REGULATIONS BY THE PLENUM OF THE USSR AND RUSSIAN FEDERATION SUPREME COURTS AS NON-JUDGE-MADE LAW

A.L.Burkov
PhD (Cantab), LLM (Essex), Candidate of juridical sciences,
Tyumen State University, Russia,
Reagan-Fascell Democracy Fellow (NED[1])

Apart from legislation itself, the Russian legal system has a unique instrument, not legislation *per se,* but the one that often performs legislative functions and is used to encourage consistent application of national legislation by courts. These are Regulations issued by the Plenum of the Supreme Court of the Russian Federation (Regulations). It will be argued that Regulations have all the properties needed to secure consistent application of Russian legislation and are effective in doing so.

In order to understand the character of Regulations and to see how they achieve their normative authority *de facto* and *de jure,* one must examine both Russian legal history and contemporary legislation and practice. The attitudes and perceptions of judges and litigators also offer important insights.

Regulations as Non-Judicial Acts

Regulations passed by the Plenum of the Supreme Court are the most unusual element of the machinery for implementation of domestic law. Regulations are general statements of good judicial practice based on review and analysis of the lower courts' and the Supreme Court's jurisprudence. They take the form of abstract norms that are authoritative for all lower courts, summarizing the judicial practice of courts and explaining how particular provisions of statutes should be applied. They allow other courts to apply provisions of legislation consistently. Regulations have their legal basis in Articles 126 of the Constitution[2].

The Russian and, before it, the Tsarist and Soviet legal systems as civil law systems have never recognised precedent as a source of law or as a tool to make consistent jurisprudence. Instead, to develop consistency of courts' practice, they

[1] A.L. Burkov. Konventsiia o zashchite prav cheloveka v sudakh Rossii [The Convention for the Protection of Human Rights in Russian Courts]. Wolters Kluwer Publishing House, Moscow, 2010.

[2] This jurisdiction of the USSR Supreme Court always had its legal basis in the USSR Constitutions of different years·

developed a tool that did not depend on creating rules through adjudication. Although Russian courts officially were denied the authority to make law, no other government organs could deal with the issue of the consistency of courts' practice better then the Supreme Court. The Soviet government granted the Plenum of the USSR Supreme Court the authority to issue Regulations. It seems that there were three main reasons for this move. First, members of the Plenum of the USSR Supreme Court were much easier to control than judges spread throughout the legal system. Second, this mechanism had already been tested earlier in history (in the Senate of the tsarist era). Third, the work of the Plenum had nothing in common with judicial activity. As we shall see, Regulations made by the Plenum of the Supreme Court are administrative rather than adjudicative acts, and can effectively create binding norms precisely because they are not judge-made law; as normative acts below the level of laws, they bind inferior judges as a matter of practice.

Senate's Judgments as Predecessors of Regulations

Because of the official ideology which stated that every part of the Soviet legal system was absolutely new and built on the ruins of the imperial legal system, it was not possible for Soviet scholars to compare existing Soviet legal institutions with past imperial Russian institutions.

The undoubted task of the proletariat revolution was not to reform judicial institutions..., but to utterly annihilate, wipe out entirely the old court and its machinery. This essential task the October Revolution has fulfilled. It has done so successfully[3].

By 1918, all the courts of the old regime were eliminated[4], and the use of laws of Tsarist Russia and the Provisional government (*Vremennoe pravitel'stvo*) was prohibited[5].

Although all the Soviet institutions were said to be new, this was not the case. Many Soviet legal phenomena, including Regulations by the Plenum of the USSR Supreme Court, had their roots in the legal history of Tsarist Russia. The reason for this was very simple. In the case of Regulations, their revival was due to the fact that

[3] V.I. Lenin. Polnoe sobranie sochinenii [Omnibus Edition]. Gosudarstvennoe izdatel'stvo politicheskoi literatury [Politicheskaia Literatura state Publishing House], Moscow, 1958, V. 36, pp. 162 – 163. Cited from O.P. Temushkin and T.N. Dobrovolskaia. Stanovlenie i razvitie sovetskoi sudebnoi sistemy [Formation and Development of the Soviet Judicial System]// Edited by L.N. Smirnov et al. Moscow, Yuridicheskaia Literatura Publishing House, 1977, pp. 67 – 68.

[4] Art. 1 of the Decree on Court. Dekrety Sovetskoi Vlasti [Decrees of Soviet Power], dated November 22 (December 5), 1917, No.1, V. 1, [Politicheskaia Literatura state Publishing House], Moscow, 1957.

[5] The Regulation on People's Courts of November 30, 1918 prohibited any reference to the law of the deposed government. See: M.N. Marchenko. Uchebnoe posobie [Tutorial]. TK Velbi, Nad-vo Prospekt Publishing House, Moscow, 2005, p. 53.

the new State faced the same problems the Tsarist Russia government had experienced in the 19th century. These were a shortage of laws to deal with problems and gaps in legislation, as well as the necessity to make court practice consistent[6]. The same problems were dealt with by similar tools. The Russian legal history had already known the phenomenon of Regulations issued by the highest court of the land, although they had been of a slightly different character.

Starting from the beginning of the second half of the 19th century, which was marked by the liberation of the serfs in Russia and the rapid development of capitalism, Tsarist Russia entered the stage of "inadequacy of statutory provisions governing private law"[7].

Legislation did not keep pace with contemporary economic developments of the world and the country itself. In 1864, during the reform of the legal system, with the adoption of the codes of Criminal and Civil Procedure, the situation with respect to judge-made law changed significantly. And, by the time of the October Revolution, it was argued that judicial practice had become an important source of private law in Russia[8].

The 1864 Code of Civil Procedure introduced three logically-interrelated provisions that allowed the Senate to give binding official interpretation of statutes. In Article 9 of the Code, a provision was introduced that prohibited judges from refusing to rule on a case because of a lack of clarity in a law. The same provisions were introduced in Articles 12–13 of the Code of Criminal Procedure[9]. The Civil Procedure Code prescribed the use of 'the common sense of laws' as a ground for their decisions. For the sake of uniformity of interpretation and application of law, the determination of the common sense of laws could not be left to judges of all the Empire's courts. Therefore, under Article 813, judicial bodies were ordered to use the opinion of the Ruling Senate, which explained precise meaning of the statute[10].

Wagner characterised the binding force of rulings by the Civil and Criminal Cassation Departments of the Senate:

In addition [to the opinions of the Ruling Senate], the cassation departments [of the Ruling Senate] could issue warnings or reprimands to judges whose decisions

[6] A good account on gaps in Soviet legislation was written by Vladimir A. Gsovski. See: Arbor. Sovetskoe grazhdanskoe pravo [Soviet Civil Law]. V. 1, Michigan Legal Studies, University of Michigan Law School, 1948, pp. 256 – 260.

[7] Ibid., p. 256.

[8] Ibid., p. 259

[9] O.I. Chistiakov. Sudebnaia reforma [Judicial Reform]. V. 8, Rossiiskoe zakonodatelstvo X-XX vekov [Russian Legislation X-XX Centuries]. Yuridicheskaia Literatura Publishing House, Moscow, p. 121.

[10] The judicial bodies shall follow the opinion of the Senate explaining the precise meaning of the statute, and no appeal from the second decision in the case rendered on this ground shall be permitted. The translation is from Gsovski. Sovetskoe grazhdanskoe pravo [Soviet Civil Law]. p. 257.

involved serious procedural errors, and senators from the cassation departments composed the court that heard disciplinary actions against members of the judiciary. [...] [T]he lower courts generally accepted the authority of the Civil Cassation Department and observed its precedents, albeit sometimes grudgingly[11].

As a final step for making interpretations binding, an official opinion as to 'the common sense of laws' was to be publicized 'to the knowledge of all as a guide for the uniform interpretation and application of the laws' (Article 815). Jurisprudence of the Senate was published in specialized state-owned gazettes, unofficial legal journals, legal textbooks, and in the general press, which was widely available among judicial personnel and legal practitioners[12].

