THE PRINCIPLE OF NE BIS IN IDEM AS A PART OF CRIMINAL LAW AND ITS INFLUENCE ON DISCIPLINARY PROCEDURE

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Abstract:
The principle "ne bis in idem" literally means "not twice about the same thing", and represents the key foundation of fairness and legal certainty. This principle guarantees that no one can be subjected to judicial proceedings or punishment again for the same criminal offense after a legally binding decision has already been made. The principle of ne bis in idem (also known as the prohibition of double jeopardy) is a comprehensive legal principle that protects an individual from double prosecution and punishment for the same offense. This principle, whose roots go back to Roman law, is today accepted in international and national legal systems and thus represents a basic component of the right to a fair trial. Its purpose is to prevent the arbitrariness of the state and protect the rights of the accused/defendant from unjustified re-persecution, thus ensuring legal certainty and faith in the judiciary. As the globalization of the legal order continues, the principle of "ne bis in idem" becomes increasingly important in the context of international legal processes, especially within the European Union and other international institutions. In legal practice, which refers to labor-legal responsibilities, the question arises whether the completed disciplinary procedure can be considered a decided matter according to the principle ne bis in idem, or whether it is not an obstacle, a procedural obstacle to the completion of the criminal procedure. There is also the issue of cumulation of criminal and some other court proceedings (misdemeanor, tax, economic-criminal, administrative, disciplinary). The answers to these questions differ from country to country and depending on the national or international validity of the ne bis in idem principle.
Keywords: *disciplinary procedure, administrative procedure, not twice about the same thing, judgment, solution.*

1. INTRODUCTION

Legal certainty is one of the basic values of modern legal systems, and the ne bis in idem principle occupies an important place in its balance. Its application includes not only national legal systems, but also international acts and documents, with great respect for judicial practice. This prohibition is not only of normative character, but represents a

system of a broader aspect of fairness and protection of human rights. The idea of banning prosecution for the same crime has its roots in Roman law, where this principle was known as "nemo bis vexari pro eadem causa", which would mean that no one should be punished twice for the same thing. During the Middle Ages, this concept was maintained through canon law, in order to experience its full development in the modern civil and criminal legal systems of Europe and the world. In modern international law, the principle is standardized through various conventions and treaties, and especially through the decisions and case law of the European Court of Human Rights.[1]

Looking comprehensively in the legal sense, the disciplinary procedure is not a part of the administrative procedure in the classic sense of the term, but it is conducted according to the rules of the administrative procedure, and therefore the decisions and legal protection are tied to the normative regulations of the administrative procedure, in accordance with and depending on the context of the legal act itself that regulates disciplinary responsibility. Therefore, it should be borne in mind that the disciplinary procedure is mostly based on and supplemented by the provisions related to the general administrative procedure. Accordingly, the decision made in the disciplinary procedure is an administrative act against which, after the second-instance decision, an administrative dispute can be conducted before the Administrative Court. [2]

2. BASIC CHARACTERISTICS OF THE "NE BIS IN IDEM" PRINCIPLE

It is important to repeat that this principle, above all, provides great legal certainty to a person who has already been subjected to court proceedings. It guarantees that he will not be subjected to the same procedure again, thereby avoiding the possibility of arbitrariness and abuse of the legal system. Ne bis in idem" is applied in various segments of law, including criminal law, misdemeanor law, labor law, as well as arbitration. There are certain exceptions to this rule. For example, in some jurisdictions, a retrial is possible provided that new circumstances or evidence that was not available during the original court proceedings are discovered. Different states have different interpretations and implementations of this principle. For example, in some legal systems, "ne bis in idem" can only be applied to the same legal qualifications acts, while in others it applies to different qualifications. The main features of this principle include: the prohibition of

double punishment (one person cannot be punished again for the same offense or acquitted); arbitrary prosecution or retrial). This principle is not only present in national legal systems, but is applied in international law to ensure respect for human rights. The principle of "ne bis in idem" has a deep-rooted place in judicial systems and contributes to justice and fair treatment of accused persons.[3]

3. LEGAL SOURCES

The legal sources of the legal procedure in question have their sources in international and domestic legislation. In international law, they are: 1) European Convention on Human Rights, Protocol 7, which stipulates in Article 4: "No one can be retried or punished in criminal proceedings under the jurisdiction of the same state for an offense for which he was already acquitted or convicted by a final judgment"; 2) The Charter of the European Union on Fundamental Rights, which stipulates in Article 50: "No one may be tried or punished again for the same criminal offense for which he was already convicted or acquitted"; 3) The International Criminal Court (Rome Statute, adopted on July 17, 1998) also recognizes this principle, which is specifically prescribed and contained in Article 20 and is called "Ne bis in idem".[4]

