PREJUDICE AS AN INTERDISCIPLINARY ISSUE

O.A. Kuznetsova
Professor, Doctor of Law
Civil Law and Procedure Subdepartment, Perm State University, Russia

V.V. Stepanov
Candidate of Law, Criminal Law and Public Prosecutorial Supervision Subdepartment, Perm State University,
Perm, Russia

Criminal procedural prejudice has been known to domestic legislation for a long period of time. The limitation of applying interdisciplinary prejudices to the complex of the circumstances being established as well as to the capacity of participants in the procedure is a consequence of objective differences in the purpose, functions, goals and the order of presenting evidence of typical of different court procedures. A different approach to the understanding of the inter-branch prejudice, in our opinion, contradicts not only the principles of criminal procedure but also the principles of the rule-of-law state in general.

In accordance with current Article 90 of the RF Criminal Procedural Code[1], which deals with the application of *prejudice* in criminal procedure, the circumstances established by the sentence or any other court decision in force passed within civil, arbitration or administrative court proceedings are admitted by the court, prosecutor, investigator, interrogating officer with no additional check. Such a sentence or decision cannot predetermine the guiltiness of the persons who have not participated in the criminal case in question before.

The change in the mentioned legal norm has been largely caused by the legal position of the RF Constitutional Court described in Decision No. 193-O-P dated January 15, 2008, in accordance with which

"Article 90 of the Russian Federation Criminal Procedural Code does not imply the opportunity to ignore the circumstances discovered by the state arbitration (commercial) court decisions still in force…"[2].

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[1] Ugolovno-processual'nyi' kodeks Rossiiskoi Federatzii No. 174-FZ [Criminal Procedure Code of the Russian Federationot No. 174-FZ]. Sobranie Zakonodatel'stva Rossiiskoi Federatzii [Russian Federation Collection of Legislation]. 2001, No. 52, Iterm 4921.

[2] Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii [The Russian Federation Constitutional Court Review]. 2008, No. 4.

The new legislative approach has both supporters and opponents among legal experts.

The principal arguments of the supporters are as follows:

— criminal courts must respect other courts' decisions as Articles 10 and 118 of the RF Constitution provide that all court decisions are binding[3];

— the previously existing priority of criminal court proceedings over arbitration/commercial and administrative court proceedings has been eliminated, and this circumstance "sufficiently increases the efficiency of the prejudice practice in general"[4];

— opposition of acts of different court branches is risky.

The legal innovation of the RF Criminal Procedural Code faces the following counter- arguments in academic literature:

— criminal and civil proceedings significantly differ in their essence, principles, goals and objectives as well as in the order of collecting, checking and evaluating evidence;

— the existence of interdisciplinary prejudices is inadmissible without limitations, as it can negatively influence the definition of a subject of a criminal case and the extent of proof, and violate rights of persons involved in the sphere of criminal procedural relations[5];

— the criminal proceeding loses its independence, and the acts of criminal proceedings turn out to be substituted by the acts of civil proceedings;

— the principle of freedom of evaluating evidence is being ignored although it is found in Article 17 of the RF Criminal Procedural Code, in accordance with which no evidence has a predetermined force[6].

Let us look at the above mentioned scholarly discussion from a practical view point, i.e., through a particular case.

In accordance with the insurance contract concluded antedate to protect the loss of property, a person tries to file a claim for an insurance compensation. The insur-

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[3] N.A. Kolokolov. Preyuditziya. Prestupleniya v sfere ekonomiki: fakty odni, a ikh otzenki u sudov obshchei' yurisdiktzii i arbitrazhnykh sudov raznye [Preclusion. Economic Crimes Facts Alone, and their Assessment by the Courts of General Jurisdiction and Arbitration Courts are Different]// Jurist [Lawyer]. 2009, No. 6, pp. 57, 59.

[4] S. Werba, I. Chawina. Novyi' zakon o preyuditzii v ugolovnom protzesse: davnost' i znachenie [The New Law on Preclusion in Criminal Process: Antiquity and Importance]// Ugolovnoe pravo [Criminal law]. 2010, No. 3, p. 104.

