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Research Article

PREJUDICE AS A MEANS OF PROOF IN CRIMINAL PROCEEDINGS IN UKRAINE: A COMPARATIVE ANALYSIS WITH CONTINENTAL AND COMMON LAW SYSTEMS

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ABSTRACT

Background: *During the preparation of the CPC of Ukraine in 2012, the issue of legal regulation regarding the use of prejudice in the process of criminal procedure proof received little scholarly attention. Although much time has passed since then, this subject of discussion remains largely unexplored in textbooks and manuals on criminal procedure published after the adoption of the codified act. Even within the few scholarly investigations dedicated to prejudice in criminal proceedings, a communis opinion doctorum on some issues related to the means of proof has yet to be achieved.*

This article aims to clarify the concept, formulate its characteristics, uncover the significance of prejudice in Ukraine's criminal procedure, and distinguish peculiarities of legal regulation and the use of this means of proof in criminal procedure law of countries with continental and general systems of law.

Methods: *The methodological basis of the article is a dialectical approach to the scientific understanding of social phenomena. In writing this article, general scientific and specialised legal methods of cognition were also used, including analysis, generalisation, structural and functional methods, hermeneutic methods, doctrinal or specialised legal methods, and comparative legal methods.*

Results and conclusions: *It has been found that prejudicial significance is attributed to legal acts that summarise the outcome of criminal procedural activities in specific criminal proceedings. These legal acts include final judgments and rulings of the court and unrevoked decisions of the interrogator, investigator, detective, and prosecutor. Prejudice encompasses not only relevant facts and circumstances but also legal conclusions regarding them. The principle*

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of free evaluation of proof allows the parties to come to different legal conclusions than those made in the previous criminal proceedings, with proper argumentation of their legal position. The use of prejudice in criminal proceedings of civil law jurisdictions is based on the doctrine of res judicata, while in common law systems, it is based on the doctrine of collateral estoppel. Examples from the criminal procedure of Poland, Greece, Italy, and the USA illustrate the specific features of using this means of proof.

1 INTRODUCTION

One means of establishing circumstances significant for criminal proceedings and subject to proof without conducting investigative activities is prejudice (from Latin *praejudicium* – to make decisions in advance; a decision made in advance; circumstances that allow discussing consequences).

In legal theory, prejudice is interpreted as the exclusion of challenging the legal credibility of a fact that a court or other jurisdictional body has once proved.[1] The fact referred to in this definition is called prejudicial. This is an event established using the appropriate standard of proof within the form of legal proceedings, which has been enshrined in a procedural decision that has entered into force and, therefore, does not require proof in another case involving the same persons, provided that the truth of its establishment is not reasonably doubted.

Prejudice is connected with the principle of the binding nature of court decisions, which states that a judgment or ruling of the court that has acquired legal force in the manner determined by criminal procedural law is mandatory and subject to unconditional enforcement throughout Ukraine (Part 2 of Article 21 of the Criminal Procedure Code of Ukraine). Article 533 of the Criminal Procedure Code of Ukraine specifies that a judgment or ruling of the court that has acquired legal force is binding for individuals participating in criminal proceedings, as well as for all natural and legal persons, state authorities, local self-government bodies, their officials, and must be enforced throughout Ukraine.[2] This principle is based on the presumption of the truthfulness of a court decision that has acquired legal force, forming the foundation of the concept of prejudice.

Moreover, according to Part 2 of Article 13 of the Law of Ukraine "On Judicial System and Status of Judges" dated 2 June 2016, the mandatory consideration (prejudicial nature) of court decisions by other courts is determined by law.[3] In Ukrainian legal doctrine, the

1 OF Skakun, *Theory of Law and State* (Alerta 2012) 417; SD Ghusarjeva and OD Tykhomyrova (eds), *Theory of Law and State* (Education of Ukraine 2017) 215.

2 Code of Ukraine no 4651-VI of 13 April 2012 'Criminal Procedure Code of Ukraine' (amended 19 May 2024) <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 20 May 2024.

3 Law of Ukraine no 1402-VIII of 2 June 2016 'On the Judiciary and the Status of Judges' (amended 26 March 2024) <https://zakon.rada.gov.ua/laws/show/1402-19#Text> accessed 20 May 2024.

prejudicial nature of court decisions means that all courts hearing a case must accept as facts, without reviewing evidence, the findings previously established by a court decision in another case involving the same parties, provided that the decision has acquired legal force.[4]

Therefore, the limits of the prejudicial nature of a court decision are determined by its objective (the facts and circumstances established in the court decision) and subjective (the persons, rights, freedoms, or interests affected by the court decision) boundaries of its legal force.

In Ukrainian criminal procedural science, prejudiciality is commonly regarded as one of the attributes of a court decision.[5] The prejudicial nature of court decisions does not prevent their review in a cassation procedure based on newly discovered or exceptional circumstances, as a result of which such decisions may be annulled or modified. These mechanisms provide the opportunity to challenge prejudicial facts and circumstances. Moreover, according to Part 3, Clause 3 of Article 459 of the Criminal Procedure Code of Ukraine, the cancellation of a court decision that served as the basis for a judgment or ruling to be reviewed is considered a newly discovered circumstance.[6] This ensures an optimal balance between the binding nature of a court decision that has acquired legal force and the establishment of objective truth as the purpose of evidence. This means that prejudice in criminal proceedings is not absolute.

From the perspective of the European Court of Human Rights (ECtHR), the Criminal Procedure Code of Ukraine (CPCU) does not prohibit the use of presumptions of facts and legal presumptions in criminal cases. Still, it requires states "to confine them within reasonable limits which consider the importance of what is at stake and maintain the rights of the defence. The Court accepts that in complex criminal proceedings involving several persons who cannot be tried together, references by the trial court to the participation of third parties, who may later be tried separately, may be indispensable for the assessment of the guilt of those on trial. Criminal courts are obliged to establish the facts of the case relevant for the assessment of the legal responsibility of the accused as accurately and precisely as possible, and they cannot present established facts as mere allegations or suspicions. This also applies to facts related to the involvement of third parties, though if such facts have to be introduced, the court should avoid giving more information than necessary for the assessment of the legal responsibility of those accused in the trial before it. Even if the law expressly states that no inferences about the guilt of a person can be drawn from criminal proceedings in which he or she has not participated, judicial decisions must

4 VT Nor and others (eds), *The Great Ukrainian Legal Encyclopedia*, vol 19: *Criminal Procedure, Judiciary, Public Prosecution and Advocacy* (Pravo 2020) 683.

