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“ARCHIBALD REISS DAYS”

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PREFACE

Dear readers,

In front of you is the Thematic Collection of Papers presented at the International Scientific Conference "Archibald Reiss Days", which was organized by the Academy of Criminalistic and Police Studies in Belgrade, in cooperation with the Ministry of Interior and the Ministry of Education, Science and Technological Development of the Republic of Serbia, School of Criminal Justice, Michigan State University in USA, School of Criminal Justice University of Laussane in Switzerland, National Police Academy in Spain, Police Academy Szczytno in Poland, National Police University of China, Lviv State University of Internal Affairs, Volgograd Academy of the Russian Internal Affairs Ministry, Faculty of Security in Skopje, Faculty of Criminal Justice and Security in Ljubljana, Police Academy "Alexandru Ioan Cuza" in Bucharest, Academy of Police Force in Bratislava, Faculty of Security Science University of Banja Luka, Faculty for Criminal Justice, Criminology and Security Studies University of Sarajevo, Faculty of Law in Montenegro, Police Academy in Montenegro and held at the Academy of Criminalistic and Police Studies, on 7, 8 and 9 November 2017.

The International Scientific Conference "Archibald Reiss Days" is organized for the seventh time in a row, in memory of the founder and director of the first modern higher police school in Serbia, Rodolphe Archibald Reiss, after whom the Conference was named. The Thematic Collection of Papers contains 131 papers written by eminent scholars in the field of law, security, criminalistics, police studies, forensics, informatics, as well as by members of national security system participating in education of the police, army and other security services from Belarus, Bosnia and Herzegovina, Bulgaria, Bangladesh, Abu Dhabi, Greece, Hungary, Macedonia, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Czech Republic, Switzerland, Turkey, Ukraine, Italy, Australia and United Kingdom. Each paper has been double-blind peer reviewed by two reviewers, international experts competent for the field to which the paper is related, and the Thematic Conference Proceedings in whole has been reviewed by five competent international reviewers.

The papers published in the Thematic Collection of Papers provide us with the analysis of the criminalistic and criminal justice aspects in solving and proving of criminal offences, police organization, contemporary security studies, social, economic and political flows of crime, forensic linguistics, cybercrime, and forensic engineering. The Collection of Papers represents a significant contribution to the existing fund of scientific and expert knowledge in the field of criminalistic, security, penal and legal theory and practice. Publication of this Collection contributes to improving of mutual cooperation between educational, scientific and expert institutions at national, regional and international level.

The Thematic Collection of Papers "Archibald Reiss Days", according to the Rules of procedure and way of evaluation and quantitative expression of scientific results of researchers, passed by the National Council for Scientific and Technological Development of the Republic of Serbia, as scientific publication, meets the criteria for obtaining the status of thematic collection of papers of international importance.

Finally, we wish to extend our gratitude to all the authors and participants in the Conference, as well as to all those who contributed to or supported the Conference and publishing of this Collection, especially to the Ministry of Interior and the Ministry of Education, Science and Technological Development of the Republic of Serbia.

Belgrade, October 2017 *Programme and Organizing Committees*

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NE BIS IN IDEM PRINCIPLE IN THE PRACTICE OF THE CONSTITUTIONAL COURT OF SERBIA[1]

Professor Dragana Kolarić, PhD
Judge of the Constitutional Court of Serbia

Assistant Professor Saša Marković, PhD
Academy of Criminalistic and Police Studies

Abstract: The European Court of Human Rights disregards the authenticity of those legal systems which protect various values with various categories of criminal offences. This sets new tasks to our legislator regarding the amendments to legal solutions. It should be careful though, since as regards interpretation whether there is "the same offence", the European Court of Human Rights can also be given numerous remarks. Namely, it has also been changing its practice.

On the other hand, an authentic concept has existed in criminal legislation of the Republic of Serbia for many years of multidegree, multiple culpability expressed in Article 63, paragraph 3 of the Criminal Code. In this paper the authors analyse the practice of the Constitutional Court of Serbia and the European Court of Human Rights.

In concluding remarks the authors set out two guidelines of the Constitutional Court. Namely, the Constitutional Court points out, with good reason, first that inexistence of clear demarcation between criminal offences and misdemeanours in Serbian legislation must not lead to a situation in court practice that *res iudicata* in misdemeanour proceedings represents an obstacle for prosecution of criminal offenders. Second, the Constitutional Court is of the opinion that misdemeanour courts must be limited to determining those facts which make the specific element of a misdemeanour and to leave to criminal courts to determine the facts relevant for the existence of a criminal offence. Actually, in the opinion of the authors, these guidelines of the Constitutional Court are directed at those authorized to file motions for initiation of misdemeanour proceedings.