The Senate itself persistently held that "its interpretation of the statutes (ruling) was binding upon all courts in all cases of a nature similar to that of the case in which the ruling was issued"[13]. Gsovski concluded that "a decision of the Ruling Senate was given the full authority of a judicial precedent, in spite of the contrary opinion of certain professors of law"[14]. Professor Wagner called the Imperial legal system "a hybrid system of the civilian and common law systems," and in some way the Civil Cassation Department of the Senate had "even greater power and flexibility than that enjoyed by Anglo-American courts"[15].

The situation repeated itself in Soviet and post-Soviet legal systems. In spite of the official position of the government, legislative provisions, and the opinion of many law professors, Regulations issued by the Plenum of the USSR Supreme Court and later the Supreme Court of the Russian Federation have enjoyed, in practice, the character of a quasi-source of law.

As in the case of Regulations by the USSR Supreme Court, in many instances the Senate, in its interpretation of legislation, was touching upon fundamental questions that were borderline cases between giving an interpretation of existing laws and legislating new laws[16]. As we shall see later in this article, the nature of judgments of the Senate was similar to that of Regulations of the USSR and the Russian Federation Supreme Court. There was one main feature that distinguished the Senate's judgments from the Supreme Court Regulations. Unlike Regulations of the Plenum of the USSR Supreme Court based on the generalization of courts' prac-

[11] W. Wagner. Marriage, Property, and Law in Late Imperial Russia. Clarendon Press, Oxford, 1994, pp. 41, 44.

[12] Ibid., p. 46.

[13] Gsovski. Ruling Senate, Civil Appellate Division, Decisions No. 1598 of 1870, No.106 and 107 of 1889, No.86 of 1893, No.82 of 1909. Sovetskoe grazhdanskoe pravo [Soviet Civil Law]. p. 258.

[14] Gsovski. Sovetskoe grazhdanskoe pravo [Soviet Civil Law]. p. 258.

[15] Wagner. Marriage, Property, and Law in Late Imperial Russia. p. 45.

[16] For an example of the Senate's borderline case, please refer to M.N. Marchenko. Ed. Istochniki rossiiskogo prava [Sources of Russian law]. Voprosy teorii i istorii [Theory and History]. Uchebnoe posobie [Tutorial]. Norma Publishing House, Moscow, 2005, p. 259.

tices, interpretations of the Senate could be called precedents since they were contained in decisions on the merits of particular cases. As V. Gsovski noticed, "[t]he Senate also began to draw a distinction between *ratio decidendi* and *obiter dicta* (Ruling Senate, Civil Appellate Division, Decisions No.59 of 1882, No.75 of 1910)"[17].

Thus, the judicial practice of the Senate played an important role as a source of private law on the eve of the October Revolution and, as V. Gsovski wrote, judicial practice "was to a large extent judge-made law, a law of judicial precedent"[18].

The described issues alone would not be of interest for this paper but for the fact that the Plenum of the Supreme Court inherited from the Ruling Senate the function of issuing decisions binding on all. Although Regulations by the Plenum of the Supreme Court absorbed most of the characteristics of the decisions of the Ruling Senate, they were not delivered in the course of solving cases on the merits (administration of justice).

The USSR and Russian Supreme Courts' Regulations are abstract opinions with no relation to the facts of particular cases and are summaries of the Supreme Court's and lower courts' judicial practice. The Chief Justice of the USSR Supreme Court (1984-1989), V. Terebilov, distinguished decisions passed by the Plenum of the USSR Supreme Court in a specific case from its Regulations. Unlike a decision on a specific case, which is binding only in a given case and only for the parties of this case, Regulations by the Plenum

[...] are obligatory not only for the adjudication of a particular criminal or civil case, but for all instances where an appropriate legal rule is applied. Since the Plenary Session gives explanations of legal rules by which all the courts have to be guided in the administration of justice, these explanations are also binding on the inquiry bodies and on all those who participate in trials[19].

From the viewpoint of a common law scholar, Hazard defined Regulations as follows:

Instructions[20], which are brief statements of a rule, "distilled" from a concrete situation, but the facts of the case are not restated in the instruction. The instructions are, therefore, of general application and do not lend themselves to the process of "distinguishing" as easily as is the case when a concrete set of facts is present for analysis[21].

[17] Gsovski. Sovetskoe grazhdanskoe pravo [Soviet Civil Law]. p. 258.

[18] Ibid., pp. 258 – 259.

[19] V. Terebilov. The Soviet Court. Progress Publishers, Moscow, 1973, p. 132.

[20] At different times Regulations were defined in statutes as "explanations" ("raziasnenia") and as "instructions" ("ukazania"). The latter meaning gave Regulations a more obligatory character. See: A. Burkov.

[21] J.N. Hazard. The Soviet Court as a Source of Law. Washington Law Review 24. 1949, No.1, p. 85.

The latter fact made Regulations even less judge-made law than were the Senate's decisions during the Tsarist Russia. In the USSR legal system, Regulations become *administrative* sub-law acts issued by the Supreme Court judges.

Some scholars admitted that the Codes of 1864[22], which yielded the famous legal reforms of the second half of the 19th century in Russia, started a tendency for Russian courts to administer functions of creating new legal norms, an unusual authority for courts of civil tradition.

The following overview of the legislation and practice of the Plenum of the USSR Supreme Court and of the Plenum of the Supreme Court of the Russian Federation proves that the Plenum continued the tendency of creating legal norms. However, provisions produced by the Plenum of the USSR and Russian Federation supreme courts are not judge-made law.

Regulations' Evolution: Non-Judicial Nature of Regulations

The history of the Regulations' evolution proves that these acts originated from the activity of the Senate and later became the administrative decisions of a judicial body. For a decision to become a part of judge-made law, it is not enough for this decision to be issued by a bench of judges. Some imperative criteria have to be satisfied, including following special judicial procedures. To demonstrate this, the development of Supreme Court Regulations will be examined.

For the first time in the history of Soviet law, the idea of guiding explanations by a supreme body issued in order to make judicial practice uniform was expressed in the Decree "On Courts" No.2 passed by the All-Russian Central Executive Committee of the Soviets of Deputies of Workers, Solders, Peasants, and Cossacks of February 15, 1918 (*Vserossiiskii Tsentralnyi Ispolnitelnyi Komitet Sovetov Rabochikh, Krestianskikh i Kazakskikh Deputatov*). The extract concerning the guiding explanations runs as follows:

Article 6. For the purpose of achievement of uniform cassation practice [...] the Supreme Judicial Control shall be established in Petrograd [...] The Supreme Judicial Control [...] shall issue uniting fundamental decisions (*ob"ediniauschie principial'nie resheniia*), which henceforth shall be taken by cassation instances as a guide. [...] Only the Soviet legislative body (*zakonodatel'nii organ Sovetskoi vlasti*) can cancel decisions of the Supreme Judicial Control[23].

Despite the fact that these provisions and Lenin's amendments to the initial draft of the Decree were not implemented in practice and that the Supreme Judicial Control was not established at that time, it was stated in 1977 that "Lenin's idea of the

[22] There were four codes issued: the Codes of Civil and Criminal Procedure; the Code of the Judicial Establishments; Uchrezhdenie sudebnykh ustanovlenii [Establishment of Court of Justice]; The Code of Punishments Inflicted upon by Justices of the Peace; Ustav o nakazaniiakh, nalagaemykh mirovymi sudiami [Charter of the Penalties Imposed by the Justices of the Peace Courts];

[23] See Dekrety sovetskoi vlasti [Decrees of Soviet Power]; pp. 466 – 474.

aim of judicial supervision, establishment of uniform judicial practice, serves as a basic idea to this very day"[24]. Although this idea of judicial supervision developed significantly, there are grounds to believe that this idea of supreme supervision and guiding explanations was borrowed from the Ruling Senate's practice.

For the first time, the idea of guiding explanations by a supreme supervisory body was implemented after the People's Commissariat of Justice (a ministry) was assigned to exercise supreme judicial control over the decisions of people's courts[25]. A special act on the Supreme Judicial Control was issued[26], authorising the People's Commissariat of Justice to issue "guiding explanations and instructions on application of Soviet legislation"[27].

