

CONTROVERSY OVER ISSUE PRECLUSION IN RUSSIA'S CRIMINAL PROCEDURE: CAN COMMON LAW OFFER A SOLUTION?

YURY ROVNOV,
Higher School of Economics
(Moscow, Russia)

DOI:10.17589/2309-8678-2015-3-4-102-123

Even though Russia's new Code of Criminal Procedure of 2001 had from the very beginning contained the article titled 'Preclusive Effects,' it was not until a decision by the Constitutional Court of 2008 that the doctrine of issue preclusion was, in its proper sense, reinstated in Russian criminal law, barring facts definitively established in a civil trial from relitigation in criminal proceedings. Despite heavy criticism that came down on the Constitutional Court for what was seen by law enforcement agents as unwarranted judicial activism, the Russian Parliament soon amended the article in line with the interpretation offered by the Court. This, however, did not end the controversy as critics raised a valid point: an automatic transfer of facts from civil proceedings with a priori more lenient requirements of proof is likely to distort outcomes, harming defendants, the prosecution, and, ultimately, societal interests. This article will turn for a potential solution to common law, which has been able to avoid this problem by clearly distinguishing between different standards of proof applicable in civil v. criminal litigations. It will be shown, using the United States as an example, how courts can effectively use issue preclusion to pursue a number of legitimate objectives, such as consistency of judgments and judicial economy, with due account for the interests of parties in proceedings. At the same time, issue preclusion appears an inappropriate and ineffective means to combat arbitrariness of the judiciary – the end which Russia's Constitutional Court and law makers arguably had in mind when introducing the doctrine into Russian law.

Keywords: issue preclusion; collateral estoppel; criminal procedure; adversarial process.

Recommended citation: Yury Rovnov, *Controversy over Issue Preclusion in Russia's Criminal Procedure: Can Common Law Offer a Solution?*, 3(4) RLJ (2015).

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1. Introduction

By its decision of January 15, 2008,¹ the Constitutional Court of Russia introduced issue preclusion into the Code of Criminal Procedure of the Russian Federation [hereinafter CCrP]. Adopting an interpretation that, some believe, went beyond the express language of the relevant provision, CCrP Art. 90, the Court not only converted what was effectively no more than a right to take previous sentences into account into a full-fledged collateral estoppel, but went as far as attaching the force of *res judicata* also to issues established in a civil case where such issues are relevant for a subsequent criminal trial (the doctrine is referred to in Russian jurisprudence as 'inter-branch' issue preclusion).

The move sparked a lively controversy. Welcomed and praised by defence lawyers, Decision No. 193-O-P came under intense criticism by investigative and prosecution authorities. A barrier to unfounded prosecution in the eyes of the former, it was denounced by the latter as a spoke in the wheel of effective fight against crime. In 2009 the legislature had its authoritative – albeit not final – say in the dispute. CCrP Art. 90 was amended to explicitly forbid relitigation in a criminal trial of issues previously established in civil, administrative, or criminal proceedings. By virtue of this amendment, the interpretation adopted by the Constitutional Court (by all means in itself universally binding) was explicitly incorporated into the legislation. However, the preclusion effects of the revised norm, read at its face value, were taken

¹ Decision of the Constitutional Court of the Russian Federation No. 193-O-P of January 15, 2008 [hereinafter Decision No. 193-O-P].

by courts and law enforcement agents to be so strong and to extend so far that the Constitutional Court had to intervene once again – this time, to impose constraints on and delimit the scope of Art. 90.

While the qualifications imposed on Art. 90 by the Constitutional Court served to cool down the heat of the debate, they did not take the point of contention off the table. Strong arguments are offered by those who contend that the Russian rules of civil procedure are incompatible with the prohibition on the relitigation in criminal proceedings of issues established in an earlier civil case: the consequences of a criminal judgment are too far-reaching (for both defendants, who face a prison term, not to mention a criminal record, and the general public, whose interest is in effective prevention and punishment of crime) for such a judgment to rely on ‘facts’ established in civil proceedings as such ‘facts’ are likely to materially depart from the ‘objective truth.’ Those who support and praise the Court’s ‘constitutional interpretation’ of the law retort that in the absence of such inter-branch issue preclusion, criminal defendants way too often end up being unfairly convicted on account of dealings which the country’s highest civil (commercial) court previously confirmed were perfectly legal.

It may be useful in this context to turn to the experience of other jurisdictions to see how they resolve, or prevent, this dilemma. Common law legal systems are of special interest for this purpose. While it is the difference in the sources of law that normally defines the common law – civil law dichotomy, there is at least one other area in which the two legal families are set a world apart from each other. [N]owhere are the cultural differences between common law and civil law as prominent as in the law of evidence² – a statement one finds hard to disagree with. A fundamental difference between common and civil law jurisdictions lies in their approach to evidence, proof and, therefore, facts – which, once established in a previous case, may be precluded from revision if the doctrine of ‘issue preclusion’ takes effect.

Despite this seeming doctrinal divergence, it has previously been suggested in the literature³ that Russia consider borrowing from the experience of the United States of America in the area of inter-branch *claim* preclusion. Indeed, even though Russian law, since the very term is unknown to it, does not *explicitly* provide for different ‘standards of proof’ in criminal as opposed to civil cases as does English or US law, it may be argued that it nevertheless *implicitly* does so: for instance, it sets

² Antoine Garapon & Ioannis Papadopoulos, *Juger en Amérique et en France* 123 (Odile Jacob 2003) ([L]es différences culturelles entre *common law* et *civil law* ne se voient nulle part plus clairement que dans le droit de la preuve).

³ Кипнис Н.М. Надзорное производство: «вещь в себе» или «вещь для нас»? // Права человека. Практика Европейского суда по правам человека. 2007. № 3. С. 48 [Kipnis N.M. *Nadzornoe proizvodstvo: ‘veshch’ v sebe’ ili ‘veshch’ dlya nas’?* // *Prava cheloveka. Praktika Evropeiskogo suda po pravam cheloveka*. 2007. No. 3. S. 48 [Nikolay M. Kipnis, *Writ of Certiorari in Russian Law: A Thing in Itself or a Thing for Us?*, 2007(3) Human Rights. Jurisprudence of the European Court of Human Rights 48]].

the bar higher for the prosecution (than for either party in a civil trial) by employing the presumption of innocence and, besides that, outlines different roles for the court in civil as opposed to criminal proceedings. In addition, the US jurisprudence can be attractive as a benchmark for comparison and a potential source of instructive insights in that its doctrine of issue preclusion, while certainly designed to promote legal certainty and judicial economy, seeks not to achieve this at the expense of the right to a fair trial and aims to protect the interests of the party that may have not been able to fully prove its case in an earlier dispute.

