NEW FORMS AND PERSPECTIVES ON *RES JUDICATA* IN CRIMINAL MATTERS

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Abstract

The fundamental principles of the due process in criminal matters compel the prosecution to ensure that an effective official investigation is carried out, which can identify criminal offences, ensuring that the perpetrators are held accountable. At the same time, the impartial administration of criminal justice requires the existence of a single trial, with due respect for the rights of the defender, in which the substantive truth is definitively established. It must be possible to review a court's decision exclusively by means of appeals, regulated by clear and precise rules, so as to establish a specific point in time when the final judgment that settles a criminal trial becomes final, after which the judge's ruling cannot be overturned. Res judicata is the power or force given by law to a final judgment to be enforced and to prevent a new prosecution for the same offence. This doctrine is based on two fundamental rules: a person can only be tried once for a criminal offence; the basis for the judgment is presumed to express the truth and must not be contradicted by another judgment. What legitimates res judicata is not so much the finality of the judgment as the truth which must underlie it, the truth which constitutes the basis, the rationale and the social and moral foundation of this effect of the judgment. This study is an analysis of res judicata, in terms of the content of the doctrine, its legal dimension, as well as the way in which it ensures the guarantee of a fair trial in order to establish the judicial truth. The article also examines the relationship between res judicata, res judicata and the non bis in idem principle. The way in which these three principles operate in the course of criminal proceedings helps to ascertain the particular effects of decisions not to refer to trial, decisions of the committing judge of the pre-trial chamber. At the same time, the study also takes into account the effects of the Constitutional Court Decision no. 102/2021 on the res judicata authority of judgments rendered by civil courts in preliminary points of law, as provided under Article 52 of the Code of Criminal Procedure.

Keywords: *finality of judgments, res judicata, claim preclusion, non bis in idem, preliminary points of law.*

1. Introductory considerations

"It is necessary for the social order, for the freedom and security of citizens that the judgment should come to an end, become unappealable, final; (....) a justice whose judgments could be questioned at any time would lack prestige, public confidence and social utility; the idea of justice would be jeopardized; final judgments must be presumed to express the real truth or 'social and legal truth', because they are the result of research carried out with all the guarantees and impartiality necessary to establish this truth." [1]

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[1] Tr. Pop, *Drept procesual penal. Partea specială, vol. 4*, National Printing House, Cluj, 1948, p. 558-559.

Professor Traian Pop's references include a summary presentation of the specific defining characteristics of res judicata. Although summarily treated in the Romanian criminal procedure doctrine, the authority of res judicata is not limited to the regulation of a mere effect of the court rulings, but represents one of the main ways of pursuing criminal justice.

The principles of legality and right to truth, which heavily shape the Romanian criminal procedure, compel the prosecution to carry out an effective official investigation in order to identify the criminal offences and to take the necessary measures to criminally prosecute the perpetrators of the offences. In order to ensure the effective application of these principles and with a view to preventing bias, the State must guarantee that the defendants in criminal proceedings are subject to a single trial that respects the legal procedural guarantees, in particular the right to a defense so that the judicial truth is impartially established.

Thus, the legislator established that the judgment of a court of law can only be reviewed by means of appeals, under by clear and precise rules, so as to establish a specific point in time when the final judgment that settles a criminal trial becomes final, after which the judge's ruling cannot be overturned.

Once the judgment has become final, the trial can be reopened under national and European law only by means of an extraordinary appeal in accordance with the law, in two cases, namely the existence of a serious procedural error, and the occurrence of a new fact or circumstance, unknown at the time of the initial judgment, which makes it necessary to re-establish the facts[2]. Thus, the prospect of a retrial, in the absence of the above-mentioned situations and only by means of an extraordinary appeal, has been rejected by all modern legislation, being considered that "it is quite inhuman to keep the defendant under perpetual threat of a new prosecution."[3]

In order to settle this principle into law, modern legislation has established res judicata as one of the effects of final judgments.

2. Concept. Character.

Res judicata is a specific effect of judicial decisions. In the doctrine[4] , it has been held that the concept of *"res judicata"* is the resolution by a final judgment of criminal case brought before the courts. The judgment settles the merits of the case or an actionable matter and settles the case on the merits or the actionable matter to the extent that a judgment is pronounced. Thus, what the court has definitively decided in a criminal case is *'res judicata'* and such a judgment has *'res judicata authority'*.

Also, **res judicata** is the power or force granted by law to a final judgment to be enforced and to preclude a new prosecution for the same offence[5]. Res judicata - the most important effect of judgments - is based on two fundamental rules: a person can only be tried once for a

[2] Under Article 4 of Protocol 7 to the European Convention on Human Rights:

"1.No one shall be liable to be prosecuted or punished as a criminal offender in the same State for the commission of an offense for which he has already been finally acquitted or convicted by a final judgment in accordance with the criminal law and procedure of that State.

2.The provisions of the preceding paragraph shall not preclude the reopening of the trial, in accordance with the law and criminal procedure of the State concerned, if new or newly discovered facts or a fundamental flaw in the previous proceedings are such as to affect the judgment (...)".

[3] Tr. Pop, *op. cit.*, p. 558.

[4] Tr. Pop, *op. cit.*, vol IV, p. 557.

[5] *Ibidem*

criminal offence; the basis for the judgment is presumed to express the truth and must not be contradicted by another judgment[6]. What legitimizes res judicata is not so much the finality of the judgment as the truth which must underlie it, the truth which constitutes the basis, the rationale and the social and moral foundation of this effect of the judgment.

The characteristics of res judicata[7] are: exclusivity, unappealability, enforceability and binding force.

a. ***The exclusive nature*** prevents the opening of a new trial with the same subject matter as the one settled by a final judgment. According to Article 371 of the Code of Criminal Procedure, the new criminal trial may not concern the same facts and the same persons in respect of whom the legal conflict has been extinguished by a final judgment. In the event of the commencement of a new criminal investigation of the same offences and the same persons, a criminal case may not be opened, in accordance with Article 16(1)(i) of the Code of Criminal Procedure, and if all means of appeal have been exhausted, the judgment rendered may only be set aside by way of an appeal for annulment (Art. 426(i) and Art. 432 (2) of the Code of Criminal Procedure), regardless of the outcome of the proceedings (except in case where the outcome was the termination of the criminal trial, pursuant to Art. 16 (1)(i) of the Code of Criminal Procedure].