As was precisely mentioned by the authors of "Formation and Development of the Soviet Legal System," Temushkin and Dobrovolskaia,

[...] the Supreme Judicial Control was an administrative body since it functioned exercising its rights as a division of the People's Commissariat of Justice. This holding of administrative and judicial duties was kept right up to the adoption of the Regulation [*polozhenie*] on judicial system [sudoustroistve] of the RSFSR of October 31, 1922 [when the judicial supervision functions were assigned to the RSFSR Supreme Court][28].

Thus, having its roots in the practice of the Ruling Senate[29], during the Soviet period Regulations were re-established (revived) within the jurisdiction of an administrative body, the People's Commissariat of Justice, and were the outcome of administrative activity (issued by an executive body, without following judicial procedure, and resolving no case). Therefore, early Regulations were provisions of an administrative character. Although later the judicial supervision function was assigned to the judicial body (the Supreme Court), Regulations did not become bearers of judge-made law and remained administrative acts.

Unlike the jurisdiction of the RSFRS Supreme Court, as well as supreme courts of other Union Republics, which periodically lost and recovered the right to issue Regulations on the Union Republics law, the USSR Supreme Court exercised this function right from the beginning.

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[24] Temushkin and Dobrovolskaia· Stanovlenie i razvitie sovetskoi sudebnoi sistemy [Formation and Development of the Soviet Judicial System]. p. 71.

[25] Regulation On a People's Court of the RSFSR, dated October 21, 1920. Sobranie uzakonenii RSFSR 83 [Collection of Statutes of the RSFSR]. 1920, Art. 407.

[26] The Regulation on the Supreme Judicial Control was approved by the Decree of the Russian Central Executive Committee and Soviet of People's Commissars of the RSFSR of March 10, 1921. Sobranie uzakonenii RSFSR 15 [Collection of Statutes of the RSFSR]. 1921, Art. 97.

[27] Temushkin and Dobrovolskaia· Stanovlenie i razvitie sovetskoi sudebnoi sistemy [Formation and Development of the Soviet Judicial System]· p· 73·

[28] Ibid.

[29] It shall be admitted that Vereshchagin arrived at the same conclusion· See: A·N· Vereshchagin· Sudebnoe pravotvorchestvo v Rossii. Sravnitel'no-pravovye aspekty [Judicial Law-Making in Russia. Comparative Legal Aspects]. Moscow, 2004, p. 142.

Initial Regulations by the Plenary sessions[30] of the USSR Supreme Court were like the Ruling Senate's decisions in that they contained guiding explanations on judicial practice. The first Regulation was adopted on November 3, 1924 at the third Plenary session of the USSR Supreme Court. This first Regulation is of interest to us owing to the fact that it originated out of the consideration by the Supreme Court of a particular case, as was true of the Ruling Senate. Having heard an individual case without parties being present, the USSR Supreme Court adopted a guiding explanation addressed to an indefinite circle of judges in order to further apply the expressed principle of law in future legal practice[31]. Subsequently, guiding explanations were issued in many cases based on generalisations of legal practice, without distinguishing the facts of the cases.

From December 29, 1922[32] until today, there have been about 14 statutes and sub-law normative acts adopted on the issue of the Supreme Court's guiding explanations. As time went by, Regulations became more administrative and less judicial in nature. Judging by the language of the statutes and the practice of issuance, the importance of Regulations as normative acts has grown significantly. Even under the first Edict on the Supreme Court of November 23, 1923 and the USSR Constitution of 1924, issuing guiding explanations and interpretation of all-union legislation was first in the description of the USSR Supreme Court. Although later the practice of the legislature of giving guiding explanations receded into the background of the Supreme Court's judicial activity[33], in practice the activity of giving guiding explanations has never become secondary. The most significant conclusion that can be drawn from studying development of the USSR Supreme Court's and, later, that of the Russian Federation Supreme Court's Regulations, is that they are less judge-made than administrator-made Regulations, although they were issued by the Supreme Court, the highest judicial body of the USSR and the Russian Federation.

The phenomenon of administrative acts issued by judges is not surprising given the initial nature of the USSR Supreme Court at the time it was given authority to

[30] At first, there was no "Plenum" per se as an organ of the Supreme Court. Its function was exercised by "the Plenary session". See: K.B. Sheinin. Rukovodiashchie raziasneniia Verkhovnogo Suda SSSR – vazhnoe sredstvo ukrepleniia sotsialisticheskoi zakonnosti [Guiding Explations of the Supreme Court USSR – an Important Means of Strengthening Socialist Legality]. Verkhovnyi Sud SSSR [Supreme Court of the USSR]. Ed. L.N. Smirnov, V.V. Kulikov, and B.S. Nikiforova. Yuridicheskaia Literatura Publishing House, Moscow, 1974, p. 141.

[31] K.B. Sheinin. Rukovodiashchie raziasneniia plenuma Verkhovnogo Suda SSSR i kontrol' za ikh vypolneniem [Guiding Explanations of the Supreme Court of the USSR and Monitoring of Their Implementation]. Vysshyi Sudebnyi Organ SSSR [Highest Judicial Organ of the USSR]. Ed. L.N. Smirnov et al. Yuridicheskaia Literatura Publishing House, Moscow, 1984, p. 93.

[32] The date of ratification of the Treaty on the Formation of the Union of the Soviet Socialist Republics by the first Congress of USSR Soviets. In this document, the USSR Supreme Court and its jurisdiction was first mentioned.

[33] See: Art. 75 of the Law on Judicial System of the USSR, Union and Autonomous Republics of August 16, 1938.

issue guiding explanations. The procedure of issuing Regulations, as well as their structure and substance, also contributes to the conclusion that Regulations are administrative acts issued by judges.

First of all, the USSR Supreme Court was under the jurisdiction of the Central Executive Committee of the USSR (the USSR CEC).

Second, its primary jurisdiction was not to adjudicate cases but to exercise the so-called 'general supervision'. The USSR Supreme Court's jurisdiction included passing Regulations on the application of legislation, initially on the request of the CEC, and issuing Regulations by request of the CEC 'conclusions' as to the constitutionality of the member Republics' laws[34]. L. N. Smirnov, the Chairman of the USSR Supreme Court of 1962-72, did not consider 'general supervision' as judicial activity, saying that "the Supreme Court of the USSR functioned not only as a judicial body. It was given general supervision jurisdiction as well"[35].

Another USSR Supreme Court official, Kh. B. Sheinin, who wrote extensively on the matter of Regulations, admitted that "the jurisdiction of giving guiding explanations to courts is not administration of justice, although it is carried out by the judicial body"[36]. Until 1972, the USSR Supreme Court, *inter alia*, exercised the purely administrative function of organizational management (*'organizatsionnoe rukovodstvo'*) of the courts. After the establishment of the USSR Ministry of Justice, this function was given to the Ministry.

Taking into account the fact that official policy denied the existence of judge-made law in the Soviet Union and that the main source of Soviet law was administrative regulations and orders, given the administrative nature of the Supreme Court Regulations, one might think that Regulations represented 'hard' law in the Soviet Union and the Russian Federation. All the characteristics of the Supreme Court Regulations show that they were no less binding than regulations passed, for example, by the Soviet of Peoples Commissariat (later the Council of Ministers) or statutes by the parliament today.

Having stressed that Soviet courts were part of the State administration, A.Ya. Vyshinskii, General Prosecutor of the USSR in 1935-39, offered two points that

[34] For more details on the constitutional review jurisdiction of the USSR Supreme Court of 1924-33. See: M.A. Mitiukov, Sudebnyi konstitutsionnyi nadzor [Judicial Constitutional Supervision] 1924-1933: Voprosy istorii, teorii i praktiki [The History and Practice]. Formula Prava [Fhe Formula of Law]. Moscow, 2005, p. 208.