Therefore, after laying out the main events and debate surrounding the emergence of issue preclusion in the CCrP, this article will proceed to review the rules of evidence and standards of proof in US law to then analyse how these shape the US doctrine of issue preclusion that is applied at an inter-branch level. The piece will conclude with suggestions on how the US experience can be applicable to Russian law.

2. Issue Preclusion in the Criminal Procedure of Russia before Decision No. 193-O-P

Issue preclusion is not defined anywhere in the legislation of the Russian Federation, but the Russian jurisprudence has traditionally used the term '*preyuditsiya*' to refer to that aspect of the *res judicata* principle whereunder an issue adjudicated in an earlier case cannot be subject to readjudication in a later trial and must be admitted by the court as conclusively established.⁴

If understood in accordance with this definition, issue preclusion had not existed in the criminal procedure of modern Russia prior to Decision No. 193-O-P. Even though CCrP Art. 90 had been titled '*Preyuditsiya*' (which can be translated in this context as 'Preclusive Effects'⁵), it, *stricto sensu*, did not preclude relitigation. In its original version, Art. 90 had read:

Issues established by a sentence which has come into legal force shall be admitted by a court, prosecutor, investigating officer, enquiry officer without additional verification *unless the court has doubts about such issues*. Such a sentence, however, cannot predetermine the guilt of persons who were not previously involved in the criminal case at hand (emphasis added).

⁴ See, e.g., Уголовный процесс: Учебник для вузов [*Ugolovnyi protsess: Uchebnik dlya vuzov* (Criminal Procedure: University Textbook)] 162 (Boris B. Bulatov & Aleksander M. Baranov, eds.) (4th ed., Yurait 2013).

⁵ This translation of Art. 90 title is used in Pyotr A. Skoblikov, *Issue Preclusion under Contemporary Russian Law: A New Interpretation*, 19(1) *European Journal of Crime, Criminal Law and Criminal Justice* 60 (2011), available at <<http://booksandjournals.brillonline.com/content/journals/10.1163/157181711x553960?crawler=true>> (accessed Dec. 8, 2015). doi:10.1163/157181711X553960

This and other provisions to the same effect are commonly referred to in the Russian jurisprudence as 'rebuttable preclusion,' meaning a rebuttable presumption that issue preclusion applies.⁶ The term, however, is inaccurate. Since Art. 90 did not require of the law enforcement agents or the court to provide reasonable (or, for that matter, any) motivation for its doubts, it did not in reality establish any presumption of applicability of issue preclusion. The court could 'rebut' this 'presumption' in a simple declaratory fashion by stating that it *did* have doubts, without going to great lengths to substantiate them. In effect, the provision thus established a *right*, rather than an obligation, for courts and law enforcement agents to take as conclusive issues of fact determined by a previous sentence. This right cannot qualify as issue preclusion or even as a presumption of its applicability because it does not actually preclude, or create any surmountable barriers to, relitigation of the same issue in a subsequent dispute.

Sinai conveniently summarizes the rationale for issue preclusion commonly invoked by common-law scholars: public policy (public interest in having all disputes ended), individual rights (protection from repetitive litigation), economic efficiency of courts (judicial economy), consistency and stability of judgments (as a way to preserve the legitimacy and authority of the courts).⁷ While there is no reason why all of these considerations would not remain valid for civil law jurisdictions, Article 90 in its 'old' form obviously failed to protect individual rights or serve public policy interests and would only offer the courts a way to manage their resources and workload by allowing them not to reconsider previously resolved issues. Even consistency and stability of judgments is arguably not something an individual judge would be primarily concerned with when deciding whether to avail of the procedural right in question.

Because Art. 90 did not impose any obligations on the courts, investigation or prosecution authorities, it is not surprising that 'courts of general jurisdiction had not had any problems applying this norm from July 1, 2002, up to [the moment the Constitutional Court ruled on a complaint by Surinov].'⁸

⁶ See, e.g., Стенограмма круглого стола Комитета Государственной Думы по безопасности на тему: «О совершенствовании института преюдиции в уголовно-процессуальном законодательстве Российской Федерации» (16 июня 2011 г.) [*Stenogramma kruglogo stola Komiteta Gosudarstvennoi Dumy po bezopasnosti na temu: 'O sovershenstvovanii instituta preyuditsii v ugovovno-protsessual'nom zakonodate'l'stve Rossiiskoi Federatsii' (16 iyunya 2011)*] [*Transcript of the State Duma Security Committee's Round Table on Improvement of the Doctrine of Issue Preclusion in the Criminal Procedure of the Russian Federation (June 16, 2011)*] 4, <<http://www.komitet2-16.km.duma.gov.ru/site.xp/051054054124053048048.html>> (accessed Dec. 8, 2015) [hereinafter *Transcript*].

⁷ Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective*, 21 *Duke J. Comp. & Int'l L.* 353, 360–62 (2011), available at <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1025&context=djcil>> (accessed Dec. 8, 2015).

⁸ *Transcript, supra* n. 6, at 4.

3. Decision No. 193-O-P

Tatevos Surinov was the general director of RAK, a company which in 2002 purchased air navigation equipment from the Russian Federal Property Fund. The Fund, by now disbanded, was responsible, *inter alia*, for arranging the sale of property seized by a court authority (the equipment fell into possession of the Fund following a failure by the importer to pay customs duties). Later same year, RAK resold the equipment to a third party at a much higher price. In 2007 these transactions landed Surinov in prison on charges of fraud, money laundering, and abuse of powers. The court found him, as well as a few other persons, guilty of theft of federal property – the air navigation equipment. The criminal sentence, however, was in direct contradiction with an earlier finding of the Commercial Court of the Republic of Tatarstan⁹ that the equipment had been duly sold through a bidding process and, contrary to what had been claimed by the plaintiff in the case (Tatarstan's regional air navigation authority), was *not* federal property. The criminal division of the Moscow City Court rejected Surinov's argument that the commercial court judgments precluded his prosecution. Surinov then filed a complaint with the Constitutional Court of Russia claiming that CCrP Art. 90 violated his constitutional rights by allowing his criminal conviction notwithstanding the commercial court judgment in his favour.¹⁰

As Skoblikov validly points out,¹¹ it remains unclear from the text of Decision No. 193-O-P if Art. 90 was in fact *applied* in the complainant's case (the text of the sentence is not publicly available). Moreover, the Court stated that the article was not even *applicable* because it only dealt with issues conclusively established by *sentences*, whereas the complainant sought to preclude his prosecution based on issues established by another kind of judicial act – a civil (commercial) court decision.¹² If CCrP Art. 90 was not applied or applicable in the complainant's case, the Constitutional Court had actually no competence to hear the complaint¹³ and

⁹ The judgment of the trial commercial court – the Commercial Court of the Republic of Tatarstan – was affirmed by the Federal Commercial Court of the Volga District. The Supreme Commercial Court of the Russian Federation refused to grant a review (see Decision of the Commercial Court of the Republic of Tatarstan of August 28, 2007. Case No. A65-25849/2003-sg3-13, at <http://www.arbitr.ru/?id_sec=353&id_doc=17797> (accessed Dec. 8, 2015)).