Keywords: *ne bis in idem,* the Constitutional Court of Serbia, the European Court of Human Rights, misdemeanours, criminal offences

INTRODUCTORY REMARKS

In many countries of continental, but also of Anglo-Saxon legal culture there is classification of criminal behavior into either two or three categories. In Anglo-Saxon law there is a differentiation between serious criminal offences covered by the term felonies and other offences covered by the term misdemeanours. Three classes of criminal offences, felonies, misdemeanours and petty offences, exist in France, but such a classification was adopted by some other codes also. Whether a criminal offence would be classified as a felony, misdemeanour or

1 This paper is the result of the research on project: "Crime in Serbia and instruments of state response", which is financed and carried out by the Academy of Criminalistic and Police Studies, Belgrade - the cycle of scientific projects 2015-2019.

a petty offence depends on the type of punishment prescribed by the law. Classifying all criminal offences into three groups depending on the punishment, and based on it the French law primarily determines the jurisdiction of courts. In order not to list criminal offences which are to be handed for trial to certain courts one criterion was adopted to enable easier orientation.[2] In Italy all criminal offences are classified into two categories. The first one includes serious crimes (*delitti)*, and the second one includes less serious crimes (*contravvenzioni).* The difference between these two groups of unlawful behaviours reflects in the seriousness of crime committed and the punishment prescribed by law. [3] The Norwegians differentiate between serious criminal offences or felonies (*forbrytelser)* and violations *(forseelser*).[4]

In our legal system there is a clear gradation among criminal offences, misdemeanours and commercial offences. The main reasons for multiple degrees of culpability are more efficient protection under criminal law. However, we wonder if this is really true. Let us take an example of certain criminal offences and corresponding misdemeanours from the Law on Public Peace and Order. The application of similar legal norms is exactly what leads to the problem of demarcation, wrong qualification and ultimately legal consequences which result in activation of procedural prohibition *ne bis in idem*. Due to these reasons it is important for a legislator to avoid mutual similarity of the mentioned offences both when prescribing certain behaviours as criminal offences and when prescribing misdemeanours. For instance, it is much easier for law enforcement officers to motion for initiation of misdemeanour proceedings than to instigate criminal proceedings and such a discretionary assessment of theirs can result in many problems in practice.

At the very beginning it is important to point out that the Criminal Code of Serbia[5] contains a traditional provision according to which a prison sentence or a fine which the offender has served or paid for a misdemeanour or commercial offence, as well as sentence or disciplinary measure of depriving of liberty which the offender has served for violation of military discipline shall be credited to the sentence pronounced for a criminal offence whose elements comprise also the elements of a misdemeanour, commercial offence or violation of military discipline. This provision regulates the situation in which a person has been found gulity and sentenced in the misdemeanour proceedings, and after that it has been found guilty and convicted in the criminal proceedings. In addition to this the description of a misdemeanour corresponds to the description of a criminal offence. In such a situation, according to the expressive legal provision, the *ne bis in idem* principle is not applied. Crediting sentence given in misdemeanour proceedings into the sentence given in the criminal proceedings does not mean application of the *ne bis in idem* principle.

PRACTICE OF THE CONSTITUTIONAL COURT OF SERBIA

When legal certainty in criminal law is concerned, the Constitution of the Republic of Serbia[6] in Article 34 emphasizes:

"*No person may be held guilty for any act which did not constitute a criminal offence under law or any other regulation based on the law at the time when it was committed, nor shall a penalty be imposed which was not prescribed for this act.*

2 Срзентић, С; Стајић, С; Лазаревић, Љ; *Кривично право Југославије- општи део*, Београд, 1997, стр. 221.
3 Коларић, Д*; Кривично дело убиства*, 2008, Београд, стр. 140.
4 *Ibidem*, стр. 143.
5 Criminal Code of Serbia, *Official Gazette of the RS,* no. 85/2005, 88/2005 – corr. 107/2005 – corr. 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/16.
6 The Constitution of the Republic of Serbia, *Official Gazette of the RS*, no. 98/2006.

The penalties shall be determined pursuant to a regulation in force at the time when the act was committed, save when subsequent regulation is more lenient for the perpetrator. Criminal offences and penalties shall be laid down by the law.

Everyone shall be presumed innocent for a criminal offence until convicted by a final judgment of the court.

No person may be prosecuted or sentenced for a criminal offence for which he has been acquitted or convicted by a final judgment, for which the charges have been rejected or criminal proceedings dismissed by final judgment, nor may court ruling be altered to the detriment of a person charged with criminal offence by extraordinary legal remedy. The same prohibitions shall be applicable to all other proceedings conducted for any other act punishable by law.

In special cases, reopening of proceedings shall be allowed in accordance with criminal legislation if evidence is presented about new facts which could have influenced significantly the outcome of proceedings had they been disclosed at the time of the trial, or if serious miscarriage of justice occurred in the previous proceedings which might have influenced its outcome.

Criminal prosecution of execution of punishment for a war crime, genocide, or crime against humanity shall not be subject to statute of limitation."

This is why and with good reason the question is asked in our legal system as to whether two parallel or subsequent proceedings can be conducted regarding the same individual for similar public law offences committed on the same occasion? The Constitutional Court of Serbia endeavours, on the one hand, to preserve the authenticity of our legal system by its decisions and on the other hand, to protect the right to legal certainty in criminal law. Starting from this not at all easy a task, the Constitutional Court sets certain guidelines.

