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THE RIGHT NOT TO BE PROSECUTED, JUDGED, OR PUNISHED MORE THAN ONE TIME

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Abstract
In order to carry out the tasks of the criminal process, a regulation is necessary in accordance with certain ideas and guiding rules of its conduct. This function is fulfilled by the principles of the criminal process, by which the rules of a general nature are understood, manifested by concrete procedural-criminal norms or which derive from the interpretation of a set of such norms; determining the integral construction of the process, as well as the essence and ensuring the achievement of its tasks.
One of these principles is the right not to be prosecuted, judged, or punished more than once. The research of the concerned problem is based on the analysis of the jurisprudence of the Republic of Moldova, as well as the jurisprudence of the ECHR. This principle is complex and manifests itself in several characteristic aspects, which have been subjected to detailed research in this article. At the same time, following the analysis of this principle, some legislative and practical problems were highlighted that affect the guarantee of human rights in the criminal process, coming up with proposals for *ferenda law* and practical recommendations for the criminal investigation body, the prosecutor, and the court of law.

Keywords: principle, law, criminal procedural rules, ECHR jurisprudence, trial.

INTRODUCTION

The principle of not being prosecuted, judged, or punished more than once, constitutes a fundamental right of the person and has great scientific, practical, and moral importance. In jurisprudence, this principle is known as *ne bis in idem*. In a rule of law, bilateral relations are always formed between the state (authority) and the person (individual). These relationships give rise to obligations, on the one hand, the obligations of a person in relation to the state (the person must obey the law) and, on the other hand, the state in relation to the person (the state must ensure the

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implementation of the law). These relationships (bonds) are also applicable to the right not to be prosecuted, judged, or punished more than once.

METHODOLOGY

Theoretical, normative, and empirical material was used in the development of this publication. Furthermore, the research of the respective subject was possible by applying several scientific investigation methods specific to the criminal procedural theory and doctrine: logical method, method of comparative analysis, systemic analysis, etc.

OUTCOMES

The *ne bis in idem* principle is analyzed in relation to the effects of the final decision. "More exactly, it is shown that the definitive retention of the judgment produces a positive effect (which constitutes the legal basis for the execution of the ruling) and a negative effect (prevents a new prosecution and trial for the facts and claims settled by the judgment); this negative effect, embodied in the *ne bis in idem* rule and is known as *res judicata* authority." [1, p. 99]

"*The right of not to be judged or punished twice for the same act has become a fundamental and indisputable principle of any legal system and is guaranteed by the norms of international acts, to which the Republic of Moldova has also joined*." [17, point 44]

According to art. 4 paragraph (1) of the Protocol 7 of the ECHR, "*No one may be prosecuted or punished criminally by the jurisdictions of the same state for the commission of the offense for which he has already been acquitted or convicted by a final judgment according to the law and criminal procedure of that state*." The European Court noted that, "the purpose of Article 4 of Protocol no. 7 to the Convention is to prohibit the repetition of definitively concluded criminal proceedings *(Franz Fischer, quoted above, § 22, and Gradinger, quoted above, § 53). This leads to the prohibition of consecutive criminal proceedings*." [22, §. 46]

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"According to art. 4 § 3, no derogation is possible from art. 4 of the Protocol by invoking art. 15 of the Convention (derogation "in case of war or in case of other public danger, which threatens the life of the nation")." [16, point 8]

With similar terms, operates art. 14 paragraph (7) of the International Covenant on Civil and Political Rights, according to which no one can be prosecuted or punished for an offense for which he has already been acquitted or convicted by a final judgment in accordance with the law and criminal procedure of each country.

Analyzing the European norm, we note that the *ne bis in idem* principle is applicable to the jurisdictions of the same state. This also was invoked in ECHR jurisprudence. For example, in the case Sarria v. Poland [30, §. 24], the Court found that, "*To the extent that the plaintiff, invoking Article 4 of Protocol no. 7 to the Convention, claims that his extradition would violate the ne bis in idem principle, the Court recalls that Article 4 of Protocol no. 7, which enshrines the principle in question, applies only when a person has been prosecuted or punished twice for the same acts by the courts of the same state (see Ypsilanti versus Greece (decision), no. 56599/00, 29.3.2001 and Gestra versus Italy, no. 21072/92) (...)*."

Another content of the *ne bis in idem* principle is regulated in art. 54 of the Convention Implementing the Schengen Agreement [12] (CISA), according to which "*A person against whom a final judgment has been rendered in a trial in the territory of a Contracting Party may not be the subject of criminal prosecution by another Contracting Party for the same acts, provided that, in the situation where a penalty has been rendered, to be executed, in the process of being executed or can no longer be executed according to the laws of the Contracting Party that pronounced the sentence*." Regulations similar in essence are included in art. 50 of the Charter of Fundamental Rights of the European Union [11]: "*No one may be tried or convicted for a crime for which he has already been acquitted or convicted within the Union, by a final court decision, in accordance with the law*."