5 OI Berezhnyi, *Prejudicial Effect of Court Decisions in Criminal Cases* (Publ Vapnyarchuk 2004) 12; DV Shilin, 'Prejudices in Criminal Proceedings' (PhD (Law) thesis abstract, National University "Odesa Law Academy" 2010) 11, 14; II Kohutych, *Court Decisions in Criminal Proceedings of Ukraine* (Textbooks and Manuals 2013) 45; KhR Taylieva, 'Judicial Decisions in Criminal Proceedings' (PhD (Law) thesis, National Academy of Internal Affairs 2016) 164-5.

6 Code of Ukraine no 4651-VI (n 2).

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be worded so as to avoid any potential pre-judgment about the third party's guilt in order not to jeopardise the fair examination of the charges in the separate proceedings."[7]

While using prejudice in criminal proceedings, there is a partial manifestation of the principle of prohibition of double jeopardy (*ne bis in idem*). According to Part 2 of Article 19 of the Criminal Procedure Code of Ukraine, criminal proceedings shall be immediately terminated if it becomes known that there is a final court judgment on the same charge.[8]

Ne bis in idem is inseparable from the principle of *res judicata*. It ensures that a convicted person, after serving their punishment and "repaying their debt" to society, can reintegrate without fearing further prosecution.[9]

Prejudice facilitates and expedites criminal procedural activities, providing the opportunity to avoid significant costs, efforts, and time associated with re-proving facts and circumstances, preventing collisions in the results of the activities of state authorities and officials conducting criminal proceedings, and ensuring legal certainty.

On the other hand, prejudice also imposes certain restrictions. It limits the application of the principle of free evaluation of evidence by leading investigators, prosecutors, investigating judges, and courts to accept the facts and circumstances from previous criminal proceedings as established reality. Nonetheless, this does not exempt the aforementioned subjects of evidence from the necessity of assessing prejudicial facts and circumstances in conjunction with the evidence available in the materials of the criminal proceedings. Such an assessment is conducted from the perspective of their relevance, admissibility, reliability, and sufficiency.

Assessing relevance means determining the existence of a prejudicial connection between the facts and circumstances established in one criminal proceeding and those needed in another. Admissibility involves determining whether the rules for obtaining evidence are followed. Assessing reliability entails identifying and analysing the evidence corroborating prejudicial facts and circumstances mentioned in the final procedural decision and ascertaining their correspondence to the facts and circumstances established in the criminal proceedings where prejudice is being used. Lastly, assessing the sufficiency of prejudicial facts and circumstances involves determining whether these elements of the subject of evidence are established with exhaustive completeness.

As a result of such an assessment, one may be convinced of the inadequacy, inadmissibility, or unreliability of prejudicial facts and circumstances. In such cases, prejudice will not be applied, and the relevant facts and circumstances must be established afresh in the new

7 *Navalnyy and Ofitserov v Russia* App nos 46632/13, 28671/14 (ECtHR, 23 February 2016) paras 98, 99 <https://hudoc.echr.coe.int/fre?i=001-161060> accessed 20 May 2024.

8 Code of Ukraine no 4651-VI (n 2).

9 Libor Klimek, 'Ne Bis in Idem as a Modern Guarantee in Criminal Proceedings in Europe' (2022) 5(4) Access to Justice in Eastern Europe 103, doi:10.33327/AJEE-18-5.4-a000439.

criminal proceeding. Therefore, the use of prejudicial facts and circumstances must be justified in procedural decisions.

One can unlikely agree that "legal prejudice is not directly related to the cognitive process".[10] Prejudice encompasses not only relevant facts and circumstances but also legal conclusions drawn from them. The principle of free assessment of evidence allows parties to reach different legal conclusions than those made in prior criminal proceedings, with proper argumentation of their legal position.

2 THE CONCEPT, SIGNS OF PREJUDICE AND PECULIARITIES O F ITS LEGAL REGULATION AND USE IN CRIMINAL PROCEEDINGS OF UKRAINE

In the Criminal Procedure Code of Ukraine, no article is dedicated to the comprehensive regulation of prejudice in criminal proceedings. Such a legal regulation of this means of criminal procedural evidence has resulted in an interpretation that is too narrow by some researchers in the field of its use in criminal proceedings. In particular, according to N.M. Senchenko, "in national legislation, prejudicial facts are determined by circumstances established by a court decision that has acquired legal force, which, as a result, do not require proof in the consideration of another case involving the same persons or a person concerning whom these circumstances have been established, or by a decision of another authority empowered by law to establish legal facts".[11] Other authors, when characterising prejudicial facts, also assert that prejudicial facts are exclusively enshrined in court decisions.[12]

However, the use of prejudice in criminal proceedings is not limited solely to court decisions. According to the provisions of the Criminal Procedure Code of Ukraine, prejudice is manifested in various ways in criminal procedural evidence. First, there is interbranch and international prejudice, where decisions by national courts or international judicial institutions that establish violations of human rights and fundamental freedoms guaranteed by the Constitution of Ukraine and international treaties ratified by the Verkhovna Rada of Ukraine influence the admissibility of evidence as per Article 90 of the Criminal Procedure Code of Ukraine.

10 OV Pavlichenko, 'Legal Presumption, Legal Prejudice and Legal Fiction: Correlation of Concepts' (2010) 50 The State and Law, Legal and Political Sciences 96; II Kohutych, *Theory and Practice of Using Fictions in the Investigation of Crimes* (Textbooks and manuals 2014) 64.

11 NM Senchenko, 'On the Essence of Prejudicial Facts in the Process of Proving in Criminal Proceedings' (Modern Jurisprudence of the European Union: The Interaction of Law, Rulemaking and Practice: International Scientific Conference, Lublin, 17 April 2018) 153.