[35] L.N. Smirnov. 50 let Verkhovnogo Suda SSSR [50 Years of Supreme Court of the USSR]. Verkhovnyi Sud SSSR [Supreme Court of the USSR]. Ed. L.N. Smirnov, V.V. Kulikov and B.S. Nikiforov. Yuridicheskaia Literatura Publishing House, Moscow, 1974, p. 9.

[36] K.B. Sheinin· Rukovodiashchie raz'iasneniia Verkhovnogo Suda SSSR – vazhnoe sredstvo ukrepleniia sotsialisticheskoi zakonnosti [Guiding Explanations of the Supreme Court – an Important Means of Strengthening Socialist Legality]. p. 171.

distinguished them from the 'executive' branch of the government. Those were: (1) courts exercised their jurisdiction in a judicial procedure, and (2) an active role was played by the parties[37]. Indeed, the process of passing Regulations by the Plenum of the Supreme Court has nothing in common with judicial process. From its inception, the procedure of passing Regulations containing guiding explanations did not differ from the procedure of passing regulations in regard to particular cases[38]. Over time the procedure of passing Regulations became more like legislative procedure[39]. Since the Plenum was not solving particular disputes when passing Regulations, there were no parties present at the hearing. Since there was no legal procedure followed by the Plenum, it was hardly possible to call a sitting of the Plenum a "hearing".

The procedure of plenary sessions has never been laid down in any of the 14 statutes on the Supreme Court. As of February 2011, there is no statute on the Supreme Court of the Russian Federation. Only the jurisdiction of the Plenum of the USSR Supreme Court and the most basic procedural issues (the membership of the Plenum, the identity of those who had the right to propose a new Regulation, and voting procedure) were framed in the law. The remainder of the procedure is determined by practice. The accumulated practice of preparing and passing Regulations was set out in a law on the USSR Supreme Court on 30 November 1979. However, only Article 38 covered organisational and procedural functions of the Plenum's secretariat[40].

At different times, the initiative to adopt a regulation could come from the CEC, the General Prosecutor's Office, the Ministry of Justice, Supreme Courts of member-republics, the USSR Supreme Court itself, or even the Central Committee of the Communist Party. Later (in the 1970s), the USSR Supreme Court became the only body that could initiate the process. All the aforementioned bodies could take part in the deliberation process on a draft Regulation. If the conclusion was that a regulation ought to be passed, a special committee was set up for the purpose of editing the draft. Alternative drafts could

[37] A.Y. Vyshinskii. The Soviet Constitutional Law. Moscow, 1938, p. 448. Cited from Gsovski. Soviet Civil Law. p. 251.

[38] K.B. Sheinin· Rukovodiashchie raz'iasneniia plenuma Verkhovnogo Suda SSSR i kontrol' za ikh vypolneniem [Guiding Explanations of the Supreme Court of the USSR and Monitoring of Their Implementation]. p. 99.

[39] There were exceptions when a particular case served as a basis for guiding explanations· For an example please refer to S·N· Bratus and A·B· Vengerov· Poniatie· soderzhanie i formy sudebnoi praktiki [Concept· Content and Form of Jurisprudence]. Sudebnaia praktika v sovetskoi pravovoi sisteme [Jurisprudence in the Judicial Legal System]. Ed. S.N. Bratus. Yuridicheskaia Literatura Publishing House, Moscow, 1975, p. 57.

[40] K.B. Sheinin· Rukovodiashchie raz'iasneniia plenuma Verkhovnogo Suda SSSR i kontrol za ikh vypolneniem [Guiding Explanations of the Supreme Court of the USSR and Monitoring of Their Implementation]. p. 97.

be submitted. In order to be passed, draft Regulations had to be passed by a majority of Plenum's members[41].

At one point in the history of the USSR Supreme Court, the Central Committee of the Communist Party played an important role in drafting the Regulations[42].

Over the course of time, along with the change in subordination, the procedure became more complex.

[I]n the 1980s as a result of campaign to liberalize criminal justice Russian judges' approaches to the application of law and the administration of justice came to be dominated by the views and wishes of their immediate judicial supervisors[43].

In its early practice, the Plenum of the USSR Supreme Court started to pass Regulations based on generalisations from many cases and analysis. At any time, a Supreme Court Regulation, which can be in force for an indefinite period of time, might be amended by a later Regulation. In 1970, the necessity for the codification of Regulation was realized, and the Plenum of the Supreme Court passed some Regulations codifying (consolidating) and updating (amending) previously-issued Regulations[44]. This is the usual practice today.

The structure of Regulations is determined by the procedure by which they are made. Since Regulations are the result of the generalization of many cases of the Supreme Court and lower courts, their inner structure differs from the structure of a regular judicial decision.

R. Z. Livshitz characterized the structure of Regulations by the Plenum of the Supreme Court of the Russian Federation:

The Plenum's explanations are the most directive and the least judicial acts in all of judicial practice [...] Outwardly, explanations appear as typical acts of a leg-

[41] The description of the procedure followed by the USSR Supreme Court has largely been drawn from K·B· Sheinin· Rukovodiashchie raz'iasneniia Verkhovnogo Suda SSSR – vazhnoe sredstvo ukrepleniia sotsialisticheskoi zakonnosti [Guiding Explanations of the Supreme Court – an Important Means of Strengthening Socialist Legality]. pp. 141 – 178 and Ibid., pp. 93 – 102.

[42] P.H. Solomon· Professor, interview by A. Burkov. Dated October 20, 2006; P.H. Solomon, Soviet Criminal Justice Under Stalin. Cambridge University Press. Cambridge, 1996, pp. 416 – 418; T. Foglesong. The Reform of Criminal Justice and Evolution of Judicial Dependence in Late Soviet Russia. Reforming Justice in Russia, 1864 – 1996: power, culture, and the limits of legal order. Ed. Peter Solomon. Armonk, N.Y. London, 1997, p. 283.

[43] Foglesong. The Reform of Criminal Justice and Evolution of Judicial Dependence in Late Soviet Russia. p. 283.

[44] Bratus and Vengerov. Poniatie, soderzhanie i formy sudebnoi praktiki [Concept, Content and Form of Jurisprudence]. p. 56.

islative or executive body; if one wishes, one can distinguish in the Regulation's provision the hypothesis, disposition, and sanction[45].

In legal doctrine it was argued, although it was not a widely-discussed viewpoint, that the process of giving explanations on issues of judicial practice in the form of Regulations passed by the Plenum of the Supreme Court cannot be related to solving a specific case or to courts' judicial activity and should be qualified as administrative activity. Most of the debates concentrated on the issue of whether Regulations are obligatory and could be called 'precedents.'

The Soviet legal theory rejected judge-made law as a source of law. General Prosecutor of the USSR in 1935-1939 A. Ya. Vyshinskii, who to a large extent determined the legal doctrine of sources of law during 1930-40[46], stated on many occasions that Soviet courts are sub-law organs, and as such, they must not create law[47]. Only a small number of legal scholars (for example, S.N. Bratus, A. B. Vengerov, P. E. Orlovskii) attempted to argue that a single Supreme Court decision could be considered as a source of law.

The debate over Regulations by the Plenum of the Supreme Court was more active. In 1939–40, the first attempts to determine the law-making nature of the Supreme Court Regulations were undertaken by some Soviet scholars, including P. E. Orlovskii, a member of the USSR Supreme Court from 1938 and vice-chairman of the USSR Supreme Court from 1948 to 1950[48]. "A change in emphasis was called for in 1943" when a new paper by Vilnyanskii[49] on judicial practice as a source of law was ready to be published[50]. In order to justify law-making activity by the Supreme Court, the author used Hegel's materialistic dialectic law of the transformation of quantity changes into quality changes. Referring to Lenin's and Stalin's interpreta-

[45] R.Z. Livshits. Sudebnaia praktika kak istochnik prava [Judicial Practice as a Source of Law]. Moscow. Institut gosudarstva i prava rossiiskoi academii nauk [State and Law Institute of the Russian Academy of Sciences]. 1997, p. 5. Similar analysis of the structure of Regulations by the Plenum of the Supreme Court of the USSR was given by K.B. Sheinin. See: K.B. Sheinin. Rukovodiaschie raz"iasneniia Verkhovnogo Suda SSSR – vazhnoe sredstvo ukreplenia sotsialisticheskoi zakonnosti [Guiding Explanations of the Supreme Court – an Important Means of Strengthening Socialist Legality]. p. 172.