In the case Turanský, the Court of Justice of the European Union (CJEU) held that, "*It follows from the very content of Article 54 of the CISA that no person can be*

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prosecuted in a contracting state for the same facts for which a "final judgment" has already been rendered in a first contracting state." [20, §. 31]

In the Moldovan doctrine, it is mentioned that "the principle of not being prosecuted, judged or punished more than once is included and is respected even when a person has been sanctioned for a crime in a foreign state. The issue of recognizing the foreign court decision involves deducting the terms of preventive detention from another state, and in the case of starting the execution of the sentence or its total execution, the person is no longer subject to repeated punishment for the same act." [3, p. 113]

"The application of the principle is conditioned by the existence of a criminal procedure completed by a final judgment of acquittal or conviction of a person against whom a criminal charge has been filed, in connection with which the authorities initiate another criminal procedure (*bis* element) for the same act (*idem* element), regarding the same person." [2, p. 82]

That principle does not apply when one of the decisions is not criminal (for example, in the case of disciplinary procedures, dismissals, etc.). In such cases, the Court declares the complaints inadmissible, noting that they are "incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be dismissed in accordance with Article *35 § 4*." [27, §. 69]

> "In essence, the purpose of regulating the presumption of innocence, which has the nature of a right (Article 4 of Protocol No. 7 is called "The right of not to be tried or punished twice"), is to prohibit the repetition of criminal proceedings already completed by a final decision, regardless of how it became final (the decision is not susceptible to appeals or the parties have already exhausted these appeals or have not used them within the term provided by law)." [2, p. 82]
>
> "The *ne bis in idem* principle has as its objective the imposition of respect for the "authority of *res judicata*" in the conduct of a criminal trial." [7, p. 76]

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> "*Res judicata* is the resolution by a final and irrevocable court decision of the criminal law conflict brought before the court (…), and *res judicata* authority is the power or force granted by law to the final court decision, to be executed and to prevent a new one prosecution for the same fact (*exceptio rei judicatae*)." [9, p. 557]

According to N. Volonciu, "*res judicata* essentially produces two effects: a positive effect, which consists in the fact that the criminal judgment can be enforced, being enforceable from the very moment of its finality; a negative effect, consisting in the fact that it represents an obstacle to the exercise of the criminal action, which can be exceptionally invoked (*exceptio rei iudicatae*). The latter materializes in the prevention of the repetition of a criminal trial in which a final criminal judgment has been issued and implies the incidence of the *ne bis in idem* rule." [10, p. 247]

"The authority of *res judicata* means the power which the law gives to a final judgment to prevent a new prosecution and a new trial, as well as to prevent a new sanction of the same person for the same material fact for which that person had previously been definitively judged. This is the negative effect of *res judicata*. The principle works regardless of the final solution the court settled on in the first trial (conviction, renunciation of the application of the penalty, postponement of the application of the penalty, completion of the criminal process, acquittal) and regardless of the legal classification given to the act at the time of the first judgment (for example, if the defendant was definitively tried in the first trial for an act classified as theft, he cannot be tried later for the same act, but classified as robbery)." [8, p. 19]

In this sense, the ECHR also expressed itself, noting that, "*Therefore, the Court must focus its examination on the facts that constitute a set of circumstances of concrete facts involving the same criminal and also inextricably linked to each other in time and space, the existence of these circumstances having to be demonstrated in order to be able to pronounce a conviction or it can be initiated a criminal action (...). (...)* ***the issue to be resolved is not whether the constitutive elements of the offenses (…) were identical or not, but whether the facts of which the applicant was accused in the two criminal proceedings were related to the same conduct*** *(Grande Stevens and Others,*

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quoted above, § 224). For this, the Court must determine whether the same conduct by the same persons on the same date was at issue (Mareşti versus Croatia, no. 55759/07, § 63, June 25, 2009, and Muslija versus Bosnia and Herzegovina, no. 32042/11, § 34, January 14, 2014). In that case, the Court notes that the applicant was accused twice of the same acts of violence allegedly committed by the same person, D.M.M., and at the same time, June 2, 2004; it also notes that D.M.M. had the opportunity to present her case as a victim (...). Even if other facts and namely an attack on the heritage of D.M.M. were alleged against the applicant in the course of the second trial, it is nevertheless true that the two sets of proceedings in question coincided as regards the acts of violence." [22, §. 34, 36, 37]

Therefore, "*(...) article 4 of the Protocol no. 7 of the Convention must be understood as prohibiting the prosecution or trial of a person for a second "offense" provided that it arises out of identical or substantially the same acts (...)*" [22, §. 31]. Moreover, the European Court considers a violation of the *ne bis in idem* principle even if the crimes for which the applicants were convicted are different, but at the same time, they contain essential elements when the proceedings overlap. Thus, the Court found that "*(...) the facts were essentially the same, although the two sets of proceedings concerned partly different matters (see, in this sense, Gradinger versus Austria, October 23, 1995, § 55, Series A no. 328-C). More recently, in the case Asadbeyli and Others v. Azerbaijan (no. 3653/05, 14729/05, 20908/05, 26242/05, 36083/05 and 16519/06, December 11, 2012), in which the claimants were subject to two separate sets of proceedings relating to the demonstration in which they participated, the Court accepted that the offenses with which the applicants were charged were different in a number of respects, but concluded that the proceedings overlapped in respect of the essential elements of those offences (...)*." [22, §. 38]

"This principle, which is incidental in criminal matters, represents not only a rule of procedure but also of substance because it establishes an individual right of the suspect or defendant, which is opposable *erga omnes*. Therefore, we consider that the recognition of the *ne bis in idem* rule as one of the fundamental principles of the criminal process is based on both the interest of the suspect or the defendant, as well as the public interest of the state and society in general, from the perspective of crime

