Issue Preclusion under Contemporary Russian Law: 
A New Interpretation

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On 15 January 2008 the Constitutional Court of the Russian Federation issued ruling No. 193-O-P in response to the appeal of Mr. Tetevos Romanovich Surinov regarding infringement of his constitutional rights with respect to Article 90 of the Criminal Procedure Code of the Russian Federation (hereafter – the Constitutional Court Ruling of 15 January 2008). This ruling may have, and indeed is strongly likely to have, a significant impact on Russian law enforcement practices and on the country’s approach to dealing with crime.

1. Issue Preclusion in Contemporary Court Procedures: Concepts and Forms

Article 90 of the Criminal Procedure Code of the Russian Federation, which was subject to the analysis of the Constitutional Court of the Russian Federation, deals with the question of issue preclusion. Contemporary Russian legislation does not contain a definition of this term. Legal doctrine usually defines preclusion (from the Latin praeiudicium, a preliminary court decision) as an attribute of a previous judicial decision, for which the conclusions concerning legal facts and legal relationships of the parties involved are binding for a court handling a second case associated with the earlier case.¹ This term has a long history. As far back as

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in ancient Rome, lawyers followed a clause that to a significant extent remains relevant today: res judicata pro veritate accipur (habetur).\(^2\)

It should be noted that in contemporary Russian legislation the doctrine of preclusion is neither absolute nor unlimited. Therefore analysis of the concept of preclusion may be facilitated by first defining its various forms.

The theory of law distinguishes between two forms of issue preclusion: inter-branch issue preclusion and intra-branch issue preclusion.

*Inter-branch* issue preclusion occurs in instances when the facts and (or) legal conclusions of a court issued during one type of proceeding (e.g., criminal procedure) become binding for a court hearing a case in another type of proceeding (e.g., administrative or civil procedure).

*Intra-branch* issue preclusion occurs in instances when the facts and (or) legal conclusions of a court issued during one type of proceeding (e.g., criminal procedure) become binding for a court hearing a case within the same type of proceeding (in this case, criminal procedure).

One may further distinguish between irrefutable (strict) and rebuttable (lenient)\(^3\) forms of issue preclusion. In the case of irrefutable issue preclusion, a court hearing a new case should, given the presence of the conditions discussed above, accept the facts established by the first court without further examination. Under rebuttable issue preclusion a court is entitled to examine the previous court decision and to reject the presumed facts.

For example, Article 90 of the Criminal Procedure Code of the Russian Federation provides for intra-branch rebuttable issue preclusion: “circumstances established by a previous judgment should be recognized by the court… without additional examination, provided that the court does not find reason for doubt.”

Classification of issue preclusion according to these criteria (the criteria of rebuttableness) is controversial, as rebuttable issue preclusion practically ceases to be issue preclusion (given the definition proposed here). In such instances, a court decision that is ostensibly the basis for issue preclusion appears as evidence subject to further evaluation, so reference to this earlier decision cannot properly be called issue preclusion.\(^4\)

\(^2\) A previously rendered court decision should be accepted as the truth.

\(^3\) In the author’s opinion, the adjectives “strict” and “lenient” more accurately reflect the essence of the distinction between these terms.

\(^4\) “Labeling the facts as… prejuditionally stated does not merely exempt the parties from the usual burden of proof. The other important effect of this action is to ban contestation and refutation of the facts with the aim of reversing the earlier conclusions” (Comments on the Arbitrazh Procedure Code of the Russian Federation / edited by Yakovleva V.F. and Ukov M.K., Moscow, 1997, p. 135).