¹⁰ For a summary of these events, see, e.g., Decision of August 28, 2007, *supra* n. 9; Decision No. 193-O-P, *supra* n. 1, para. 1.

¹¹ Skoblikov, *supra* n. 5, at 67.

¹² Decision No. 193-O-P, *supra* n. 1, para. 2.

¹³ Constitution of the Russian Federation, Art. 125(4); Federal Constitutional Law No. 1-FKZ of July 21, 1994, 'On the Constitutional Court of the Russian Federation' [Федеральный конституционный закон от 21 июля 1994 г. № 1-ФКЗ «О Конституционном Суде Российской Федерации» [Federal'nyi konstitutsionnyi zakon ot 21 iyulya 1994 g. No. 1-FKZ 'O Konstitutsionnom Sude Rossiiskoi Federatsii']], Art. 3(3) (as in force at the time of the complaint).

may have engaged in judicial activism driven by public policy considerations. The Court's decision further underpins this hypothesis.

The Constitutional Court stated that the legal force of a properly rendered court decision that has come into effect can only be quashed if exceptional conditions are met, which are to be defined by the legislature (*e.g.*, a newly discovered fact or miscarriage of justice which can only be remedied by repealing the respective judgment). The ability of courts to revise issues conclusively established by such properly rendered decisions of other courts could result in the arbitrariness of the judiciary. In the context of criminal proceedings, where facts speaking in favour of the defendant were established by an earlier judgment in whatever kind of proceedings, such facts cannot be set aside or disregarded by the court and must, until disproved by the prosecution, be treated as an insurmountable doubt as to his / her guilt.¹⁴

This language, obviously, would not have been enough to institute issue preclusion because it does not prevent courts from making findings or reaching conclusions contrary to those made or reached by other courts. But the Constitutional Court did not stop at that and noted further that 'issues which were affirmed by a commercial court and are favourable to the accused may only be rejected after the respective judicial act of the commercial court . . . is quashed within established procedures.'¹⁵ This rather small remark closing a half-page-long sentence instituted 'inter-branch' issue preclusion in the criminal procedure of the Russian Federation.

4. Amendment of Art. 90

Despite vivid criticism that Decision No. 193-O-P received from law enforcement agencies (discussed below), the legislature, as soon as 2009, explicitly incorporated issue preclusion into the CCRP by amending Art. 90. In its new edition, the article reads:

Issues established by a sentence or another court decision which was rendered as part of civil, commercial or administrative proceedings and has come into legal force, shall be admitted by a court, prosecutor, investigating officer, enquiry officer without additional verification. Such a sentence or decision, however, cannot predetermine the guilt of persons who were not previously involved in the criminal case at hand (emphasis added).

The changes versus the previous version are two: 1) judicial acts from other branches of law have been put on a par with criminal sentences; and 2) any doubts of the court trying a criminal case as to the issues established by such an earlier judicial act have become irrelevant as they cannot serve to 'override' it.

¹⁴ Decision No. 193-O-P, *supra* n. 1, para. 2.

¹⁵ *Id.*

5. Rationale for and Criticism of Inter-Branch Issue Preclusion in Russia's Criminal Procedure

The amendments to CCrP Art. 90 came into force on January 1, 2010. Both in Decision No. 193-O-P and a later ruling handed down in 2011¹⁶ (discussed below), the Constitutional Court mentions just one of the four objectives for the institution of issue preclusion mentioned by Sinai¹⁷ – legal certainty or, in other words, consistency of judicial acts.¹⁸ However, consistency of judgments was arguably not the main consideration behind either Decision No. 193-O-P or the amendments to Art. 90.

Indeed, in Decision No. 193-O-P the Constitutional Court notes that issue preclusion serves to prevent 'arbitrariness of the judiciary,'¹⁹ *i.e.* helps prevent the abuse of power by judges. Prominent Russian lawyer Henri Reznik opined that the new version of CCrP Art. 90 was a result of 'the legislators struggling with those who apply the law . . . to prevent investigators, prosecutors and judges . . . from twisting the law in a repressive way.'²⁰ Sultanov quotes²¹ State Duma deputy Makarov, who presented to the lower chamber of Russian parliament the amendments to Art. 90, as saying that issue preclusion was intended to prevent situations where 'a tax payer beats a tax authority in a commercial court only to get arrested by the Economic Crime Unit on the staircase of the court and then be sent to jail for allegedly committing a crime [on account of a transaction] which the commercial court has concluded is totally [lawful].'

To be sure, Decision No. 193-O-P and new Article 90 were not met with enthusiasm in the law enforcement circles as investigation may now be 'paralyzed by civil, commercial cases rendered in different kinds of proceedings.' The thrust of argument against inter-branch issue preclusion is the incompatibility of civil (commercial) and criminal procedure.²² This incompatibility arises from the lower standards of evidence in the civil as compared to criminal procedure. As a result, what a civil judgment

¹⁶ Ruling No. 30-P of the Constitutional Court of the Russian Federation of December 21, 2011 [hereinafter Ruling No. 30-P].

¹⁷ Sinai, *supra* n. 7.

¹⁸ Decision No. 193-O-P, *supra* n. 1, para. 2.

¹⁹ *Id.*

²⁰ Резник Г.М. Стандарты доказанности и межотраслевая преюдиция [Reznik G.M. *Standarty dokazannosti i mezhotraslevaya preyuditsiya* [Genri M. Reznik, *Standard of Proof and Inter-Branch Issue Preclusion*]], International Union of Assistance to Justice (Jan. 7, 2011), <<http://www.iauaj.net/node/625>> (accessed Dec. 8, 2015).

²¹ Султанов А.Р. Вопросы межотраслевой преюдиции // Адвокат. 2011. № 6. С. 36 [Sultanov A.R. *Voprosy mezhotraslevoi preyuditsii* // *Advokat*. 2011. No. 6. S. 36 [Aidar R. Sultanov, *Inter-Branch Issue Preclusion Revisited*, 2011(6) *Advocate* 36]].