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preventing and fighting, interests that converge for the same purpose, to prevent the initiation of a new criminal procedure against the same person and regarding the same facts." [7, p. 77]

The content of the *ne bis in idem* principle includes two elements:

1) **The "bis" element**, which consists in the existence of a final judgment rendered against a person. According to Art. 6 point 13) of the CCP, "*judicial decision is a decision of the court adopted in a criminal case: sentence, decision, conclusion, and judgment*." Therefore, there must be a criminal judgment, issued by the judicial authority. At the same time, it should be noted that the European Court has extended the scope of application also regarding the decisions taken by the prosecutor. For example, in the case Butnaru and Bejan-Piser v. Romania [22, §. 45], the ECHR reiterated that "*article 4 of the Protocol no. 7 of the Convention covers not only the case of double conviction but also that of double prosecution (Franz Fischer v. Austria, no. 37950/97, § 29, May 29, 2001)*." The Court of Justice of the European Union also made the respective extension. For example, in the case Vladimir Turanský [20, §. 30, 32-35], CJEU held that "*By means of this question, the referring court essentially asks to determine whether the ne bis in idem principle enshrined in Article 54 of the CISA applies to a decision such as the one at issue in the main proceedings, whereby, after examining the merits of the case with which is notified, a police body ordered, at a stage prior to the initiation of criminal proceedings against a person suspected of having committed a crime, the termination of the criminal investigation launched in the case. (...). As regards the notion of "final judgment", the Court has already stated, on the one hand, in paragraph 30 of the Decision from February 11, 2003, Gözütok and Brügge (C-187/01 and C-385/01, Rec., p. I-1345), that, in the event that, following a criminal procedure, the public action has been definitively extinguished, it must be considered that a "final judgment" has been pronounced regarding the person involved and the facts imputed to him, within the meaning of Article 54 of the CISA. On the other hand, towards point 61 of the Decision from September 28, 2006, Van Straaten (C-150/05, Rec., p. I-9327), the Court held that Article 54 of the CISA applies to a decision by the judicial authorities of a Contracting State by which a defendant is definitively acquitted for lack of evidence. It follows that*

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basically, in order to be qualified as a final decision within the meaning of Article 54 of the CISA, a decision must terminate the criminal investigation and definitively extinguish the criminal action. In order to assess whether a decision is "final" within the meaning of Article 54 of the CISA, it must first be ascertained, as the Austrian, Dutch, Finnish and United Kingdom Governments and the Commission have shown in particular; whether the decision in question is considered final and binding within the meaning of the national law of the contracting state whose authorities adopted it and to ensure that the mentioned decision confers, in this state, the protection granted on the basis of the ne bis in idem principle." Therefore, the scope of the final decision includes not only court decisions, but also those issued by the prosecutor (for example, those of removal from criminal prosecution, termination of criminal prosecution, or closing the criminal process).

2)

"*Simultaneously, the Court notes that within the decision Zigarella v. Italy from October 3, 2002, the European Court added a new condition to the bis element for parallel proceedings. Thus, in this case, the European Court examined whether Article 4 of Protocol no. 7 applies in all new proceedings initiated in connection with the same crime; i.e. regardless of whether or not it was known at the time of the initiation of the proceedings that the person had already been tried in previous proceedings or whether the mentioned article only applies to new proceedings at the time of which it was known with certainty that the person had already been judged. Thus, in the mentioned case, the European Court held that the violation of Article 4 of Protocol no. 7 occurs only at the start of the new proceedings when the authorities knew about the trial of the defendant in the previous proceedings*." [14, point 29]

3) **"Idem" element**, refers to the same person and the same cause. As for the "same person", it means the person in respect of whom a judgment or decision was previously taken by the court or, respectively, by the prosecutor. In any case, the target is the person being tracked (suspected, accused, and indicted). According to our opinion, this situation also applies to the person about whom a complaint is submitted to the criminal investigation body or prosecutor. Regarding the "same cause", it is considered that "both criminal procedures have as their object the same material facts, regardless of their legal framework. Since these facts have been judged, receiving a

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definitive solution, they can no longer be the subject of a new prosecution or trial, even when they had a different legal framework." The ECHR has also expressed itself in this regard. For example, in the case Butnaru and Bejan-Piser v. Romania [22, §. 42-44], the Court held that

> "*The Court considers that the crime of violence with which the applicant was accused fully encompassed the facts of the crime of assault and that the latter crime did not contain any elements that were not included in the crime of robbery with violence. Acts of violence thus constituted the only criminal element in the trial for aggression and hitting and an essential element in the trial for robbery with violence. Finally, the Court notes that, although the applicant invoked res judicata in the second set of proceedings, the domestic courts did not expressly establish in the context of that proceeding that there were circumstances that distinguished the charge of robbery from that of assault for which the plaintiff had already been paid (Asadbeyli and Others, (...), § 161, see paragraphs 17 and 19 mentioned above). It notes, however, that the Court of Appeal held, in its decision of 4 March 2008, that the facts of the two sets of proceedings in question were identical (...), but that these findings could not lead, for procedural reasons, to a reopening of the procedure (...). The Court is therefore of the view that the acts of violence with which the applicant was charged during the two sets of proceedings were essentially the same*."

