 37950/97, 29. 5. 2001, § 29.

[17] At hand are, among others, cases: *Göktan v. France*, 33402/96, 2. 7. 2002, *Hauser-Sporn v. Austria*, 37301/03, 7. 12. 2006, *Schutte v. Austria*, 18015/03, 26. 7. 2007 and *Garretta v. France*, 2529/04, 4. 3. 2008.

Due to that, the European Court of Human Rights tried to secure an even interpretation of the „same offence" concept, and the opportunity for that came along with the case *Sergey Zolotukhin v. Russia*.[18] Since the approach which underlines the legal qualification of the offence was too restricted for the rights of an individual, the Court took a stand that Article 4 of the Protocol No. 7 must be understood as a prohibition on prosecution or trial to one person for the second offence to the extent that it arises from *identical facts* or *facts which are substantially the same.* The examination must be directed towards facts that make up a set of concrete situational circumstances that refer to the same defendant and inextricably linked together in time and space, and whose existence must be determined in order to secure a conviction or institute criminal proceedings. The new approach basically corresponds to the manner in which the Court of Justice of the European Union interprets the concept of *idem* in Article 54 of the Schengen Agreement.[19] Namely, the same facts implies the identity of the material acts, understood as a part of the existence of the set of concrete (facts) that are inextricably linked together in time, space and content.[20]

It was mentioned that the violation of the *ne bis in idem* principle occurs not only due to the overlapping of legal classification of different types of „criminal" offences, but also because the factual description of the offence in a „final" decision is fraught with facts unimportant for its existence. A problem appears if the mentioned facts represent a being of a severe „criminal" offence, because the *res iudicata* for a minor „criminal" offence can be a prohibition against double jeopardy (*et vice versa*). This situation is especially problematic in case of a concurrently conduction of an administrative and criminal proceedings against the defendant, because an administrative proceedings is usually completed swiftly, which can affects the possibility for a criminal prosecution.

A typical example of it is the *Maresti*[21] case in which the applicant was firstly found guilty in the administrative proceedings for disturbing public order and peace, and then convicted in a criminal proceedings for a crime of aggravated assault, because while he was under the influence of alcohol he insulted the victim and inflicted severe bodily injuries to his head and body. Although the legal description of the administrative offence for which he was convicted did not mention aggravated assault, the Court of administrative offence determined the defendant guilty for aggravated assault as well. Given that the conviction for aggravated assault ensued in the criminal proceedings as well, the European Court of Human Rights came to a administrative and criminal conviction referred to the same offence and that Article 4 of the Protocol No. 7 was violated.

Given that in the *Zolotukhine* judgment those cases of procedures, connected in such a way so that they make a whole, were not reviewed, the European Court of Human Rights addressed this issue in the case *A. and B. v. Norway*.[22] When considering the fulfillment of conditions for Article 4 of the Protocol No. 7 application it is necessary to examine whether the dual proceedings in question have been *sufficiently closely*

---

[18] *Sergey Zolotukhin v. Russia*, 14939/03, 10. 2. 2009, §§ 81, 82, 84.

[19] European Union, *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders („Schengen Implementation Agreement")*, 19 June 1990.

[20] *Leopold Henri Van Esbroeck*, Judgement of the Court, 9 March 2006, C-436/04, §§ 36, 38.

[21] *Maresti v. Croatia*, 55759/07, 25. 6. 2009, §§ 63, 64, 68, 69.

[22] *A. and B. v. Norway*, 24130/11 and 29758/11, 15. 11. 2016, §§ 111, 130.

connected in substance and in time. In other words, it is necessary to show that they have been combined in an integrated manner so as to form a coherent whole. This implies not only that the purposes pursued and the means used to achieve it should in essence be complementary and linked in time, but also that the possible consequences of organizing the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the injured persons.