Most legal systems include this principle in their highest legal acts - constitutions or laws on criminal procedure. In the Republic of Serbia, it is contained in: 1) the Constitution of the Republic of Serbia, Article 34, paragraph 4, which stipulates that: "No one can be retried or punished for a criminal offense for which he has already been legally convicted or acquitted, in accordance with the law"; 2) The Criminal Procedure Code, which foresees procedural obstacles for re-conducting the procedure on the same grounds.[5]

4. RELEVANT COURT PRACTICE

With the judgment Zolotukhin v. Russia (2009), the European Court of Human Rights expands legal protection - if a person has already been prosecuted for the same facts, retrial is prohibited, regardless of the qualification of the act. The most important case in the development of the doctrine. The court decided that there was a violation of

Article 4 of Protocol 7 of the European Convention on Human Rights, because Zolotukhin was first disciplined and then prosecuted for the same facts.

With the judgment of Åkerberg Fransson (C-617/10), the Court of Justice of the EU assessed that the monetary sanctions for tax violations had a criminal nature and that a person cannot be prosecuted again for the same actions.

The judgment of Bond v. United States The US Supreme Court interprets the issue of double prosecution between federal and state authorities, allowing double prosecution in some cases. The US Supreme Court considered the issue of parallel jurisdiction of federal and state authorities and found that federal and state laws may in some cases allow for separate proceedings, which raises debates about the universality of the principle.

The judgment of the European Court of Human Rights in the case "A and B v. Norway" represents a turning point in the development of the interpretation of the relationship between criminal and administrative proceedings in the context of the application of the ne bis in idem principle. Until this decision, especially after the judgment Zolotukhin v. Russia (2009), the interpretation was strict and formalistic, and refers to the fact that every new reaction of the state, either in criminal or administrative proceedings, which refers to the same factual situation, was considered a violation of the prohibition of double prosecution and punishment. However, the judgment of A and B v. Norway introduces a new, more flexible standard, which significantly changes the relationship between criminal and administrative proceedings.

The court introduces the so-called "sufficiently close connection in substance and in time" test. This means that criminal and administrative proceedings can coexist, provided that: a) they have different purposes, but they are not contradictory, b) there is coordination between the authorities conducting the proceedings, c) there is no duplication of sanctions that would represent an additional burden for the defendant.

This judgment had a huge impact on the member states of the Council of Europe and the European Union because it relaxes the strict standard from the Zolotukhin judgment, which enables a more effective fight against serious financial and tax violations, increases the responsibility of states to establish clear mechanisms of coordination

between administrative and criminal authorities, and sets new standards of proportionality and fairness in the application of multiple sanctions.[6]

5. DISCIPLINARY PROCEDURE AND ADMINISTRATIVE PROCEDURE

The administrative procedure is conducted according to the rules of the Law on General Administrative Procedure and refers to the resolution of the rights, obligations and legal interests of natural and legal persons by administrative authorities. Disciplinary proceedings are internal proceedings carried out by a certain institution (e.g. public administration, school, police, army, etc.) against an employee or its member due to a violation of a work or official obligation. It has its legal basis, often in special laws or internal regulations. When disciplinary proceedings are conducted in the public sector (e.g. against a civil servant), certain rules from the administrative procedure are often applied (e.g. right to defence, inspection of files, possibility of appeal), so it can be said that it has elements of administrative procedure. Therefore, the disciplinary procedure is not an administrative procedure by its legal nature, but it can be conducted according to rules that are similar or the same as in the administrative procedure, especially if a decision is made that affects the rights of the employee.

In the case of the Ministry of Internal Affairs, the disciplinary procedure against employees is a special procedure that has certain elements of administrative procedure, but it is not a classic administrative procedure according to the Law on General Administrative Procedure. Disciplinary proceedings in the Ministry of Internal Affairs of the Republic of Serbia are carried out in accordance with the Law on Police and by-laws, with the corresponding application of the Law on General Administrative Procedure. However, although the disciplinary procedure is not a classic administrative procedure, the disciplinary procedure must respect the basic principles of fair treatment (right to defense, statement, inspection of files, etc.), which is in accordance with the rules of the Law on General Administrative Procedure.[7]

