ŠUTOVA MILICA[1] УДК:347.4/.5(497.7)

THE CONCEPT OF THE PREVIOUS QUESTIONS IN ACCORDANCE WITH THE MACEDONIAN LAW AND PRACTICES

Abstract: To study the institute of "previous question "beyond judicial practice is purposeless in any aspect of jurisprudence. Inspired by the practical application of this instrument, simultaneously taking into account the theoretical concept and the complexity of the problem, this paper will approach the comprehensive analysis of the "previous/prejudicial issue" with a focus on judicial perception in concreto. The previous question can be analyzed from criminal law, civil law, administrative, bankruptcy, etc. perspective. In the area of civil law, we insert business law because the rules for both of these areas are identical, and the courts that dispute these questions of business and civil relationship are identical**.**

However, the aim of the article is not to study criminal, administrative, bankruptcy or civil procedure separately. The aim of the article is to explore the concept of "previous question' using interdisciplinary approach, systematical methods, in the context of criminal, administrative, bankruptcy and business law issues. Nevertheless, we emphasize the role of the legal standards applicable from the domestic courts during determination of the subject or taking attitude in terms of "previous questions ".

Keywords: *termination of the procedure, incidental question, decision, validity, previous question in civil procedure.*

1. INTRODUCTION

"The previous question" widely represents an accepted institution in the field of procedural law. This conclusion is based on the fact that there is no law on civil procedure in comparative legal systems where the institute's previous question is unknown category.[2] Comparatively, in the German legal literature and regulation the institute's "*binding decision as to the lack of jurisdiction,*"[3] is implemented, in the French procedural civil science is implemented the institute's „*lack of jurisdiction raised by the parties.*"Identical is also the concept in the Dutch, Italian, Austrian law on civil procedure etc.[4] In the area of criminal matters, the institute of previous question is implemented in the law on criminal procedure. In the administrative law issues, the institute of a previous question is arranged by implementing the legal basis for settling / taking of stance in relation to the previous question *in concreto*. Finally, in the area of business law, remains the application of the rules of civil procedure.

With the commencement of the civil procedure *in concreto* starts the setting of a numerous questions of a civil as well as any other issue for which the court before the procedure is leading is competent or incompetent.[5] Everything that is disputable for court, before which the procedure is leading, is a question. Of course, everything that will be set as a question is not relevant / important for the decision making of the main issue. After the opening of the civil procedure is determining and comprehending what is relevant for deciding the main issue.

When it is a question of a previous question, relevant to deciding are the issues that have legal nature. Factual issues that are during the procedure in any part do not converge with the concept of a previous question. *Differentia specifica* of the previous questions is the prejudicial character and the legality which must necessarily to present in relation to give the issue a qualification of *"privious question"*. The legality as a basic component of the previous question is concerning to the existence of a certain right, a legal relationship, or legal content which deciding contributes to the resolution of the main issue in the procedure.

[1] Assistant Professor of Faculty of Law, University "Goce Delcev" Stip, milica.sutova@ugd.edu.mk

[2] http://www.osstip.mk/Odluki.aspx?odluka=5560.

[3] Look art. 11., (Bundesgesetzblatt (BGBl., Federal Law Gazette) I page 3202; 2006 I page 431; 2007 I page 1781), last amended by Article 1 of the Act dated 31 August 2013 (Federal Law Gazette I page 3533)Available from: http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html, 16.07.2021.

[4] Available on: http://www.gesetze-im-internet.de/zpo/. (admitted on: 18.07.2021).

[5] The concept of previous question is in direct collision with the question of competence (actual) of the courts. Certainly this institute has questioned the rules for actual competence in the procedural laws of civil matter. However, given the fact that previous question finds its justification and legal base in the civil procedural laws, it is undoubted that the previous question is an exception in the rules for competence.