2. Serbian jurisprudence

Although, not until recently, the Republic of Serbia did not find itself under „attack" by the ECHR due to the violation of rights in Article 4, Paragraph 1 of the Protocol No. 7, the point of view of Strasbourg's Court on this matter is present in the domestic jurisprudence. Before some of the more important decisions dealing with these problems are portrayed, it should be highlighted that through a provision of Article 34, Paragraph 4 of the Constitution[23] a wider range of the *ne bis in idem* principle was guaranteed, because it includes, apart from the acquittal or the finally conviction judgment, those cases which are impossible to be conducted due to the existence of permanent procedural obstacles. It was in this sense prescribed that no person can be prosecuted or punished for a criminal offence for which he was either acquittal or convicted by final judgment or for which the charge was finally rejected or the procedure finally dismissed. Besides, it was underscored that the same prohibition is subjected to the conduction of a procedure for a different „criminal" offence.

2.1. The Jurisprudence of the Supreme Court of Cassation

It should be highlighted, to begin with, that the case in which the Supreme Court of Cassation established that the conditions for dismissing the administrative procedure were not fulfilled after the public prosecutor for the same event dropped the criminal offence report upon the suspect's accepting and completing a certain obligation.[24] It is the case in which the person in state of total alcohol abuse drove a vehicle through traffic. Thus, it was the groundwork for initiating the administrative proceedings and simultaneously submission of criminal offence report to the public prosecutor. Since the public prosecutor rejected the criminal offence report because the suspect completed the obligations laid down by the agreement on the delay of prosecuting, the Higher Court of administrative offences changed the first-instance conviction judgment for a traffic administrative offence and dismissed the procedure upon reminding that not even the injured person has rights to take on himself the prosecution of the person who completed the obligations. The key argument was that the re-prosecution of the same person for the same offence would, in some other „penal procedure", violate the right to a citizen's legal certainty as an integral part of the right to a fair trial guaranteed by the Constitution, through provisions on human and minority rights, which are directly applied. The Supreme Court of Cassation did not accept the exposed interpretation. It explained its standpoint through the argument that in case the criminal offence report are dropped the criminal proceedings has not even been initiated, nor has the defendant been finally convicted in the criminal proceedings for the offence that has the marks of a administrative offence. If the decisions of the Higher Court of administrative offences

[23] The Constitution of the Republic of Serbia – Constitution, *Official Gazette of RS* no 98/06.
[24] The Supreme Court of Cassation, Przz. br. 12/12, 23. 11. 2012.

and the Supreme Court of Cassation are considered in the light of the problems *ne bis in idem* so far, it can be said that the first judgement reflects the core meaning of the prohibition of double jeopardy.[25]

In the next case,[26] the Supreme Court of Cassation highlighted that, even though in a both administrative and criminal proceedings the defendant is the same and the life event took place within the same temporal and spatial frame, factual descriptions of „criminal" offences are crucially distinguished. Namely, the factual description of the administrative offence does not contain all facts and actions of the defendant related to inflicting light bodily injuries to the injured person's head and right arm, and does not include the event that ensued after the initial conflict, described as the administrative offence. With the nature of the defendant's committed actions in mind that are not mentioned in administrative offence judgment and the severity of unknown consequences at the time of the administrative procedure initiation, which were revealed after the expertise and examination of the injured person, the Supreme Court of Cassation decided that the description of administrative offence, related to the procedure which was finally dismissed, did not refer to an identical event and completely same facts and actions of the defendant. It did not refer to the consequence of inflicting severe bodily injuries, as well, which is generally a mark of an offence that was the subject of the charge in a criminal procedure.

2.2. The Jurisprudence of the Constitutional Court

The Constitutional Court dealt with the question of the *ne bis in idem* principle application as well, thereby setting the measures with which it could be determined whether it is the same offence.[27] After reminding that a clear line between criminal and administrative offences in our legislation does not exist, the Constitutional Court underlined that that does not mean that the *res iudicata* in the administrative procedure, when it is the same event, always represents an obstacle to prosecute the offender for the criminal offence as well. The gist of the criminal protection, and above all the life and body integrity protection, is questioned when the Court of administrative offences in judgment dispositive unnecessarily broadens the factual description of the administrative offence so that it includes the factual substrate of a criminal offence. In that type of a case the prohibition *ne bis in idem* is activated. When it is absent, this principle does not have to be applied, because one socially unacceptable behavior can simultaneously jeopardize various protected properties and realize characteristics of two or more „criminal" offences that can be under the competence of the same or different prosecution authorities of the same state.