12 G Ustinova-Boychenko, T Chernysh and Y Chabanenko, 'The Place of Prejudicial Facts in the Process of Criminal Procedural Evidence' (2019) 4 Law Herald 181-2, DOI:10.32837/yuv.v0i4.988.

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Second, branch prejudice is evident in the binding nature of final judgment rulings or rulings on the same charge, including court rulings on the closure of criminal proceedings as detailed in paragraph 6 of Part 1 of Article 284 of the Criminal Procedure Code of Ukraine. Additionally, branch prejudice applies to the uncancelled decision of an investigator, interrogator, or prosecutor to close criminal proceedings on the grounds provided for in paragraphs 1, 2, 4, 9 of Part 1 of Article 284 of the Criminal Procedure Code of Ukraine, provided the requirements for jurisdiction are observed, as detailed in paragraph 91 of Part 1 of Article 284 of the Criminal Procedure Code of Ukraine.

Furthermore, international prejudice is also evident in the recognition and enforcement of judgements from foreign state courts under Articles 602-604 of the Criminal Procedure Code of Ukraine, as well as the execution of decisions from the International Criminal Court according to Article 636 of the Criminal Procedure Code of Ukraine.[13]

In essence, the discussion revolves around the grounds for exemption from proof in criminal proceedings. The following conclusions can be drawn from the provisions of the criminal procedural law.

First, judicial decisions that have acquired legal force in civil, commercial, and administrative proceedings hold prejudicial significance in criminal proceedings. This includes decisions from international judicial institutions referred to in Article 90 of the Criminal Procedure Code of Ukraine, including the European Court of Human Rights, the United Nations Human Rights Committee, and the International Criminal Court.

Second, prejudicial significance is given to legal acts summarising the results of criminal procedural activities in a specific criminal proceeding. Accordingly, the scope of prejudice does not extend to intermediate procedural decisions. For instance, Article 198 of the Criminal Procedure Code of Ukraine provides a normative assessment of the significance of conclusions contained in a ruling on the application of preventive measures – conclusions expressed in a ruling by an investigating judge or court following consideration of a motion for the application of a preventive measure. Conclusions regarding any circumstances relating to the substance of suspicion or accusation do not have prejudicial significance for the court during trial or for the investigator or prosecutor during this or other criminal proceedings.[14]

Third, the aforementioned legal acts include not only final judgments and rulings of the court that have acquired legal force but also uncancelled decisions of an investigator, interrogator, detective, or prosecutor. The Code of Criminal Procedure (Part 1 of Article 36, Part 5 of Article 40, Part 4 of Article 40[1]) stipulates the mandatory nature of procedural decisions of pre-trial investigation bodies and prosecutors.[15]

13 Code of Ukraine no 4651-VI (n 2).
14 ibid.
15 ibid.

Thus, it is inadequate to limit oneself solely to the prejudicial nature of court decisions in criminal proceedings; it is more accurate to speak about the prejudicial nature of procedural decisions that conclude criminal proceedings. It is also worth noting that the Ukrainian legislature attributes the quality of prejudiciality even to judgments rendered as a result of expedited court proceedings, for the consequences of simplified proceedings regarding criminal offences, as well as based on agreements on the admission of guilt or reconciliation. This reflects the principle of *res judicata*.

Regarding such a legislative approach, legal literature notes that "when proof in one case is presented under the rules of Chapter 35 of the Criminal Procedure Code of Ukraine, priority is given to proof presented in the ordinary course of judicial proceedings. Thus, prejudiciality has a reverse significance in cases where evidence in the first case is presented in a special manner of court proceedings, meaning that a later court decision becomes prejudicial to an earlier one".[16] It seems that the example is not about choosing between the general or special procedure of criminal procedural proof using prejudice but rather about its non-use altogether. Therefore, the identification of reverse (reversive) prejudice raises objections.

In this regard, V.V. Vapnyarchuk is correct in stating that "in such cases, there should be no problems, as the current Criminal Procedure Code contains sufficient guarantees to ensure that a court decision made in such a criminal procedural manner does not raise doubts about its legality and validity."[17]

Fourth, the scope of prejudice extends to a) the fact of violations of human rights and fundamental freedoms guaranteed by the Constitution of Ukraine and international treaties ratified by the Verkhovna Rada of Ukraine, which is relevant to determining the admissibility of evidence; b) the same accusation for which a judgment was rendered, a ruling was issued, or a decision to close the criminal proceedings was made; c) the same act for which the criminal proceedings were closed by an investigator, interrogator, or prosecutor during the pre-trial investigation stage.

For instance, in overturning the ruling of the appellate court and appointing a new judicial review in the appellate court, the panel of judges of the First Judicial Chamber of the Cassation Court of Ukraine noted the following:

"In justifying the decision on the necessity to close the criminal proceedings regarding PERSON_6 due to the absence of elements of a criminal offence under Article 172, the appellate court stated that PERSON_8 and PERSON_9 were not employed by the individual entrepreneur PERSON_6 under labour relations but worked according to civil law contracts. In support of this conclusion, the appellate court referred to the decision of the Lviv District Administrative Court of 12 November 2014, which recognised the

16 Marija Pavlova, 'Classification of Types of Prejudice as a Tool for Determining its Essence' (2016) 7 Entrepreneurship, Economy and Law 135.

17 VV Vapnyarchuk, *Theory and Practice of Criminal Procedural Evidence* (Yurait 2017) 324.

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unlawful actions of the chief state inspector of the Territorial State Labor Inspectorate in the Lviv region during an unscheduled inspection regarding compliance with labour legislation by the individual entrepreneur PERSON_6, following which an inspection report No. 13170140749 was drawn up on 9 July 2014. By the same decision, the order to eliminate the identified violations of labour legislation (regarding the obligation under Article 24 of the Labor Code of Ukraine to employ workers by concluding written employment contracts with subsequent registration with the state employment service, ensuring the recording of working time, and deducting unified social contributions when using hired labour) was revoked. Moreover, the appellate court, referring to Articles 86 and 90 of the Criminal Procedure Code, stated that the decision of the Lviv District Administrative Court of 12 November 2014 has prejudicial significance in deciding on the admissibility of evidence to confirm the absence of violations of labour legislation by the individual entrepreneur PERSON_6. Therefore, the first-instance court unjustifiably did not recognise the inspection report No. 13170140749 of 9 July 2014 as inadmissible evidence, which indicates the incompleteness of the judicial review."[18]

Fifth, the use of court decisions in administrative, commercial, and civil cases as evidence in criminal procedural proceedings is limited.