²² This article will leave the administrative procedure aside as less relevant in the context of this study.

treats as an established fact may, according to criminal procedure standards, be very far from established. This means that the outcome of a criminal investigation or trial will depend on 'facts,' which do not qualify as facts under Russia's rules of criminal procedure because such 'facts' are based on evidence which is inadequate by criminal procedure standards. The arguments of opponents of inter-branch issue preclusion in Russia's criminal procedure run as follows.

5.1. Facts Established Based on Inadequate Evidence

Skoblikov reminds us that as part of the judicial reform of the 1990⁵ Russia adopted the adversarial model of civil procedure generally found in common law jurisdictions: a civil court is not concerned with the establishment of the 'objective truth' and therefore does not take part in the search for evidence, but only weighs the evidence and arguments that the parties submit to it. The prevailing party thus wins not because the court has established the truth, which dictates who wins, but because the prevailing party was able to produce stronger evidence in support of its case compared to the losing party. 'Courts were deprived of their active role and became a kind of referee in the dispute between the parties.'²³ The requirement to 'go beyond materials and explanations submitted [by parties] and take all measures provided for by the law for a comprehensive, full and objective ascertainment of facts as they really are' was therefore abolished; the impartial court was now to 'create the necessary conditions for comprehensive and full examination of facts of the case.'²⁴ Thus a Russian court trying a civil case does not anymore have the abilities or duties to procure evidence, which it would have had in an inquisitorial system. At the same time, the Russian law of civil procedure does not confer on the parties any significant rights to obtain, on their own, evidence they need or to compel their opponent in the dispute to disclose evidence in its possession: the law of evidence, says Skoblikov, remains a legacy of the old inquisitorial system and needs fundamental revision.²⁵

This argument against issue preclusion proves especially strong when comparison is made with common law jurisdictions, such as the United States or England and Wales: it is illustrative of how the Russian law of evidence 'lags behind' and fails to provide the parties with tools they need to prove their case. Budylin²⁶ reminds

²³ Skoblikov, *supra* n. 5, at 61.

²⁴ Будылин С.Л. Внутреннее убеждение или баланс вероятностей? Стандарты доказывания в России и за рубежом // Вестник ВАС РФ. 2014. № 3. С. 50 [Budylin S.L. *Vnutrennee ubezhdenie ili balans veroyatnostei? Standarty dokazyvaniya v Rossii i za rubezhom* // *Vestnik VAS RF*. 2014. No. 3. S. 50 [Sergey L. Budylin, *Inner Conviction or Balance of Probabilities? Standards of Proof in Russia and Abroad*, 2014(3) Supreme Commercial Court Review 50]] [hereinafter Budylin (pt. 1)].

²⁵ Skoblikov, *supra* n. 5, at 62.

²⁶ Budylin (pt. 1), *supra* n. 24, at 30.

that '[i]n the United States, parties to a civil dispute are vested with extraordinary capabilities to compel evidence.' Specifically, Fed. R. Civ. P. stipulate that parties have the right to obtain from each other 'any nonprivileged matter that is relevant to any party's claim or defense – including . . . any documents or other tangible things and the identity and location of persons who know of any discoverable matter.'²⁷ Importantly, Fed. R. Civ. P. provide for severe sanctions for a party's failure to make available the evidence that the other party has the right to obtain from it. In addition to dismissing the disobedient party's action and ruling against it right away,²⁸ a US court may treat a refusal to provide evidence as contempt of court²⁹ (punishable with a fine or even incarceration).

Budylin further notes that, even though English law does not confer on parties in a civil dispute rights to discover evidence as broad in scope as those secured by US law, it still seeks to ensure that the court can examine all the evidence available to the parties. It does so by requiring the parties to search for and disclose not only evidence beneficial to the party itself, but also evidence which may play in the hands of the opponent – and imposes sanctions for failure to comply similar to those stipulated by US law.³⁰

The Code of Civil Procedure of the Russian Federation [hereinafter CCivP], on the other hand, leaves the parties largely empty-handed: 'Russia's civil or commercial procedure does not provide for effective evidence discovery / disclosure tools, and the courts are rather reluctant to use the tools that the law does make available to them.'³¹ In view of excessive caseload on commercial court judges – an issue repeatedly brought up³² by the Chairman of the Russia's Supreme Commercial Court³³ – this unwillingness of judges to engage in time-consuming discovery of evidence is not surprising. On the other hand, the Russian law does not provide for any grave consequences of withholding evidence. Therefore, if a party (the claimant) bears the burden of proof while the evidence supporting the claimant's case is in the possession of the defendant, the claimant will in all likelihood lose because

²⁷ Fed. R. Civ. P. 26(b)(1).

²⁸ *Id.* 37(b)(2)(A)(v), (vi).

²⁹ *Id.* 37(b)(2)(A)(vii).

³⁰ Budylin, *supra* n. 24, at 30 (fn. 20).

³¹ Будылин С.Л. Внутреннее убеждение или баланс вероятностей? Стандарты доказывания в России и за рубежом // Вестник ВАС РФ. 2014. № 4. С. 39 [Budylin S.L. *Vnutrennee ubezhdenie ili balans veroyatnostei? Standarty dokazyvaniya v Rossii i za rubezhom* // *Vestnik VAS RF*. 2014. No. 4. S. 39 [Sergey L. Budylin, *Inner Conviction or Balance of Probabilities? Standards of Proof in Russia and Abroad*, 2014(4) *Supreme Commercial Court Review* 39]] [hereinafter Budylin (pt. 2)].

³² See, e.g., <<http://www.vesti.ru/doc.html?id=1079207>> (accessed Dec. 8, 2015).

³³ The Supreme Commercial Court of the Russian Federation ceased to exist on August 6, 2014, with the Supreme Court of the Russian Federation taking over its jurisdiction.

he/she has no effective tools to compel the defendant to disclose the evidence. For this reason, Budylin, for instance, argues that minority shareholders of a company stand little chance of prevailing over executives of the same company in a dispute where the shareholders allege bad faith or unreasonable management on the part of the executives.³⁴

5.2. The Rule of the Stronger

Russia's rules of civil procedure thus confer on the parties in a civil dispute very limited *formal* rights in collecting evidence to build their case. This automatically means an advantage for the party which has larger *informal* capabilities to get hold of the evidence it needs and to secure the best defence forces it can find. According to Skoblikov, such informal capabilities include financial resources (which are 'easily transformed into all others'³⁵), professionalism of lawyers, availability of former police and security service officers in a party's corporate security department.³⁶ Because the parties in a civil dispute are formally equal, but in reality are not, the strongest party has leverage, afforded to it by law, over the opponent – and over the court. It is therefore likely that facts established in a civil trial will be, through no fault of the judge, skewed in favour of such stronger party.