The exclusive nature of the final judgment clarifies the duality of the principle of res judicata.

From an extrinsic point of view, res judicata precludes an ordinary procedure aimed at retrial and quashing of a final judgment. Thus, the exclusive nature of res judicata will also be undisputed, since the procedural law exhaustively regulates the extraordinary procedures allowing the court to reopen proceedings in whole or in part.

From an *intrinsic point of view*, res judicata ensures the overlapping of judicial and material truth. Although it is intellectually impossible to superimpose the two forms of truth, in order to ensure the certainty of legal relationships arising from final judgments, the law confers on judicial truth the value of absolute truth. It can no longer be called in question by means of an extraordinary appeal in the absence of proof of a substantial change in the facts on the basis of which that truth was established in the first place, or in the absence of a fundamental procedural error, since that would entail a breach of the fundamental principle of fair justice in a State governed by the rule of law.

These elements form the basis of the presumption expressed as *" judged matter"*, namely *res judecata pro veritate habetur* - the judicial truth that shapes, on the basis of the law, into an absolute truth that ensures the stability of the legal relations created, transformed or changed by a final judgment, regardless of the premise on which they were based.

b. ***The incontestable nature of*** res judicata follows from the exclusive nature of res judicata and ensures that it is impossible for the parties or the prosecutor to question the judicial truth established by the final judgment in an ordinary procedure.

The case law of the European Court of Justice held that the right to a fair trial before a court of law, guaranteed under Art. 6(1), is to be interpreted in accordance with the preamble to the Convention, which states the supremacy of law as an element of the common legacy of the Contracting States.

[6] V. M. Ciobanu, *Tratat teoretic și practic de procedură civilă, vol. II*, National Publishing House, Bucharest, 1997, p. 270 - 271.

[7] *idem*, p. 272.

One of the fundamental elements of the supremacy of law is the principle of certainty of legal relations, which implies, inter alia, that the final decision given by the courts in any dispute may not be called into question[8] .

The certainty of legal relations implies that final judgments are res judicata. On the basis of this principle, no party to the proceedings may apply for a review of a final judgment in order to have a retrial of the facts or points of law and, ultimately, a back-door settlement of the case. The powers of the reviewing courts in the area of extraordinary review should be exercised to remedy certain miscarriages of justice, not to re-examine the merits. Thus, an extraordinary appeal against a final judgment must not become an appeal in disguise, as the mere existence of different views on the same legal issue is not a sufficient ground for a retrial. Derogations from this principle are justified only when they are necessary *on the basis of substantial and compelling circumstances*. The powers of higher courts to set aside or vary final and enforceable judgments should be exercised *in order to remedy fundamental shortcomings* - the existence of serious procedural errors or the establishment of new facts or circumstances which make it necessary to reconsider the case. These powers must be exercised in such a way as to so as to strike, as far as possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice [9] .

On the basis of these guiding principles, the European Court of Human Rights has established that the appeal for annulment, an extraordinary remedy regulated in the Criminal Procedure Code of 1968, repealed by Law no. 281/2003, whereby the Supreme Court of Justice had the jurisdiction to settle on serious errors of fact or the conformity of a final judgment with the substantive and procedural rules of law applicable to the case, was an appeal in disguise, contrary to the provisions of Article 6(1) of the Convention[10] .

Thus, the indisputable nature of res judicata requires certain parameters to be set within the limits within which the legislator may regulate extraordinary legal remedies that ensure the stability of the solution contained in a final judgment. Under the minimum standard laid down by the Convention, an extraordinary appeal must:

- have the functional capacity to lead to the modification of a final judgment only on the basis of substantial and compelling circumstances;
- to seek to remedy fundamental deficiencies - the existence of serious procedural flaws or the proving of new facts or circumstances which make it necessary to review the facts;
- to ensure, as far as possible, a fair balance between the interest of an individual and the need to ensure the effectiveness of the justice system.

The current criminal procedure legislation sets out four extraordinary remedies: appeal for annulment, appeal in cassation, review, and reopening of the criminal proceedings in the case of a person convicted in absentia. In order to ensure that these remedies comply with the conventional standard, the legislator inserted certain safeguards to prevent these

[8] Case Brumărescu v. Romania, Grand Chamber judgment of 30.09.1999, application no.28342/95, para. 61.
[9] Case of Elisei-Uzun and Andonie v. Romania, judgment of 23.04.2019, application no. 42447/10, paras. 42 - 43.
[10] Brumărescu v. Romania, cited above.

procedures from becoming an appeal in disguise.

First of all, the retrial of the merits and the modification of the final judgment must be preceded by a "screening" of admissibility in principle, in which the applicant must prove the existence of a legal reason which makes it necessary to remedy a fundamental flaw in the judgment.

Secondly, the grounds on which a court's final decision may be called into question are expressly and restrictively provided under the law and cannot be aimed at the correct ascertainment of the facts, i.e. the concurrence of the judicial truth with the material truth barring any new facts or circumstances which were not known by the court that rendered the final judgment, and which have a decisive influence on the situation of the parties to a trial, ensuring the effectiveness of the justice system (for example, the perpetration of offences in establishing the judicial truth - false testimony, forgery of documents, or corruption or abuse of office committed by judicial bodies).

Lastly, the misapplication of the law is limited to cases in which the procedure in which the judicial truth was established was carried out in breach of the fundamental guarantees laid down in the Constitution or in the Convention for the Protection of Human Rights and Fundamental Freedoms, which are usually subject to absolute nullity (for example, trial by a court which lacked jurisdiction or failed to guarantee independence and impartiality, failure of the prosecutor to participate in the trial or breach of the obligation to hear the defendant during the appeal). Likewise, the wrongful infringement of the substantive rules is limited to cases where a serious miscarriage of justice has occurred which justifies quashing the judgment under appeal (e.g. the conviction was for an act which is not a crime; a course of action which prevented prosecution was wrongly relied on; a sentence was executed that was subject to the statute of limitation).