[5] V. Bozh'ev. Izderzhki sistemnogo kharaktera pri korrektirovke norm Ugolovnogo protzessual'nogo kodeksa o dokazyvanii i preyuditzii [The Cost of a Systemic Nature in Adjusting the Rules of Evidence and Preclusion in Criminal Procedure Code ,]// Zakonnost' [Legality]. No. 6, 2010, p. 7.

[6] P.A. Skoblikov. Problemy sovremennoi' preyuditzii: arbitrazhnyi' process blokiruet ugolovnyi' [Problems of Modern Preclusion: the Arbitration Process is Blocking the Criminal Process]// Zakon [Law]. 2010, No. 4, p. 187.

ance company initiates a criminal case. The results of the investigation objectively display the elements of a fraud.

However, during the investigation, other three court instances hear a civil case involving a claim by the alleged fraudster against the insurance company. The claim is sustained because the fact of concluding the contract antedate has not been proved, and the prime witness has not arrived for testimony.

Can the person be prosecuted in this situation?

In our opinion, we can generally agree with the definition of criminal legislative prejudice suggested by V.P. Bozhiev. The well-known scientist defined the *prejudice* as a rule in criminal proceedings in accordance with which the previous criminal sentence or court decision in force is must be taken into consideration by a court trying a criminal case, in a *specific part* of this decision, including other court decisions made within other procedural relationships[7].

In Article 90 of the RF Criminal Procedural Code interpreted literally we notice that the legislator does not specify *in which part and concerning which persons* the earlier criminal case sentence or decision are mandatory for the court, investigator, prosecutor within the framework of criminal proceedings. This juridical and technical drawback to which legal scholars has repeatedly pointed should be *eliminated* legislatively *de lega ferenda* (as an ideal decision for the future). However, until now, this drawback can be *overcome* in a concrete case by construing a legal norm properly.

Criminal procedural prejudice has been known to domestic legislation for a long period of time. The Charters of the Criminal Proceedings of 1894 (Article 29) stipulated that the final decision of a civil court (i.e., the one in force) is mandatory for a criminal court "only concerning the reality and features of the event or an action but not concerning the guiltness of the defendant". The Criminal Procedural Codes of the Russian Soviet Federative Socialist Republic of 1923 (Article 12) and of 1960 (Article 28) stipulated that for a court trying a criminal case only those earlier civil case decisions are mandatory which concern the issue of whether the event or action did take place, but not the issue of the defendant's guiltness.

The historical content of the *prejudice* both in the period of its formation in the Roman Law and within all the domestic legal history has never been endless and never meant the obligatoriness of *all* the earlier circumstances, events, facts established in a court decision *with no exceptions*.

The principle of the systemic interpretation of legal norms requires application of Article 90 of the RF Criminal Procedural Code taking account of its place in the Code's structure.

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[7] V. Bozh'ev. Izdershki sistemnogo kharaktera pri korrektirovke norm Ugolovnogo protzessual'nogo kodeksa o dokazyvanii i preyuditzii [The Cost of a Systemic Nature in Adjusting the Rules of Evidence and Preclusion in Criminal Procedure Code Preclusion]// Zakonnost'. 2010, No. 6, p. 7.

First, Article 90 of the RF Criminal Procedural Code should be applied and interpreted in accordance with the principle of freedom of evidence evaluation declared in Article 17 of the Code: "1. The judge, the jury, the prosecutor, the investigator, the interrogating officer evaluate the evidence to the best of their belief based on the manifest weight of all the evidence and follow the law and their conscience. 2. No evidence has predetermined strength".

Second, the norm is found in Section "Evidence and Proof", and its meaning should be understood on the basis of the essence of the relevant institution[8]. Thus, Article 90 of the RF Criminal Procedural Code forbids to *examine* the circumstances established by a court decision in force. However, the norm does not prohibit the court, the prosecutor, the investigator, the inquiry officer from *evaluating the decision's contents* together and with the other evidence in the case, in accordance with the rules of Article 88 of the RF Criminal Procedural Code.

The absence of the opportunity for the investigator, the prosecutor, the court to freely *evaluate* the court decision in force, especially when it contains conclusions that contradict the other evidence in the case, the absence of opportunity to make the decision to the best of one's belief, guided by the law and conscience, would mean "deliberately evading the purpose of evidence in criminal proceedings to discover the objective truth, and taking the decision in force as a formal piece of evidence, which contradicts Article 2 of the RF Criminal Procedural Code stating that no evidence has predetermined strength"[9].