The previous questions are those questions that by their content seem right or legal relationship. Prejudicial questions during the procedure should be previously resolved in order to continue the procedure and to be finished up with the right decision.[6] These questions can also be set as independent, main issues in another court or administrative procedure. The need for the previous resolution of this question gives a conditional attribute to the question in the manner that its prior settlement conditioned the continuation of the procedure and the resolving of the main subject. Illustrative: 1) *before making a decision for paying the purchase price should be determined whether there is a purchasing agreement*;[7] *2) before making a decision for the status of* the will *successor should determine whether there is a valid will; 3) the adoption of rei vindicatio lawsuit is conditioned by prior determination whether the plaintiff is a title of the ownership right; 4)The decision on the request for payment of interest is determined by the question of the existence or non-existence of the main debt* etc. However, the legal question in specific litigation can occur as the main issue / independently subject for decision-making in any other procedure including: *litigation, non-litigation, administrative procedure.*[8] Basically it is the essence of the institute's previous question: *it can be the main subject for settlement in another procedure, and in the actual litigation is occurring as the previous question*. This concept does not mean that the previous question by its nature could not be the main subject for settlement in another procedure.

The previous question may be the main issue in the particular litigation in which initially emerged as a previous question. This legal concept in civil procedural literature qualifies as finishing the issue with interlocutory or partial judgment.[9] In fact, the possibility of the previous question being transformed into the main issue lies in the will of the plaintiff or defendant in the same action to put of the previous question as the main issue. The legal basis for such treatment of one of the parties lies in article 177/3 of the Law on litigation pursuant to which resolution: *If the decision upon the dispute depends on whether there is or there is no legal relation that during the course of the litigation has become disputable,* ***the plaintiff can, besides the existing claim, point out a petition for the court to declare that such relation exists, i.e. does not exist, should the court where the litigation is ongoing be competent for such a claim***. This legal concept represents the exception of the rule *"the court's stance to the previous question does not contain in the pronunciation of the verdict"*. The exception provides that in the case when the request for resolving of the previous question is submitted in the form of a separate lawsuit (between proposal) for determining or in form of a counterclaim.

However, regardless of the legal ability, the applicability of this concept depends on the will of the parties and the character of the procedure in which the previous question is imposed: civil, criminal, administrative.

2. TERM, IMPORTANCE AND PURPOSE OF THE PREVIOUS QUESTION

The importance, the role, and the purpose of the previous question arise from its basic task provided with the positive laws as follows: to contribute to the rational, quick, economic, effective proceeding within a reasonable time, which in *ultima linea* should contribute to the protection of basic human rights in the procedures. Basically, it is the essence of this institute. Taking into account the complexity which is posed by the practice regarding the previous question, rightly remains a dilemma where appropriateness in the application of this institute, respectively where is the limit in view of protection of the rights of the parties in the procedure?! Is it more important for the procedure to be resolved efficiently and effectively, or to be resolved in accordance with the Constitution, the laws of the territory where that is applied? This area of research is intruded on us by the general rules for the real competence of the courts and other state bodies. Whether the incompetence of the particular court or authority in taking a position on a particular issue presents a threat to wrong resolving of the previous question, which ultimately reflects on the overall outcome of the procedure?! The prescribing of the competence of courts and the

[6] Кеса.R., Старовић Б., Civil Procedural Law, Novi Sad, 2004, page. 101.

[7] In the judicial practice, the determination of the question of whether or not there is a purchasing agreement is usually being related to the question of whether the transmitted initial act of signing of an agreement with a potential contracting party is deemed as an offer or not. Respectively, whether the delivered initial act fulfilled the criteria to achieve the status of an offer in accordance with the Law on obligation. Usually, in order to avoid fulfilling the agreement, the party who delivered the initial act for stipulation, disputes the fact that there is an agreement between it and the other contracting /non contracting party, pointed that they were in the process of negotiation, respectively that it indicates a call for the conclusion of the agreement, and not an offer that entails different legal consequences in case of default.