This is also emphasised in judicial practice. Analysing the provision of Article 90 of the Criminal Procedure Code of Ukraine, the panel of judges of the Third Judicial Chamber of the Cassation Court of Ukraine noted that "a court decision has prejudicial significance for the court considering criminal proceedings only in the cases defined by this article. The current Criminal Procedure Code does not contain other provisions under which decisions of courts of other jurisdictions could be recognised as prejudicial in criminal proceedings, that is, those that exempt the court from the necessity of establishing facts subject to proof by examining and evaluating all the evidence in the criminal proceedings. ...The task of criminal justice is different from the tasks solved by national courts in civil, commercial, or administrative jurisdictions. In conducting criminal justice, courts do not resolve disputes but consider the accusation against the person and, with the help of evidence, establish whether the particular person is guilty of it. ...All evidence of guilt or innocence of a person is subject to examination in an adversarial criminal process. ...The appellate court, by granting prejudicial significance to the aforementioned decisions of other jurisdictions, did not consider that different participants, different subjects of consideration, means of evidence, and the scope of evidence were involved in the aforementioned cases and in this criminal proceeding. ...The appellate court should not have limited itself to referring to the mentioned decisions of courts of other jurisdictions but should have evaluated them taking into account all the circumstances of the criminal proceedings and the entire body of evidence provided by the parties."[19]

18 Case no 446/1797/14-к (Supreme Court of Ukraine, 19 June 2018) <https://reyestr.court.gov.ua/Review/74927276> accessed 20 May 2024.

19 Case no 390/934/13-к (Supreme Court of Ukraine, 4 August 2021) <https://reyestr.court.gov.ua/Review/98882010> accessed 20 May 2024.

The presented approach has been critically evaluated in procedural literature:

"The mentioned legal position is quite controversial because it effectively nullifies the prejudicial nature of decisions of national courts made in civil, commercial, or administrative proceedings ... Otherwise, within the framework of criminal proceedings, there will be a reassessment of established circumstances by the courts, thereby nullifying the legal significance of the court decision and creating opportunities for the courts to adopt diametrically opposite judicial acts on the same issues, which not only negatively affects the quality of justice but also contradicts the essence of the rule of law."[20]

It is envisaged that in the analysed legal position, the Supreme Court correctly interpreted the content of Article 90 of the Criminal Procedure Code of Ukraine. In each form of legal proceedings, due to its tasks, subject matter, methods and the mechanism of legal regulation, special rules of evidence apply that are characteristic only for it. A vivid example is criminal proceedings, in which significantly higher standards of cognitive activity and its results are established compared to administrative and civil proceedings. In criminal proceedings, qualitatively different procedural guarantees operate, and the implementation of the principles of proceedings is distinguished by its specificity. In addition, the subjects of evidence, as well as the opportunities for participants in procedural relations to obtain and verify evidence, differ. The rules regarding the burden of proof also differ. Therefore, facts and circumstances predominantly established during criminal procedural activity can be accepted without prior verification.

In criminal procedural doctrine, the opinion has been expressed that "procedural decisions containing prejudicial facts can be used in evidence as 'other documents".[21] However, M. Khavronyuk is right in stating that "a judicial decision having prejudicial significance is not evidence in itself."[22] Indeed, the approach mentioned above does not correspond to the provisions of the Criminal Procedure Code of Ukraine, as it equates to a legal decision in which legally significant facts are established based on evidence, with the evidence itself.

Hence, prejudice in criminal proceedings is characterised by the following provisions:

1) facts and circumstances established in the framework of another criminal proceeding, provided they are relevant to both processes, regarding the same accusation or act, are not subject to proof in the criminal proceedings;

20 D Melnikov, 'Prejudice in Criminal Proceedings: The Position of the Supreme Court' <https://uz.ligazakon.ua/ua/magazine_article/EA015333> accessed 20 May 2024.

21 Shilin (n) 10-1.

22 MI Khavroniuk, 'Expert Opinion on the Prejudicial Effect of Decisions' (*Council of Public NABU*, 2023) <https://rgk-nabu.org/uk/diyalnist-rhk/korysni-dokumenty/ekspertniy-visnovok-na-temu-znachennya-rishen-sudiv-nekriminalnoi-yurisdiktsii-dlya-kriminalnikh-provadzhen> accessed 20 May 2024.

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2) facts and circumstances established in civil, criminal, and economic cases, as well as by the European Court of Human Rights, the UN Human Rights Committee, and the International Criminal Court, are not subject to proof in criminal proceedings, provided they are relevant to both processes regarding the admissibility of evidence;
3) therefore, re-examination, verification, and reassessment of these facts and circumstances are unnecessary;
4) legal conclusions regarding such facts and circumstances are outlined in the final procedural decisions of the investigator, detective, prosecutor, or court;
5) the prejudicial nature of the procedural decision remains until its cancellation or modification regarding the clarification of the relevant facts and circumstances;
6) the legal act establishing prejudicial facts and circumstances is binding for all subjects of criminal procedural proof.

Therefore, ***prejudice*** is a means of procedural proof that exempts from the necessity to prove facts and circumstances in criminal proceedings, which have been established in final procedural decisions in another criminal proceeding regarding the same accusation or act, in court decisions in civil, commercial, and administrative cases, as well as in decisions of the European Court of Human Rights, the UN Human Rights Committee, and the International Criminal Court regarding the admissibility of evidence, provided these facts and circumstances are relevant to both processes.

For further scientific reflections on the use of prejudice in criminal proceedings, it is important to consider the impact of standards of proof in various branches of justice on the prejudicial effect of court decisions.