5.3. Facts Established by Agreement

One other criticism once voiced, for instance, by a Supreme Court judge and an Investigative Committee representative is that facts in a civil (commercial) dispute can be established by agreement between the parties.³⁷ Indeed, pursuant to CCivP Art. 68(2), '[a]cknowledgment by a party of facts on which the other party bases its claims or objections releases such other party from the need to prove such facts.' The Code of Commercial Procedure of the Russian Federation [hereinafter CCommP] requires commercial courts to facilitate the achievement of an agreement by the parties about their assessment of facts (Art. 70(1)) and stipulates that '[f]acts acknowledged by the parties through an agreement between them shall be admitted by a commercial court as facts which do not require further proof' (Art. 70(2)). More than that, even a tacit agreement will do: if a party alleges a fact, it is enough that its opponent not contest the fact and the opponent's disagreement with the fact not follow from the other evidence produced by it for such a fact to be deemed acknowledged by the opponent (Art. 70(3.1)).

³⁴ Budylin (pt. 2), *supra* n. 31, at 42.

³⁵ Skoblikov, *supra* n. 5, at 62.

³⁶ *Id.* 62–63.

³⁷ *Transcript*, *supra* n. 6, at 6, 10.

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In effect, Russia's civil procedure is arguably even more adversarial than that found in the United States or England: with the court having no formal duty or informal interest in establishing 'the truth' or assisting the parties in obtaining pieces of evidence not readily accessible to them, the parties are left on their own to procure evidence using any appropriate means at their disposal. Concerns about the accuracy of 'facts' established by a court under this approach are therefore well-grounded.

The country's criminal procedure, on the other hand, has largely retained its objective of pursuit of truth. The CCrP, unlike its Soviet predecessor, does not explicitly require establishing 'the [objective] truth' through 'comprehensive, full and objective examination of facts of the case,' yet its rules may still be said to promote, even if implicitly, this objective.³⁸ The most graphic manifestation of this is, of course, the presumption of innocence enshrined in Art. 49 of Russia's Constitution as well as in CCrP Art. 14. Pursuant to these norms, a suspect or accused bears no burden of proving his / her innocence and cannot be convicted unless all doubts as to his / her guilt have been eliminated.

It is the prosecution that must present overwhelming evidence of guilt, while the suspect or accused is allowed not to testify against him- / herself.³⁹ Thus a criminal court cannot pronounce an accused guilty where the prosecution has presented weak, unconvincing evidence while the defence has produced no evidence at all: the question in a criminal case is not 'who produced stronger evidence *vis-à-vis* the opponent,' but 'does the evidence presented by the prosecution convincingly prove (i.e. leaves no insurmountable doubts as to) guilt.' In addition, the parties in a criminal trial (prosecution and defence) cannot reach an agreement about issues of fact: the acknowledgement of guilt by an accused does not relieve the prosecution from its burden of proving his / her guilt.⁴⁰ The criminal law also protects the weaker party, the defendant, by requiring that the state provide him / her with a free defence lawyer.

Those who assert that facts established in a civil trial cannot be directly used in criminal proceedings definitely have a point. The 'standard of evidence' applied in the former is manifestly lower than that used in the latter. Where certain evidence leads to the establishment of a fact in the civil procedure, it might well fail to do

³⁸ For a review of authors holding this view, see, e.g., Азарёнок Н.В. Обусловленность преюдиции в российском уголовном процессе // Журнал российского права. 2013. №8. С. 109–110 [Azaryonok N.V. *Obuslovlennost' preyuditsii v rossiiskom ugovolnom protsesse* // *Zhurnal rossiiskogo prava*. 2013. No. 8. S. 109–110 [Nikolay V. Azaryonok, *Justifiability of Issue Preclusion in the Russian Criminal Procedure*, 2013(8) *Journal of Russian Law* 109–10]].

³⁹ Constitution of the Russian Federation, Art. 51; Code of Criminal Procedure, Arts. 46(4)(2), 47(4)(3).

⁴⁰ CCrP Art. 77(2). This general rule is, however, qualified by the so-called 'special procedure' (*osobyi porядok*): in some cases, an accused who admits guilt may move the court to hand down a sentence without examination and assessment of evidence (CCrP Ch. 40).

so if examined as part of a criminal case. As inter-branch issue preclusion imposes on the investigation and a criminal judge 'facts' of dubious reliability established in a civil dispute, issue preclusion has been said to go against the interests of victims of crimes:

[T]he interests of victims cannot be protected. They file a complaint . . . alleging falsification of evidence[,] [b]ut the investigator cannot but dismiss the complaint because Art. 90 as it stands today does not allow him to overcome issue preclusion, including where the evidence [based on which the issue in question was decided] was falsified.⁴¹

6. Ruling No. 30-P

It is exactly this situation that brought V.D. Vlasenko and E.A. Vlasenko to the Constitutional Court. Earlier, a civil court allowed an action by G.K. Chernyshova seeking declaration of her title to V.D. Vlasenko's house. The Vlasenkos, however, alleged that Chernyshova had acquired title to the property using what she knew were forged documents. Following the civil trial, the Vlasenkos sought initiation of criminal proceedings against Chernyshova, but their complaints were consistently dismissed. When, finally, in April 2010 an investigation officer issued an order to initiate criminal proceedings, a court quashed it on the basis of CCrP Art. 90: as Chernyshova had earlier been declared by the court to lawfully have title to the property, her criminal prosecution was precluded.⁴²

Ruling No. 30-P issued on the Vlasenko's complaint added an important qualification to the rule instituted by Art. 90. The Court stated that the rule of issue preclusion cannot cover issues that were not actually tried by the court.⁴³ In the specific case at hand, the documents that established Chernyshova's title to the disputed property were never examined by the court for forgery. In fact, a civil court is not even competent to examine evidence of forgery as a criminal offence.⁴⁴ The fact that the documents were *not* forged was therefore never established by the court, while the court's declaration of Chernyshova's title was only based on a presumption of authenticity of the documents. The presumption of authenticity, in turn, follows from the presumption of innocence: suspicions or allegations of fraud alone cannot overturn a transaction.⁴⁵

⁴¹ *Transcript, supra* n. 6, at 13.

⁴² For a summary of these events, see Ruling No. 30-P, *supra* n. 16, para. 1.1.

⁴³ *Id.* para. 3.3.

⁴⁴ *Id.* para. 4.

⁴⁵ *Id.* para. 4.2.