4) In other words, in the case Butnaru and Bejan-Piser v. Romania, the ECHR found that the applicant (Butnaru) was acquitted, during the initial phase, of the accusation of hitting or other violence (read – injury to bodily integrity or health – *n.a.*) and, subsequently, she was convicted of robbery in relation to the same incident. It was found that the applicant was accused twice of the same acts of violence that she had inflicted on the same person and on the same date. Even if other facts that affected social relations regarding the patrimony were imputed to the person in question in the second procedure, however, the two procedures coincided with regard to the acts of violence. Thus, the applicant was tried twice for the same acts of violence and, therefore, the ECHR found that Art. 4 of Protocol no. 7 to the European Convention on Human Rights has been violated (in the following we will use the acronym "ECHR"), being an article that guarantees the ne bis in idem principle).

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"The guarantee enshrined in Article 4 Protocol 7 comes into force when new proceedings are instituted and the previous judgment of acquittal or conviction has already become final. At this stage, the elements of the file will necessarily include the decision by which the first "criminal" trial within the meaning of the Convention has ended and the list of charges brought against the person being the subject of the new trial. These documents will normally contain a statement of facts relating to the offense for which the person has already been tried and another relating to the second offense for which they are charged. These statements provide a useful starting point for the Court's examination of whether the facts of the two sets of proceedings are identical or substantially the same (see Grande Stevens and Others versus Italy, no. 18640/10, 18647/10, 18663/). 10, 18668/10 and 18698/10, § 220, March 4, 2014)." [22, §. 32]

The European Court also emphasizes in its jurisprudence that

> "*(...) it does not matter which parts of the new charges are ultimately upheld or rejected in subsequent proceedings, since Article 4 of Protocol no. 7 of the Convention establishes a guarantee against re-prosecution or the risk of re-prosecution, and not the prohibition of a second conviction or acquittal (...)*." [22, §. 33]

In a more recent case that piqued our interest, Mihalache v. Romania [24, §. 49], the Court establishes the elements of the right not to be prosecuted or tried more than once. Thus, "*The Court notes that, as drafted, the first paragraph of Article 4 of Protocol no. 7 establishes the three components of the ne bis in idem principle:*

1) *the two sets of proceedings must be "criminal" in nature;*
2) *they must refer to the same facts;*
3) *they must be a repetition of the procedure*."

"The third component includes three elements:

a) the second procedure must be new;
b) the first decision must be "final";
c) the exception mentioned in the second paragraph should not apply to it." [16, point 5]

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National criminal procedural legislation also comes with effective guarantees in this regard. According to art. 22 paragraph (1) of the CCP,

> "*No one can be criminally prosecuted or tried for the commission of the criminal act in respect of which an uncancelled order was issued to terminate the criminal prosecution, to remove the person from criminal prosecution and/or to close the case, or to refuse to start the criminal prosecution or in respect of which a final court decision of conviction, acquittal or termination of the criminal process was pronounced*."

From the analysis of the respective norm, we observe that it corresponds to the international guarantees in the matter of the regulation of the *ne bis in idem* principle. Moreover, the national norm establishes and specifically indicates the cases when the person cannot be prosecuted or tried twice for the same criminal act. In other words, the procedural norm in question has detailed and explicit content in order to guarantee the right provided for in art. 22 of the CCP. Therefore, in the national criminal procedure, the principle in question will be applied if the person was previously suspected, accused, indicted or convicted of an act that later became the subject of a criminal prosecution or repeated judicial examination.

With reference to the quality of the person in the criminal process,

> "*in the Decision no. 12 from May 14, 2015, the Court emphasized that, in its jurisprudence, the European Court held that the non bis in idem principle is applicable only in the case of an accusation in criminal matters (see, for example, the case Maaouia vs. France, October 5, 2000) and, obviously, in the criminal files in which accused persons appear. Therefore, in the national criminal procedure, the principle will be applied if the person was previously suspected, accused, indicted or convicted for an act that later became the subject of criminal prosecution or repeated judicial examinations*." [13, point 30]

The Constitutional Court held that

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> "*(…), this principle is to be applied only when a definitive act has been issued, whether it is an ordinance terminating criminal prosecution, closing the criminal case or removing the person from criminal prosecution, or a final court decision. Therefore, the non bis in idem principle does not apply in ordinary appeals or other legal appeal procedures.*" [17, point 54; 18, point 6]

"At the same time, the Court notes that, according to Article 4 Paragraph 2 of Protocol no. 7 to the European Convention, the *non bis in idem* principle does not prevent the resumption of the criminal prosecution if *new or recently discovered facts* or *a fundamental flaw* in the previous procedure are likely to affect the judgment pronounced." [17, point 56]

> "*(…) the principle established by art. 21 of the Constitution providing all the necessary guarantees for the defense of the person accused of a crime in the judicial process, in addition to other procedural rights, it also offers the person the constitutional right not to be prosecuted, judged or punished more than once for the same act. The principle in question assumes that the one who, through his conduct, ignored the legal order will be liable only once for the illegal act, because for a violation of the law only one legal sanction will be applied*." [18, point 5]

> "The meaning of this right is, on the one hand, to avoid the repeated suffering of the person if the suspicions were not confirmed the first time, and on the other hand, to exclude the harassment of the person by the criminal investigation bodies by investigating the same fact." [18, point 6]

According to art. 275 points 7), 8) of the CCP, the criminal prosecution cannot be started, but if it has been started, it cannot be carried out, and it will be terminated in cases where:

> "*regarding the person in question, when there is a final court decision in relation to the same accusation or by which it was found impossible to prosecute on the same grounds*." In relation to and in accordance with the fundamental principles of law and the rule of law, a person cannot be held criminally liable for committing an offense more than once. Art. 22 of the CCP stipulates that "*no one can be prosecuted by the criminal investigation bodies,*

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> *judged or punished by the court more than once for the same deed*." Likewise, the criminal prosecution cannot be started, if regarding this person there is already a court decision entered into force or a decision to close the criminal prosecution on the same charge;
> "*regarding the person in question, there is an unannounced decision not to initiate criminal prosecution or to terminate criminal prosecution on the same charge*." In the given case, we are in a situation where for the same deed against the same person, a reasoned ordinance has already been issued regarding the non-initiation of criminal prosecution. The prosecution will not be able to begin until the prosecutor's ordinance is canceled. Art. 4 of Protocol 7 of the ECHR prohibits the repeated conduct of a criminal trial, which previously ended with a judgment that remained final.

"*The Court notes that in this case, the question arises as to whether the provisions of Article 275 point 8) of the Code of Criminal Procedure prohibit or not the initiation of a new procedure regarding facts and persons that were the subject of examination in the first procedure; but under a different legal framework of the crime (see § 11 above). The Court notes that this dispute is based on the interpretation of the text "on the same charges" from Article 275, point 8) of the Code. Being contested by the author of the exception, the Court considers that it must rule on article 275 point 8) of the Code of Criminal Procedure in the aspect mentioned above, because the erroneous application of this rule may violate the ne bis in idem principle guaranteed by the Constitution*." [14, point 32]

At the same time, "*The Court notes that the text "on the same charges" from Article 275 point 8) of the Code of Criminal Procedure cannot justify a restrictive approach, so as to allow the existence of two parallel procedures based on the same facts and persons, but with different legal frameworks. Moreover, regardless of the legal classification of the deed within a new procedure, the deed remains the same*." [14, point 34]

According to the provisions of art. 22 paragraph (2) of the CCP, "*The final court decision prevents the initiation or continuation of the criminal process against the*

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same person for the same deed, except in cases when new or recently discovered facts or a fundamental flaw in the previous procedure affected the respective decision." According to art. 22 paragraph (3) of the CCP, "*The ordinances of the prosecutor to terminate the criminal investigation, to remove the person from criminal investigation and/or to close the case or to refuse to start the criminal investigation prevent the initiation or continuation of the criminal process regarding the same person for the same deed, except for the cases when these ordinances were cancelled*."

The analysis of the respective provisions shows that "new or recently discovered facts or fundamental flaw" refers only to court decisions. Regarding the prosecutor's ordinances mentioned in art. 22 paragraph (3) of the CCP, the criminal procedural law only indicates the need to cancel them. Therefore, based on the ECHR and the national jurisprudence, we consider it appropriate to amend and complete art. 22 paragraph (3) of the CCP, as it should be concretely indicated that the annulment of the prosecutor's ordinances could only take place in the case when new or recently discovered facts or a fundamental flaw in the previous procedure affected the respective decision. At the same time, the respective aspects also refer to the situation of resuming the criminal prosecution, putting the person under a more serious accusation or establishing a harsher punishment for the same person and for the same act.

New facts constitute data about the circumstances of which the criminal investigation body was not aware at the time of the adoption of the challenged ordinance and which could not have been known at that time either. The evidence administered in the investigation of other cases must be new and not the means of evidence through which evidence already known in the respective case are administered. [19, point 5.5] "*(...) Specific circumstances of the case that emerge only after the trial are "new" (see Bulgakova versus Russia, no. 69524/01, § 39, January 18, 2007, and Vedernikova versus Russia, no. 25580/02, § 30, July 12, 2007, regarding article 6) (...)*." [24, §. 131]

Recently discovered facts are the facts that existed on the date of adoption of the challenged ordinance, but could not be discovered. The attitude of a party who, knowing a fact or a circumstance that was favorable to him, preferred to remain silent,

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cannot justify the mention of a judicial error and cannot constitute an obstacle to the admission of the resumption of the criminal prosecution if, by other means of proof, such circumstances could not be discovered at that time. [19, point 5.5] "*The Court has already explained that particular circumstances of a case which existed at the time of the trial, but of which the judge didn't know and which became known only after the trial, are "newly discovered" circumstances. (...). Also, the Court considers, as the explanatory report to Protocol no. 7, that the expression "new or recently discovered facts" includes all evidence relating to pre-existing facts (...)*." [24, §. 131]

A fundamental flaw in the previous procedure, which affected the judgment pronounced – "*essential violation of the rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, by other international treaties, by the Constitution of the Republic of Moldova and other national laws*" (art. 6 point 44) of the CCP). "*In certain cases, the Court also maintained the application of the exception provided for in Article 4 § 2 of Protocol no. 7 in case of reopening the procedure on the grounds of a "fundamental defect of the previous procedure". In Fadine v. Russia (no. 58079/00, § 32, July 27, 2006), for example, it held that the reopening of the proceedings on the ground that the lower court did not comply with the instructions given by the Supreme Court regarding the stages of the investigation was justified by a fundamental defect in the previous proceedings and was therefore in accordance with Article 4 § 2 of Protocol no. 7 (see Bratyakin versus Russia (decision), no. 72776/01, March 9, 2006, and Goncharovy versus Russia, no. 77989/01, November 27, 2008)*." [24, §. 132]