Enshrined in procedural law and formulated in the legal positions of the Supreme Court, the rules that ensure the necessary level of conviction of the law enforcement officer when making procedural decisions and the standards of proof affect compliance with all established requirements (conditions) for cognitive activities including the use of presumptions. This impact depends on the type of prejudice, the nature of the issues to which the relevant standards of proof are applied, and the form of legal proceedings.

Under sectoral prejudice, a court decision must be based on a fact established by a standard of proof not lower than that required to decide another case using those facts. Thus, if a fact in a civil case was established in accordance with the "balance of probabilities" standard, and a higher standard of proof is required to decide another civil case (for example, "clear and convincing evidence"), the court is not entitled to apply prejudgment. In this case, the parties must provide additional evidence that meets the required (higher) standard of proof.

Instead, under inter-branch prejudice, the facts established under the rules of a higher standard of proof may be used as the basis for a court decision but based on a lower standard of proof. In particular, for a court considering a case on the civil legal consequences of the actions of a convicted or acquitted person, the prejudicial effect of the verdict extends to the question of whether such actions actually took place and

whether that person committed them. At the same time, different standards of proof generally apply in criminal and civil proceedings.

In criminal proceedings, the standard of proof is "beyond reasonable doubt", while in civil proceedings, the standard is the "balance of probabilities". This disparity allows for the possibility that, after an acquittal in criminal proceedings due to the absence of a criminal offence, a civil court might still satisfy the claim in civil proceedings. This occurs because the court operates under the lower "balance of probabilities" standard, which is sufficient to decide a civil case despite being less stringent than the criminal standard of "beyond reasonable doubt".

Criminal proceedings provide the most thorough knowledge of the circumstances to be proved. The standards of proof in this area are higher than in civil, commercial and administrative proceedings. In general, establishing facts through criminal procedural standards in civil, commercial, and administrative cases is excessive, as the ECtHR has pointed out in its judgments.[23] At the same time, the use of prejudicial facts established through a higher standard of proof to make a decision significantly increases the level of conviction of the law enforcement officer in their integrity. It is no coincidence that the Ukrainian civil procedure, commercial procedure, and administrative procedure laws state that a court in civil, commercial, and administrative cases is prejudiced by a decision in criminal proceedings - a court verdict in criminal proceedings, a decision to close criminal proceedings and release a person from criminal liability.

The CPC of Ukraine does not contain a similar provision. Prejudicial facts established under the rules of some common standards of proof for the forms of legal proceedings may be the factual basis for making procedural decisions of different functional significance. While the aforementioned "balance of probabilities" standard of proof in civil proceedings is used to make final decisions, in criminal proceedings, its application is limited to intermediate procedural decisions (e.g., temporary restriction of a special right, removal from office).

The subject matter of this study also includes consideration of the difference between the precedential nature of court decisions and the binding nature of the Supreme Court's legal opinions.

While the Supreme Court's legal opinions relate to an inexhaustible number of proceedings, as they are designed for a typical situation and repeated use, precedence is limited to a few cases with common objective and subjective factors. Thus, if the legal opinions of the Supreme Court are to be taken into account in proceedings with similar circumstances, then precedence establishes the obligation to take into account specific facts and circumstances previously established in a procedural decision in the investigation or consideration of another case. In

23 *JK and Others v Sweden* App no 59166/12 (ECtHR, 23 August 2016) para 53 <https://hudoc.echr.coe.int/fre?i=001-165442> accessed 20 May 2024; *Balsamo v San Marino* App nos 20319/17, 21414/17 (ECtHR, 8 October 2019) paras 58-66 <https://hudoc.echr.coe.int/?i=001-196421> accessed 20 May 2024.

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addition, while the Supreme Court's opinions apply to an unlimited number of subjects, precedence applies only to law enforcement officers conducting proceedings related to the first case and to those participants who are the same for both cases.

The binding nature of the Supreme Court's legal opinions ensures the unity of judicial practice, while prejudiciality ensures the unity of fact-finding. The Supreme Court's opinions are based on law interpretation, law enforcement and regulatory precedents (if they contain judicial rules and examples of their application to the circumstances of a particular criminal proceeding). Precedence, on the other hand, is based on the reliability of facts.

Lower-level courts may not use the Supreme Court's opinion without properly motivating such a decision. In case of doubt about the reliability of the prejudicial facts, they may verify them or establish them themselves. When conclusions come from the Supreme Court, the prejudicial effect refers to decisions of the body that first established a particular fact or circumstance that can be used in another proceeding.

The conclusions are set out in a resolution of the Supreme Court. While verdicts and court rulings that have entered into force, unrepealed decisions of the investigator, detective, and prosecutor to close criminal proceedings, as well as decisions of the ECHR, the UN Human Rights Committee, and the International Criminal Court, acquire precedential value.

The Supreme Court's opinions are not permanent and may be subject to correction. At the same time, precedence is characterised by stability, as it is a manifestation of the entry into force of a court decision and, accordingly, res judicata. It depends only on legal regulation, and therefore, law enforcement officers must strictly adhere to the rules of precedence.

The Supreme Court's opinions relate to various issues of law enforcement, both substantive and procedural law, while prejudice is only a matter of evidence.

3 REGULATION OF THE USE OF PREJUDICE IN CRIMINAL PROCEDURE OF OTHER EUROPEAN STATES

Modern criminal procedure research will be considered incomplete without the use of the comparative legal method. In the context of this research, the purpose of the comparison is to identify the common, similar, distinctive and unique features of the criminal procedure law of Ukraine and foreign countries with regard to the institute of prejudgment and the practice of its use.

The study of the use of prejudice in criminal procedure in the continental legal system from the perspective of legal regulation, the practice of use and doctrinal approaches to understanding this category made it possible to distinguish two polar national approaches - a broad one, as exemplified by the criminal procedure law of the Republic of Poland, and a narrow one, embodied in particular in the criminal procedure of the Republic of Italy. It

is also worthwhile to dwell on the regulation of prejudice in the Code of Criminal Procedure of the Republic of Greece, which enshrines the safeguards for its use.