Ruling No. 30-P thus addressed some of the criticisms, while others remain on the table. In certain cases, a criminal case may revolve around issues that were actually central to and decided as part of civil proceedings. One such example is tax offences: if a tax authority has lost its case against a tax payer in a civil trial, should the law allow criminal investigation to be opened on account of the same claims of non-payment?

As will be shown below using the example of US law, pertinent rules of common law jurisdictions seem to offer an effective solution to the problem. By operating the concept of ‘standard of proof’ and explicitly – and in a very disciplined way – differentiating between standards of proof that parties must meet in civil as opposed to criminal trials, the adversarial model, adopted by Russia and central to all common law systems, reduces the problem to comparison of standards the parties are required to meet in a first and subsequent case. Inter-branch issue preclusion then takes effect if the standard of proof in the subsequent case does not exceed that of the earlier trial.

7. Issue Preclusion in the Criminal Procedure of the United States

What has lately come to be referred to as ‘issue preclusion’ was for a long time known in the US criminal procedure as ‘collateral estoppel.’ Courts now use the two terms interchangeably, but earlier decisions ordinarily employ the latter option.

The US Supreme Court noted in *Ashe v. Swenson*:

[Collateral estoppel] means simply that, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.⁴⁶

Restatement (Second) of Judgments,⁴⁷ apparently borrowing from *Ashe v. Swenson*, provides the following definition:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.⁴⁸

In US law, there are no two separate issue preclusion (or collateral estoppel) doctrines for civil and criminal cases. Ever since *Unites States v. Oppenheimer*, when the Supreme Court extended the application of the principle of *res judicata* from civil

⁴⁶ 397 U.S. 436, 443 (1970).

⁴⁷ An overview of general principles of common law prepared by the American Law Institute.

⁴⁸ Restatement (Second) of Judgments § 27 (1982).

to criminal cases,⁴⁹ the doctrine of collateral estoppel, if with certain modifications, has been applied in criminal litigations. One such incoherence in application, however, is a 'mutuality' requirement. Both above-quoted definitions of collateral estoppel stipulate that the doctrine can only be applied in a subsequent case if it is *between the same parties as the earlier one*. This is not unreasonable. Indeed, not allowing the same claimant and defendant (even if they switch roles) to engage swords over the same issue for the second time is not the same as not allowing litigation over the exactly same issue with *another* opponent. The mutuality doctrine, however, remained in place until *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*⁵⁰ and *Parklane Hosiery Co. v. Shore*, in which the Supreme Court dropped the requirement of mutuality.⁵¹

But those two were civil disputes. Only a year after its ruling in *Parklane*, the Supreme Court held in a criminal case that 'the important federal interest in the enforcement of the criminal law' dictated that the requirement of mutuality remained in force for criminal litigations.⁵² Specifically, a defendant is not allowed to invoke non-mutual issue preclusion against the government⁵³ (*i.e.* the prosecution) because of the limitations imposed on the government's procedural rights in a criminal trial.

That case, *Standefer v. United States*, concerned charges of aiding and abetting bribery. The accused (*i.e.* the petitioner in the Supreme Court case) moved to bar his indictment on the ground that the person actually charged with bribery (using money whose payment the petitioner allegedly authorized) had been acquitted. The Supreme Court affirmed the lower court's denial of the motion. Issue preclusion, explained the Court, can only be applied if the party against whom its application is sought had a 'full and fair opportunity to litigate' in the earlier dispute. If the defendant in the current trial, however, did not take part in the earlier one, the government could not be considered to have had such an opportunity: *inter alia*, its evidence discovery capabilities are limited and, in the event of an acquittal, the government cannot have the case reviewed or sent for a new trial 'no matter how clear the evidence in support of guilt.'⁵⁴ In other words, and somewhat ironically, procedural limitations imposed on the government as a measure to protect the rights of the accused in the first case turn against the accused in the second case because these limitations are likely to lead to distortions in the outcome of the criminal trial.

⁴⁹ 242 U.S. 85 (1916).

⁵⁰ 402 U.S. 313 (1971).

⁵¹ 439 U.S. 322, 322 (1979) ('The mutuality doctrine, under which neither party could use a prior judgment against the other unless both parties were bound by the same judgment, no longer applies.').

⁵² *Standefer v. United States*, 447 U.S. 10, 10–11 (1980).

⁵³ As will be discussed below, mutual issue preclusion, on the other hand, can be invoked against the government.

⁵⁴ *Standefer*, *supra* n. 52, at 22.

In criminal proceedings, when a defendant moves to bar relitigation by the prosecution of an issue previously resolved in his favour, he is said to invoke 'defensive' collateral estoppel. This is the situation described in the previous paragraph: a court is unlikely to apply a non-mutual defensive collateral estoppel, but will allow the motion if both parties were involved in the previous dispute. If, on the other hand, it is the government that invokes collateral estoppel in respect of an issue previously resolved against a defendant, such collateral estoppel is referred to as 'offensive.' Courts are generally averse to allowing motions for offensive collateral estoppels. As the US Court of Appeals for the Sixth Circuit put it,

insofar as collateral estoppel is a doctrine which exists independent of the Double Jeopardy Clause . . . a state actor may not avail itself of this doctrine in the criminal context . . . [T]he doctrine of collateral estoppel exists because of concerns over judicial economy and finality . . . In criminal cases, however 'finality and conservation of private, public, and judicial resources are lesser values than in civil litigation' . . . This is so . . . because in a criminal case, the defendant 'has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.'⁵⁵

In a rare case where a US court is potentially willing to apply offensive collateral estoppel to a defendant, it subjects such application to a number of conditions. In *United States v. Levasseur*, a district court spelled out five criteria to determine if defendants can be barred from relitigating an evidence suppression motion previously decided against the defendant.⁵⁶ The court, *inter alia*, stated that, for collateral estoppel to apply, not only a defendant must have had an *opportunity*, but also '*sufficient incentive* to have vigorously and thoroughly litigated the issue in previous proceedings'⁵⁷ (emphasis added). One other criterion courts sometimes feel they have to employ before the government can avail of collateral estoppel is effectiveness of defence in the previous proceedings whose outcome was unfavourable to the defendant.⁵⁸ Interestingly, a court may refuse to grant estoppel to the government where this would go against the objective of judicial economy. This is precisely what the US Court of Appeals for the Eleventh Circuit did in *United States v. Harnage*, noting that checking if all the necessary criteria have been met (including the existence of sufficient incentive to litigate and the effectiveness

⁵⁵ *Bies v. Bagley*, 519 F.3d 324, 339–40 (6th Cir. 2008).

⁵⁶ 699 F. Supp. 965 (D. Mass. 1988).

⁵⁷ *Id.* at 981. This means, explained that court, that if previous charges were smaller in scale or gravity, the issue (suppression of evidence) should not be precluded from relitigation.