"*Therefore, from the jurisprudence mentioned above, it follows that the Court evaluates on a case-by-case basis whether the circumstances invoked by a higher authority to reopen the procedure constitute new or recently discovered facts or a fundamental flaw in the previous procedure. The notion of "fundamental flaw" within the meaning of Article 4 § 2 of Protocol no. 7 tends to indicate that only a serious violation of a rule of procedure, which considerably undermines the integrity of the previous procedure; can serve as a basis for reopening it to the detriment of the accused when the latter has been acquitted of a crime or punished for a crime less serious than that provided by the applicable law. Therefore, in such cases, the simple*

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re-evaluation of the case material by the prosecutor or the higher court cannot fulfill this criterion. However, with regard to situations in which an accused has been found guilty and in which reopening the proceedings could benefit him, the Court recalls that paragraph 31 of the explanatory report to Protocol no. 7 (...) emphasizes the fact that "this article does not exclude a reopening of the procedure in favor of the convicted person or any other modification of the decision in favor of the convicted person". In such a situation, the nature of the vice must therefore first be assessed on the basis that there has been a violation of the right to defense and therefore an obstruction to the proper administration of justice. Finally, in all cases, the reasons justifying the reopening of the procedure must, according to the wording of Article 4 § 2 in fine of Protocol no. 7, to be likely to "affect the judgment rendered", either in favor or to the detriment of the person concerned (...)."[24, §. 133]

"It is true that some final judgments are wrong in the aspect of establishing the real situation and in fact, and for this reason, the retrial of the case is required; but this does not deny the applicability of the *ne bis in idem* principle, which constitutes the rule, while the retrial of a definitively established situation constitutes the exception. Thus, the rule that the truth has been found out is given by *ne bis in idem*, while the institution of extraordinary remedies embodies the exception to the case's retrial, especially it refers to the review. A strict sharing of the scope of action of these rules can be found here as well, avoiding their conflict; where there are no grounds for reforming/retracting the decision, the *ne bis in idem* principle applies; where grounds for the re-examination of the final decision are proven, extraordinary appeals apply." [4, p. 119]

"In cases Gozutok and Brugge, M and Kossowski, the CJEU considered that the *ne bis in idem* principle also applies to non-prosecution solutions, whereby the Public Ministry, ruling on the merits of the case, following an in-depth procedure, terminate the criminal proceedings commenced in this state without the intervention of the court." [1, p. 43]

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In the national judicial practice, the act of starting a new criminal investigation regarding the same person and the same charges was declared null.[1]

"*Regarding these criticisms, the Court notes that the general rule established by the bis element (double procedure) of the ne bis in idem principle seeks to prohibit the repetition of a criminal procedure that has been concluded by a "final" decision (see A and B v. Norway, [MC], November 15, 2016, § 109). At the same time, the Court notes that in the Zigarella v. Italy decision of October 3, 2002, the European Court added a new condition to the bis element for parallel proceedings. Thus, in this case the European Court examined whether Article 4 of Protocol no. 7 applies in all new proceedings initiated in connection with the same crime, meaning that, regardless of whether or not at the time of their initiation it was known that the person had already been tried in previous proceedings or if the mentioned article applies only to new proceedings at the initiation of which it was known for certain that the person had already been tried. Thus, in the mentioned case, the European Court held that the violation of Article 4 of Protocol no. 7 occurs* ***only when, at the start of the new proceedings, the authorities knew about the trial of the defendant in the previous proceedings****. In this sense, in order to comply with the ne bis in idem principle, the European Court held that the second procedure must cease after the first procedure becomes definitive (Zigarella v. Italy, quoted above). At the same time, considering that the ne bis in idem principle imposes on the competent public authorities not only the prohibition of repeatedly judging a person but also the prohibition to prosecute the person several times for the same act (DCC no. 12 from May 14, 2015, § 52); the Court notes that in the event of the existence of two parallel procedures regarding the*

[1] *According to the conclusion of the investigating judge of the Central Court of March 28, 2005, the accepted complaint of S.V. and the minutes of the initiation of the criminal prosecution of February 17, 2005, regarding the crime provided for by art. 318 paragraph (3) of the Criminal Code was declared null and void. Adopting the given solution, the court referred to the provision of art. 275 point 8) of the CCP that there are circumstances that exclude the initiation of criminal prosecution, because regarding the same fact, through an unannulled decision of the criminal prosecution body, the criminal prosecution regarding S.V. was terminated. The ordinance terminating the criminal prosecution from 05.02.2005 and the minutes of the initiation of the criminal prosecution regarding S.V. of 17.02.2005 describe and are based on his same behavior and, considering that art. 4 of Protocol 7 of the ECHR prohibits the repeated conduct of a criminal trial, which previously ended with a final judgment, the declaration of the last procedural act as null is legal.* The college mentioned that this solution is also based on the judicial practice of the ECHR exposed in the cases Gradinger v. Austria (Decision of 23.10.1995) and Franţ Fişer v. Austria (Decision of 29.05.2001). (Extract from DCC of SCJ of the Republic of Moldova no. 1re-58/2005 from 24.05.2005 // SCJ Bulletin of the Republic of Moldova, 2005, Special edition, page 34; SCJ Bulletin of the Republic of Moldova, 2005, no. 7, page 13.