According to Part 1 of Article 8 of the Criminal Procedure Code of the Republic of Poland, the criminal court independently decides factual and legal issues and is not bound by the decision of another court or authority.[24]

In Polish procedural doctrine, the provisions cited are a manifestation of the principle of judicial independence *(zasada samodzielności jurysdykcyjnej sądu)*.[25] It interacts closely with other criminal procedure principles of the Republic of Poland, particularly with the establishment of objective truth, ensuring the right to defence, the direct examination of evidence, and their free evaluation.

Furthermore, there is a connection with the principle of judicial independence.[26] Judicial independence entails the court's freedom to decide matters within its jurisdiction. This principle exclusively pertains to the issuance of judicial decisions.[27]

The court's independence in making decisions pertains to factual and legal issues. The court's independence in deciding legal issues lies in its autonomy in the criminal-legal qualification of the actions charged by the accusation. The jurisdictional independence of the court in deciding legal issues also manifests in its independent interpretation of both substantive and procedural law. When it comes to the jurisdictional independence of the court in establishing factual circumstances, this independence, although it authorises the court to draw its own conclusions, does not imply that the decision of another court in the case regarding the same act is invalid. An alternative assessment by the criminal court will require a corresponding justification, i.e., presenting arguments for adopting a contradictory judicial decision. Otherwise, there may be a situation where two completely different versions of the same event are present in legal proceedings based on extremely different assessments of the same evidence. Such a situation is undesirable, as there should be only one version of the same event in legal circulation, regardless of whether the case was considered in one proceeding or whether issues concerning certain defendants were separated for separate judicial consideration. However, this does not mean that the previously made decision is preliminary, but this circumstance requires the court issuing the decision later in time to thoroughly consider the arguments that are the basis for the already final decision.[28]

24 Criminal Procedure Code of the Republic of Poland of 6 June 1996 'Kodeks Postępowania Karnego' <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970890555> accessed 20 May 2024.

25 Ewa Pieniążek, 'Prejudycjalność Orzeczeń w Procesie Karnym' (2005) 12 Prokuratura i Prawo 102; Barbara Augustyniak i in (red), *Kodeks postępowania karnego: Komentarz*, t 1 (6 wyd, Wolters Kluwer 2022) 74.

26 Renata Badowiec, *Zasada samodzielności jurysdykcyjnej sądu karnego i odstępstwa od niej* (Dom Organizatora 2021) 28.

27 ibid 30, 32.

28 ibid 34-6.

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The independent examination and resolution of all issues arising during judicial proceedings are intended to ensure a comprehensive clarification of the circumstances of a criminal case and its resolution based on evidence examined exclusively during these proceedings. Therefore, the basis for all judicial decisions in criminal proceedings is only those conclusions drawn in this process. In criminal proceedings, the court has the right to independently resolve issues in areas of law other than those related to the relevant legal relationships. The principle of judicial independence allows the court to apply any legal norm to the facts substantiating the prejudicial decision, regardless of the field of law to which it belongs. This regulation is a manifestation of the legal certainty and predictability of the law. Thus, judicial independence constitutes a legal value and is one of the guarantees of a fair trial.[29]

Nevertheless, the unconditional implementation of this principle can lead to negative consequences. The most significant are the divergent interpretations of legal regulations, discrepancies between judicial decisions in establishing factual circumstances, the threat to the finality of legally binding court decisions, and the inability to guarantee legal certainty. Establishing reasonable limits on applying the principle in question by the court in resolving factual and legal issues is necessary to ensure the right to a fair trial.

Given this, there are normatively established limitations on the principle of judicial independence. For instance, in Part 2 of Article 8 of the Criminal Procedure Code of the Republic of Poland, an exception to the above-mentioned general rule is stipulated – final court decisions that regulate rights or legal relationships are binding.[30]

From the provided paragraph, three conditions determine the binding nature of court decisions in criminal proceedings. First, a decision must be final, meaning it cannot be appealed using regular legal means (*zażalenie, apelacja*). Second, the decision must orginate from a court, defined as an entity belonging to the judicial system of the Republic of Poland, regardless of its level. Third, the decision must regulate rights or legal relationships. This involves establishing, modifying, or terminating the rights of a specific subject or the legal relationships involving such a subject. Such decisions are termed constitutive (*konstytutywny*) as they mark a legal event associated with specific consequences, meaning that only upon its adoption do certain outcomes occur, such as changing existing legal relationships or forming a new legal status.[31] Typically, such court decisions include accusatory (guilty) and acquittal verdicts.[32]

In particular, in criminal proceedings, the court is bound by the decisions of another court regarding 1) imposing punishment of the same kind for the commission of two or more crimes or other punishments that can be combined (*kara łączną*); 2) reopening proceedings

29 ibid 43.
30 Criminal Procedure Code of the Republic of Poland (n 24).
31 Augustyniak and others (n 25) 75-6.
32 Pieniążek (n 25) 103-4.

that have been concluded by a final court decision (Part 1, Article 540 of the Criminal Procedure Code of the Republic of Poland); 3) establishing the fact of recidivism in accordance with the provisions of Part 1 or Part 2 of Article 64 of the Criminal Code of the Republic of Poland; 4) decisions regarding compensation for damages or compensation for unlawful conviction, pre-trial detention, or arrest; 4) legal assessment by the appellate court, in the event of its returning the criminal proceedings for a new judicial review.[33]

Moreover, in the Republic of Poland, courts are not only bound by decisions made in other criminal proceedings but also by those made in administrative and civil cases. Specifically, decisions from administrative cases are mandatory when they have a constitutive effect on the sphere of personal rights of a specific individual, establish factual circumstances, or are aimed at ensuring the proper conduct of criminal proceedings.[34]

Similarly, when a court in civil proceedings, based on the provisions of the current legislation of the Republic of Poland, establishes a new legal status in the sphere of legal relations of specific legal subjects, this status cannot subsequently be changed according to these provisions by any means other than by another court decision in a civil case that has acquired legal force, the court in criminal proceedings must recognise this particular status. In such a situation, the previously established legal status appears before the criminal court as a concrete reality. As an example, decisions of the civil court regarding the dissolution of marriage are cited.[35]

The use of cross-sector prejudice in criminal proceedings is permitted by the legislation of other European states. Specifically, according to Article 59(1) of the Code of Criminal Procedure of the Hellenic Republic, when a decision in a judicial proceeding depends on another case in which criminal prosecution is carried out, the consideration of the first case is postponed until the final decision is made in the second judicial proceeding. Additionally, Article 60(2) of the same codified act states that criminal prosecution is suspended if a civil court decision of the civil court precedes. Furthermore, according to Article 61, when the civil court is conducting a judicial proceeding regarding an issue within the competence of civil courts, which, however, is related to criminal judicial proceedings, the criminal court may, at its discretion, postpone the judicial proceeding until the conclusion of the civil proceeding. However, according to Article 62, while the decision of the civil court on an issue related to criminal prosecution is not binding on the criminal court, it is considered a factor that the criminal judge may evaluate alongside other evidence.[36]

33 Badowiec (n 26) 45, 47-66.

34 ibid 68.