⁵⁸ *See, e.g., United States v. Harnage*, 976 F.2d 633 (11th Cir. 1992), ¶ 10.

of defence in the previous trial) 'would create more problems than [the analysis proposed in *Levasseur* was] designed to solve.'⁵⁹

It is clear from the overview above that in US law, the doctrine of issue preclusion is rather flexibly applied to make sure that, on the one hand, the interests of criminal defendants are protected to the largest extent possible but, on the other hand, the very objective of the doctrine, judicial economy, is not sacrificed to formalism. The same principles apply in the operation of issue preclusion at the intersection of civil and criminal cases. But in the application of the doctrine at an 'inter-branch' level, account must be taken of the difference in the standards of proof in civil v. criminal procedure in US law.

8. Standards of Proof and 'Inter-Branch' Issue Preclusion in US Jurisprudence

The United States being a common law jurisdiction, its law of procedure is distinct in that it uses the notion of 'standard of proof,' which is generally unknown to civil law jurisdictions, including Russia. The Russian law does not impose on the judge any rules for the evaluation of evidence – quite on the contrary, the judge enjoys the freedom of evaluating evidence in accordance with his / her 'inner conviction' with no evidence having predetermined force.⁶⁰ It is therefore up to the judge to decide if the totality of the evidence produced by the prosecution in a criminal case or by a claimant in a civil case is sufficient for a fact (including, *e.g.*, that of guilt) to be treated as determined. In other words, the law does not prescribe how much evidence is enough and it is the personality of the judge that resolves issues and decides a case.

The role of the judge in a common law jurisdiction, the US being one example, is different. The US law does tell the judge 'exactly' (though not necessarily in absolute terms) how much is enough. The personality of the judge must therefore not interfere with the evaluation of evidence presented by parties as it would only introduce bias in what is intended as an objective, as opposed to subjective, process. Importantly, how much is enough depends on the kind of proceedings – the law therefore provides for different 'standards of proof' in civil v. administrative v. criminal cases. A 'standard of proof' is basically a measure of how much evidence a party must produce in order to prove its claim or defence.

The US jurisprudence uses three standards of proof: 'preponderance of the evidence,' 'clear and convincing evidence,' and 'beyond a reasonable doubt.' Because parties in a civil dispute are, at least nominally, equal (*i.e.* neither is vested with government power or has formal power over the other), law of evidence treats them as equals. This means that, in a general case, the standard of proof applicable to a civil dispute is the *preponderance of the evidence*: *e.g.*, for a claimant to prevail, the

⁵⁹ *Harnage, supra* n. 58, ¶ 16.

⁶⁰ CCrP Art. 17; CCivP Arts. 67(1), (2); CCommP Arts. 67(1), (5).

evidence it submitted to the court must at least marginally outweigh the evidence produced by a defendant. As the Supreme Court noted in *Grogan v. Garner*, 'this standard is applicable in civil actions between private litigants unless "particularly important individual interests or rights are at stake".⁶¹ For the reason of the parties' presumed equality, this standard necessarily 'results in a roughly equal allocation of the risk of error between litigants.'⁶²

On the other edge of the continuum is the *beyond a reasonable doubt* standard, which is used in criminal trials: an accused may only be convicted if his / her guilt is proved beyond a reasonable doubt. Put differently, an accused must necessarily be acquitted where any reasonable doubt exists as to his / her guilt. The US Supreme Court noted in *In re Winship*:

The requirement that guilt of a criminal charge be established by proof *beyond a reasonable doubt* dates at least from our early years as a Nation . . . 'It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.'⁶³ (emphasis added).

It is again the considerations of judicial error that resulted in the institution of this standard for criminal cases: '[T]he requirement [is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'⁶⁴

The intermediate standard, *clear and convincing evidence*, is used in civil cases where more than money is at stake. For example, evidence supporting allegations of fraud in a non-criminal context will have to meet this standard, which is less strict than *beyond a reasonable doubt*, but is more demanding than *preponderance of the evidence*.⁶⁵

It follows directly from the difference in the standards of proof that facts established in the two different kinds of proceedings are not fully compatible. A defendant's acquittal in a criminal trial means that his / her guilt was not established beyond a reasonable doubt. However, if a victim, or a victim's privies then bring a civil action against the same defendant, the latter will not be able to avail of *defensive collateral estoppel*

⁶¹ *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

⁶² *Id.*

⁶³ *In re Winship*, 397 U.S. 358, 361 (1970) (quoting Charles T. McCormick, Handbook of the Law of Evidence § 321, 681–82 (West Pub. Co. 1954)).

⁶⁴ *Id.* at 372. In *Addington v. Texas*, 441 U.S. 418, 423–24 (1979), the Supreme Court noted: 'In a criminal case . . . the interests of the defendant are of such magnitude that, historically and without any explicit constitutional requirement, they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt.'

⁶⁵ *Addington*, *supra* n. 64, at 424. Note that this standard can also be applied in a criminal case, but not in respect of the prosecution, for whom the bar never goes below the *beyond a reasonable doubt* threshold.

(i.e. use the previous decision in his favour) because his / her fault will have to be proved by preponderance of the evidence, a much laxer standard. The case commonly cited in this context is that of O.J. Simpson. Simpson was charged with murdering his ex-wife and her friend, but acquitted by the jury. Later, however, the victims' relatives brought civil suits against Simpson and were awarded tens of millions of dollars in compensatory and punitive damage, notwithstanding the acquittal.⁶⁶ Had the Simpson been convicted in the criminal trial, however, the victims' families could have invoked *offensive* collateral estoppel (i.e. use the previous decision unfavourable to the defendant, Simpson) to claim damages, because his guilt would have been established beyond a reasonable doubt – much more than is needed to prevail in a civil dispute.

The same logic works the other way around too – with one qualification. In a criminal litigation, the party opposing the defendant is always the prosecution, i.e. the government. As discussed above,⁶⁷ a court will be willing to apply issue preclusion in a criminal trial only if the previous proceedings (in this case – a civil trial) involved the same parties.⁶⁸ This means that a defendant may only seek to bar the prosecution from relitigating an issue previously resolved in the defendant's favour if the government 'had a full and fair opportunity to litigate the issue in the prior action.'⁶⁹ In *United States v. Rogers*, the defendant moved to apply collateral estoppel, seeking to bar his prosecution on the ground that the issue on account of which charges had been brought against him had been previously determined in his favour and against the claimant, the Securities and Exchange Commission [hereinafter SEC], in a civil case. The district court refused to apply the doctrine and Rogers was convicted, but the court of appeals supported Roger's arguments and granted the motion, explaining that the SEC did have a full and favour opportunity to litigate in the civil trial and was 'in privity' with the prosecution as both institutions represented the same US government.⁷⁰ The different standards of proof did not prevent the court from applying *defensive* collateral estoppel because if the government (i.e. the SEC) was not able to prevail in the civil dispute where it only needed to prove its case by preponderance of the evidence, the government (i.e. the prosecution) would the more so not be able to succeed in the criminal litigation where the standard of proof is 'beyond a reasonable doubt.'