5. DISCIPLINARY PROCEDURE AND PRINCIPLE OF NE BIS IN IDEM

Due to its importance, this issue has become part of the normative system in all countries of the region. The Law on the Police in the Republic of Serbia stipulates that

responsibility for a criminal act, as well as misdemeanor responsibility, do not simultaneously exclude disciplinary responsibility for the same act that is the subject of disciplinary proceedings if the act of criminal or misdemeanor proceedings also constitutes a violation of official duty (paragraph 3, Article 203), and that exemption from criminal or misdemeanor responsibility does not presuppose exemption from disciplinary responsibility, which was the subject of the same action, if the action is qualified and as a breach of official duty (paragraph 4, Article 203).[8]

An identical provision is contained in the Law on the Police in the Republic of Croatia, which stipulates that criminal or misdemeanor liability does not exclude liability for breach of official duty if the act that is the subject of criminal or misdemeanor proceedings is also a breach of official duty (paragraph 3, Article 93), and that exemption from criminal or misdemeanor liability does not presuppose exemption from responsibility for breach of official duty if the committed act is prescribed as a breach of official duty (paragraph 4. Article 93).[9]

Also, the Law on Police Officers of Bosnia and Herzegovina stipulates that criminal responsibility for a criminal offense does not exclude the disciplinary responsibility of a police officer, if the commission of a criminal offense is also a breach of official duty (paragraph 2, Article 103), and that exemption from criminal responsibility does not imply exemption from disciplinary responsibility at the same time (paragraph 3, Article 103).[10]

The same is the case with the Law on Police and Internal Affairs of the Republic of Srpska, where it is prescribed that the responsibility for a committed criminal act and misdemeanor does not include the disciplinary responsibility of the police officer, as long as the commission of the criminal act and misdemeanor is also a violation of office (paragraph 4, Article 115), and that exemption from criminal and misdemeanor responsibility does not subject to caution and exemption from disciplinary liability (paragraph 5, Article 115).[11]

Article 3 of the Disciplinary Law of Police Personnel in the Republic of Greece stipulates that pardoning, rehabilitation or otherwise removing a criminal sentence or removing all or part of the consequences of a criminal conviction does not cancel the disciplinary punishment.[12]

Respecting the jurisprudence of the European Court of Human Rights, the Constitutional Court of the Republic of Serbia has set criteria on the basis of which an assessment is made as to whether the conduct of proceedings against the defendant for an act arising from the same life event constitutes a violation of the principle, and those criteria are: 1) whether both proceedings that were conducted against the defendant were conducted for an act that by its nature is a punishable offense, i.e. whether a sanction is threatened in disciplinary procedure by its nature criminal-legal; 2) whether the acts for which the defendant is being prosecuted are the same (idem); 3) whether there was a double procedure (bis). Therefore, only after fulfilling all three criteria can we talk about a decided matter.

The legal nature of the sanctions that could have been imposed on the defendant in the disciplinary procedure are of a labor law nature, since disciplinary measures limit or take away certain rights and positions, that is, the characteristics of the employee. Therefore, all prescribed sanctions are related to the labor-legal status of the person against whom disciplinary proceedings are being conducted, and the purpose of the sanction can only be achieved while that person is in an employment relationship, and therefore, by their nature, they are not criminal law. With the termination of that status, the aforementioned sanctions lose their purpose and cannot be executed, so the nature of the act is related to the labor-legal status of the perpetrator, and thus the preventive and repressive purpose of the prescribed sanctions.[13]

Bearing in mind the above, regardless of the fact that a disciplinary and then a criminal proceeding is being conducted due to an event that partly stems from the same facts, upon completion of the disciplinary proceeding, there are no procedural obstacles for conducting another type of proceeding regarding the same life event.

The extent to which the principle of "ne bis in idem" is applicable in procedures for determining violations of official or work duty, i.e. in disciplinary proceedings, cannot be viewed only from the aspect that the same person cannot be punished twice for the same violation of official duty, as well as that disciplinary proceedings cannot be initiated for a violation for which the employee has already been declared responsible or exempted from responsibility, but a wider spectrum of responsibility is imposed here.

Namely, for the sake of legal certainty, this relationship cannot be viewed only from the aspect of disciplinary proceedings, but must also be viewed from the perspective of disciplinary-criminal proceedings and disciplinary-misdemeanor proceedings.

Disciplinary procedure is a special type of penal procedure that determines the existence of disciplinary liability of the employee and, after its completion, imposes an appropriate disciplinary measure, which in itself represents a penal procedure, such as a criminal and misdemeanor procedure in itself.[14]

The issue in question of the application of the principle "ne bis in idem" was raised as disputed through the practice of the European Court of Human Rights.

Although the disciplinary procedure represents a special type of administrative procedure, with a special standard of proof, regulated by special regulations through the norming of responsibility for injuries (offences) related to work and labor relations, the point of contact that occurs with the penal procedure (criminal and misdemeanor) cannot be ignored.