That is why a person authorized to arrange the preliminary investigation is obliged, under the current law, to investigate every case fully, universally and objectively , even having a court decision already in force.

In connection with this, I.L. Petrukhin justifiably states that the presence of a court decision in civil case should not constrain the investigator and the court from collecting and evaluating the evidence which determines all the elements of the evidence including the event of crime and the defendant's actions. The investigator and the court should have an opportunity to establish the event and the actions in a different way from the decision in the civil case[10].

Let us address similar legal norms belonging to another branch. In accordance with Part 4 of Article 61 of the RF Arbitration Procedural Code, "a criminal court decision in force must be recognized by a court considering a case of civil and legal

[8] S. Werba, I. Chawina. Novyi' zakon o preyuditzii v ugolovnom protzesse: davnost' i znachenie [The New Law on Preclusion in Criminal Process: Antiquity and Importance]// Ugolovnoe pravo [Criminal law]. 2010, No. 3, p. 103.

[9] V.T. Tomin, M.P. Poljakov. Jurajt Kommentarii' k Ugolovnomu protzessual'nomu kodeksu [Comment on the Criminal Procedure Code]. 2010, p. 90.

[10] I.L. Petruhin. Teoreticheskie osnovy reformy ugolovnogo protzessa v Rossii [Theoretical Foundations of Penal Reform Process in Russia]. Moscow, 2004, Part I, p. 171.

consequences of the actions performed by the person convicted, regarding the issues of whether *the actions have been really performed and whether they have been performed by this very person*[11]. A similar regulation is contained in Part 4 of Article 69 of the RF State Arbitration Procedural Code[12].

As we see, both in civil and arbitration procedure, the prejudice is used only in a specific meaning — only when it is necessary to determine the actions and the agent. To a large extent, such an interpretation is connected with the fact that criminal procedure has more opportunities and legal means to establish these circumstances, and all the other circumstances can be ascertained by the court while considering a civil case.

Such a legislative decision seems to be absolutely true because both criminal and civil procedures have significant differences in the order of the evidence collection and examination, in purposes and objectives pursued, in the principles of functioning.

Civil and arbitration procedures are limited in opportunities to collect evidence, especially if the parties are passive, at least because these procedures do not involve such a stage as the investigation of the case. In the criminal procedure, the situation is apparent when an investigator as a professional having the corresponding authority to collect evidence (a search, a seizure, controlling and recording of conversations) can collect evidence to prove or disprove the circumstances of importance which participants in a litigation failed to collect. "Taking into account the difference in access to "equipment" among participants collecting evidence… in criminal and other kinds of proceedings, and the opportunity to act quickly, … the accuracy and reliability of the results obtained will be principally different"[13].

That is why the circumstances not proven in a civil case should not have the prejudice meaning for a criminal case investigation.

The situation seems absurd when the subjects of civil proceedings which function on the basis of optionality principles, use only two evidence types as prejudicial from a criminal case decision, whereas the subjects of criminal proceedings based

[11] Grazhdanskii' processual'nyi kodeks Rossiiskoi Federatzii No. 138-FZ [Civil Procedure Code of the Russian Federation No. 138-FZ]. Sobranie Zakonodatel'stva Rossiiskoi Federatzii [Russian Federation Collection of Legislation]. 2002, No. 46, Item 4532.

[12] Arbitrazhnyj processual'nyi kodeks Rossiiskoi Federatzii No. 95-FZ [Arbitration Procedure Code of the Russian Federation]. Sobranie Zakonodatel'stva Rossiiskoi Federatzii [Russian Federation Collection of Legislation]. 2002, No. 30, Item 3012.