Namely, recognizing the real danger that in practice criminal law protection of important interests might be unjustifiably exhausted by punishing a perpetrator for a misdemeanour and not for a criminal offence, the Constitutional Court of the Republic of Serbia in its explanation to the decision Уж 1285/2012, and with good reason, has pointed out that the inexistence of clear demarcation between criminal offences and misdemeanours in Serbian legislation must not result in a situation in judicial practice that conviction for a misdemeanour would represent an obstacle for prosecution of a criminal offender. Also, the essence of criminal law protection of fundamental social values, primarily life and bodily integrity of each individual, would be brought into question when a misdemeanour court would in its explanation expand the factual description of a misdemeanour and thus include the factual substrate of a criminal offence, thus activating the prohibition of *ne bis in idem* in a criminal proceedings, in case when the elements of the explanation of the misdemeanour decision do not represent the essential elements prescribed by law for that concrete misdemeanour, but exclusively make the essential part of some criminal offence. The Constitutional Court is of the opinion that misdemeanour courts must limit themselves to determining those facts that make the essence of misdemeanour and that they should leave to criminal courts to determine the facts relevant for the existence of a criminal offence. Specifically, one basically unique event, which starts as disturbance of public peace and order and ends as injury of bodily integrity can timely and substantially considered as two separate entities, in other words as two different actualities, one in misdemeanour and the other in criminal proceedings. In that case the offender would not be charged with the same facts and the *ne bis in idem* principle would not be violated.

Starting from the above said, and acknowledging the practice of the European Court of Human Rights, the Constitutional Court is of the opinion that specificity and shortcomings of Serbian criminal legislation, as well as "wandering" of judicial practice must not result in that the narrow interpretation of criteria of inherent identity of offence from the judgment

of ***Sergey Yolotukhin v. Russia***,[7] dated February 10, 2009, and protection of the convention *ne bis in idem* principle, jeopardize more prevalent convention obligations of each member state, which is above all the protection of the victim's right to life from Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which represents the most valuable human right, or the right to bodily and psychological integrity from Article 3 of the Convention. Therefore, the Constitutional Court thinks that in order to protect the more prevailing interest, in addition to the determined criteria of factual identity of the offence, it is necessary in each concrete case to consider the additional, the so called corrective criteria: a) the identity of the protected good and the severity of consequences of that offence, b) the identity of punishment in order to answer the question if the offences for which the applicant of the constitutional complaint is prosecuted or has been convicted in various proceedings are the same (*idem*).[8]

The Constitutional Court has considered in detail the complaints related to the *ne bis in idem* principle in many cases. Thus in one of them it has been established before the Constitutional Court that on the occasion of the same event originally the misdemeanor proceedings were conducted against the applicant in the constitutional complaint and then the criminal proceedings, and that in both court proceedings the applicant was found guilty by a final judgment and convicted to pay fines in various amounts. In the misdemeanor proceedings, conducted upon the report of the Ministry of Interior of the Republic of Serbia – Police station Medijana, the applicant was fined by a final judgment for misdemeanor from Article 6 paragraph 3 of the Law on Public Order and Peace, while the contested judgments were reached in criminal proceedings upon the personal action at law of M. B. for criminal offence of light bodily injury from Article 122, paragraph 1 of the Criminal Code and criminal offence of insult from Article 170 of the Criminal Code. Starting from the fact that the purpose of Article 34, paragraph 4 of the Constitution is to prohibit to repeat the proceedings ended with a decision which acquired the status *res iudicata*, and that the Constitutional Court determined that the applicant in the constitutional complaint was originally convicted in misdemeanor proceedings which in terms of provisions of Article 34, paragraph 4 and Article 33, paragraph 8 of the Constitution are equal to criminal proceedings, and that upon the final misdemeanor judgment he was found guilty for criminal offence related to the same behavior for which he was punished in the misdemeanor proceedings and which included in essence the same facts, for which applying even corrective criteria it was determined to be the same offence (*idem*), the Constitutional Court concluded that the contested verdicts violated the *ne bis in idem* principle. Considering all the above said, the Constitutional Court determined that the applicant's right to legal security in criminal law has been violated, which is guaranteed by the provision of Article 34, paragraph 4 of the Constitution, and upheld the constitutional appeal.[9]

In another case, the Constitutional Court also established that the applicant's right to legal security in criminal law has been violated, which is guaranteed by the provision of Article 34, paragraph 4 of the Constitution, and upheld the constitutional appeal. In the proceedings conducted before the Constitutional Court, it is established that on the occasion of the same event against the applicant of the constitutional complaint there were original misdemeanour proceedings conducted for the misdemeanour from Article 6 paragraph 3 of the Law on Public Peace and Order, which were dismissed since it was not proven that the accused committed the misdemeanour for which he had been charged according to the motion, in other words it was not proven that he "violated public peace and order during the control of fishing licence

7 *Sergey Zolotukhin v. Russia*, 14939/03, dated February 10, 2009.
8 From the explanation of the judgment of the Constitutional Court of Serbia Уж 1285/2012 dated March 26, 2014, available at: http:// www.slglasnik.info/sr/45-27-04-2014/23268-odluka-ustavnog-suda-broj-uz-1285-2012.
9 Уж-1285/2012.