Most of the regulations governing disciplinary liability contain an explicit provision that stipulates that criminal and misdemeanor liability does not exclude disciplinary liability for the same act.

The question in question regarding the application of the principle "ne bis in idem" has become controversial and has attracted the attention of the Croatian professional public due to the position of the European Court of Human Rights in the judgment Maresti v. Croatia, and it refers to the relationship between misdemeanor and criminal proceedings, with broader interpretative implications (Request No. 55759/07, judgment dated 06.25.2009). This judgment referred to the fact that the punishment for the committed offense against public order and peace was by its nature criminal law, and that there was a duality of the procedure.[15]

Also, in the previously mentioned judgment in the Zolotukhin v. Russia case (Request No. 14939/03, judgment of 10.02.2009), in point 82 of the explanation of the presentation of the European Court of Human Rights on the "idem" criterion, it was emphasized in the conclusion that the court takes the position that Article 4 of Protocol no. 7 must be interpreted in such a way as to prohibit prosecution or trial for another crime, if it arises from the same facts or facts that are essentially the same.[16]

These judgments caused serious criticism, because the criminal and misdemeanor proceedings deal with different protected goods and consequences, and the misdemeanor court did not convict the defendant of a criminal offense, as neither did the criminal misdemeanor court.

According to the judgment of the European Court of Human Rights in the case of Milenkovic v. Serbia, it refers to the situation that the applicant participated with another person in an incident, which is why the police initiated misdemeanor proceedings against him for disturbing public order and peace. In November 2007, the applicant was convicted and fined, and in the meantime, in April 2007, criminal proceedings for grievous bodily harm were initiated against the applicant for the same incident. After that, in 2011, he was sentenced to prison for insult and minor bodily injury. The position of the court was that regarding the application of Article 4 of Protocol no. 7 The European Court has developed practical rules for determining whether there has been a violation of the ne bis in idem principle in a specific case.[17]

The principle of "ne bis in idem" in the previous practice of the European Court was applied to various factual descriptions that include not only criminal and misdemeanor prosecutions, as in the cases of Milenkovic v. Serbia and Maresti v. Croatia (Maresti, V., Croatia, no. 55759/07 of 25.06.2009) and Muslija v. Bosnia and Herzegovina (Muslija V., Bosnia and Herzegovina, no. 32042/11 of 14.01.2014), but also criminal prosecution in parallel with the prosecution for tax crimes, such as Kiveri v. Finland (Kiiveri V. Finland, No. 53753/12 dated 10.02.2015), as well as criminal prosecution in parallel with cases of punishment in administrative proceedings, from the example of Riutsalinen v. Finland (Request No.: 24130/11, judgment dated 15.11.2016).[18]

However, the above-mentioned judgment of the European Court of Human Rights in the case of A. and B. v. Norway (Request No.: 24130/11, judgment of 15.11.2016) provides a different approach in the interpretation of the convention principle "ne bis in idem", especially with regard to the relationship between criminal proceedings and administrative (tax) proceedings, which conceptually does not deviate from the Zolotukhin judgment.[19]

However, a large number of states have expressed concern that the condition interpretation of Article 4 of Protocol no. 7 could lead to the impossibility of the fight against

crime, but also to the avoidance of paying tax fines, which would make it impossible for the state to respond to socially unacceptable behavior, as well as to manipulations by the defendants in the case of conducting and deciding in the proceedings against the defendant.

This decision contained several important points. First, the consequences of the ban from Article 4 of Protocol no. 7 cannot prevent the state from organizing its legal system by imposing a fine in a tax proceeding for non-payment of taxes, and in another criminal proceeding, convicting an individual in the event that the non-payment of taxes also includes fraudulent intent. Second, Article 4 of Protocol no. 7 cannot be interpreted in such a way that it absolutely prohibits administrative, misdemeanor and criminal proceedings regarding the same facts. Thirdly, the automatic ban on the continuation of the second procedure at the moment when the decision in the first has become legally binding, could allow the interested person to use the principle of "ne bis in idem" as a means of manipulation, which could lead to impunity for serious criminal acts. Fourth, each of the procedures represents a predictable and reasonable response of the state to a particular aspect of socially unacceptable behavior, and both procedures together should form one connected whole, so that the person against whom the procedures are conducted is not exposed to injustice.

When an employee, by the same action, is subject to both disciplinary and criminal, or misdemeanor proceedings, there is no application of the principle of "ne bis in idem", but the principle of parallel (cumulative responsibility).