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same deed and the same person, the prosecutor, who learns this information, is obliged to terminate one of these procedures ***until the case is sent to court****. Similarly, if it is known about the existence of a parallel procedure at the trial stage of the case, in order to comply with the ne bis in idem principle, it is necessary to terminate the criminal process*." [14, pct. 28-31]

In the ECHR case, Sergey Zolotukhin v. Russia [31, §. 81-83], the Court pointed out that, "(…) *the approach that emphasizes the legal qualification of the two crimes is too restrictive in terms of the rights of the person, because if the Court limits itself to finding that the person has been prosecuted for crimes with a different legal qualification, it risks undermining the guarantee enshrined in Article 4 from Protocol no. 7, rather than making it practical and effective as the convention requires (compare with Franz Fischer, quoted above, § 25). Consequently, the Court considers that Article 4 of Protocol no. 7 must be understood as prohibiting the prosecution or trial of a second "offense" to the extent that it arises out of identical or substantially the same acts. The guarantee enshrined in Article 4 of Protocol no. 7 becomes relevant at the start of a new criminal prosecution, when an acquittal or prior conviction has already acquired the force of res judicata. At this point, the available material will necessarily include the decision that closed the first "criminal proceeding" and the list of charges against the applicant in the new trial. These documents would normally contain a statement of facts relating to both the offense for which the applicant has already been tried and the offense with which he is charged. In the Court's view, such statements of fact are an appropriate starting point for determining the question whether the facts in both proceedings were identical or substantially the same. The Court points out that it is irrelevant which parts of the new charges are ultimately upheld or dismissed in subsequent proceedings, since Article 4 of Protocol no. 7 contains a guarantee against trial or the risk of being tried again in new proceedings, rather than a prohibition of a second conviction or acquittal (...)*."

It is important to note that, "*The Court could not find a violation of the ne bis in idem principle, when the author raised the issue of sanctioning two different persons: one natural person and another legal entity (see, mutatis mutandis, DCC no. 68 from May 14, 2019, §* 17)". [15, point 17]

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A rather important and, at the same time, illegal problem is parallel (separate) or mixed processes. The practice shows that there are situations in which the judicial bodies sanction the person for a misdemeanor, and then start a criminal investigation regarding the same person. Therefore, we find ourselves in a situation where the person is punished for a misdemeanor, and then, through the revision of the misdemeanor process, this decision is canceled, the criminal prosecution is started against the same person.

In the ECHR case, Maresti v. Croatia [23, §. 63-69], the Court found that the applicant was, firstly, found guilty of committing a misdemeanor (which tends to protect social relations regarding public order) for allegedly using violence in a public place against a person. Later, for the same conduct, the applicant was convicted of committing the crime of serious injury to bodily integrity. Therefore, the facts imputed to the applicant in the two proceedings referred to the same behavior. It was held that it was obvious that there had been a duplication of criminal proceedings. Therefore, the ECHR found a violation of Art. 4 of Protocol No. 7 of the ECHR.

The case of Milenković v. Serbia is also eloquent [25, §. 39-42, 49]. In this case, the ECHR held that the applicant was accused: 1) within the contravention process – for beating on the head of R.C. and use of obscene language; 2) within the criminal process – for beating on the head of R.C., resulting in serious injury to the body integrity. It has been noted that the actions imputed to the applicant (from the two trials) are inextricably linked in time and space. Thus, it was found that the violence exercised has been taken into consideration twice: for the recognition of the applicant guilty of committing a misdemeanor and, respectively, with a view to incurring criminal liability for the commission of the crime of serious injury to bodily integrity. In addition, this time the ECHR reached the conclusion that art. 4 of Protocol No. 7 of the ECHR was violated.

In the ECHR case, Muslija v. Bosnia and Herzegovina [26, §. 34], the Court held that both in the misdemeanor and in the criminal proceedings, the applicant was found

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guilty of the same conduct towards the same victim and within the same period of time.

At the same time, the *ne bis in idem* principle can also have scope of application in cases of parallel fiscal processes. An eloquent example is the case Ruotsalainen v. Finland [29, §. 56], in which the Court found that, "*(...) the facts which gave rise to a summary penalty ordinance against the applicant related to the fact that he used a more leniently taxed fuel than diesel in his van without paying the additional use tax. The fuel tax charge was imposed because the claimant's van was driven on a more leniently taxed fuel than diesel and was then trebled for failing to give prior notice of this fact. This last factor was considered a punishment to discourage recidivism. Thus, the facts of the two sets of proceedings differed little, although there was the requirement of intent in the first set of proceedings. Therefore, the Court considers that the facts of the two crimes must be considered substantially the same within the meaning of Article 4 of Protocol no. 7 (...)*."