[46] Vyshinskii was called the "leader of the movement for the new Socialist law". See: H.J. Berman. The Spirit of Soviet Law. Washington Law Review, 1948, No.23, p. 160.

[47] See for example: A.Ya. Vyshinskii. Teoriia sudebnykh dokazatel'stv v sovetskom prave [The Theory of Judicial Evidence in Soviet law]. 2nd ed. Yuridicheskoe Izdatelstvo Publishing House, Moscow, 1946. Cited from M.S. Strogovich. Kritika i bibliografia. [Criticism & Bibliography]. Sotsialisticheskaia zakonnost' [Socialist legality]. 1946, No.11-12, p. 54.

[48] See: S.I. Vilnyanskii. K voprosu ob istochnikakh sovetskogo prava [The Question About the Sources of Soviet Law]. Problemy sozialisticheskogo prava. Uchenie trudy [The Problems of Socialist Law. Scholarly Works]. VIUN, 1938, No.4-5; P. Orlovskii. Znachenie sudebnoi praktiki v razvitii sovetskogo grazhdanskogo prava [Importance of Judicial Practice in the Development of Soviet Civil Law].// Sovetskoe gosudarstvo i pravo [Soviet State and Law]. 1940, No.8 – 9.

[49] S.I. Vilnyanskii. Znachenie sudebnoi praktiki v grazhdanskom prave [Importance of Judicial Practice in Civil Law]. Uchenie trudy [Scholarly Works]. VIUN, 1947, No.IX.

[50] J.N. Hazard. The Soviet Court as a Source of Law. p. 81.

tions of the law, Vilnyanskii concluded that, although in the USSR there is no ground for recognition of the obligatory force of a precedent, so-called 'plural precedent' (a regulation by the Plenum of the Supreme Court that generalises court practice) can lead to quality changes (changes in law). When many court decisions are generalized, analysed, and put into the form of a Regulation by the Plenum of the Supreme Court, 'plural precedent' is being created that shall be regarded as a source of law[51].

This notion appeared to have been officially approved by the government. Vilnyanskii's paper, ready to be published in 1943[52], was actually printed only four years later, in 1947, after a general meeting of the Moscow Juridical Institute of 1946[53]. Hazard speculated over a possible conclusion of the meeting:

The debate seems to have resulted in a decision to reconsider the status of the court, for a 1947 textbook (Institut Prava Akademii Nauk S.S.S.R., Osnovy Sovetskogo Gosudarstva i Prava 50 [Fundamentals of the Soviet State and Law, Moscow, 1947)] took the position that at least the guiding instructions on question of court practice [Regulations], issued by the full bench (plenum) of the Supreme Court of the U.S.S.R. ... may be considered as sources of law[54].

The debate continued during the 1950s, and most of those who participated were in favour of Regulations as a source of law. The culmination of the debate was an editor's article in the journal "The Soviet State and Law" (*Gosudarstvo i Pravo*)[55]. The editor's conclusion was that there was a majority point of view expressed in letters and articles for the journal summarized by the article that Regulations by the Plenum of the USSR Supreme Court were one of the sub-law sources of Soviet law[56].

The modern practice of the Supreme Court of the Russian Federation reflects that of the USSR Supreme Court. Before the issue appears on the agenda of the Plenum, extensive research is made into the judicial practice of the Supreme Court, as well as that of the lower courts. The resulting data are analysed by specialists from

[51] S.I. Vilnyanskii. Znachenie sudebnoi praktiki v grazhdanskom prave [Importance of Judicial Practice in Civil Law]. pp. 244 – 245.

[52] According to Hazard, an editorial note to the book where the S.I. Vilnyanskii's paper was published states that all material was in readiness for publication in 1943. See: J.N. Hazard. The Soviet Court as a Source of Law. p. 81.

[53] At the meeting, apart from the teaching staff of the Moscow Juridical Institute itself, there were representatives of the All-Union Institute of Legal Science, Law Institute of the USSR Academy of Science, Ministry of Justice and Supreme Court present. See: V uridicheskikh institutakh. Nauchnaia sessiia v moskovskom yuridicheskom institute [In the Institutes of Law. Scientific Session in Moscow Institute of Law]//Sotsialisticheskaia zakonnost' [Socialist legality]. 1946, No.9, pp. 21-22.

[54] J.N. Hazard. The Soviet Court as a Source of Law. p. 81.

[55] The leading law journal in the Soviet Union. The 1947 textbook and the journal were produced by the same academic institution – Law Institute of the USSR Academy of Science.

[56] O yuridicheskoi prirode rukovodiashchikh ukazanii plenuma Verkhovnogo Suda SSSR [The Legal Nature of the Guidelines the Supreme Court of the USSR] (Editor's Article).// Sovetskoe gosudarstvo i pravo [Soviet State and Law]. 1956, No.8, p. 21.

different ministries and by university professors. The draft can be sent to lower courts for comments. Different divisions and the Scientific Advisory Council (*Nauchno-Konsultativnii Sovet*) of the Supreme Court discuss Regulation drafts. Only after comments have been taken into account is the draft submitted to the Plenum. The process of issuing Regulations is finished by publishing Regulations in the Supreme Court's bulletin[57].

Regulations As Quasi-Legislation Instruments De Jure and De Facto

In this section it is submitted that, although under legislation *(de jure)*, the legal status of the Supreme Court Regulations is not clearly determined—that, in practice *(de facto)*, Regulations are more than mere recommendations ('soft law'). In reality, they are regarded by legal professionals as quasi-legislation ('hard law'). The status of Regulations in practice is thus quite different from their official legal status.

There is no exact status of Regulations in legislation. Article 126 of the Constitution provides that the Supreme Court "[shall] provide explanations on issues of court practice" (*daet raz"iasneniia po voprosam sudebnoi praktiki*). On the one hand, this article gives Regulations (the document which contains explanations) constitutional status. On the other hand, the Constitution does not make clear whether Regulations are legally binding documents. The latter was the subject of debate during the drafting of the 1993 Constitution.

On June 25, 1993, participants to the Constitutional Convention, attached to the President of the Russian Federation (*Konstitutsionnoe Soveshchanie pri Presidente Rossiiskoi Federatsii*), debated the wording of Article 126 of the Constitution (Article 122 of the draft version). The debate concerned the assertion that, if Regulations are legally binding (obligatory), they should be incorporated into the new constitution that was being drafted at the time. One group, consisting of academics and other participants with no judicial background, argued that Regulations by the Plenum of the Supreme Court could not be legally binding on judges because judges should obey only the Constitution and federal laws (Part 1 of Article 120 of the Constitution — Article 117 of the draft version). Another group, consisting mainly of judges, members of the President administration and the Government, insisted that in practice the Regulations are treated as having legally binding force, regardless of whether this status was reflected in the Constitution. V. I. Radchenko, First Deputy Chairman of the Supreme Court of the Russian Federation since 1989, stated at the Constitutional Convention:

[57] The description of the procedure was largely drawn from V. Demidov. O roli i znachenii [The role and importance]. pp. 21 – 24.

We [the Plenum of the Supreme Court] give courts *guiding* explanations... [The judge] shall adhere to some sort of explanations which are given by higher courts. This issue has been solved in practice. It has not aroused any questions so far. There are debates about it only in doctrine[58].

The Chairman of the Constitutional Convention and Head of the Presidential Administration, Sergey Aleksandrovich Filatov, admitted:

The Supreme Court will quash [a judgment] anyway if somebody acts contrary to the Plenum [of the Supreme Court]. And that is it. And these [Regulations by the Plenum of the Supreme Court] will be obligatory in practice[59].