In the light of the above, it should be noted that the indisputability of res judicata requires both the impossibility of reforming or amending a final judgment by an ordinary appeal and the quality standards of those extraordinary proceedings, in order to avoid the formulation of *" appeals in disguise"*.

e. *The binding nature of* res judicata requires that the prosecutor, the parties to the trial and the other parties to the proceedings must be subject to the effect of res judicata, without being able to set it aside. This res judicata effect is, in criminal matters, a consequence of the principle of formality and is automatic. Thus, no further formality is necessary for res judicata to operate, as this legal attribute of final criminal judgments cannot be postponed or refused by judicial process and operates without any limitation in time, until the possible admission of an extraordinary appeal.

In order to guarantee the absolute nature of res judicata, the legislator has provided, under Article 428 (2) of the Code of Criminal Procedure, the possibility of enforcing at any time an appeal for annulment where two final judgments have been handed down against a person for the same offence.

d. *Enforceability* follows from the mandatory nature of the judgment and makes it possible to enforce criminal court judgments as soon as they become final. It has been pointed out in the doctrine[11] that res judicata has two effects:

- *the negative effect*, consisting in preventing a new criminal trial on the same

[11] Gh. Mateuț, *Procedură penală. Partea generală*, Universul Juridic Publishing House, Bucharest, 2019, p. 76.

subject-matter, an effect owing to the exclusive nature of res judicata;

- *the positive effect*, whereby the court may order immediate enforcement of the final judgment.

According to Article 555 et seq. of the Code of Criminal Procedure, judgments are enforced ex officio by the enforcing judge delegated by the competent court on the day the judgments become final. If the judgment became final through the settlement of an appeal, the court of appeal or a higher court shall send an extract from that judgment to the enforcing court, with the necessary data for enforcement, on the day of the judgment.

We thus note that the enforceable effect of final criminal judgments is also produced by operation of law, without any other formalities (e.g. statement of enforceability; writ of execution). The procedural acts carried out by the enforcing judge are intended to involve in the enforcement process certain extra-judicial bodies that are entrusted with specific tasks to ensure compliance with the court's judgment.

3. Regulatory dimension of the doctrine

Res judicata is only regulated in civil procedural law. Pursuant to Article 430 of the Code of Civil Procedure: (1) A court judgment which resolves, in whole or in part, the merits of the case or rules on a procedural objection or any other issue shall, from the time of its pronouncement, be res judicata in respect of the matter decided.

(2) The res judicata shall relate to the operative part of the judgment and the grounds on which it is based, including those on which a matter has been settled.

(3) A court judgment taking a provisional measure shall not have res judicata effect on the merits.

(4) Where the judgment is subject to appeal or other remedies, res judicata shall be provisional.

(5) The judgment appealed against by an application for annulment or revision shall remain res judicata until it is replaced by another judgment.

Although the criminal procedural legislation has not expressly regulated the authority of res judicata, the provisions of Article 430 of the Code of Civil Procedure must be applied in accordance with those of Article 2 (2) of the same law, according to which the provisions of the Code of Civil Procedure also apply in other matters, to the extent that the laws governing them do not state otherwise[12] .

The fundamental principles found in the broad regulation of res judicata provided by the civil procedural rule must also be taken into account by the interpreter of the criminal procedure rule for the following reasons.

In criminal procedural law, the effects of the judgment **are not separately regulated in relation to specific procedures** that would bar the application of the civil procedural law rule in this aspect. However, the Code of Criminal Procedure recognizes three **particular applications of** res judicata, namely: the existence of the cause for dismissal of criminal proceedings under Article 16(1)(i) of the Code of Criminal Procedure, the application for annulment under Article 426(i) of the Code of Criminal Procedure and the non bis in idem principle. Given the close connection of the doctrine with the latter principle, as well as its wider scope of application, we consider that, in order to avoid possible

[12] High Court of Cassation and Justice, decision no. XXXIV pronounced on 06.11.2006, published in Official Gazette of Romania, no. 368 of 30.05.2007.

over-regulation, the legislator has provided rules exclusively on the particular application of res judicata, namely the non bis in idem principle.

However, it has been pointed out in the doctrine that, although non bis in idem derives from the principle of res judicata, the guarantee of procedural impartiality implies the extension of the scope of theft no bis in idem principle beyond the authority of res judicata. In this regard, when analyzing the relationship between the res judicata of criminal judgments and the non bis in idem principle, it has been held that[13] the latter has a much broader scope than res judicata. Although the non bis in idem principle precludes a new prosecution or trial for the facts and persons subject to res judicata, it extends the concept of "final judgment" to all procedural acts that ultimately settle the criminal proceedings and definitively extinguish the criminal prosecution. Thus, in accordance with the non bis in idem principle, even certain orders of the public prosecutor have, under domestic and European laws, the ability to complete and definitively terminate criminal proceedings. In other words, it is possible that an act issued by judicial bodies does not have the force of res judicata, but prevents the duplication of proceedings, based on the non bis in idem principle.

However, the inextricable link between the non bis in idem principle and res judicata cannot be denied, as both principles will always refer to the subject matter of the judgment as provided under Article 371 of the Code of Criminal Procedure, namely to the individual notions of "same facts", "same persons" and "same trial".

While for the non bis in idem principle, the provisions of the Code of Criminal Procedure are supplemented by the case law of the European Court of Human Rights[14] and the Court of Justice of the European Union[15] , the interpretation and application of the principle of res judicata must be referred to the provisions of Article 430 of the Code of Civil Procedure. This approach is not essentially theoretical in nature, since the limits within which res judicata is defined in the Code of Civil Procedure make it possible to settle an old doctrinal dispute as to which part or parts of the judgment are subject to res judicata.

As we have shown, **under the rule of civil procedural law**, res judicata relates to the operative part of the judgment by which the conflict of law has been settled, but **is not limited to it, extending also to the considerations which settle any contentious matter being judged**. **In criminal procedural law**, the existence of a final judgment precludes criminal proceedings in respect of the same offence and the same person and entitles the person concerned to have the judgment set aside by extraordinary appeal if the prohibition has been disregarded. While the provisions of Art. 426(i) provide that the criminal judgment is subject to annulment if it has been handed down against of an offence or a person in respect of whom a trial had previously been finally settled, Art. 16 (1) (i) provides that criminal proceedings may not be brought where there is res judicata. In both cases, the rule seems to refer to the operative part of the final judgment, since it contains the court's decision settling the conflict of criminal law arising in connection

[13] A. Zarafiu, *Procedură penală. Partea generală. Partea specială, 2nd edition*, C.H. Beck Publishing House, Bucharest, 2015, p. 23.