by grabbing S. T. for the neck". By contested judgments, reached in criminal proceedings, which were conducted by bill of indictment of the injured party S. T. as the plaintiff for attack on an official in performance of duty from Article 323 paragraph 1 of the Criminal Code, the applicant was found guilty for committing the criminal offence for which he was charged, which he had committed in such a manner that when controlled by S. T., the game-keeper, and after the game-keeper found out that the accused did not have a fishing licence and after he attempted to seize his fishing gear, the applicant physically attacked the game-keeper by grabbing him for the neck and he was pronounced a suspended sentence. The Constitutional Court concludes that the facts comprised by the explanation of the misdemeanour judgment by which the misdemeanour proceedings against the applicant had been finally dismissed are identical to those facts which represent the elements of criminal offence of attack on an official in performance of duty, for which the applicant of the constitutional complaint has been found guilty in criminal proceedings, after the final misdemeanour judgment on dismissal of misdemeanour proceedings (*res iudicata*). The Constitutional Court estimated that in a concrete case the criminal offence of attack on an official in performance of duty had been consumed by the stated misdemeanour against public peace and order, and that the acts for which the misdemeanour proceedings against the applicant of the constitutional complaint were dismissed and for which he was pronounced a suspended sentence in criminal proceedings are the same (*idem*). The Constitutional Court is at the standpoint that in cases of a final judgment for misdemeanours which in their severity are on the very verge of criminal offences, for which misdemeanour legislation prescribes prison sentence or high monetary fines, excludes the possibility of subsequent criminal proceedings for so called "less serious" criminal offences for which the criminal legislation prescribes fine as the main penalty or suspended sentence is pronounced as a rule in criminal proceedings.[10]

Let us mention one more case. In the misdemeanour proceedings conducted at the request of the Ministry of Interior of the Republic of Serbia – Police administration of Leskovac, before the Misdemeanour Court in Leskovac, it is established that the applicant of the constitutional complaint "at 14:10, on November 20, 2009, in a yard in the village of Brza disturbed public peace and order doing violence in such a way that Miroslav Jovic attacked V. M. and on that occasion hit him in his face with his fist and hurt him". By the Judgment of the Misdemeanour Court in Leskovac the applicant of the constitutional complaint was pronounced guilty for misdemeanour from Article 6 paragraph 3 of the Law on Public Peace and Order and he was sentenced to a fine to the amount of 5.000,00 dinars. In the criminal proceedings conducted according to private criminal prosecution of private prosecutor V. M. before the Basic Court in Leskovac in case K. 1881/12 it is established that the applicant of the constitutional complaint caused light bodily injuries to the private prosecutor V. M. from B., whereas he could understand the significance of his act and could control his behaviour. By the Judgment of the Basic Court in Leskovac K. 1881/12 dated July 2, 2013, which became final and legally binding on November 4, 2013, by reaching the contested judgment of the Appellate Court in Niš Кж1. 3318/13, the applicant of the constitutional complaint was pronounced guilty for criminal offence of causing light bodily injuries from Article 122 paragraph 1 of the Criminal Code and he was pronounced a suspended sentence. The Constitutional Court concluded that the contested judgments violated the *ne bis in idem* principle. The Constitutional Court additionally points to the part of the explanation of the contested judgment by the Appellate Court in Niš in which it was stated that after the representations made the court was submitted a brief related to violation of the *ne bis in idem* principle, but that "accordingly the judgment was not contested by timely representations made" and that "on that ground the Appellate Court could not consider the statements from the mentioned brief". The Constitutional Court emphasizes that the violation of the said principle pursuant to the provision of

10 Уж-11106/2013.

Article 438, paragraph 1, item 1) of the Criminal Proceedings Code (Official Gazette of the RS, No. 72/11, 101/11, 121/2012, 32/13, 45/13 and 55/14) represents absolutely fundamental violation of criminal proceedings provisions, and that the Appellate Court in Niš must have taken this circumstance into account.[11]

As we can see, the Constitutional Court, acknowledging the practice of the European Court of Human Rights which we shall summarize later on, has set criteria based on which it evaluates if the *ne bis in idem* principle has been violated. It is important to determine the following: first, if the concrete misdemeanour proceedings referred to the criminal matter, in other words if the possible conviction in a concrete misdemeanour proceedings would be criminal in its nature; second, if the acts for which the applicant is criminally prosecuted were the same (*idem*); third, if there was a duplication of proceedings (*bis*).

However, in the case ***Milenkovic v. Serbia***,[12] the ECHR upheld the appeal of a Serbian citizen who was previously convicted for misdemeanour from Article 6, paragraph 3 (insult and violence) of the Law on Public Peace and Order for 4000 dinars, and then convicted pursuant to Article 121, paragraph 2 of the Criminal Code (Serious Bodily Harm) to imprisonment of three months (amnestied later) and who also exercised his right to constitutional complaint based on the *ne bis in idem* principle, but it was dismissed.