Justice of the Constitutional Court of the Russian Federation U. D. Rudkin admitted, and Chairman of the Constitutional Convention agreed, that in practice the law of precedent (including Regulations by the Plenum of the Supreme Court) had been working, although such practice was not in the Constitution[60].

As a result, Article 126 of the Constitution does not incorporate the word "guiding" or any other words stressing the binding status of the Supreme Court Regulations.

Federal legislation is not uniform on the issue of the status of Regulations.

Article 56 of the RFSFR Law of July 8, 1981 No.976 "On the Judicial System of the RSFSR" (*O sudoustroistve RSFSR*), which is still currently in force (last amended on August 20, 2004), grants the Supreme Court of the Russian Federation the authority to give courts "*guiding* explanations" which are "*obligatory* for courts, other organs and officials, who implement statutes, application of which was explained [in guiding explanations]" (emphasis added). This wording is of July 8, 1981.

Federal Law No.1-FKZ of December 31, 1996 "On the Judicial System of the Russian Federation" (*O sudebnoi sisteme RF*), last amended on April 5, 2005, states that the Supreme Court of the Russian Federation "shall give explanations on issues of judicial practice" (Part 5 of Article 19).

At the same time, legislation governing Russia's highest court resolving commercial disputes, the Supreme Commercial (Arbitrazh) Court (*Vysshyi Arbitrazhnyi Sud Rossiiskoi Federatsii*), explicitly gives Regulations by the Plenum of the Supreme Commercial Court obligatory status. Although Article 127 of the Constitution (on the Supreme Commercial Court) is similar to Article 126, subsequent legislation clearly identifies the status of Regulations by the Plenum of the Supreme Commercial Court as obligatory.

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[58] Emphasis added. Konstitutsionnoe soveshchanie: stenogrammy, materialy, dokumenty April 29 – November 10, 1993 [Constitutional Conference: Transcripts, Materials, Documents April 29 – November 10, 1993]. V. I. 11. Yuridicheskaia Literatura Publishing House, Moscow, 1996. Evening session, dated June 17, 1993, p. 41.

[59] Ibid., Para 44.

[60] Ibid., p. 48.

Part 2 of Article 13 of the Federal Constitutional Law "On Commercial Courts in the Russian Federation" provides:

With regard to questions of its jurisdiction the Plenum of the Supreme Commercial Court of the Russian Federation shall adopt Regulations which are binding upon arbitrazh (commercial) courts in the Russian Federation.

In addition, the legislature directly authorised citations of Regulations by the Plenum of the Supreme Commercial Court. Paragraph 4 of Sub-part 3 of Part 4 of Article 170 of the Arbitrazh Procedure Code provides:

The motivation part of the decision may contain references to the Regulations by the Plenum of the Supreme Commercial Court of the Russian Federation on the issues of court practice.

Thus, though the Supreme Commercial Court and the Supreme Court have equal status under the Constitution, the legal status of the major document of these courts is different under federal law. This difference is peculiar because quite often the Supreme Court and the Supreme Commercial Court jointly issue Regulations.

There was a European Court of Human Rights (ECHR) judgment that, *inter alia*, assessed the legal status of a Russian Supreme Court Regulation. In the case *Baklanov v. Russia*[61], *the applicant alleged that he was deprived of his money ($ 250, 000) by a judgment which contained no legal grounds for the forfeiture. The applicant asked his acquaintance, B., to deliver the money to Moscow. The applicant was planning to purchase a flat with the money. B. failed to declare the money at the customs checkpoint and was charged with smuggling and later convicted. The court ruled that the money was to be forfeited to the Treasury as an object of smuggling. The applicant argued before the ECHR that at the material time there was no legal ground for the forfeiture. The only legal act that referred to the forfeiture was the Regulation by the Plenum of the USSR Supreme Court ('ruling' as it was called in the ECHR judgment) of February 3, 1978 that allowed the forfeiture of objects of smuggling (Article 7), which, in turn, stated that the forfeiture shall be carried out under the legislation in force. There was no provision of the Criminal Code or the Criminal Procedure Code in force at the time that allowed the forfeiture of smuggled objects. Having said that "it remained unclear what legal basis served as the grounds other than a Ruling of the Supreme Court which, however, appears to relate to legislation no longer in force"*[62], *the ECHR found that "the law in question was not formulated with such precision as to enable the applicant to foresee, to a degree that is reasonable in the circumstances, the consequences of his actions"*[63]. Apparently, by this judgment the ECHR regarded the Regulation by the Plenum of the USSR Supreme

[61] Baklanov v. Russia. Judgment of June 9, 2005.

[62] Ibid., Para 44.

[63] Ibid., Para 44.

Court as 'the law' in the meaning of the Convention, although it ruled that the law lacked clarity because it referred to legislation no longer in force.

In practice, however contestable it may be as a matter of legal theory, Regulations contain new legal norms that amend statutes and are binding (guiding as a matter of practice because judges and other agencies disregard for them provide ground for legitimate professional criticism) not only on lower courts, but also on other agencies, legal persons, and individuals who apply statutes interpreted in Regulations.

The Plenum of the Supreme Court promulgates norms in a form similar to those found in documents which, without controversy, have legally binding authority when issued by the government, whether by ministries or administrative agencies. Their form is even similar to that of statutes. Officially, Regulations interpret and develop the meaning of statutes "on the basis of and in execution of laws", as is done by ordinary normative acts. Initially, Regulations were published along with normative acts of ministries and other state agencies in the *Bulletin of Normative Acts of USSR Ministries and Agencies*[64]. Later, they were published in the monthly *Bulletin of the USSR Supreme Court* and today are published in the *Bulletin of the Supreme Court of the Russian Federation.*

The legal professionals interviewed accepted that Regulations could contain new legal norms used to bridge gaps in statutes and could even change a statute. President of the Sutyajnik NGO, Sergei Beliaev, mentioned that the problems faced by people seeking legal advice from his NGO often concern Regulations, not statutes. Oftentimes, an "interpretation" of a statute by the Plenum of the Supreme Court changes the legal position in ways that weaken citizens' rights. For example, Paragraph 8 of Section 14 of Regulation No.5 of March 24, 2005 "On Some Issues Arising before Courts in the Course of Implementation of the Code of Administrative Offences" introduced a provision allowing people to be prosecuted for administrative offences after the two months following the date which the offence took place as prescribed by the Code of Administrative Offences. This regulation extended the period allowed for prosecution for an indefinite period of time if a cassation on an initial judgment of an administrative offence reached a cassation court within two months of the offence.

The history of the legal system of the Soviet Union and the Russian Federation exemplifies the capacity of Regulations to change the law.

J.N. Hazard gives a good example of an amendment being made through Regulations. In his article "The Soviet Court as a Source of Law," Hazard demonstrated how the crime of "speculation" was interpreted by the Plenum of the RSFSR Supreme Court

[64] Bratus and Vengerov. Poniatie, soderzhanie i formy sudebnoi praktiki [The Notion, Content and Form of Jurisprudence]. p. 55.

during 1930-1940[65]. In 1932, the definition of the crime of speculation contained in Article 107 of the RSFSR Criminal Code was formulated as "the purchase or resale by private persons, for gain [*i.e.*, as a speculation], of any agricultural produce or of any article of mass consumption"[66]. Over the next 15 years, this definition was amended several times, primarily by Regulations of the Plenum of the RSFSR Supreme Court. By 1946, the Article 107 definition of the crime of speculation was extended to cover:

1) persons who failed to take up ration books from workers who were dismissed or who issued ration books illegally, if such acts were accompanied by speculation in the goods obtained thereby;

2) wealthy peasants (*kulaks*) who failed to take the required grain deliveries to the state within the period set (amendments by the Commissariat of Justice);

3) persons who sell wine, liquors, and other spirits at prices in excess of the set prices;

4) buying up of the collective farmers' expectancies in future distribution of produce ("labour days"), if done systematically;

5) buying state bonds at less than face amount for the purpose of resale (the same act done by a group was to be qualified as counter revolution);

6) production of a secret flour mill, even by hand power, if conducted as a business for the purpose of making profit;

7) buying up of raw materials to manufacture "moonshine liquor" for the subsequent sale of liquor, or the purchase of liquor for resale.