[14] In application of Article 4 of Protocol No. 7 to the Convention.

[15] In application of Article 54 of the Convention implementing the Schengen Agreement.

with the offence and the persons who were the subject of the proceedings.

We thus note that none of the applications of the principle of res judicata establishes to what extent **a litigation**, which preceded the resolution on the merits of the case exclusively considered in the recitals of the final judgment, benefits from res judicata in the same way as the operative part of the judgment. For example, does a judgment in criminal proceedings, by which the good faith or bad faith of a company manager has been established in the course of the trial for embezzlement or an offence under Law No 31/1990 on trading companies, confer a res judicata effect to that litigation, so that another civil or criminal court would no longer be able to reopen that particular case?

We consider that the answer must be yes, otherwise a **discriminatory situation** would arise between the persons in respect of whom this contentious matter has been decided by the civil court, whose judgment is deemed as res judicata by the criminal court, on the basis of Article 52 (3) of the Code of Criminal Procedure, read in conjunction with Article 430 of the Code of Civil Procedure, and those in respect of which the matter has been decided in the recitals of a judgment delivered by the criminal court, where res judicata would relate exclusively to the operative part of the judgment, which would imply that all the disputed matters decided in the recitals or in the preliminary rulings would not be res judicata.

In a broader sense, **the resolution of this problem must start from a particularly important effect of res judicata on the impartiality of the proceedings, namely the separate notion of "legal certainty"**. In this regard, the European Court of Human Rights has recalled in several cases, including Brumărescu v. Romania and Androne v. Romania, that the right to a fair trial before a court (civil or criminal), guaranteed by Art. 6 (1), is to be interpreted in accordance with the preamble to the Convention, which states the supremacy of law as an element of the common legacy of the Contracting States. One fundamental element of the supremacy of law is the **principle of the legal certainty, which implies, inter alia, that the final decision given by the courts in any dispute must not be questioned in a future case.**

When drawing a parallel between the analyzed issue and the guarantee of legal certainty, we believe that it is not fair to make a distinction between the matters that were the main subject of the trial, as provided by Article 371 of the Criminal Procedure Code, and the related matters that have been finally settled by the operative part of the judgment rendered by a civil or criminal court. This was the basic premise on which Article 430 of the Code of Civil Procedure was built, which expressly provides that res judicata must also extend to the considerations of the final judgment settling any matters constituting the main or secondary subject-matter of the trial.

From this perspective, it cannot be held that the specific rules of criminal procedural law prevent the application in this matter of Article 430 of the Code of Civil Procedure in all aspects related to the effects of res judicata.

4. Conditions of *res judicata*

The content of the concept of *"res judicata"* must be related to the case law of the ECHR and the CJEU in applying the *non bis in idem* principle. Thus, in order for res judicata to apply, the following conditions must be met: the two criminal proceedings must concern **the same facts and the same persons**; **the** first criminal proceedings **must have been finally concluded** by a judgment. However, as stated above, the

scope of the *non bis in idem* principle also extends to other acts of the judicial authorities that are capable of definitively closing the case following an effective investigation. From this perspective, the latter condition will be subject to a different interpretation when considering the *non bis in idem* principle, namely res judicata.

While the identity of persons would not raise any particular problems, further clarification was needed in European doctrine on the **separate notion of *"same facts".***

In *Sergey Zolotukhin v. Russian Federation*[16] , the European Court of Human Rights held that the existence of a variety of approaches to establishing whether the crime for which a person has been prosecuted is indeed the same as the one for which he has already been convicted or acquitted by a final judgment creates legal uncertainty incompatible with a fundamental right, namely the right not to be tried twice for the same offence. When asked to give a harmonized interpretation of the concept of *"same offence"*, the Court pointed out 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***.[17]

Further, the Court held that the guarantee enshrined in Article 4 of Protocol No 7 becomes relevant when a new prosecution is initiated, if a previous acquittal or conviction has already acquired the status of *res judicata*. At that point, the materials available will necessarily include the decision by which the first "criminal proceedings" were terminated and the list of charges brought against the applicant in the new proceedings. Normally, these documents would contain a description of the facts regarding both the offence for which the applicant has already been tried and the offence with they are charged. In the Court's view, such descriptions of the facts are, in fact, an appropriate starting point for determining whether the facts in both proceedings were identical or substantially the same. The Court emphasizes that it is irrelevant which parts of the new charges are ultimately admitted or dismissed in the subsequent proceedings, since ***Article 4 of Protocol No. 7 contains a safeguard against retrial or the risk of retrial in fresh proceedings rather than a prohibition of a second conviction or acquittal***.

In establishing the *"idem"* element, the investigation should focus on those facts which constitute a set of concrete circumstances actually involving the same defendant and which are inextricably linked in time and space, the existence of which must be proved in order to secure a conviction or to initiate criminal proceedings[18] .

In the *Van Esbroeck* case[19] , the Court found that the only relevant criterion for the application of Article 54 of the CISA is that of the identity of the material acts, understood as the existence of a set of facts indissolubly linked together, and that this criterion applies irrespective of the legal classification of those acts or the legal interest protected. Although this view was criticized by the governments of the Member States, which argued that the application of the criterion based on the identity of the material acts must enable the competent national courts to take the protected legal interest into account in the same way when

[16] Judgment of the Grand Chamber of February 10, 2009, Application No 14939/03.

[17] In the same sense, see A. Crișu, *Drept procesual penal. Partea generală, 5th edition*, Hamangiu Publishing House, Bucharest, 2021, p. 83-84.

[18] Paragraphs 78 - 84.

[19] Judgment of March 9, 2006, (C-436/04, ECR, p. I-2333), paras. 36 and 42.

assessing a set of specific circumstances, in *Kretzinger*[20] , the Court pointed out that, because of the lack of harmonization of national criminal law, assessments based on the protected legal interest would be likely to create as many obstacles to freedom of movement within the Schengen area as there are criminal systems in the Contracting States. Therefore, it must be confirmed that the competent national courts, when called upon to determine whether there is identity of material acts, must confine themselves to examining whether they constitute a set of facts inextricably linked in time, space and subject-matter, without considering as relevant any assessment based on the protected legal interest.

In conclusion, **the separate notion of *"same facts"*** concerns both **the material identity** between the two activities that are the subject of the subsequent criminal proceedings and the assumption of **a set of facts inextricably linked in time and space**, the existence of which must be proven in order to secure a conviction or to initiate criminal proceedings.