[13] P.A. Skoblikov. Problemy sovremennoi' preyuditzii: arbitrazhnyi' process blokiruet ugolovnyi' [Problems of Modern Preclusion: Civil Process is Blocking the Criminal Process]// Zakon [Law]. 2010, No. 4, p. 181. Preyuditziya aktov arbitrazhnykh sudov: novoe prochtenie [Preclusion Acts of Arbitration Courts: New Interpretation]// Zhurnal Rossiiskogo Prava [Journal of Russian Law]. 2009, No. 2, pp. 69-82. Arbitrazhnyi i ugolovnyi protzessy: kollizii v sfere dokazyvaniya i puti ikh preodoleniya [Arbitration and Criminal Processes: Conflicts in Evidence and Ways to Overcome them]. Norma Publishing House. 2006, p. 146.

on the imperative principles should use the conclusions of the court in a civil case as prejudicial with no exception.

Such an approach contradicts *public and legal* objectives of criminal proceedings — i.e., the protection of rights and legitimate interests of persons and organizations who are the victims of a crime, and the protection of an individual from *illegal and groundless accusations*, limitation of his/her rights and freedoms provided for by Article 6 of the RF Criminal Procedural Code:

"In criminal proceedings, the recognition of acts of civil proceedings as unalterably true would mean that those which are the result of a compromise, mistake or tampering, persons' putting pressure on one another, insufficient level of technical or other "equipment", the mobility of those providing evidence would predetermine the outcome of criminal cases — where the principal thing is the public interest, and the objective is to prevent actions of heightened public danger"[14].

Besides, it is also necessary to take in account the position of the RF Constitutional Court that the circumstances discovered in a criminal case should be accepted in a criminal case unless the *prosecution disproves them"*[15]. This constitutional and legal interpretation of the norm complies with objectives of the criminal procedure and is still relevant in spite of the changes introduced into Article 90 of the RF Criminal Procedural Code.

In connection with that, it is difficult to support the scholarly position that doubts in the guilt of the accused (based on a civil case) should be treated by the criminal court as non-correctable[16].

Article 90 of the RF Criminal Procedural Code sets prejudicial meaning only for *circumstances discovered* by the court. Here an important doctrinal and practical issue of such circumstances arises.

In accordance with the rules of evidence in civil and arbitration proceedings, some of the circumstances are not directly established by the court but *taken as established* by it. This is the functioning of the procedural presumptions: the presumed fact is *taken* by the court *as established* if the *opposing party* does not prove *otherwise*.

Besides, in the arbitration proceedings, the circumstances acknowledged by the parties as a result of their agreement are taken by the arbitration court as facts not

[14] P.A. Skoblikov. Problemy sovremennoi' preyuditzii: arbitrazhnyi' process blokiruet ugolovnyi' [Problems of Modern Preclusion: the Arbitration Process is Blocking the Criminal Process]// Zakon [Law]. p. 183.

[15] Opredelenie Konstitutzionnogo Suda Rossiiskoi Federatsii [Decree of the Constitutional Court of the Russian Federation]. 2008, No. 193-O-P.

[16] O.G. Grigor'ev. Vzaimosvyaz' preyuditzii i prezumptzii nevinovnosti v rossiiskom ugolovnom protzesse. Problemy zashchity prav cheloveka v rossiiskom sudoproizvodstve [Interaction of Preclusion, and the Presumption of Innocence in the Russian Criminal Process. Problems of Protection of Human Rights in Russian Legal Proceedings]// Vserossiiskaya nauchno-prakticheskaya konferentziya [Russian Scientific Practical Conference]: Tyumen, 2009, part 1, p. 97.

requiring proof (Part 2 of Article 70 of the RF Arbitration Procedural Code), i.e., are *considered to be established*.

When one party agrees with the circumstances which are the basis for the other party's claim or counter-arguments, there is no necessity for the other party to prove such circumstances (Part 3 of Article 70 of the RF Arbitration Procedural Code), and the circumstances are *treated by the court established*

In 2007, the RF State Arbitration Procedural Code was amended with a norm in accordance with which the circumstances referred to by a party to justify its claim or disagreement are considered to be acknowledged by the other party if they are not directly challenged by the other party, or if the disagreement with such circumstances does not result from other evidence justifying the objection to the essence of the claim (Part 3.1 of Article 70 of the RF Arbitration Procedural Code)[17]. Consequently, if some of the circumstances are not challenged by the other party (and the reasons for that could be different, including insufficient knowledge of laws), such circumstances are also *considered as established by the court*.