"Within CJEU Fransson Decision it was held back that: "the *ne bis in idem* principle enunciated in Article 50 of the Charter does not prevent a member state from imposing, for the same facts of non-compliance with VAT declaration obligations, and successively, a fiscal sanction and a criminal sanction to the extent that the first sanction does not have a criminal character, an aspect that must be verified by the national court." *Per a contrario*, when the fiscal subject has been engaged in fiscal administrative liability for an act identified as his responsibility, then criminal liability can no longer be engaged, if the sanction previously ordered in fiscal matters was of a criminal nature." [1, p. 45]

On the other hand, in the ECHR case, Pirttimaki v. Finland, the Court found that there was no violation of Article 4 of Protocol no. 7 to the Convention because the two sets of challenged proceedings did not constitute a single set of concrete factual circumstances arising from identical facts or facts that were essentially the same. "*First, the legal entities involved in these proceedings were not the same: in the first set of proceedings it was the claimant and in the second set of proceedings the society (...). Even assuming that actually, the claimant filed the tax return in both cases, the*

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circumstances were still not the same: making a tax return in personal taxation differs from the tax return for a company because these returns are made in different forms, they can be made at a different time and, in the case of the company, other people can be involved." [28, §. 51, 52]

"*Regarding parallel criminal proceedings, the aforementioned Article 4 does not prohibit them. In such a situation, it cannot be said that the applicant has been prosecuted more than once for "an offense for which he has already been acquitted or convicted by a final judgment" (Garaudy versus France (decision), no. 65831/01, CEDO 2003-IX (extracts)). Thus, the Court found that a claim in a case where the national court dismissed the second set of proceedings was manifestly ill-founded when a final decision was rendered in the first set of proceedings (Zigarella versus Italy (decision), no. 48154/99, October 3, 2002). However, a violation was found when the national courts did not thus conclude the second set of proceedings (Tomasović versus Croatia, no. 53785/09, § 31, October 18, 2011, Muslija, quoted above, § 37, and Lucky Dev v. Sweden, no. 7356/10, §§ 59 and 63, November 27, 2014)*." [22, §. 47]

Therefore, there will be a violation of the *ne bis in idem* principle (guaranteed by art. 4 of Protocol no. 7 of the ECHR) in the situation where the same charge would be the subject of two or more separate trials [6, p. 25]. For example, when a person would be acquitted or convicted (*lato sensu*) [24, §. 97, 98] based on art. 287 of the Criminal Code and later another criminal/contravention case would be opened for the same deed, according to Art. 151, 152, or 155 of the Criminal Code of the Republic of Moldova or, as the case may be, based on art. 78 of the Contravention Code. [6, p. 25]

On the contrary, the application of liability in a single trial according to the rules of the contest of crimes will raise a problem from the perspective of the *nullum crimen sine lege, nulla poena sine* principles. More precisely, acting in such a way will represent nothing more than an unfavorable extensive interpretation of the criminal law. [6, p. 25]

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In order to fulfill the conditions regarding parallel proceedings (contravention (fiscal) and criminal) the material connection must be taken into account. In this regard, the case of A and B v. Norway is eloquent. According to this case, "*The relevant elements for determining the existence of a sufficiently close connection from a material point of view are in particular the following:*

- *if the various procedures pursue complementary objectives and therefore concern, not only in the abstract but also in concreto, different aspects of the act that harms the society in question;*
- *whether the mixture of proceedings in question is a foreseeable consequence, both in law and in practice, of the same punishable conduct (idem);*
- *whether the procedures in question have been conducted in a way that avoids, as far as possible, any repetition in the collection and evaluation of evidence, in particular through appropriate interaction between the various competent authorities, resulting in fact-finding being carried out in one stage of the process that was repeated in the other;*
- *and, in particular, the purpose of knowing whether the sanction applied at the closing of the procedure that ended first was taken into account in the procedure that ended last, so as not to burden the person concerned, the latter being less likely to occur if there is a compensatory mechanism designed to ensure that the total amount of all penalties imposed is proportionate*." [21, §. 132]

"*As a preliminary, the Court notes that the application of the ne bis in idem principle, provided for in Article 22 of the Constitution, requires compliance with four conditions: 1) identity regarding the person pursued or sanctioned; 2) identity of the facts deduced from the judgment (*idem*); 3) a double sanctioning procedure (*bis*); and 4) the finality of one of the two decisions*." [14, point 23]

CONCLUSIONS.

The analysis of the procedural-criminal norms shows that "new or recently discovered facts or fundamental flaw" refers only to court decisions. Regarding the prosecutor's ordinances mentioned in art. 22 paragraph (3) of the CCP, the criminal procedural law only indicates the need to cancel them. Therefore, based on ECHR and national jurisprudence, we consider it appropriate to amend and supplement Art. 22 paragraph

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(3) of the CCP, in order to concretely indicate that the cancellation of the prosecutor's ordinances can only take place if new or recently discovered facts or a fundamental flaw in the previous procedure affected the respective decision. At the same time, the respective aspects also refer to the situation of resuming the criminal prosecution, putting the person under a more serious accusation or establishing a harsher punishment for the same person and for the same act.
In order to fulfill the conditions regarding parallel proceedings (contravention (fiscal) and criminal) the material connection must be taken into account. The relevant elements for determining the existence of a sufficiently close connection from a material point of view are in particular the following:

- if the various procedures pursue complementary objectives and therefore concern, not only in the abstract but also *in concreto*, different aspects of the act that harms the society in question;
- whether the mixture of proceedings in question is a foreseeable consequence, both in law and in practice, of the same punishable conduct (idem);
- whether the procedures in question have been conducted in a way that avoids, as far as possible, any repetition in the collection and evaluation of evidence, in particular through appropriate interaction between the various competent authorities, resulting in fact-finding being carried out in a repeated process;
- the purpose of knowing whether the sanction applied at the end of the procedure that ended first was taken into account in the procedure that ended last, so as not to impose a burden on the person concerned, the latter being less likely to occur if there is a mechanism compensatory measure designed to ensure that the total amount of all penalties imposed is proportionate.

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