[8] The previous question cannot always be set as a matter for which is competent court authority. It may be a subject of resolving as main issue before another body. In this context of resolving of the administrative legal issues as main issues in administrative proceedings, and as a previous question in other civil or criminal procedure.

[9] Look more for this: Salma. M, Previous question in civil procedure ", Novi Sad, 1995, p.56.

authorities is reflecting of the rule that any authority which acts in legal matters falls within its jurisdiction. The incompetence in the resolution of certain legal matters entails the annulment of the decision.

However, should not forgot the fact that when the court gets to the resolving of the previous question that is realized only for the purposes of the procedure which it leads, with no impact on the procedure which the same matter is resolved as a main issue. Moreover, the court (unless it resolves the issue of interlocutory), does not resolve the issue, but it occupies a position that essentially means that the issue is still not resolved validity and it is not *res judicata*. On the very basis of, this it seems to us that lay the biggest justification of the concept previous question, and the idea and importance which it has against the protection of human rights in the field of civil, criminal, commercial and administrative matters.

2.1. The legal standards for the stop of the procedure as a result of the previous question

The legal standards for the stop of the procedure refer to the perception of the courts for the relevancy of the particular question to be qualified as the previous question. When the decision of the court depends on the previous resolution of the question of whether existing some right or legal relation, and for that question the court still don't adopt decision or other competitive body (previous question), the court may on his own to resolve that question, if with special regulation is determined otherwise. (Law on litigation, article 11/1). This decision applies to cases of civil and commercial nature. In the economic substance the application of Article 11 of Law on litigation is often in bankruptcy cases. Within these procedures the previous question is posed in the cases in which the plaintiff /creditor in the bankruptcy procedure, requesting revocation of the conclusion of sale issued by the executor. Along with this procedure, usually, an administrative procedure for cancellation of the transformation of the property shall be ongoing, which essentially means that the outcome of the same is a previous question. Hence, the current procedure is necessary to be stopped until the completion of the administrative procedure.

The application of Article 11 of the Law on litigation is part of civil court practice and most often in cases with compensation basis on damage as subjects. In that case, if commenced criminal procedure, the civil court shall wait for the outcome, and if it is not a criminal procedure, the court determines the guilt as the previous question, based on the traffic expert, which is the most common occurrence in the litigation.

In judicial practice, often arises the question: is there some right or legal relationship, from which depends the resolution of the specific legal relationship that is the subject of hearing at the moment and mostly in property disputes. In the context of this is the claim with the subject- harassment of ownership. Namely*, the defendant claims that he owns the property, which implies the need for the court to determine who the owner is, where the decision will depend on the subject discussed. It occurs in property cases where prior should be decided in an administrative procedure for specific cadastral designations relating to the parcel, from which shall depend on a final court decision.*

In cases where the subject of the lawsuit is compensation for damage to the house for which is leading administrative procedure to demolish the same. Within this procedure is necessary to wait for the outcome of the administrative procedure to be decided on the main issue of the claim whether there is a legal base for compensation.

Frequently, as a basis for stopping the procedure is a question the arises from a criminal legal matter with a legal basis compensation of damage. The civil court in such cases regularly awaits the outcome of criminal procedure. However, exists the legal basis for deciding in such cases. In cases where the civil court will take a position in terms of whether there is a fault, it shall make in terms of civil rights. Respectively it shall take a position and shall input in the explanation of the verdict, not in the dispositive.

In the divorce of marriage disputes in the part of the awarding the child's support and storage, in case of denial of paternity may be occurred the previous question. In such cases, the court usually adopts a partial decision, so in the part of the assignment of the children will wait to be resolved the previous question in terms to determine the paternity.