Since the authority of res judicata arises from the need to establish a connection between the judicial truth resulting from examining the evidence and the real truth, as an objective reflection of reality in the real world, the legislator also provided for a **regulation on res judicata** that would allow the removal of two different, irreconcilable realities, established by final court judgments, which although do not concern the same facts and the same persons, coexist in time and space.

In these circumstances, subsequent to a judgment establishing the truth of a case becoming final, the intervention of another judgment that differs from the original judgment constitutes a **new circumstance within the meaning of Article 4 Protocol 7 of the ECHR**. In such a situation, **the courts must intervene to establish a single judicial truth** by reference to both sets of facts, since impartiality is incompatible with the existence of two final judgments stating two distinct versions of the same judicial truth.

In this situation, the extraordinary remedy of revision of judgments applies, which allows irreconcilable judgments to be set aside, cases to be joined and a new judgment to be handed down, which would also give a consistent solution to inextricably linked conflicts of criminal law.

5. Scope

5.1. Res judicata applies to all judgments in criminal matters, in respect of the points of law ruled on, including where the law regulates procedures whereby the points of law established by a final judgment are reviewed by another judge, in order to pursue the purpose of the criminal trial.

On this last point, we note that the issue of res judicata must be considered differently in the scope of the new Criminal Procedure Code, as opposed to the previous one. Under the 1968 rules, the judge's intervention was mainly at the trial stage, whereas the new legislation divided the jurisdiction into three areas of functional competence, in accordance with the principle of the separation of judicial functions:

- the provision on the fundamental rights and freedoms of the person during criminal proceedings, within the functional competence of the committing judge;
- verification of the legality of the referral or non-referral for trial, as well as

[20] Judgment of July 18, 2007, (C- 288/05, ECR, p. I- 6470), paras. 33 - 34.

taking of specific measures in case of non-referral (special confiscation, destruction of documents, verification of security measures, confirmation of the order to reopen criminal proceedings, etc.), within the functional competence of the pre-trial judge;

- judgment on the merits of the case, within the jurisdiction of the court.

While it is much clearer to establish the res judicata effect of judgments given by the trial court, certain problems arise in relation to the authority of judgments given by the committing judge and the pre-trial judge.

From a theoretical point of view, the main attributes of jurisdiction - *cognitio* and *imperium* - should be borne in mind - in relation to which the characteristics and effects of res judicata have been established. In the absence of provisions expressly governing the enforceability of judgments (*imperium*) or the possibility of reviewing a final decision at subsequent stages of the proceedings (*cognitio*), the scope of these attributes should not be limited to the plenary powers exercised by the courts.

In its case law, the Constitutional Court has consistently held that the substance of the safeguards laid down in Article 6(1) ECHR is given by the *"right to appear in court"*, as a right of access to justice or to a judge. As the European Court of Human Rights has concluded, a *'court'* is characterized, in a substantive sense, by its jurisdictional role, which is to adjudicate, on the basis of the applicable rules of law and in accordance with an organized procedure, any dispute brought before it. This safeguard can only be applied by establishing a procedure that is consistent with the requirements of impartiality under Article 21 (3) of the Constitution and Article 6(1) of the ECHR, barring which any ruling given by a judge within the limits of his or her powers is devoid of substance[21]. As pointed out before, constitutional and conventional safeguards deem res judicata to be a means of ensuring legal certainty.

In this regard, in civil matters, the doctrine[22] and judicial practice make a distinction between the *"res judicata"* and the *"res judicata authority"* of the decisions. By judgment no. 177/25.06.2015, the High Court of Cassation and Justice - Second Civil Section[23] , held that res judicata has two procedural dimensions: that of procedural exception and that of presumption, a means of evidence capable of demonstrating a certain fact in relation to the legal relationship between the parties.

While, in its manifestation as a procedural exception (which corresponds to a negative, extinctive effect capable of precluding a new judgment), res judicata implies the triple identity of the elements – subject matter, parties, cause – unlike in the assumption in which this vital effect of the judgment is positive, integrating the manner in which certain contentious matters were previously settled between the parties, without the possibility of ruling otherwise. In other words, the positive effect of the res judicata is established in a second judgment which relates to the issue previously settled, without the possibility of being reversed.

There is a clear distinction between res judicata and res judicata authority as regards the condition of application. In this respect, res judicata authority implies the identity of the actions (parties, subject-matter and legal cause) which precludes a new trial, whereas

[21] Decision No 599/21.10.2014, published in Official Gazette of Romania, no. 886/05.12.2014, par. 19 and 30.

[22] V. M. Ciobanu, *op. cit.*, p. 269-271.

[23] www.scj.ro

res judicata evokes the presumption of judged matter, in the interest of consistent judgments, so that what has been found and ruled in one judgment must not be overturned by another judgment.

In such circumstances, an appellate court could not dismiss the action on the basis of res judicata, as it had an obligation to rule on the merits, but the solution had to take into account the ruling already given on the question of law before the court, giving effect to the presumption of res judicata, since the matter in dispute had already been settled once before by a previous judgment, which had become final.

The rationale for the decision given by the higher court lies in the *cognitio* - the power to decide and rule on the matter referred for settlement - which belongs to any jurisdiction, regardless of whether the judgment was given following the resolution of a judicial action or of a litigation under the law.

In criminal procedural matters, ever since the inter-war period, the doctrine[24] took on and analyzed such reasonings, finding that the law gives all judgments (regardless of whether they are pronounced by the trial court or by the investigating judge or the indictment chamber of the court) legal force and enforceability, ensuring legal effectiveness and, where necessary, enforceability of the jurisdictional act, preventing the duplication of proceedings, in the absence of new facts or evidence.

We consider that two forms of res judicata are found in the current legislative context, namely:

- *complete or total authority* - the judgment on the merits (criminal and civil action), which will definitively extinguish the litigation, precluding a new criminal trial against the same person for the same offence;
- *limited or relative authority* - a decision by which the judicial bodies with jurisdictional powers (the court, the committing judge or pre-trial judge) resolve a litigation, the solution of which cannot be overturned by another decision, except in cases where new facts or evidence arise and the law allows the review of the final judgment previously pronounced by the judge.