It is obvious that all court cases refer to problematic cumulative application of norms on misdemeanours against public peace and order and corresponding legal qualifications of criminal offences, such as insulting, endangering safety, light and serious bodily harm, coercion, domestic violence, violent behaviour, violent behaviour at sporting events, preventing an official during security tasks or keeping public peace and order and similar.[13]

The Constitutional Court dismissed the appeal of Milenkovic with the explanation that the description of acts he was charged with differs, since in misdemeanour proceedings he was convicted for disrupting public peace and order, while in criminal proceedings the sentence was pronounced for bodily harm. [14] The applicant was amnestied in November 2012. In May 2013, the Constitutional Court dismissed applicant's appeal lodged for violation of the right to legal safety in criminal law as ill-founded. When examining this case, the ECHR applied the so called Engel criteria,[15] assessing before all if the first misdemeanour proceedings were by their nature the proceedings referring to "criminal" matter within the meaning of Article 4 of Protocol No. 7 and what was the nature of the first conviction. The ECHR concluded that both sets of proceedings were to be regarded as criminal for the purposes of Article 4 of Protocol No. 7 to the Convention. After that, the ECHR, using criteria from the *Zolotukhin* judgment, examined if the offences for which an applicant was prosecuted were the same, and concluded that the facts constituting the two offences must be regarded as substantially the same for the purposes of Article 4 of Protocol No. 7 to the Convention. The next question which the ECHR dealt with was if in this concrete case whether there was a duplication of proceedings (*bis*) and assessed that the domestic authorities permitted the duplication of criminal proceedings to be conducted in the full knowledge of the applicant's previous conviction for the same offence.

11 Уж-9529/2013.

12 *Milenković v. Serbia,* Application no. 50124/13 dated March 01, 2016.

13 Наташа Мрвић-Петровић, „Поштовање начела *ne bis in idem* при суђењу за сличне прекршаје и кривична дела", *Наука, безбедност и полиција – Журнал за криминалистику и право*, Криминалистичко-полицијска академија, Београд, бр. 2/2014, стр. 34.

14 On May 20, 2013, the Constitutional Court, referring to the explanation of the Appellate Court in Nis as "completely admissible according to constitutional law", dismissed the appeal of the applicant as ungrounded. As for the ne bis in idem principle, the Appellate Court found that it was determined that the applicant was guilty of misdemeanor against public peace and order in misdemeanor proceedings, whereas he was convicted for criminal offence of serious bodily harm in a criminal proceedings. According to the court's standing, the descriptions of the punished acts were accordingly clearly different.

15 *Engel and other v. The Netherlands*, 5100/71, dated June 8, 1976.

Finally, the ECHR concluded that the applicant was "convicted" in misdemeanour proceedings, which can be likened to "criminal proceedings" within the autonomous Convention meaning of this term. The ECHR further established that after this "conviction" became final and despite his appeal based on the *ne bis in idem* principle, the applicant was found guilty of a criminal offence which related to the same conduct as that punished in the misdemeanour proceedings. The ECHR stated that the Constitutional Court failed to apply the principles established in the Zolotukhin case and thus to correct the applicant's situation. Due to the afore stated reasons, the ECHR established that there has been a violation of Article 4 of Protocol No. 7 to the Convention. In the said judgement the Court compares a misdemeanour and a criminal offence and takes a stance that any reference to the "minor" nature of the acts does not, in itself, exclude its classification as "criminal" in the autonomous sense of the Convention, as there is nothing in the Convention to suggest that the criminal nature of an offence, within the meaning of the Engel criteria, necessarily requires a certain degree of seriousness. The ECHR considers that the fine is not intended as pecuniary compensation for damage, but that the primary aims in establishing the offence in question were punishment and deterrence of reoffending, which are recognised as further characteristic features of criminal penalties. *"As the Court has confirmed on many occasions, in a society subscribing to the rule of law, where the penalty liable to be and actually imposed on an applicant involves the loss of liberty, there is a presumption that the charges against the applicant are "criminal", a presumption which can be rebutted entirely exceptionally, and only if the deprivation of liberty cannot be considered "appreciably detrimental" given their nature, duration or manner of execution."*

It is clear from all the above said that the ECHR disregards the authenticity of those legal systems which protect various values with various categories of criminal offences. This sets new tasks to our legislator regarding the amendments of legal solutions. Still, it should also be very careful here since the ECHR can give numerous remarks related to interpretation whether the "offences were the same". Namely, the court was also changing its practice and thus unlike in the case of ***Maresti v. Croatia***,[16] in the case of ***Oliveira v. Switzerland,***[17] it delivered a different judgment. Here the applicant was first convicted of misdemeanour of not adjusting speed to the road conditions, and then criminally of negligently causing physical injury. It is interesting that here calculating misdemeanour conviction into the conviction for criminal offence excluded the existence of duplication of convictions for the same offence. In the Court's opinion, what exists here is a seemingly ideal concurrence based on the principle of absorbing a lesser included offence, and in that case there is no violation of the *ne bis in idem* principle, since it can be considered that this is a single criminal act split up into two separate offences in which case the greater penalty will usually absorb the lesser one, and not the same behaviour.

We think that this judgment is important for both the legal system of Serbia and the approach our legislator has had for many years in Article 63, paragraph 3 of the Criminal Code. However, taking into account that the ECHR's judgments can cost Serbia a lot, since the expenses of their enforcement are borne by the budget,[18] it is necessary to correct the existing practice and legal basis *de lege ferenda* by making the specific elements of crimes more precise.