3. JUDICIAL PRACTICE IN SOLVING THE PREVIOUS QUESTION IN THE REPUBLIC OF NORTH MACEDONIA

The results of the conducted research on the case law in the Republic of North Macedonia confirms the main thesis set at the outset in this study. The main idea of the institute "previous question" is realized in minimum cases solved by the previous question, taking into account the fact that in most cases court suspends the proceeding and if the dispute has not begun, gave direction to the parties to initiate action and resolve the issue. We based this constitution on many conducted interviews with domestic courts in different high courts. Special contribution in this respect had a collection of judgments of the

courts analyzed in the bases of primary courts in which the previous question imposed as sporadically question in this segment. In this context, the question about the confirmation of property right in the procedure for dividing asset: P. N.483/00-II, Primary Court in Gevgelija, establishing/declaration the existence of a lease agreement in order to resolve the issue of debt arising from unpaid rent as follows: Malvo. P. No. 179/11. The operative part of the decision in Municipal Court in Gevgelija on the subject debt unpaid rent emphasized: Suspension of the procedure is declared till the final completion of the procedure/subject P1.br.280 / 11 of this Court. The procedure will continue in accordance with Article 203 paragraph 3 of the Law on Civil Procedure. In front of the court, the respondent-attorney proposed to suspend this procedure until the final completion of the procedure P1.br. 280/11 of the Court. An authorized representative of the respondent argued that the plaintiff in this hearing of evidence suggests looking into unfinal judgment P1.br. 280/11, so in order to establish the facts necessary to inspect the records of the case which terminated the lease agreement from which it requires debt in this procedure, that after his final settlement.

'Taking into account the statements of the parties and the evidence at this stage of the proceedings in the case file, the Court finds that plaintiff proposed insight into unfinal judgment P1.br.280 / 11 which refers to the debt of unpaid rent, so that it has an earlier issue of right and fully establish the facts or determining the existence or lack of respect and leased the same period. That the resolution of the matter in this litigation depends on final conclusion of the proceedings on case P1. N.280 / 11."

The construction of dispositive direction became the signature of final judgment in the context of the main subject in the procedure for the previous question. Based on this is the case in the area of labor law/transformation of an employment relationship on an indefinite time frame to determine employment relationship: WR. n. 137/11.

The plaintiff filed a lawsuit that seeks the transformation of his employment because he met the requirements of the Labor Law. The first hearing, held at a trial attorney of the plaintiff stated that after the filing of the complaint the plaintiff received a decision on termination of employment. Against this decision the plaintiff filed an objection. Court litigation, in particular, found that the decision on the objection to a question earlier this procedure because this claim suggests the employment of the plaintiff was transformed from temporary to permanent because the decision on termination of employment timeout the defendant is void. Hence, it is necessary to wait for the decision on the appeal, and a decision to stop the procedure.

It seems to us that in such cases is quite justified for the court to decide on the complaint of the plaintiff in the case. Namely, it is not the subject of a criminal legal issue. Abandonment would essentially delay the proceedings in relation to the transformation of the relationship. This especially cases because of the labor law nature, and it has existential meaning for the contracting parties Moreover, it is a labor dispute, and it has existential significance for the party from the financial and psychological aspects. In this context.

The suspension of the court is very justified according to our opinion. The court suspended the procedure because of the previous question that has to be solved. Basic Courtin Bitola with DecisionNo. P1. 814/11interupted the proceeding on the act of the complaintP.1.n.814/11, the plaintiff LD by B.againstdefendantM.L.by B., for declaration of the right to possession, worth of the subject40,000, oo. Denars. This is the case until the finish of the procedure for heritage procedure. Bearing in mind the fact that in this procedure as a previous question is the existence of the right to property, whose solution depends on on the decision of the court in this particular suit, the court decided not to address the above question, since it is already procedure and after final completion of this procedure, possible success or store regulate ownership in front of a notary C.A.

Our opinion is that the court rightly interrupted proceedings and wait for the outcome of the procedure is underway to address this issue as mainly considering that if the court takes no position on the matter and later as the main issue is otherwise resolved in proceedings an ongoing basis it is to repeat the procedure.