This question is especially important for those cases in which the consequences of a too broad interpretation of the *ne bis in idem* principle would be harmful to the protection of basic social values and could violate the predominant obligations of any state. Those are, above all, the victim's right to have their life protected and the right to the inviolability of the physical and mental integrity from Articles 2 and 3 of the ECHR. The Constitutional Court's attitude is that when applying the *ne bis in idem* principle, with the aim of protecting the predominant interest, it is necessary to bear in mind basic

[25] This understanding was also accepted in the doctrine of I. Vuković, *Prekršajno pravo*, Pravni fakultet Univerziteta u Beogradu, Dosije studio, Beograd 2015, 146.

[26] The sentence was passed in a session of the Criminal Department of the Supreme Court of Cassation, 23. 12. 2013.

[27] The Constitutional Court, Už-1285/12, 26. 3. 2014.

and corrective criteria. The basic criteria implies: 1) that both procedures, conducted against the person making the constitutional appeal, were related to a „criminal" offence, i.e. that the first penalty was in its nature a criminal one; 2) that the offences, for which the applicant was prosecuted, were the same *(idem);* 3) that there was a duplication of proceedings *(bis).* Apart from these, additional so called corrective criteria should be considered in each concrete case: a) the identity of the protected property and the gravity of the consequence of the offence, and b) the identity of the sanction.

By applying the abovementioned corrective criteria, the Constitutional Court took the stand that the right to legal certainty was in criminal law not violated when for the same life event a warning was issued in the administrative procedure, while in the criminal proceedings it got a conditional sentence.[28] Besides, in the dispositive of the administrative offence decision, what was marked was the official position done by the injured person in the crucial moment, however, it was not specially highlighted that that position gave him the characteristics of the public official person. Since in the dispositive of the administrative offence decision the description of the administrative offence was not broadened to the characteristics of the injured person as a public official, it ensued that the substrate of a criminal offence was not included in that decision. Thus, there was neither the identity of protected property nor the gravity of those consequences. Apart from that, the attitude of the Constitutional Court is that there is not even a identity in the sanctions. A warning in the administrative procedure has also a preventive and an „executive" character, and it is the mix of a „penalty" in the material sense and a measure that serves the purpose to execute „penalty". However, a conditional sentence can possess, apart from a preventive character, a repressive character as well.

The case[29] in which the constitutional appeal referred to one life event was also interesting. Within it, it was possible to make a clear distinction between two different „criminal" offences – a traffic administrative offence and the criminal offence of endangering of public transport. While the administrative procedure was conducted against the person making the constitutional appeal due to them driving vehicle under the influence of alcohol, a charge was disputed in the criminal proceedings, because the defendant as the participant in the traffic endangered the victim's body and inflicted light bodily injuries. Hence, it was about „criminal" offences that were not determined on identical facts or facts which are substantially the same, and were besides that different to the protected property and consequence. On the basis of that, the Constitutional Court determined that a criminal offence of endangering of public transport, in the concrete case, was not consumed by the mentioned administrative offence, thus making the offences due to which the person making the constitutional appeals was twice found guilty, not the same.

3. The *Milenković v. Serbia Case*

In the *Milenković v. Serbia*[30] case, the applicant hit and hurt the injured who cursed his children, more than once, so he was ordered to pay a fine in the amount of 4000 dinars in the administrative procedure since he disturbed public order with violence.[31]

[28] The Constitutional Court, Už-1207/11, 12. 6. 2014.
[29] The Constitutional Court, Už-6835/2012, 12. 11. 2014.
[30] *Milenković v. Serbia*, 50124/13, 1. 3. 2016.
[31] The Municipal authority for administrative offences of Leskovac, Up. 7444/06-7, 6. 11. 2007.

A criminal charge was raised against him for the same event. Within it, he was found guilty on the grounds of aggravated assault and was sentenced to three months in prison.[32] The Appellate Court of Niš dismissed his appeal as ill-founded[33] and the Constitutional Court dismissed the constitutional appeal as clearly ill-founded.[34] The main argument of the Constitutional Court was that the description of the administrative offence from Article 6, Paragraph 3 of the Public Order Act[35] did not identical as the description of the criminal offence of aggravated assault execution from Article 121, Paragraph 2 of the Criminal Code[36] contained in the dispositive of judgment, thus the fact that the person making the constitutional appeal was sentenced two times for the same „criminal" offence cannot be discussed.