Disciplinary responsibility is a special type of labor law responsibility. In relation to misdemeanor and criminal responsibility, disciplinary responsibility has a special object of protection, as well as a special purpose, which is also related to different forms of damage that may arise in the event of the execution of that act or omission.

The practice of the Constitutional Court of the Republic of Croatia and other countries, as legal doctrine and legislation, is consistent in the position that there is no obstacle to conducting disciplinary proceedings for an act for which a person has already been punished criminally or misdemeanor. Therefore, in relation to disciplinary procedures, there is no place for the application of the "ne bis in idem" principle.[20]

The Constitutional Court of the Republic of Serbia (verdict Už. 2216/16 of 28/06/2018) took the position that criminal responsibility does not exclude disciplinary responsibility for breach of official duty if the act that is the subject of criminal proceedings is also a breach of official duty, nor is exemption from criminal responsibility an exemption from responsibility for breach of official duty, if the committed act is prescribed as a breach of official duty.[21]

The Supreme Court of Cassation in the Republic of Serbia (Judgment of the Supreme Court of Cassation, Kzz 245/20 of 13.5.2020) decided in its judgment that when a disciplinary proceeding was conducted against the defendant in connection with the same life event in which a disciplinary sanction was imposed on him, but that sanction is by its legal nature such that it refers to his labor law status as an employee, then the termination of the disciplinary proceeding is not a procedural obstacle to the defendant criminal proceedings are being conducted regarding that event.[22]

Also, the Supreme Court of Cassation in the Republic of Serbia (Judgment of the Supreme Court of Cassation, Kzz 1043/20 of 21.10.2020) decided in its judgment that in disciplinary proceedings, disciplinary responsibility is determined for violations of special rules of conduct that employees must adhere to at work and in connection with work, and for which prescribed disciplinary measures of a labor law nature can be imposed, while criminal law protects basic social values, through the prescription of criminal acts and criminal sanctions as repressive measures that can be imposed on the perpetrator of a criminal act, with the aim of suppressing criminality.[23]

According to the facts presented, it is evident that the principle "ne bis in idem" has no application in the part of determining disciplinary responsibility in relation to criminal and misdemeanor proceedings. Namely, disciplinary responsibility can be seen as a broader concept of responsibility, and therefore it is possible that the violation of the work obligation contains the elements of being a criminal offense or misdemeanor responsibility, so that both disciplinary and criminal or misdemeanor proceedings can be initiated and conducted at the same time, whereby in the disciplinary procedure the existence of signs of a violation of the work obligation is examined, regardless of the fact that it may coincide with the signs of a specific criminal offense or misdemeanor.[24]

6. CONCLUSION

As can be seen, the principle of "ne bis in idem" is an important aspect of the legal protection of individuals in criminal law and in other legal systems. It improves legal certainty and helps prevent abuse of legal mechanisms, thereby contributing to stability and confidence in judicial systems. To understand this principle, it is important to consider the context in which it is applied, as well as the different interpretations in different legal systems. The judgment of A and B v. Norway redefined the relationship between criminal and administrative proceedings in European law. Instead of prohibiting all double proceedings, the Court now allows them to be conducted provided that they are closely related, coherent and that the overall sanctioning remains fair and proportionate. It represents a significant balance between the effectiveness of the state sanctioning system and the protection of the basic rights of the individual, especially in areas such as tax law, financial regulation and market protection. Disciplinary proceedings and the principle of ne bis in idem are two different but sometimes related legal concepts, especially in the context of labor law and criminal law. The relationship between disciplinary (internal procedure within the work organization) and criminal procedure (public legal procedure) is an important aspect of the legal order, especially when it comes to actions against employees in state bodies, public services, as well as in other work environments or organizations and institutions. Although the disciplinary procedure is not in its full form a part of the administrative procedure, it is carried out in accordance with certain principles of the administrative procedure, such as the right to defense, the statement of evidence and the possibility of submitting objections, etc. These procedures are regulated by the Law on Police and accompanying by-laws, which regulate disciplinary responsibility in more detail and part of the disciplinary procedure itself, with the obligation to rely on the appropriate application of the administrative procedure. Disciplinary proceedings, and therefore administrative proceedings, in relation to criminal proceedings and misdemeanor proceedings are legally independent. An authority or organization can initiate disciplinary proceedings regardless of whether criminal or misdemeanor proceedings have been initiated, and vice versa. The judgment of the European Court of Human Rights in the case "A and B v. Norway" represents a turning

point in the development of the interpretation of the relationship between criminal and administrative proceedings in the context of the application of the ne bis in idem principle.

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