16 *Maresti v. Croatia*, 55759/07, dated June 25, 2009.
17 *Oliveira v. Switzerland*, 84/1997/868/1080 dated July 30, 1998.
18 Similar in: Драгана Коларић, Саша Марковић, "Основна људска права полицијских службеника у светлу новог Закона о полицији", *Српска политичка мисао,* Институт за политичке студије, бр.3/ 2016, стр. 249; Вања Бајовић, „Случај Миленковић-ne bis in idem у кривичном и прекршајном поступку", у зборнику: Казнена реакција у Србији VI део (приредио Ђорђе Игњатовић), Правни факултет-Универзитет у Београду, 2016, стр. 243.

INFLUENCE OF JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

In Article 4 of Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms[19] it is pointed out that no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in previous proceedings, which could affect the outcome of the case. No derogation from this Article shall be made under Article 15 of the Convention.[20] Therefore, this right belongs to the category of absolutely protected rights which must not be derogated.

The term "criminal proceedings" from provisions of Article 4 of Protocol 7 is wider than the definition of criminal proceedings in domestic law. In addition to proceedings which have been defined as "criminal" in national legislation, it can also refer to other kinds of proceedings the characteristics of which suggest their "criminal" nature. Whether the certain domestic proceedings are considered "criminal proceedings (charge for a criminal offence)" for the purpose of Article 4 of Protocol 7 is estimated based on three so-called *Engel criteria*:[21] the legal classification under national law, the nature of the offence, and the severity of the potential penalty which the defendant risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach when separate analysis of each criterion does not enable to achieve clear conclusion on the existence of a criminal charge.

As regards criterion "**legal classification under national law**" the judgment in the case of ***Maresti v. Croatia***[22] is significant. In this judgment the court notices that the applicant is found guilty in the proceedings conducted pursuant to Law on Misdemeanours and convicted to 40-day imprisonment. In order to establish whether the applicant "was finally acquitted or convicted in accordance with the law and penal procedure of that State" the first question on which to decide is if the proceedings refer to criminal matter within the meaning of Article 4 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. But the Court emphasizes that legal determination of the proceedings in national law cannot be the only relevant criterion for application of the *ne bis in idem* principle, otherwise the application of Article 4 of Protocol 7 would be left to assessment to signatory states and could lead to results unconnectable with the goals and purpose of the

19 Закон о ратификацији Европске конвенције за заштиту људских права и основних слобода, Сл. листу СЦГ - Међународни уговори, бр. 9/2003, 5/2005, 7/2005-исправка и Службени гласник РС- Међународни уговори бр. 12/2010.

20 *Article 15 - Derogation in time of emergency*
1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

21 *Engel and Others v. The Netherlands*, 5100/71, dated June 8, 1976.

22 *Maresti v. Croatia*, 55759/07, dated June 25, 2009.

Convention. The notion of "penal procedure" must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" in Articles 6 and 7 of the Convention respectively. Also, althought in the domestic legal classification the offence at issue may amount to a minor offence under section 6 of the Minor Offences against Public Order and Peace Act, the ECHR nevertheless reiterates that it has previously found that certain offences still have a criminal connotation although they are regarded under relevant domestic law as too trivial to be governed by criminal law and procedure.

Similarly, in the judgment in the case of ***Tomasović v. Croatia***[23] we have a situation where the applicant was first found guilty for possession of 0.21 g of heroin, pursuant to Article 3, paragraph 1 of the Prevention of Narcotics Abuse Act and fined HRK 1,700. In 2007, the Municipal Court, in criminal proceedings against the applicant, also found the applicant guilty of possessing 0,14 grams of heroin and fined her HRK 1,526. The previous fine was to be included in this one. The applicant was also ordered to bear the costs of the proceedings in the amount of HRK 400. The court of second instance unheld the applicant's conviction, but a suspended sentence of four month's imprisonment was applied with a one-year probation period. In 2009, the applicant's subsequent constitutional complaint, alleging a violation of the *ne bis in idem* principle, was dismissed by the Constitutional Court on the ground that the Croatian legal system did not exclude the possibility of punishing the same person twice for the same offence when the same act is prescribed both as a minor offence and a criminal offence. The Government of Croatia argued that the first penalty was not criminal in nature since it was adopted in the context of minor-offences proceedings and was prescribed as a minor offence under the domestic law. This minor offence was prescribed by the Prevention of Narcotics Abuse Act which had been adopted together with other laws on the basis of the national strategy on supervision of narcotics. The Act in question prescribed conditions for the growing of plants from which narcotics could be produced, measures for the prevention of narcotics abuse, and the system for preventing and treating drug abuse. This showed that the aim of that Act could not be associated with criminal law. The aim of this Act and its provisions was not to punish those in possession of small amounts of narcotics but the protection of their health by discouraging the possession and use of illegal substances. As regards the severity of the penalty, the Government argued that the applicant had been fined HRK 1,700, which was not a significant fine and that the minor offence was not liable to imprisonment. The Court reiterates here as well that the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of non bis in idem under Article 4, paragraph 1 of Protocol No. 7.[24]

As regards the criterion of "**the nature of the offence**" paragraph 22 of the judgment in the case of ***Tomasović v. Croatia*** should be seen. By its nature, the inclusion of the offence at issue in the Prevention of Narcotics Abuse Act served to guarantee the control of the abuse of illegal substances, which may also fall within the sphere of protection of criminal law. The corresponding provision of the Act was directed towards all citizens rather than towards a group possessing a special status. There is no reference to the "minor" nature of the acts and the fact that the first proceedings took place before a minor-offences court does not, in itself, exclude their classification as "criminal" in the sense of the Convention, as there is nothing in the Convention to suggest that the criminal nature of an offence, within the meaning of the Engel criteria, necessarily requires a certain degree of seriousness.