Limited res judicata authority derives precisely from the res judicata power of rulings pronounced by judges or courts by means of final judgments that precede the judgment on the merits. These judgments involve the analysis of contentious issues, aspects or incidental issues, whose resolution is directly based on the ***facts alleged against the accused, factual and legal circumstances*** are assessed, ***substantive issues*** are resolved, *and* ***evidence adduced by the prosecution*** is examined.

Moreover, some judgments handed down by the pre-trial judge definitively settle contentious issues specific to extra-criminal matters, with direct consequences on the civil rights of certain persons (for example, the procedure for the exclusion of a false document or special confiscation, as provided under Article 549[1] of the Code of Criminal Procedure).

Since the decisions given by the committing judges or the pre-trial judge are final from a legal point of view, the contentious issues decided by them must be res judicata. They may not be overturned by a subsequent judgment, unless new facts or circumstances become available which are liable to alter the original assumptions

[24] I. Ionescu-Dolj, *Curs de procedură penală*, Socec SA Publishing House, Bucharest, 1940, p. 508; Tr. Pop, *op. cit.*, 570 - 571.

underlying the separate manner of resolution of the same issue under litigation.

In this respect, as far as *preventive measures* are concerned, we have in mind the regular review of the grounds considered by the adjudicating judge or court in order to ensure the protection of fundamental rights. This procedure does not deprive the final and enforceable judgment of the authority of res judicata, but is intended to ensure the effective and constitutional operation of the measures taken during the criminal trial and the potential regular review of the grounds for the restriction of fundamental rights, in the light of the evolving nature of evidence adduced at the various stages of the trial.

According to Article 242 (1) of the Code of Criminal Procedure, the preventive measure shall be revoked, ex officio or upon request, if new evidence becomes available which show that it is unlawful. Thus, the judge called upon to review the preventive measure ordered in the criminal proceedings will not be able to reconsider the grounds on which the measure was granted in the absence of new evidence, since they were established by previous judgments which are res judicata, based on evidence adduced at the relevant trial stage.

Moreover, if when rejecting the prosecutor's motion for a preventive measure, the committing judge finds that there is a potential obstruction to the criminal proceedings, among those listed under Article 16 (1) of the Code of Criminal Procedure, their decision cannot be ignored by the criminal investigation bodies or by the court that was subsequently seized. These judicial bodies remain bound by the final decision handed down by the committing judge and are required to issue a procedural act stating that a legal impediment has occurred, if such impediment cannot be removed (for example, the intervention of a special statute of limitations or amnesty) or to update the criminal case, being able to rule in a manner contrary to the previous resolution of the contentious matter if new facts or evidence show that the impediment which was found by the judge to prevent the prosecution did not exist (for example, the evidence which the arrest referral was based on failed to show that a person had committed the crime).

The possibility of reviewing contentious issues decided by the pre-trial judge does not remove the authority of res judicata, even in matters of the legality of the evidence adduced during the criminal prosecution or the regularity of court referral. By Decision No 802/2017, the Constitutional Court ruled that *"29. [...] a review of the reliability/legality of the administration of evidence, from this perspective, is also admissible in the course of the trial, thus applying the general rule that absolute nullity may be raised throughout the criminal proceedings"*. Since the judgment of the court does not make any distinction, the legality or impartiality of the evidence may be re-examined in the course of the trial both where the pre-trial judge has ordered the commencement of the trial under Article 346 (1) of the Code of Criminal Procedure, as well as when they rejected court the claims and objections raised ex officio or raised ex officio with regard to the legality or impartiality of the evidence, ordering the commencement of the trial under Article 346 (2) of the Code of Criminal Procedure.

In the latter situation, the decision of the pre-trial judge, which rejected the claims and exceptions in relation to the legality or impartiality of specific pieces of evidence, will be final before the court, which, after reviewing the merits of the application for absolute nullity, will be bound by the previous decision, a fact which cannot be challenged in the absence of new facts or evidence that are liable to substantially alter

the premises of the previously adopted decision.

In the matter of *complaints against the decisions to dismiss the case and the decisions rejecting the reopening of criminal proceedings*, the final judgment of the pre-trial judge creates its own impediment to reopening criminal proceedings or to the commencement of new criminal proceedings for the same offence against the same person, if the procedure under Article 335 (2) and (4) of the Code of Criminal Procedure.

In the inter-war doctrine[25], it was held that final orders not to prosecute or not to refer to trial were res judicata in two respects. Firstly, those judgments were absolutely binding on the trial courts, in the sense that they could no longer be seized in another case with the trial for a case in respect of which a refusal to prosecute or not to prosecute had been ordered, even if the facts were substantiated, since the repressive justice system could only be seized by reopening the case. Even if the Public Prosecutor's Office or the injured party had relied on new evidence, the trial courts could not hear the case, since the new evidence gave rise only to the right to request the reopening of the investigation. Secondly, decisions not to refer the case to prosecution or to trial were binding on the investigating courts, which could no longer be seized with a new case, even if new evidence were adduced. In this case, too, the only possibility of using the new evidence was to apply for a reopening of the case.

Thus, according to the views with regard to the Code of Criminal Procedure of 1936, which had an organization of judicial functions similar to the one under Law No 135/2010, the decisions of investigating judges to order the non-prosecution or the non-referral to trial were res judicata and precluded the opening of a new criminal trial, even if the law in principle allowed the reopening of the case. This solution is in line with the principles governing criminal proceedings, since the possibility of reopening the criminal proceedings must be subject to the law, must be foreseeable for the participants in the proceedings and must guarantee the res judicata effect of the decision not to prosecute or not to refer the case for trial.

The above reasoning is also fully applicable in the current system of criminal procedural law, in which the order of the investigating judge or the decision of the indictment division is replaced by the decision of the pre-trial judge to reject the complaint against the decisions not to refer the case to the pre-trial chamber or the proposal to confirm the reopening of the criminal proceedings. The reasons in fact or in law which the decision not to dismiss the case is based on are relevant solely based on the possibility of reopening the criminal proceedings, but the res judicata effect of the decision of the pre-trial chamber precludes the commencement of new criminal proceedings outside the framework of Article 335 of the Code of Criminal Procedure.