Therefore, if a court in a civil case has not established any circumstances resulting from failure of evidence, then such a conclusion *clearly cannot have prejudicial meaning for criminal proceedings.* Thus, in the situation described above, the court held that the fact that the insurance contract was concluded before the date on the contract was not proved. However, this does not mean that the court clearly established the circumstance of the contract being concluded on this very date. The court just assumed that the contract was concluded on the date printed therein, taking account of the civil procedural principle of equality of parties and their contentiousness, distribution of the burden of proof and force of procedural presumptions. This presumption was not contested by the opposite party. But non-contesting a presumption in civil proceedings and establishing a fact in criminal proceedings is not the same: the evidence of the contract being concluded before the date on it could be received in the process of the preliminary investigation of a criminal case.

It is also important to mention that the prejudice is permitted — and this is important! — with the account of the parties of the argument. For example, as in Part 3 of Article 61 of the RF Civil Procedural Code, the circumstances established in a court decision in force do not need to be proved in a civil case and cannot be contested by persons *who had participated in the case heard by an arbitration (commercial) court*. The corresponding norm is also included in Part 3 of Article 69 of the RF Arbitration Procedural Code. This is an important safeguard of rights of the

[17] Federalnyi zakon "O vnesenii izmenenii v Arbitrazhnyi processual'nyi kodeks Rossiiskoj Federatzii" No. 228-FZ [Federal Law "On Amendments to the Arbitration Procedure Code of the Russian Federation" No. 228-FZ]// Sobranie Zakonodatel'stva Rossiiskoi Federatzii [SZ RF] [Russian Federation Collection of Legislation]. 2010, No. 31, Item 4197.

participants in court proceedings, as during the previous case, they could not give their arguments, objections, evidence, and could not even know about their existence.

At the same time, the RF Criminal Procedural Code does not even mention that the prejudicial court decision must be passed in the case with the same participants. That is why a situation is possible when persons concerned can stage-manage a civil case: start a civil case with a person who will wordlessly agree with the complainant's arguments or will not visit the session at all. The court will make a decision in accordance with the existing evidence, and this decision will later have a prejudicial meaning also for the complainant (or the accused). And it is a pity such examples are known from practice.

To a greater degree, the procedural law provisions that forbid the "automatic" termination of the criminal case with a private-public or public accusation only due to the conciliation with the complainant lose their meaning. This "drawback" of the law can be overcome in a civil case with a definite pressure on the complainant by the defendant.

Here we also need to emphasize the regulation that objectives of criminal proceedings can be achieved only with appropriate group of participants who will never coincide with the group of persons participating in a civil or arbitration case.

Let us summarize the following.

1. Taking into account the principles of criminal proceedings and the rules of evidence evaluation, it is inadmissible to deprive a court, an investigator, an interrogating officer, a prosecutor of their right to evaluate a previous decision in a civil case together with the other evidence collected in the order determined by the RF Criminal Procedural Code.

2. It is necessary to legislatively determine *in which part* the earlier court decision is mandatory the subjects of criminal proceedings.

3. It is necessary to fix in legislation that in investigating and considering a criminal case, all the circumstances established by a civil or arbitration court decision in force do not require additional confirmation in the case when at least the complainant or the suspect (the accused) had participated in the previous court proceedings.

4. The facts established by the court should be differentiated from those taken by the court as established in accordance with the presumption rules, approval or passive agreement of the other party. The prejudicial meaning could be given only to the facts established by the court based on the evaluation of evidence provided by the parties.

5. The failure to prove a circumstance in a civil case should not mean the establishment of the opposite circumstance.

Thus, limitation of application of interdisciplinary prejudices to the complex of circumstances being established as well as to the participants in the proceedings

does not mean one court procedure type is merged with the other, and it does not mean any disrespect of the decisions in the civil case on the part of the criminal proceedings (or vice versa). It is only the consequence of objective differences in the purpose, functions and objectives, the procedure of submitting proof in different court procedures. A different approach to the understanding of the inter-branch prejudice, in our opinion, neutralizes the essence and the purpose of criminal prosecution, does not ensure the inevitability of criminal liability of the guilty person, and contradicts not only the principles of criminal procedure but also the principles of the *rule–of-law* state in general.