Finally, the Supreme Court stated that if there was no direct evidence of purchase for resale as a business, the court might rest upon circumstantial evidence based on the quantity, assortment, and needs of the accused and his family for the goods purchased for his own needs, as well as other circumstances of the case[67]. The Criminal Code did not contain any hint of these grounds.

A lot of contemporary examples of changes to legislation were made through Regulations. One example on changing the limitation of action of prosecuting administrative offenders was given above. The example described in this paragraph is positive. It demonstrates the application of the European human rights law principle by-passing the legislature. Since 1995, when Part 1 of the Russian Civil Code entered into force, it was not clear whether Article 152, "Protection of the Honour,

[65] J.N. Hazard. The Soviet Court as a Source of Law. pp. 80 – 90.

[66] Translation is from Ibid., p. 86.

[67] The example is taken from J.N. Hazard. The Soviet Court as a Source of Law. pp. 85 – 88. For more examples on quasi-legislative provisions of Regulations in criminal law, please, refer to J.N. Hazard. Understanding Soviet Law Without the Cases in Soviet Studies. 1955. For more examples on quasi-legislative provisions of regulations in civil law, please refer to D. D. Barry and C. Barner-Barry. The USSR Supreme Court and Guiding Explanations of Civil Law. 1962 – 1971, in Contemporary Soviet Law: Essays in Honor of J.N. Hazard. Edited by Donald D. Barry, William E. Butler, and George Ginsburg. The Hague: Martinus Nijhoff, 1974, pp. 69–83.

Dignity and Business Reputation," allowed a legal entity to be awarded compensation for moral (non-pecuniary) damage. Paragraph 5 of Article 152 stated: "The citizen [*grazhdanin*], with respect to whom the information discrediting his honour, dignity or business reputation has been spread, shall have the right, in addition to the refutation of the given information, also to claim the compensation for the losses and for the moral damage caused by its spread." Provisions of Article 152 were extended to cover the protection of the business reputation of legal entities by Paragraph 7 of Article 152: "The rules of the present Article on the protection of the business reputation of the citizen shall be applied, correspondingly, to the protection of the business reputation of the legal entity." Some court decisions stated that Paragraph 5 of Article 152 does not apply to legal entities (a legal entity does not have a right to moral damages compensation) because, by definition, a legal entity cannot suffer moral damages. Other courts applied Paragraph 5 of Article 152 to legal entities. This former court practice contradicted the European Court of Human Rights case-law, which allows compensation to legal entities[68]. On February 24, 2005, the Plenum of the Russian Supreme Court followed the European way by including this rule in Paragraph 1 of Section 15 of Regulation No. 3 "On Judicial Practice on Cases on Protection of Honour and Dignity of Citizens, and Business Reputation of Citizens and Legal Entities"[69].

Another feature of Regulations that adds legal weight to this instrument is that Regulations, unlike statutes or governmental or presidential decrees, cannot not be challenged before the Constitutional Court. The Constitutional Court of the RSFSR (predecessor of the Constitutional Court of the Russian Federation) had the jurisdiction to consider the constitutionality of Regulations. But with the adoption of new law on the Constitutional Court of the Russian Federation, the jurisdiction of the Constitutional Court no longer includes the authority to review Regulations. However, the Constitutional Court can consider the constitutionality of a provision of a Federal statute in light of the interpretation given by a Regulation, although in practice it does not happen often.

Interviews with judges reflect the situation that existed at the time of the Constitutional Convention. Although Regulations are not legally binding under the Constitution, they are carefully obeyed in practice. Obedience is secured, *inter alia*, by the follow-up system, which is not prescribed by statutes but developed in practice. The enforcement system has two major elements: 1) general review of implementation of Regulations exercised by the Plenum of the Supreme Court; 2) reversal of

[68] See for example: Presidential Party of Mordoviia v. Russia. Judgment of October 5, 2005. Paragraph 2(a) of the operative part of the judgment.

[69] Rossiiskaia gazeta [Russian Newspaper]. March 15, 2005.

judgments by higher courts on the ground of not following Regulations by courts of first instance, courts of cassation.

After Regulations are issued, the Supreme Court ensures their implementation through general supervision by issuing Regulations regarding the implementation of other Regulations. The practice of applying Regulations made by different courts is reviewed and generalised. Sometimes, the implementation of Regulations would be examined along with legislation. The title of such a Regulation might read, for example, like this: "On Judicial Implementation of *Legislation* and *Guiding Explanations* by the Plenum of the Supreme Court in the Course of Consideration of Cases on Crimes Committed by Juveniles"[70]. Sometimes such Regulations were issued on implementation of a particular Regulation or several Regulations. The Plenum of the USSR Supreme Court was very active in issuing such Regulations until 1983. In 1967–77, the Plenum of the USSR Supreme Court examined the implementation of guiding explanations more than 60 times[71]. The most recent Regulation of such kind by the Plenum of the Supreme Court of the Russian Federation was issued on November 18, 1999[72].

This element of the enforcement machinery itself consists of two parts: 1) non-application of Regulations is a ground for reversal of judgment; 2) judges whose decisions were quashed are the subject of disciplinary punishment (responsibility of judges).

Although neither civil nor criminal procedure codes contain provisions on non-application of the Supreme Court Regulations as a ground for quashing judgments, in practice such a ground worked in the Soviet legal system and works today as an indisputable rule[73]. Every single judge interviewed for this thesis admits that Regulations are obligatory for them to follow in the course of administration of justice—that the collection of Regulations is a handbook (*nastol'naia kniga*) for them, and is always present in their workplace. If a judge ruled without taking into account a particular provision from a Regulation, it means that with a high probability his

[70] Regulation No. 5, July 9, 1982 by the Plenum of the USSR Supreme Court. Emphasis added.

[71] V.V. Kulikov. Verkhovnyi Sud Soyuza SSR. [Supreme Court of the USSR] in Sud v SSSR.// Edited. by L.N. Smirnov et al. Yuridicheskaia Literatura Publishing House, Moscow,1977, p. 176.

[72] Regulation No.79, November 18, 1999. On the Course of Realization of the Regulation of the Plenum of the Supreme Court of the Russian Federation of August 24, 1993, No.7. On the Course of Consideration of Criminal and Civil Cases by Courts of the Russian Federation.// Bulleten' Verkhovnogo Suda Rossiiskoi Federatsii [Bulletin of the Supreme Court of the Russian Federation]. 2000, No.1.

[73] See: K.B. Sheinin. Rukovodiashchie raz"iasneniia plenuma Verkhovnogo Suda SSSR i kontrol' za ikh vypolneniem. [Guiding Explanations of the Supreme Court of the USSR and Monitoring of Their Implementation]; S.N. Bratus. Predislovie. [Introduction]. Sudebnaia praktika v sovetskoi pravovoi sisteme [Judicial practice in the Soviet legal system]. Ed. S. N. Bratus. Yuridicheskaia Literatura Publishing House, Moscow, 1975, p. 6; L.N. Smirnov. Deiatel'nost' sudov RF kak istochnik prava [The Courts Activity of Russia as a Source of Law].// Zhurnal rossiiskogo prava [Journal of Russian law]. 2001, p. 53.

decision will be overruled by a higher court. Chief Justice of Penzenskii District Courts Pavel Guk opined:

The binding force of Regulations is determined by the fact that if in the course of consideration of a particular case a court ignores a Plenum's Regulation, the decision of the court could be quashed by higher court[74].

The Secretary of the Plenum of the Supreme Court of the Russian Federation V. V. Demidov summarized:

According to the practice of consideration of cases in cassation and extraordinary review [*nadzor*] instances, disregard of the Plenum of the Supreme Court of the Russian Federation explanations on implementation of federal legislation inevitably leads to rendering erroneous judicial decisions[75].

At least the so-called "curators" of district courts[76] will telephone (or meet at their next visit to district court) a particular judge and warn that such decision will not pass cassation on the next occasion if a judge fails again to take Regulations into account[77].