35 ibid 97-8.

36 Criminal Procedure Code of the Hellenic Republic no 4620 of 1 July 2019 'Κώδικας Ποινικής Δικονομίας' <https://www.kodiko.gr/nomothesia/document/530491/nomos-4620-2019> accessed 20 May 2024.

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Therefore, the Greek legislator has enshrined the right or obligation of courts to suspend or postpone the trial until the resolution of a related case whose court decision is relevant to the criminal proceedings.

In contrast, the criminal procedural laws of some European states do not permit the unconditional use of sectoral prejudice. For example, Article 238-bis of the Criminal Procedure Code of the Italian Republic allows for the use of final court decisions to prove a fact established by them, provided that they are evaluated in accordance with the provisions of this codified act.[37] Therefore, it follows that the decision can be used to establish the fact established in the judgment as proven. However, this requires the application of a special rule for assessing evidence: unrevoked judgments are suitable for proving the fact established in them in another proceeding only in conjunction with other evidence that confirms their reliability.[38] Thus, the evidence of a fact cannot be derived solely from an unrevoked judgment: the Italian legislator requires additional confirmations for this purpose. In this way, the Italian criminal procedural law preserves the independence of the court and ensures its free assessment of evidence for formulating legal conclusions.

It is worth noting that EU law and the national legislation of some EU states include a mechanism referred to in legal literature as a "preliminary request" or, to be more precise, a "preliminary reference". This is an appeal of a national court of an EU state to the Court of Justice of the EU or an appeal of a lower court to the highest judicial body of the national judicial system with a request to interpret and clarify the correct application of a specific rule of substantive and procedural law. The preliminary request is aimed at ensuring a uniform understanding of the provisions of EU law, harmonisation of the European legal system, and the right to effective legal protection, and is one of the ways to ensure the unity of judicial practice before the national court makes a decision on the merits of the case. After considering the preliminary request, the EU court or the highest authority in the national judicial system formulates a preliminary ruling. In this case, both the preliminary request and the preliminary ruling are based on the same factual circumstances established in a particular case.

Whereas prejudice allows the facts established in one case to be used in making a decision in another case, provided that these facts are common to both processes. In preliminary proceedings, higher and lower courts are involved, while prejudgment is used by a single court that decides the case on the merits. Therefore, while prejudice is a means of establishing circumstances relevant to criminal proceedings and subject to proof without conducting cognitive activities, a preliminary (preliminary) request is an element of the mechanism of uniform interpretation and application of legal norms.

37 Criminal Procedure Code of the Italian Republic no 477 of 22 September 1988 'Codice Di Procedura Penale' <https://www.brocardi.it/codice-di-procedura-penale/> accessed 20 May 2024.

38 Codice Di Procedura Penale Esplicato: Spiegato articolo per articolo; Leggi complementari; Formulario (18 ed, Edizioni Giuridiche Simone 2013) 334.

4 THE USE OF PREJUDICE IN THE CRIMINAL PROCESS OF THE STATES WITH A COMMON SYSTEM OF LAW

In countries with a continental legal system, the concept of prejudice arises from the principle of *res judicata*. In contrast, in countries following the Anglo-American legal system, this evidentiary tool is based on the doctrine of *collateral estoppel*.

Both *res judicata* and *collateral estoppel* are aimed at ensuring procedural economy, freeing participants in the judicial process from re-examining the same issues of fact and law. They both come into effect after a court has rendered a final decision on the merits of the dispute. Then, this decision is used to resolve subsequent legal disputes, and the initial decision can serve as a bar to relitigating the entire case (*res judicata*) or a specific issue (*collateral estoppel*).

In general law, *res judicata* is associated with *claim preclusion*, whereas *collateral estoppel* is associated with issue preclusion. The principle of *claim preclusion* prohibits the successive judicial consideration of the same claim, regardless of whether the subsequent claim raises the same issues as the previous one. The principle of *issue preclusion* prohibits further judicial consideration of a factual or legal issue that was actually litigated and decided in a prior court judgment and is essential to that prior judgment, regardless of whether the issue arises in the same or a different case. Only issues that were actually litigated and necessary to resolve the initial claim have a preclusive effect. According to the doctrine of *nonmutual collateral estoppel,* issue preclusion can be used both offensively and defensively by parties who were not involved in the initial proceeding.[39]

The doctrine of *collateral estoppel* involves using a judicial decision in a new action to prevent the relitigation of issues already decided in that decision. According to principles of general law, the use of the doctrine required that the party invoking *collateral estoppel* and the party against whom it was invoked be the same as those in the previous judicial proceeding. However, later on, the courts' desire for efficiency led to the application of this doctrine in cases where the parties were not the same.[40] The use of *collateral estoppel* is possible when the following requirements are met: a *valid final judgment*, *the court's personal* and *subject matter jurisdiction*, and the presence of the sa*me legal or factual issue*. For example, in Ashe v. Swenson (1970), Ashe was one of four individuals arrested for robbing six poker players. A jury acquitted him of one of the robberies due to insufficient evidence. Six weeks later, Ashe was again brought to trial for the robbery of another poker player. Following this trial, Ashe was found guilty and sentenced to thirty-five years in prison. The U.S. Supreme Court ruled that since the first jury had rejected the claim that Ashe was one of the robbers, the state could not constitutionally bring him before a new

39 Andrew S Tulumello and Mark Whitburn, 'Res Judicata and Collateral Estoppel Issues in Class Litigation' in Marcy Hogan Greer (ed), *A Practitioner's Guide to Class Actions* (American Bar Association 2010) 605, 607-9.