In the dispositive of decision of the administrative offence authority states that the defendant Milenković was responsible for the administrative offence of disturbing public order from Article 6, Paragraph 3 of the POA by having hit the first defendant, several times, by fist to his head and having hurt him after the other one cursed his children.[37] On the other hand, in the dispositive of the first-instance criminal judgment it was stated that the defendant Milenković endangered the victim and his life through the aggravated assault. He could have understood the importance of his offence and he could have managed his own behavior, in such a way that he hit the victim in the left side of his face. Due to that, the victim fell to the ground, with his back facing it. The defendant kept hitting him in the face and head, inflicting heavy bodily injuries that threatened his life: a hematoma in the part of both of his eyelids, a hematoma on the left conjunctiva, abrasions on the nose, crushed head and body parts and blood coagulations under the hard meninges on the left side of the head, forming in the medium rate. So although he was aware of his offence, he carried it out. He was aware that it was forbidden, and thus committed a criminal offence of aggravated assault from Article 121, Paragraph 2 of the CC.[38]

In a judgment that established that Article 4 of Protocol No. 7 was violated in a concrete case, the European Court of Human Rights determined, in the first place, along with the „Engel criteria" that the administrative offence against public order can be subjected under the notion of „criminal charge", leaving enough room to determine whether the *ne bis in idem* principle was violated.[39] After that, it considered the issue whether the same offence can be mentioned in relation to the principles stated in the *Zolotukhin* case, *i.e.* whether are the identical facts or facts which are substantially the

[32] The Basic Court of Leskovac, K. 101/10, 13. 4. 2011.

[33] The Appellation Court of Niš, Kž.1. 2313/11, 20. 3. 2012.

[34] The Constitutional Court, Už-4267/2012, 20. 5. 2103.

[35] The Public Order Act – POA, *Official Gazette of RS* nos 51/92, 53/93, 67/93, 48/94, 85/05 and 101/0.

[36] The Criminal Code – CC, *Official Gazette of RS* nos 85/05, 88/05 – modification, 107/05 – modification, 72/09, 111/09, 121/12 and 104/13.

[37] In Article 6, Paragraph 3 of the POA, it was stated that whoever insults or abuses another person, bullies someone else, causes a fight or participates in one, jeopardizes citizens' peace or disturbs public order – will be charged with a 30,000 dinars fine or with a jail sentence in the duration of 60 days.

[38] By the provision of Article 121, Paragraph 2 of the CC it is stated that whoever injures another person or disturbs their health so much that they are in a life-threatening situation or ruined or permanently and significantly damaged or if an important part of their body or vital organs are damaged or if they are permanently incapable of work or their health is permanently and seriously damaged or deformed, will be sentenced to prison in the duration of one to eight years.

[39] *Milenković v. Serbia*, §§ 33-37.

same and whether those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space.[40]

The European Court of Human Rights did not accept the attitude of the Serbian representatives that provisions of Article 6, Paragraph 3 of the POA do not include aggravated assault, while this element is of key importance to the existence of the criminal act of aggravated assault from Article 121, Paragraph 2 of the CC. In the concrete case it was crucial that in the decision of the administrative offence was clearly state that the applicant was guilty, *inter alia*, for hitting and hurting the injured, so that *the physical attack*, no matter the legal qualification of the offence, represents one of the administrative offence elements.[41] Since after the final decision for the administrative offence the applicant was found guilty in the criminal proceedings for the offence related to the same behavior for which he was punished in the administrative procedure, and the facts were substantially the same, the European Court of Human Rights established that Article 4 of the Protocol No. 7 was violated.[42]