On the other hand, as regards disciplinary and criminal proceedings the Court in its judgment in ***Toth v. Croatia***,[25] declared the application inadmissible. Namely, the charges brought

23 *Tomasović v. Croatia*, 53785/09, dated October 18, 2011.
24 In this judgment the Court found that there were violations of Article 4 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.
25 *Toth v. Croatia,* 49635/10, dated November 6, 2012.

against the applicant in the disciplinary proceedings might not be considered as entirely the same as those brought against him in the criminal proceedings. While in the disciplinary proceedings he was punished for verbal insults, making threats, impolite behaviour and preventing an official from carrying out his or her duties, in the criminal proceedings he was found guilty of making death threats. However, as already indicated above, some of the charges brought against the applicant in the disciplinary proceedings clearly corresponded to certain offences in the ordinary criminal law. Thus, the charges of verbal insults, making threats and preventing an official from carrying out his or her duties are also prescribed by the Criminal Code. However, the Court considers that these facts were not sufficient to lead to the conclusion that the offences with which the applicant was charged in the disciplinary proceedings are to be regarded as "criminal", but give them a certain colouring which does not entirely coincide with that of a purely disciplinary matter.

As for the criterion of "**the nature and severity of the penalty**" in the judgment in ***Maresti v. Croatia***, it is pointed out that it is determined by reference to the maximum potential penalty for which the relevant law provides. The Court observes that section 6 of the Minor Offences against Public Order and Peace Act provided for sixty days' imprisonment as the maximum penalty and that the applicant was eventually sentenced to serve forty days' deprivation of liberty. As the Court has confirmed on many occasions, in a society subscribing to the rule of law, where the penalty liable to be imposed and actually imposed on an applicant involves the loss of liberty, there is a presumption that the charges against the applicant are "criminal", a presumption which can be rebutted entirely exceptionally, and only if the deprivation of liberty cannot be considered "appreciably detrimental" given its nature, duration or manner of execution. In the light of the above considerations the Court concludes that the nature of the offence in question, together with the severity of the penalty, were such as to suggest that this is penal procedure for the purposes of Article 4 of Protocol No. 7. In the case of Tomasović v. Croatia, the degree of severity of the measure is also determined by reference to the maximum potential penalty for which the relevant law provides. The actual penalty imposed is relevant to the determination, but it cannot diminish the importance of what was initially at stake. The Court observes that section 54 of the Prevention of Narcotics Abuse Act provided for a fine of between HRK 5,000 and 20,000 and that the applicant was eventually fined HRK 1,700. The Court considers that the fine thus prescribed cannot be seen as minor.[26]

26 It is interesting to mention the solution of solitary confinement, i.e. in which cases the prison term is extended for the time spent in solitary confinement or when the duration remains the same although the solitary confinement was ordered, in other words whether adding additional days to an already convicted prisoner's sentence amounted to a criminal penalty. Thus, in the case of *Toth v. Croatia* examining the criterion "the nature and severity of the penalty" and the question of solitary confinement, it was pointed out that adding additional days to an already convicted prisoner's sentence amounted to a criminal penalty. The ECHR has also examined the question whether a punishment which does not extend the prisoner's prison term in military or prison context could be regarded as a "criminal charge" (see *Eggs v. Switzerland*, no. 7341/76, Commission decision of 4 March 1978, where the applicant was punished with five days of solitary confinement; X *v. Switzerland*, no. 8778/79, Commission decision of 8 July 1980, where the applicant was punished with three days of solitary confinement; *P. v. France*, no. 11691/85, Commission decision of 10 October 1986, where the applicant was punished with twelve days of solitary confinement; etc.). In each of these cases the former Commission and the Court assessed that a mere aggravation of the conditions of one's prison term with a measure such as solitary confinement did not suffice to bring the disciplinary proceedings in question within the sphere of "criminal" within the Convention meaning. In the present case the applicant was punished with twenty-one days of solitary confinement, which is the maximum prescribed under the Enforcement of Sentences Act. This punishment did not extend the applicant's prison term and thus did not amount to an additional deprivation of liberty, but only to aggravation of the conditions of his detention. With regard to this, the Court finds, in compliance with the above case-law, that the first set of proceedings conducted before the Prison authorities and the sentence-execution judge was not criminal in nature and that therefore the applicant's subsequent conviction in the criminal proceedings did not contravene the *ne bis in idem* principle of Article 4 of Protocol No. 7.