40 Rose M Alexander and others, 'Collateral Estoppel' (1982) 16(2) University of Richmond Law Review 342.

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jury to reconsider this issue. Therefore, if an ultimate issue of fact has been determined in a prior, valid, and final court decision, it cannot be relitigated between the same parties in any subsequent prosecution.[41]

5 CONCLUSIONS

Prejudice in the criminal procedure of Ukraine is a means of procedural proof that exempts from the necessity to prove facts and circumstances already established in final procedural decisions from other criminal proceedings regarding the same accusation or act in court decisions in civil, commercial, and administrative cases. This also includes decisions from the European Court of Human Rights, the UN Human Rights Committee, and the International Criminal Court regarding the admissibility of evidence, provided these facts and circumstances are relevant to both processes.

In countries with a continental legal system, prejudice follows from the principle of res judicata. A common feature of legal regulation and the use of prejudice in criminal proceedings across these countries is the recognition of only court decisions that have entered into force as prejudicial. Instead, the Ukrainian regulation allows for the establishment of prejudicial facts in the decision of the pre-trial investigation body and the prosecutor to close criminal proceedings.

Continental legal systems generally feature sectoral and inter-sectoral prejudice. In contrast, the CPC of Ukraine gives grounds to distinguish international prejudice. In the criminal proceedings of European countries, the scope of prejudice is covered by issues of fact. Ukraine legislation, however, limits these issues to the same charge or the same act while also extending it to issues of evidence admissibility.

Some continental legal systems, like that of Poland, impose no restrictions on the content of preliminary facts, allowing such facts to be established through court decisions in civil and administrative cases. Conversely, Italy adopts a narrow approach, not only by enshrining exclusively sectoral prejudice but also by introducing a condition for its use - the circumstances established by a court decision in a criminal case are subject to verification in the context of a trial in another criminal case.

The Criminal Procedure Code of the Hellenic Republic provides additional procedural institutions related to the use of prejudice, such as suspending court proceedings or postponing a criminal case until the resolution of another criminal or civil case if the outcome of the court case is directly dependent on those resolutions.

41 *Ashe v Swenson* 397 US 436 (US Supreme Court, 6 April 1970) <https://supreme.justia.com/cases/federal/us/397/436/> accessed 20 May 2024.

In contrast, in the Anglo-American legal system, the application of prejudice in evidence is based on the doctrine of collateral estoppel. At the same time, the scope of using presumption includes questions of fact and law.

Each state determines its own approach to the regulation and use of prejudice in criminal proceedings, which is influenced by many factors, including the type of legal system to which the state belongs, the model of its criminal procedure, historical traditions of state building, the effectiveness of legislation regulating the activities of pre-trial investigation and court bodies and the effectiveness of these bodies themselves, the level of legal culture and legal awareness of the population. While Ukrainian procedural law offers a more comprehensive and specific framework compared to some foreign ones, there remains room for improvement. These include clarifying the grounds for exemption from proof in criminal proceedings and prohibiting the use of prejudicial facts established through summary trials, simplified proceedings for criminal misdemeanours as well as plea agreements or reconciliation.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРЕЮДИЦІЯ ЯК ЗАСІБ ДОКАЗУВАННЯ У КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ В УКРАЇНІ: ПОРІВНЯЛЬНИЙ АНАЛІЗ ДЕРЖАВ КОНТИНЕНТАЛЬНОЇ ТА ЗАГАЛЬНОЇ СИСТЕМ ПРАВА

Назар Бобечко* та Володимир Фігурський

АНОТАЦІЯ

Вступ. *Під час підготовки КПК України 2012 р. питання правової регламентації щодо використання преюдиції у кримінальному процесуальному доказуванні не привертали особливої уваги дослідників. Відтоді пройшло чимало часу, проте ця проблематика не стала предметом висвітлення в підручниках та посібниках із кримінального процесу, що побачили світ після прийняття цього кодифікованого акту. Та й у нечисленних наукових розвідках, присвячених преюдиції у кримінальному провадженні, поки не вдалося сформулювати communis opinion doctorum із деяких питань, що стосуються цього засобу доказування.*

Метою статті є з'ясування поняття, формулювання ознак, розкриття значення преюдиції у кримінальному процесі України, виокремлення особливостей правового регулювання та використання цього засобу доказування у кримінальному процесуальному праві держав континентальної та загальної систем права.

Методи. *Методологічною основою статті є діалектичний підхід до наукового пізнання соціальних явищ. Під час написання статті також були використані загальнонаукові та спеціально-правові методи пізнання: аналіз, узагальнення, структурно-функціональний метод, герменевтичний метод, догматичний або спеціально-правовий метод, порівняльно-правовий метод.*

Результати та висновки. *З'ясовано, що преюдиційне значення надається правозастосовним актам, за допомогою яких підводиться підсумок кримінальної процесуальної діяльності у конкретному кримінальному провадженні. До цих правозастосовних актів належать не лише вироки та ухвали суду, що набрали законної сили, але й нескасовані постанови дізнавача, слідчого, детектива, прокурора. Преюдиція охоплює не лише відповідні факти й обставини, але й правові висновки щодо них. Засада вільної оцінки доказів дає можливість суб'єктам доказування дійти інших правових висновків, ніж ті, що були зроблені у попередньому кримінальному провадженні, із належною аргументацією своєї правової позиції. Використання преюдиції у кримінальному провадженні держав континентальної системи права базується на доктрині res judicata, натомість загальної системи права – на доктрині collateral estoppel. Особливості використання цього засобу доказування були розглянуті на прикладі кримінального процесу Польщі, Греції, Італії та США.*

Ключові слова: *кримінальне процесуальне право, процес доказування, засоби кримінального процесуального доказування, преюдиція, факти і обставини, суб'єкти доказування.*