First of all, it should be noted that the European Court of Human Rights did not accept the allegations that Article 6, Paragraph 3 of the POA did not prescribed the aggravated assault. It put in the front the dispositive of the administrative offence decision by which the applicant was found guilty for disturbing public order, referring thereby towards the stand it took in the *Maresti*[43] case. One of the shortcomings of this approach was that Article 6 of the Croatian AAOAPO [44] connects the existence of an administrative offence with especially insolent and rude behavior in public that insults citizens or disturbs their peace, so, it *does not prescribe aggravated assault.* Contrary to that, the provision of Article 6, Paragraph 3 of the POA has a broader scope. Disturbing citizens' peace or disturbing public order is, among other matters, connected to *exercising violent behavior towards* another person. In the Serbian doctrine and in domestic jurisprudence under the notion of exercising violent behavior towards another person it is implied to use physical force to hurt the body of the other person, to deprive the other person of the freedom to move freely or to freely make decisions about their actions.[45] Because of that the statement given by the Serbian representative does not exist, yet the European Court of Human Rights taciturnly accepted that Article 6, Paragraph 3 of the POA does not have any common points with aggravated assault. Therefore, the tables have turned in this situation, because the administrative authority in the decision by which the applicant was found guilty for disturbing public order by hitting the injured party in the head and by hurting him as was described along the lines of the framework of the provision of Article 6, Paragraph 3 of the POA.

This treatment of the administrative authority does not have to mean that the *ne bis in idem* principle violation was absent, because descriptions of certain administrative offences can completely coincide with the legal description of a criminal offence. That is how endangering another person's security with a life threat or a threat to hurt him or someone close to him would present an administrative offence against public order

---

[40] *Sergey Zolotukhin v. Russia*, §§ 82, 84.

[41] *Milenković v. Serbia*, §§ 41, 42.

[42] *Ibid*., §§ 48, 49.

[43] *Maresti v. Croatia*, § 63.

[44] Act on adminstrative offences against public order – AAOAPO, *National Paper* nos 5/90, 47/90 and 29/94.

[45] Z. Stojanović, N. Delić, *Krivično pravo Posebni deo*, Pravni fakultet Univerziteta u Beoradu, Pravna knjiga, Beograd 2013, 297.

according to Article 6, Paragraph 2 of the POA. Identical legal description relates to the criminal offence of jeopardizing security from Article 138, Paragraph 1 of the CC.[46] Therefore, in this case it is about the *identical* facts. Situations from which the conclusion is drawn on the (non)existence of facts which are substantially the same represent a far more serious problem, since the *criterion of substantiallity* is to a large degree vague. Connecting those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space [47] is not of much value when determining whether it is dealing with *in concreto* substantially the same facts. In truth, the Grand Chamber of the European Court of Human Rights followed mentioned measures in the *Zolotukhin*[48] case. However, it should not be discarded that in the concrete case a factual coincidence was examined between the administrative offence against public order and criminal offence against public order. Therefore, „criminal" offences that have the identical protected property. Considering that *the only difference* between „criminal" offences was *the violent threat oriented towards the police officer*, which represented an element of a criminal offence, but not of an administrative offence, a conclusion was drawn on the existence of facts that are substantially the same.

Problems of „substantially same facts" are complicated slightly in cases where there is no coinciding of „criminal" offences' protected properties. The case *Milenković* is the right example of that. Within it, a factual coincidence between an administrative offence against public order and a criminal offence, whose protected property is the life and body of a human being, were compared. Unlike the *Zolotukhin* case in which the emphasis was put on the *insufficiency of one element* to make the base for two „criminal" offences with the same protected property substantially different, in the *Milenković* case *the existence of one element* – the physical assault, was *enough* to draw the conclusion on the substantially factual identity of two „criminal" offences that have *different* protected properties. In other words, hitting and hurting the injured party whose fate was determined in the administrative offence decision is basically equal to committing an aggravated assault due to which the victim's life is threatened, which was established in the criminal proceedings.

The showcased approach could be accepted if a charge was raised against the defendant during the administrative procedure or after the conviction for administrative offence from Article 6, Paragraph 3 of the POA, because of the criminal offence of violent behavior from Article 344, Paragraph 1 of the CC.[49] It is in that sense that participating in a fight mentioned by the provision from Article 6, Paragraph 1 of the POA, or insolent or rude behavior as an alternative action to a criminal offence from Article 344, Paragraph 1 of the CC, could be judged as the difference that does not question the substantially factual identity of two „criminal" offences. However, the practice which

---

[46] Whoever jeopardizes the security of any person by a life threat directed to them or to a person close to them, will be sentenced to prison in the duration of one year (Article 138, Paragraph 1 of the CC).

[47] *Sergey Zolotukhin v. Russia*, § 84.

[48] *Ibid*., § 97.