⁶⁶ To give one other example, in *Helvering v. Mitchell*, 303 U.S. 391, 391 (1938), the Supreme Court held: '[A]n acquittal of a charge of willful attempt to evade [tax] does not bar assessment and collection of the 50% addition prescribed by [law] . . . The doctrine of *res judicata* is inapplicable because of the difference in quantum of proof in civil and criminal cases; the acquittal was merely an adjudication that the proof was not sufficient to overcome all reasonable doubt of guilt.'

⁶⁷ See *supra* pp. 115–16.

⁶⁸ Or a party which is 'in privity with a party to the prior adjudication' (*United States v. Rogers*, 960 F2d 1501 (10th Cir. 1992), ¶ 38).

⁶⁹ *Id.*

⁷⁰ *Id.* ¶ 46. In reaching this conclusion, the court quoted the Supreme Court decision in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402–03 (1940): 'There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government.'

Following the same logic, a court is expected to *refuse* to apply collateral estoppel where it is invoked by the prosecution (*i.e.* where collateral estoppel is *offensive*). In *United States v. Meza-Soria*, the defendant had previously been deported following deportation proceedings (a civil case), but then tried to reenter the United States only to be caught and put to criminal trial. He claimed he was actually a citizen of the United States, but the prosecution sought to bar him from relitigating the issue on the ground that his alienage had already been established in the deportation proceedings. The court of appeals dismissed the prosecution's argument the reason being the difference in the burden of proof. In the deportation hearing, the government was to prove Meza-Soria's lack of citizenship with 'clear and convincing evidence,' while in the criminal trial the bar rose to 'beyond a reasonable doubt.'⁷¹

In *State v. Freund*, however, the court of appeal refused to apply the doctrine for public policy reasons. The case concerned charges of criminal child neglect pressed against the defendant following dependency proceedings, in which a petition for dependency against her was denied. The court cited case law where other courts, in similar circumstances, allowed criminal litigation and denied motions for the application of *defensive* collateral estoppel on the ground that, due to inherent urgency of dependency proceedings, the authorities could not prepare properly.⁷² The court reasoned that, if motions for the application of collateral estoppel were allowed in cases such as this one, the prosecution would in future be forced to postpone dependency proceedings to prepare better, which would not be in the interest of the concerned child. Public policy considerations therefore dictate that the doctrine not be applied.⁷³

9. Conclusion

Despite all the flexibility and the multitude of considerations that a US court will normally take into account in the application of issue preclusion (collateral estoppel) – especially at the intersection of civil and criminal proceedings – the whole operation of the doctrine in US law appears rather structured and systematic. While promoting its original purpose – judicial economy and consistency of judgments – issue preclusion in US law does not stand in the way of criminal investigation and prosecution, but at the same time effectively protects defendants from 'double jeopardy,' *i.e.* repeated trial in courts on the same charges. The rules governing the application of collateral estoppel

⁷¹ 935 F.2d 166 (9th Cir. 1991), ¶ 25. The court conceded that the difference between clear and convincing evidence and evidence beyond a reasonable doubt was not always clear-cut and that even Supreme Court judges had sometimes opined the two standards were the same; however, this had never been the majority opinion (*id.* ¶ 26–27).

⁷² *State v. Freund*, 626 So.2d 1043, 1045 (Fla. Dist. Ct. App. 1993) (quoting *State v. Cleveland*, 794 P.2d 546, 551 (Wash. Ct. App. 1990) ('Dependency proceedings are often attended with a sense of urgency, are held as promptly as reasonably possible, and the entire focus of the proceeding is the welfare of the child. The focus being more narrow than in a typical felony trial, the State normally does not need, nor does it perform, the extensive preparation typically required for felony trials.')

⁷³ *Id.* 1045–46.

in US law are logical and effective. If they were to be applied to the Russian cases mentioned herein, they would arguably produce fair results,⁷⁴ promote consistency of judgments and protect the rights of criminal defendants.

The model offered by common law systems appears worth heeding. The Russian legal system can arguably benefit from introducing formal standards of proof into procedural law – something which, *e.g.*, Budylin strongly argues for⁷⁵ (out of the issue preclusion context). Standards of proof are an integral part of the adversarial process adopted by modern Russia and their explicit integration into the procedure is all the more warranted. In the absence of such formal standards we are in the dark as to how judges evaluate evidence and whether they actually draw a line between civil and criminal litigations. Until we know that, it is impossible to say anything specific about how issue preclusion between civil and criminal cases should work in Russia because we do not know if the amount of evidence a criminal trial judge requires from the prosecution is the same as that which a civil trial judge demands from a civil claimant.

Importantly, issue preclusion does not appear to be an appropriate tool to combat ‘arbitrariness of the judiciary.’⁷⁶ The doctrine promotes judicial economy by ‘transplanting’ earlier judgments into later ones. It is therefore self-evident that a relatively healthy judiciary is a prerequisite for an effective operation of the rule. Collateral estoppel cannot be a ‘cure’ for miscarriage of justice, but, quite on the contrary, may result in a multiplication of unjust decisions in the system.

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⁷⁴ Surinov would not be able to avail of issue preclusion because the government did not take part in the commercial dispute in which the issue of the government’s title to property was decided favourably to him (notably, even Surinov himself, as an individual, was not a party to the civil dispute). The Vlasenkos’ allegations of forgery of documents by their opponent in the civil case, on the other hand, would have to be investigated because, as the Constitutional Court pointed out, the issue of document forgery had not been considered in the property title dispute, so no grounds for issue preclusion existed. Contrariwise, where a tax payer prevailed over tax authorities in a commercial dispute over non-payment of taxes, such a tax payer would be able to successfully invoke issue preclusion to bar the prosecution from indicting him / her as the government has already had its chance to litigate.

⁷⁵ Budylin (pt. 1), *supra* n. 24, at 50–51.

⁷⁶ See *supra* p. 109.

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Information about the author

Yury Rovnov (Moscow, Russia) – Master's Student in International Law, National Research University – Higher School of Economics (17 Malaya Ordynka str., Moscow, 119017, Russia; email: yury.rovnov@m16.wti.org).