Moreover, the decision of the pre-trial judge to reject the complaint against the decisions to discontinue the proceedings or the proposals to confirm the reopening of the criminal proceedings may constitute *"final decisions closing the proceedings"* within the meaning of Article 4 of Protocol No 7 to the ECHR[26] or Article 54 of the Convention

[25] I. Tanoviceanu, V. Dongoroz, *Tratat de drept și procedură penală, 2nd edition*, vol. V, Socec&Co. Publishing House, p. 714; *Tr. Pop, op. cit.*, 571.

[26] In the *case of Zigarella v. Italy* (Decision of Section I of the European Court of Human Rights, in application no. 48154/99, delivered on 03.10.2002) it was held that Article 4 of Protocol No. 7 Additional to the ECHR *"covers not only the situation of double jeopardy but also that of double prosecution, applying even where a*

implementing the Schengen Agreement, giving rise to the *non bis in idem* principle and constituting an impediment to the commencement of a new criminal trial for the same facts and the same persons.

In the *procedure for confiscation or rejection of a document in the event of dismissal or termination of criminal proceedings*, as provided under Art. 549[1] of the Code of Criminal Procedure, the ***res judicata authority of the decisions of the pre-trial judge shall be with full effect,*** the rights of the parties or third parties arising in connection with the confiscated property or the rejected documents being amended, transmitted or transformed with full effect, without the civil or criminal procedural rules providing for a new form of access to justice for the reopening of the issues settled by the decision of the pre-trial judge.

Therefore, the authority of res judicata must also apply to the judgments of the committing judge or of the pre-trial judge, the contentious issues decided by them being open to review only in the event of new facts or evidence which warrant a review of the rulings given in fact and in law.

5.2. In the case of civil judgments, res judicata is regulated differently, depending on the subject-matter of the dispute that has been finally settled by the court. If the civil action concerned tortious civil liability for unlawful acts constituting offenses, the provisions of Art. 28 (2) of the Code of Criminal Procedure shall apply, according to which the final judgment of the civil court settling the civil action shall not be res judicata before the criminal judicial authorities as to whether a criminal offence exists, the person who committed it and their guilt.

Although seemingly contrary to the previous analysis of the principle of legal certainty, this choice of the legislator can be explained from the perspective of the **particular legal regime of the two procedures, particularly in the area of the right of disposition and evidence.** Thus, the civil procedure is not governed by the rules requiring an effective investigation of all the factual circumstances relating to the wrongful act causing the damage. The procedural framework is set by the plaintiff, who may limit the subject-matter of the proceedings to the matters which they have an interest into.

Moreover, **in terms of evidence**, the civil procedural law is much stricter, and such evidence must only be adduced to the extent that it is required under the conditions and within the time limits required by law, thus allowing the possibility that the evidence before the civil court does not cover all the relevant circumstances in relation to the wrongful act causing damage.

Last but not least, in civil matters, the **principle of availability** gives the parties much wider discretion to negotiate on the subject matter of the dispute. In view of these aspects, the civil procedure does not always enable the judicial bodies to gain a full picture of the facts and circumstances giving rise to civil liability in tort, in which case the ***parties' availability in civil proceedings could turn into a risk of impunity in criminal proceedings.***

On the other hand, the judgment of the civil court is not entirely devoid of res judicata, since the judgment of the criminal court is limited to those facts and circumstances strictly necessary to establish that the elements of a crime are present and

person has been the subject of a simple criminal prosecution which has not led to a conviction. In principle, the Court has held that the principle of non bis in idem is applicable whether or not a person has been convicted".

to hold the guilty party criminally liable. The judgment of the civil court thus retains the authority of res judicata in respect of matters in dispute which go beyond the existence of the offence the person who committed it and the guilt of that person.

With regard to this last aspect, the criminal procedure law has characterized the issues that go beyond the existence of the act, the person who committed it and their guilt as ***"preliminary matters"*** subject to a special legal regime under Article 52 of the Code of Criminal Procedure. Based on the above-mentioned article, the criminal court has jurisdiction to hear any matter prior to the resolution of the case, even if by its nature that matter falls within the jurisdiction of another court, except in situations in which the jurisdiction to resolve it does not belong to the judicial bodies.

Although the legislator does not define *in terminis the* notion of preliminary issues, we consider that they must concern the rulings of the criminal court on issues separate from those listed in the final part of Article 28 (2) of the Criminal Procedure Code. According to Article 15 of the Criminal Code, the offense is the sole basis of criminal liability, being defined as a human activity - the "deed" under criminal law (both objectively and subjectively), unwarranted and imputable. Thus, the proper elements of a criminal judgment are the proof of the existence of a human activity that had an unlawful consequence under the criminal law, the performance of that activity by the person to be held criminally liable and the culpability with which the activity was carried out.

The provision of the offence in the criminal law, together with its unjustifiability and imputability, are ***issues that must necessarily be resolved by the criminal court, but are not always appropriate for a criminal rial***.

The varied elements of the offenses depend on the specificity of the economic and social areas covered by the criminal law. For this reason, it is possible that, in relation to these areas, the civil court may have previously been called upon to settle certain contentious issues (determination of the owner of the property right, validity of consent to the conclusion of a civil legal act, etc.).

If these questions constitute **legal circumstances** in connection with the commission of an unlawful act, they will always become preliminary questions if the civil court's decision depends on the establishment of one of the components of the crime (the actual nature of a civil contract and the existence of a specific purpose for which the property was delivered for the establishment of the components of the crime of breach of trust; the existence of a family relationship between the defendant charged with the crime of aiding and abetting and the participant in the commission of the predicate offense)[27] .

On the other hand, as far as **factual circumstances** are concerned, their classification as preliminary issues depend on their connection with the human activity which is part of the act which is the subject-matter of the proceedings. If a similarity or inextricable connection in time and space exists, those factual circumstances could never constitute prior matters, except the unlawful act itself, as provided under Article 371 of the Code of Criminal Procedure, which is subject to trial. Consequently, the provisions of Art. 28 (2) of the Code of Criminal Procedure shall apply, which do not confer res judicata authority on the

[27] A. Zarafiu, *op. cit.*, p. 146.

judgment of the civil court on these factual circumstances.

On the contrary, when the factual circumstances necessary to establish the typical, unjustified or imputable nature of the act are distinct from the act that is the subject of the trial and are not inextricably linked in time and space with it, they will become preliminary matters, according to the legal regime under Article 52 of the Criminal Procedure Code (the factual circumstance of the surrender of movable property in the case of breach of trust, separate from the refusal to return or wrongfully dispose of it, which is subject to criminal law).