[49] The basic form of the criminal offence of violent behavior is committed by someone who jeopardizes another citizen's peace or significantly disturbs public order in a more serious manner through insolently insulting or molesting another person, through executing violent behavior on another person, or through causing a fight or through insolent or rude behavior (Article 344, Paragraph 1 of the CC).

emerges on the threshold of understanding the substantially same facts expressed in the *Zolotukhin* case leads towards a direction for which an excuse cannot be always found.

That is especially expressed in cases in which the question of protecting the „core" of human rights emerges. Included among those rights, among all else, are the Right to Life (Article 2 of the ECHR) and the Prohibition of Torture (Article 3 of the ECHR) and the *Ne bis in idem* principle (Article 4 of the Protocol No. 7).[50] That is justified with the fact that in the area of certain rights' application same circumstances must have same consequences regardless of the existence of special circumstances in a certain state.[51] Lately, it is noticeable that the Strasbourg jurisprudence is headed towards the direction of accepting the margins of appreciation even in regards to the Right to life and the Prohibition of Torture, especially when the European Court comes to a decision that there was a positive obligation of the state.[52] Under this notion, the liability of the state to create suitable conditions for effective execution of guaranteed human rights is implied. Provided that here, above all, it is referred to securing and respecting the Right to Life (Article 2 of the ECHP), the Prohibition of Torture (Article 3 of the ECHP) and the Right to respect for private and family life (Article 8 of the ECHP).[53]

That is why the Grand Chamber of the European Court of Human Rights tried to justify the digression from the *ne bis in idem* prohibition in the judgment *A. and B. v. Norway* along with the criterion of *sufficiently closely connection in substance and in time*. However, it seems that this time as well no gratifying answer was given. Namely, in the mentioned judgment the attitude that the existence of a sufficiently close connection assumes, among other matters, that different proceedings are directed towards complementary aims and that they *in concreto* refer to different aspects of socially harmful behavior. Thereby, it is extremely significant that imposed sanctions in an administrative procedure do not represent a part of „the core of criminal law", because then there would be the risk of repetition (*bis*) in different actions instead of completion of the punishment for the forbidden behavior.[54]

However, it is debatable whether it is possible to evaluate if it is the case of repetition or completion of punishment in different procedures, solely based on the imposed sanction. Namely, in the *Milenković* case, the sanction imposed in a administrative procedure with the aim of protecting public order, while in the criminal proceedings protected properties were the life and human body. Essentially, this is about the *concurrence of „criminal" offences*, administrative offence of public order violations, on one hand, and the criminal offence of aggravated assault, on the other. The distinctness of the mentioned situation is reflected in the fact that the decision on two „criminal" offences, which were substantially the same, conducted before two

---

[50] Apart from these, untouchable rights that are applied on everyone, in all circumstances and places, which cannot be subjected to limitations or derogation, there are also conditioned rights, which enjoy relative protection, and indirect rights that can be highlighted only in the correlation to some other rights. More on that:

F. Sudre, *La dimension internationale et européenne des libertés et droits fondamentaux*, *in*: R. Cabrillac, M.-A. Frison-Roche, Th. Revet (sous la direction de), Libertés et droits fondamentaux, 9e édition revue et augmentée, Dalloz, Paris, 2003, 38, 39, 40.

[51] F. Tulkens, L. Donnay, „L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme Paravent juridique superflu ou mécanisme indispensable par nature?", *Revue de science criminelle et de droit pénal comparé* 1/2006, 11.

[52] *Ibid.*, 12.

[53] S. Trechsel, 37.

[54] *A. and B. v. Norway*, §§ 132, 133.

competent public authorities, was being made in two separate proceedings. Had it been the case of criminal offences, i.e. had the other person got a heavy bodily injury due to the aggravated assault, the unanimous attitude of the jurisprudence and doctrine would be that the *concurrence of criminal offences* exists.[55] It can be said, for this approach, that it is synchronized with the attitude of the European Court of Human Rights expressed in the *Marguš*[56] case that the guarantees predicted in Article 4 of the Protocol No. 7 and the states' obligations based on Article 2 and 3 of the ECHP must be considered as parts of a coherent whole and interpreted so as to promote inner compliance between different provisions of the European Convention.