As for the criterion of "**legal classification under national law**", due to difficulties in its application, it becomes precise by the approach based on "identity of the material acts", so that as of the case of ***Sergey Zolotukhin v. Russia***, [27] the ECHR has considerably consolidated its practice and started to apply an approach based more on evidence, i.e. "identity of the material acts". Until the case of ***Sergey Zoloktukhin v. Russia***, the practice of the Court regarding the question whether the acts of prosecution were the same (*idem*) was not harmonized. This judgment marks abandoning some earlier criteria, and the essence of new criteria is contained in paragraph 82: *"…the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same."* Therefore, the established facts on which the objective identity of public law offenced, mutually similar according to objective features, can be a basis to deliver a sentence in only one procedure against the defendant and in one which was initiated first, which exludes the possibility of subsequent conduct of other proceedings and trial of that person before some other court for another offence with similar features which resulted from that event.[28]

In the case of ***Sergey Zolotukhin v. Russia***, seeking to put an end to the legal uncertainty related to the question of whether the offences for which an applicant was prosecuted were the same, the Court decided to provide a harmonised interpretation of the notion of the "same offences" – the *idem* element of the *ne bis in idem* principle. Accordingly, the Court notes that in both the minor-offences proceedings and the criminal proceedings the applicant was found guilty of the same conduct towards the same victim and within the same time frame. The Constitutional Court dismissed his appeal applying the pre-Zolotukhin case-law. However, for the Court in Strasbourg it is obvious that both decisions concerned exactly the same event and the same acts.

The same standpoint is confirmed by the Court in the case of ***Muslija v. Bosnia and Herzegovina***. [29] The applicant was "convicted" in misdemeanour proceedings, which is in the autonomous meaning of the term in the Convention equal to "criminal proceedings". After this "conviction" has become final, he was found guilty for a criminal offence which referred to the same conduct for which he had already been punished in misdemeanour proceedings and which included basically the same facts. The Constitutional Court failed to apply the principles established in the Zolotukhin case and thus to correct the applicant's situation. As for the answer to the question if there was a duplication of proceedings, it is pointed out that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of proceedings which have been concluded by a "final" decision. Accroding to Explanatory Report to the Protocol 7, a decision is final *„…"if, according to the traditional expression, it has acquired the force of* ***res judicata****. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them*." It is prohibited to initiate new prosecution for the same act, even in case when prosecution has not resulted in a conviction (for instance, when the verdict of acquittal was reached.[30]

Therefore, when deliberating whether the right to legal security was violated, as regards the question if there is violation of the *ne bis in idem* principle, the Constitutional Court should determine: whether both proceedings were criminal in nature, in other words, if the

27 *Sergey Zolotukhin v. Russia*, 14939/03, dated February 10, 2009.
28 Наташа Мрвић-Петровић, „Поштовање начела *ne bis in idem* при суђењу за сличне прекршаје и кривична дела", *Наука, безбедност и полиција – Журнал за криминалистику и право*, Криминалистичко-полицијска академија, Београд, бр. 2/2014, стр. 34.
29 *Muslija v. Bosnia and Herzegovina*, 32042/11 dated January 14, 2014.
30 See paragraph 110 of the Judgment in the case of *Sergey Zolotukhin* and paragraph 29 of the Judgment in the case of *Franz Fischer v. Austria*, 37950/97 dated May 29, 2001.

first proceedings could also be considered criminal, if the events and offences were the same and if there was duplication of proceedings.

CONCLUSION

Clearer legal demarcation between misdemeanours and criminal offences, as well as better cooperation of competent state authorities will result in reduction of violations of prohibition of duplication of trials in the same matter. The question of identity of offences is one of the most difficult questions of application of the *ne bis in idem* principle, particularly where major misdemeanours and criminal offences overlap, when the offences in both cases are liable to imprisonment.

It is also vital to consider the solution according to which only the public prosecutor may have jurisdiction to decide on reporting the event with either the elements of criminal offence or misdemeanour which is liable to imprisonment, and to reach the decision on possible criminal or misdemeanour prosecution of the suspect. Other state authorities in charge of prosecution of offenders (police, tax police, customs, and similar) should not have the legal possibility to prosecute offenders of such offences without written consent of the public prosecutor. When reaching a decision on prosecution of offenders, the public prosecution office could independently file motion for initiation of misdemeanour proceedings before the competent misdemeanour court and participate as a party in misdemeanour proceedings, or possibly order the police, or other authority in charge of prosecution in that legal field, to undertake prosecution of the offender for the stated event.[31]

The guidelines of the Constitutional Court given in Judgment Уж 1285/2012 rely on the ECHR Judgment in the case of *Oliveira v. Switzerland* in which better approach was expressed than in the Judgment in the case of *Maresti v. Croatia*. We repeat once again that the Constitutional Court with good reason points out first that the inexistence of clear demarcation between criminal offences and misdemeanours in Serbian legislation must not result in a situation in court practice that *res iudicata* in misdemeanour proceedings represents an obstacle for prosecution of criminal offenders. And second, the Constitutional Court takes the stance that misdemeanour courts must be limited to determining those facts that make the specific element of a misdemeanour and let criminal courts determine the facts relevant for the existence of a criminal offence. Actually, these guidelines of the Constitutional Court are directed at those who have the authority to file motion for initiation of misdemeanour proceedings.

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31 More in: Саша Марковић, *„Улога полиције у сузбијању насиља у породици у прекршајном поступку“, Наука, безбедност и полиција – Журнал за криминалистику и право*, Криминалистичко-полицијска академија, Београд, бр. 2/2015, стр. 211-231.

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