With regard to preliminary issues, the High Court of Cassation and Justice, by Judgment no. 52/2021 rendered in a Panel for the resolution of certain matters of law, held that "*doctrine and case law are consistent in interpreting the concept of 'preliminary issue', the opinions expressed being that, in the course of criminal proceedings, certain acts must necessarily be performed before others, certain situations must necessarily be investigated first, and the resolution of certain issues must necessarily be preceded by the resolution of others, etc.*" [para 108]

Thus, the High Court holds that, "*In order for a matter to be considered preliminary, its subject-matter must be of a factual or legal character that is required for the resolution of the case that is the subject of the criminal proceedings. The preliminary issue has this character when it concerns the existence of an essential requirement in the structure of the offence (the prerequisite situation or the essential elements that make up the components of the offence), the quality or status of the offender, and may concern any area of law: civil law, administrative law, labor law, international law, etc.* [para. 109] *Under the Code of Criminal Procedure, any preliminary issue of any kind is decided by the criminal court that has jurisdiction to hear the case whose outcome depends on its resolution, which also entails an increase in the subject-matter jurisdiction of the criminal court concerned."* [para 110]

Once a factual circumstance has been qualified as a preliminary issue, the code of criminal procedure regulates **two effects which will apply differently depending on whether the issue has been finally settled by another court**. If the matter has not been finally settled, the criminal court **will extend** its **jurisdiction** and will have to settle the contentious issue on which the components of the crime it is trying are based. Otherwise, if the contentious issue has been settled by a judgment of a court with jurisdiction to hear the matter, the provisions of Article 52 (3) of the Code of Criminal Procedure shall apply, which establish **the res judicata authority of the final judgment of the civil court** before the criminal court, the latter not having the functional competence to reopen the matter in question.

In this respect, the Criminal Procedure Code contained a constitutional flaw in relation to the res judicata authority of the judgment settling the preliminary issue, which was addressed by Decision no. 102/2021 of the Constitutional Court.

In its reasoning, the Court essentially held that the provisions of Article 52 (3) of the Code of Criminal Procedure, which allowed for a criminal court to extend its jurisdiction in order to resolve any preliminary issue on which an offence is predicated, entails the infringement by the criminal courts of the res judicata authority of final judgments handed down by civil courts, with the ensuing violation of the principle of legal certainty.

In this regard, in view of the requirements arising from the decisions in principle handed down by the European Court of Human Rights and the

Constitutional Court, the provisions of Article 52 (3) of the Code of Criminal Procedure enable a criminal court to review aspects of the criminal case that have been finally settled by other courts and thus to become a court of review of final judgments of other courts on aspects relating to the existence of an offence. Thus, the criminal court may pronounce solutions that are contrary to those which have become final, seriously undermining the principle of res judicata, which is a safeguard of the right to a fair trial as laid down in Article 6 of the Convention.

In such a situation, by the standard of the European Convention on Human Rights, there is no objective and reasonable argument justifying the review by the criminal court of aspects of the case which constitute preliminary issues and which have been finally settled, by a court having jurisdiction to hear another matter, even if those issues concern the very existence of the offence.

Once the constitutionality flaw in the wording of Article 52 (3) of the Code of Criminal Procedure was addressed by Decision No. 102/2021, the judgments rendered by other courts on preliminary issues will always be res judicata before the criminal court, which can no longer reopen the issue in question. As stated above, the same reasons must also justify the res judicata effect of judgments by which the criminal court has ruled on a contentious issue in the preamble to the final judgment or in a judgment prior to the decision on the merits, since it is unfair and objectively unjustified for only contentious issues decided by the civil courts to be res judicata before a criminal court, whereas the same issues finally settled by a judgment of a criminal court may be the subject of a new judgment before another criminal court.

As a result of Decision no. 102/2021 of the Constitutional Court, the Romanian legislator removed this constitutionality flaw in the criminal procedure rule, by means of Law no. 201/2023, article 52 (3), by removing the text *"except for the circumstances relating to the existence of the offence"* from the wording of the law that was ruled to be unconstitutional.

Currently, following the amendment of this text, Art. 52 (3) provides that "*Final decisions of courts other than the criminal courts on a preliminary issue in criminal proceedings have the authority of res judicata before the criminal court.*"

As regards the scope of application of Art. 52 (3) of the Criminal Procedure Code, it can be concluded that those circumstances on which the court has ruled on an incidental basis or in the recitals of the final judgment shall also constitute preliminary issues that have been settled by a previous final judgment of the civil court.

In this respect, we refer to the institution of the appeal against enforcement, by which the civil court settles certain incidents arising in the course of enforcement. Two issues are of interest in this matter:

First, Article 712 (2) of the Code of Civil Procedure provides that, in the event of enforcement on the basis of a writ of execution other than a court judgment, the appeal against enforcement may also raise pleas in fact or in law relating to the substantive right contained in the writ of execution, only if the law fails to provide for a specific procedural remedy for the annulment of that writ of execution. In such a situation, the appeal will no longer have the character of a procedure in which incidents arising in the course of enforcement are settled, but will constitute a genuine action to endorse an existing agreement, which will be fully res judicata, similar to an action for nullity or rescission.

Secondly, the specificity of the offences in the course of enforcement action

may allow the solution pronounced in an appeal against enforcement to have the same legal status as a preliminary issue under Article 52 (3) of the Criminal Procedure Code. For example, in case of an offence of non-compliance with court decisions under Article 287(b) – (g) of the Criminal Code, it is possible that, prior to the completion of the criminal proceedings, the prerequisites for establishing one of the offences may have been analyzed in the framework of an appeal against enforcement. In such a case, we consider that the provisions of art. 52 (3) of the Criminal Procedure Code Hall apply, the judgment of the civil court having the authority of res judicata on the preliminary issues that have been analyzed, even if the judgment was intended to settle incidents arising during the enforcement procedure.

6. Conclusions

In the above context, we believe that the res judicata is a complex doctrine, liable to generate different interpretations on the issues analyzed, while the legislator might find it useful to draw inspiration from the civil procedural law and the decisions of the Constitutional Court in order to establish a clear, precise legal regime that ensures the most effective protection of legal certainty, but also of the rights of the parties to a trial.

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