The *Milenković v. Serbia* judgment can be questioned in light of the attitude expressed in the *A. and B. v. Norway*[57] case that a sufficiently closely temporal connection between different procedures must exist. In the *Milenković* case the administrative procedure was initiated on October 27th 2006. It was finally over when the deadline for making the appeal against the first-instance decision passed, by which the applicant was pronounced responsible from November 6th 2007. On the other hand, the indictment was raised in the criminal proceedings against the applicant on April 4th 2007 and the conviction judgment became final on March 20th 2012. Given that the criminal proceedings was in the phase of disputing the foundation of the indictment at the moment when the administrative procedure was finally over, it can be said that the two penal procedures had a sufficiently closely temporal connection. In this concrete case there was no *res iudicata* in the moment of raising the indictment, so the applicant was not in suspense that the criminal charge would be disputed in front of the competent court, while the length of the proceedings itself did not surpass the criteria of a reasonable duration.

Concluding notes

Despite the newest attitudes of the European Court of Human Rights expressed in the judgment *A. and B. v Norway*, the scope of provision application from Article 1 of the Protocol No. 7 remains to large extent debatable. That the matter at hand is the one in which it is difficult to find a common denominator, testifies the fact that the Protocol No. 7, which introduced the *ne bis in idem* principle to the European system of human rights protection, was adopted in 1984 and came into force in 1988. Besides, Germany, Netherlands, United Kingdom, and Turkey did not ratify the Protocol No. 7. Germany, same as Austria, France, Italy and Portugal (who ratified the aforementioned Protocol), gave reserved or interpretative statements in which they specified that the word „criminal" is to be interpreted according to the meaning given to it within the national law.

The main question presented in practice to the European Court of Human Rights so far, referred to the identity of offences and the criterion by which they were judged – through legal or factual criteria. Although the *Sergey Zolotukhin v. Russia* judgment expresses the attitude that Article 4 of the Protocol No. 7 must be understood as a prohibition on prosecuting or holding a trial to the same person for another „offence" to

[55] The District Court of Belgrade, Kž. 3003/95; 194/05, *in*: Z. Stojanović, N. Delić, 299.

[56] *Marguš v. Croatia*, 4455/10, 27. 5. 2014, § 128.

[57] This request is justified with the argument that the person on trial is protected from being exposed to uncertainty and delay and from proceedings becoming protracted over time. *A. and B. v. Norway*, § 134.

the extent where it stems from identical facts or facts which are substantially the same, the application of the *ne bis in idem* principle still causes certain doubts. Considering that the aforementioned judgment did not answer the question of concurrently conduction of penal proceedings, the Grand Chamber of the European Court of Human Rights reached a judgment *A. and B. v. Norway* towards the end of the last year. On that occasion, an attempt was made to keep the approach expressed in the *Zolotukhin* case, but also to allow digressions from it by using the criterion of sufficiently closely connected in substance and in time. Having in mind the cases that changed the attitude of the European Court of Human Rights, it can be said that the financial interests of the Member States of the Council of Europe, and the European Union as well, expressed in the possibility of imposing sanctions in terms of raising the tax rate in case of unreported taxable income, had a decisive significance. However, the question is to what extent will it be able to limit the digression from the criterion established in the *Zolotukhin* case to tax sanctions. Especially if we bear in mind that the criterion adopted in the *A. and B. v. Norway* judgment is to a large degree discrete and thus appropriate for creating additional uncertainty in the field that is considered to be „the core" of human rights.[58] Some of the open questions related to the application of the *ne bis in idem* principle were underlined in this paper.

[58] On that note, as one of the solutions in the part of the doctrine is proposed: a test *„Blockburger"*. The Supreme Court of USA applies it when evaluating whether coinciding acts are at hand (*Blockburger v. United States*, 284 U.S. 299 (1932)). It is a rule used when the same act represents a violation of two different legal provisions and it ought to be used to establish whether each provision requires the carrying out of evidence on the additional fact that the other provision does not require, when judging whether two or only one offence was committed if S. Trechsel, 398, 399; B. M. Zupančič, „Ne bis in idem (zabrana ponovnog suđenja za isto delo) la belle dame sans mersi", *Crimen* 2/2011, 175, 176.