The practice has manifested that the previous question can be subject in any procedure of any nature. Following the rules for the previous question, if for the previous question judicial decision or decision of any one state body is not created, the existing court (court in which the previous question is imposed) can solve it. But, this is for the purpose of the same procedure. This conditionality/bond of one body about another, whether it is judicial or executive function is to provide coordinated functioning of the state institutions and the regulation of relations between them.

4. THE PREVIOUS QUESTION IN CRIMINAL PROCEDURE

The existence of legal validity of the verdict for the previous question (final verdict/decision in the administrative procedure), reflects the obligation of the trial court or any other court or authority to take into account when deciding on the request. Civil and Criminal procedures are procedures that are realized in front of the courts. These procedures have a different legal nature. In Criminal procedure the subject of protection is the declaration toward the question is the criminal act is done or does the acting is qualified as a criminal act/dangerous acting that imposes criminal liability.[10] In this context, is the solution according to which if the applicability of the criminal law depends on the previous solved question about which other court or body is authorized to solve, that question well be solved according to the law for proving incorporated in criminal law? The solution to this legal issue by a criminal court shall be subject only to criminal trial by this Court.

In cases where the applicability of the provisions of the Criminal Code depends on the previous decision on another legal issue for which the solution is in the hands of the competent court in another procedure or other authority, a court in a criminal case may resolve this issue according to provisions apply to evidence in criminal proceedings. The solution to this legal issue by a criminal court shall be subject only to criminal trial by this Court. If such a question before the court has already been solved in another procedure or other governmental authority, such a decision does not bind the criminal court regarding whether the assessment is done a certain crime.

The final verdict of the Criminal Court regarding the decision for legal claims connected with assets has the same legal effect as a judgment of such court cash.

The condition to qualify one question as a previous question in criminal procedure is that question to be a reason for the application of criminal law. In this context, the existence of crime according to article 195 from the Criminal Code is a previous question about resolving some property issues. For example: We must know if the first marriage is broken, to see does it effect on a second marriage.

Three reasons for an explanation of this theory are on the scene. First, in criminal proceedings, it's necessary that all elements of that decision depend on the criminal case to be determined by that court which decides on it because the only way to make an informed decision that will be in full accordance with the truth. Second, other procedures that apply principles in Criminal procedure law are not permitted (for example in Civil procedure law, judgment for declaration of formal truth can be created, judgment for absences, and the third, the necessity of fast action in criminal procedure and the application of the principle of urgency.

In certain cases, the person that has undergone damage can require civil law protection in criminal procedure and that is: on the occasion of the crime, to request the return of the good, to require the determination of legal action. Criminal court is authorized in the hole and partially to declare requirements under the assumption that the crime has been done.

5. THE PREVIOUS QUESTIONS IN ADMINISTRATIVE PROCEDURE

The administrative procedure stipulates that nobody can resolve administrative cases under the jurisdiction of another administrative body, much less if such a matter is within the jurisdiction of a court. However, the goals of the administrative procedure are to conduct it economically, rationally, and expeditiously, hence the need for some deviation from the strict rules for compliance with the regulations of the jurisdiction. In this sense, the competent administrative body has the right to discuss an issue that does not fall within its competence in the event of a previous issue. In the administrative procedure, the term previous question is used, but in the legal literature, the term prejudicial question is also in parallel use. In cases when the body conducting the administrative procedure has encountered a previous question, then it can:

A) in accordance with the legal conditions to discuss the issue himself, or

B) to terminate the procedure until the competent body makes a decision on the same, and after its termination to make a decision on the main matter.

But this authorization has some limitations. In this sense, if the body takes a position on the previous issue, its decision has legal force only in the case in which that issue is resolved. Regarding the question of whether there is a crime and criminal responsibility of the perpetrator, the body conducting the procedure is bound by the final judgment of the court by which the defendant is found guilty. The law also states cases in which the administrative body cannot decide on a previous issue, and these are the cases when the previous issue refers to determining the existence of a crime, the existence of marriage, establishing paternity or when it is determined by law. In cases when the administrative body decides on

[10] Starovic.B, ,Keca. P., op. cit., p. 107.

the previous issue, then the decision on it is not an integral part of the dispositive of the decision but is an integral part of the explanation of the decision and is part of the factual situation.

CONCLUSION:

The institute's "prior question "finds its application/applicable value only if it has been solved by the court that has much experience and expertise, competition, and accomplishment. The whole of this research we based on two familiar components and: the theory as an accepted concept of prior question and judgments as variables that depends on the court's capacity and present a changeable category. Hoping that applying the concept of research will present a clear picture of the above question in the country, called upon the most relevant authors in the former region, and conducted interviews of the most respected judges in the country. Basically, the judges are under pressure that the procedure will be terminated, and the case will again be returned to the trial. This pressure contributes to a decision to terminate the procedure, the final completion of the procedure in the previous question that he had become solves another procedure the main issue.

These results impose the constitution that the prior question does not find its applicability in a practical sense. The law creator, in some cases, avoids the rule for authorization on the account of rationalization of the procedure, effectiveness, and economic solutions of the subject. We call this ad hoc authorization for some courts and bodies. However, practice shows that although there is a possibility that courts rarely decide to take a stand with regard to the previous question.

Although the practice suggests that courts often take the option of termination of the procedure, however, the legal possibility for the second alternative does not lose its significance. Regardless of the survey and presented results, in practice remains the viewpoint that prior questions almost every time create an interruption of the procedure. So, we can't say this institute provides with fast solution, even in the theory it serves as a basic justification for its existence.

References:

[1] M. Grubiša, Criminal Court and procedural questions, Review of the Faculty of Law in Zagreb, no. 2/66;
[2] M. Salma, Previous question in civil procedure, Novi Sad, 1995;
[3] M. Storme, B. Hess, Compétence discrétionnairedujuge: limit eset controle, 2003;
[4] M.Giunio, Crime and criminal liability as previous questions in civil procedure, our legitimacy, no. 4/67;
[5] O: Jelčić, Previous questions in civil procedure, our legitimacy, no. 9-10/89;
[6] Rijavec, V. Das institut der Vorfrageim slowenischen Zivil prozessrecht u Bittner, 2005;
[7] S.Triva, V.Belajes, M.Dika, Civil procedur**e** law, sixth revised and expanded edition, Zagreb, 1986;
[8] Stankovic. G, Civil procedur**e** law, first volume, Niš 2007;
[9] Triva. S, Dika. M, Civil procedur**e** law, Zagreb, 2007;
[10] V. Crisanto Mandrioli, Corso di diritto processuale civile, II corso di cognition, Quinta edition, G Giapichellieditiore, Torino;
[11] V. Kralikdr. Winfried, DieVorfrageimVerfrahrensrecht, WienManz, 1953;
[12] V. Lent, Jauerning. Zivil prazessrecht, dreizehnte Auflage, 1966;
[13] W. Zeiss, K. Schreiber, Zivil prozessrecht, Mohr Siebeck, Artur Nikisch Zivil prozessrecht, zweiteerganzte Auflage, 2003;
[14] **A.Janevski**, T. Zoroska – Kamilovska, Solving previous issues litigious Civil Procedure of the Republic of Macedonia, LeXonomica – Journal of Law and Economics Let. II, št.2, 2010;
[15] G. Stankovic, Civil procedur**e** Law, Faculty of law Nis, 2010.

Laws and regulations:

[16] Law on Litigation Procedure , "Official Gazette of the Republic of Macedonia" nos. 79/2005, 110/2008, 83/2009, 116/2010 and 124/2015.
[17] Law of criminal procedure, "Official Gazette of the Republic of Macedonia" no. 150/2010, 100/2012, 142/2016 и 198/2018;
[18] Law of the general administrative procedure "Official Gazette of the Republic of Macedonia" no. 124/2015.