The following conclusions were made through analysis of interviews of 15 judges (mostly chief justices of the district court of Sverdlovsk oblast) and 15 advocates and staff attorneys (from different organizations interviewed in 2007-2008). While Regulations are very important in determining the law, judges do not always make it clear that they have ruled based on a Regulation. Judges of first instance courts admit that, although they take Regulations into account, they do not cite the particular Regulations they apply. They may take Regulations into account, they may even use the exact wording of a Regulation in their judgment (copy and paste the text), but the judge will not, as a rule, acknowledge this fact. No identities of Regulations will be cited in a judgement. However, in the legal literature, it was admitted that after the promulgation of the 1979 Law "On the Supreme Court of the USSR," citations of the Supreme Court Regulations in judgments became a common matter in court practice[78]. Today, although the absolute majority of interviewed judges insisted that they do not cite Regulations, an overvie of judgments revealed some citations.

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[74] P.A. Guk. Interview by A. Burkov. December 1, 2008.

[75] Demidov. O roli i znachenii postanovlenii plenuma Verkhovnogo Suda Rossiiskoi Federatsii. [The Role and Importance of Supreme Court Ruling the Russian Federation]. p. 24.

[76] There is a system of curators which is not established by any of the two Federal statutes on judicial system of the Russian Federation. Judges of regional courts (e.g., Sverdlovsk Oblast Court) who work as cassation judges are assigned to supervise over particular district court of a region.

[77] L.N. Rudenko. Chief Justice of Ordzhonikidzevskii District Court of Yekaterinburg, interview by A. Burkov. August 29, 2007. A. G. Valter, Chief Justice of Serov District Court, interview by A. Burkov. September 4, 2007.

[78] K.B. Sheinin. Rukovodiashchie raz"iasneniia plenuma Verkhovnogo Suda SSSR i kontrol' za ikh vypolneniem. [Guiding Explanations of the Supreme Court of the USSR and Monitoring Their Implementation]. p. 101.

There were no reasons provided by judges for not citing Regulations applied. Chief Justice of Oktiabr'skii District Court Valova gave the following rationale:

I never cite Regulations, although I always implement them. There is one simple reason for this — I consider that courts should not do so. But the judge should possess knowledge on Regulations[79].

Higher courts, including the Supreme Court, do not expressly or formally require lower courts judges to make reference to Regulations in their decisions.

When lack of implementation of a Regulation is the reason for quashing a judgment, the cassation court, as a rule, will not point out that the decision is inconsistent with a Regulation, but will refer instead to "violation or wrongful implementation of norms of material law or norms of procedural law" (Article 362 of the Code of Civil Procedure of the Russian Federation).

Neither statutes nor the Regulations themselves prohibit reference to Regulations, but there exists a clear practice of not mentioning them expressly. Chief Justice of Serovskii District Court Valter admitted:

No, [in our decisions] we do not write the number, date and title of Regulations. It will only litter decisions. Judges can take from a Regulation particular expression, a phrase which expresses the legal position of the Supreme Court. But we do not give reference to a particular regulation from which a legal position was taken. All in all, the Plenum of the Supreme Court itself does not specify whether judges should refer to a particular regulation[80].

As was mentioned by Justice Viacheslav Nikolaevich Kurchenko:

As a rule the Supreme Court in its judgments does not cite Regulations of the Plenum of the Supreme Court, but only states "under the meaning of the law..." (*po smislu zakona*). This "meaning of the law" is interpreted in Regulations[81].

The Plenum of the Supreme Court explained that judges shall take into account its Regulations, but did not provide that judges shall cite Regulations that were taken into account when composing a judgment. In particular, the Plenum of the Supreme Court in Paragraph 2 of Part 2 of Regulation No.23 of December 19, 2003 "On Judicial Decision" stated:

When a contradiction between norms of law, which are to be applied during consideration and adjudication of a case, is established, judges also should take into account (*dolzhni uchitivat'*) explanations by the Plenum of the Supreme Court of the Russian Federation given in Regulations.

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[79] M.A. Valova. Chief Justice of Oktiabr'skii District Court of Yekaterinburg, interview by A. Burkov. September 12, 2007.

[80] A.G. Valter. Cheif Justice of Serov District Court, interview.

[81] V.N. Kurchenko. Justice of Sverdlovsk Oblast Court, Chairman of the Qualification College of Judges of Sverdlovsk oblast, interview by A. Burkov. September 21, 2007.

In paragraph "b" of Part 4 of the Regulation, the Plenum provided that courts shall take into account not only decisions by the Constitution Court and the European Court of Human Rights, but also "...Regulations by the Plenum of the Supreme Court of the Russian Federation, issued under Article 126 of the Constitution of the Russian Federation..."

This seems to be the general policy of the Supreme Court. Nevertheless, the Supreme Court does not require lower court judges to refer expressly to Regulations.

However, there are differences of opinion among the top Supreme Court judges as to whether it would be improper to provide references to Regulations. Although having admitted that Regulations are always taken into account in practice, former Deputy of Chief Justice of the Supreme Court V. M. Zhuikov expressed the opinion that judges must not refer to Regulations[82]. On the contrary, Chief Justice of the Supreme Court Lebedev—despite expressing the point of view that Regulations cannot be regarded as a primary (*pervichnii*) source of law—admitted that this does not exclude the possibility of providing reference to a Regulation in a decision on a particular case[83].

An interesting fact was noted by Elena Romanova, advocate of Sverdlovsk Oblast Collegium of Advocates:

In many decisions [*opredeleniiakh* — cassation decision on particular cases], the Supreme Court of the Russian Federation points to the fact that reference to a regulation is considered to be unlawful because it is not a statute but only recommendation and that our legal system is not based on precedent. This position is not reflected in Regulations themselves[84].

It is necessary to point out that cassation decisions by the Supreme Court are not officially reported in the *Supreme Court Bulletin*, unlike Regulations. Why should there be such sensitivity over the content of decisions that are not officially published and thus have little educational value?

The majority of judges interviewed explained the lack of reference to Regulations by saying that Regulations are not sources of law in a country with a civil law tradition[85]. At the same time, they state that Regulations cannot be ignored because the

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[82] V.M. Zhuikov. Sudebnaia zashchita prav grazhdan i yuridicheskikh lits [Judicial Protection of Rights of Citizens and Legal Entities]. Moscow, 1997, p. 145.

[83] V.M. Lebedev. Sudebnaia vlast' v sovremennoi Rossii: problemy stanovleniia i razvitiia [Judicial Power in Contemporary Russia: Problems of Formation and Development]. Lan' publishing house, St. Petersburg, 2001, p. 214.

[84] E.V. Romanova, advocate of Sverdlovsk Oblast College of Advocates, interview by A. Burkov. May 4, 2008.

[85] The same reason was given for lack of references to the ECHR case-law. See: Chapter 8.

higher court will quash a judgment if a relevant Regulation is not taken into account. Judges generally explain this contradictory situation by "prevalent practice." They did not point to legislation requiring it.

Unlike judges, advocates, as well as staff attorneys of NGOs, openly say that they consider Regulations to be a source of law, and that they use Regulations in their legal practice. Moreover, litigators say that in their written submissions to the court they refer to specific Regulations used to support legal arguments.

Mitin, Chairman of Sverdlovsk Oblast College of Advocates stated:

We tested the obligatory character of Regulations and consider this characteristic necessary. Practice speaks for the obligatory character of Regulations. I personally have been referring to Regulations for 30 years of my legal practice [...] Regulations supplement legislation. Any legal practitioner, an advocate in particular, simply must be familiar with explanations by the Plenum of the Supreme Court. All practitioners, judges in particular, consider Regulations obligatory[86].

In general, this point of view is representative of the opinions expressed by the interviewed litigators. Another Deputy Chairman of Sverdlovsk Oblast College of Advocates, Fyodorov, added that "judges prefer Regulations to Federal statutes"[87].

The interviews with legal professionals gave strong support to the view that, whilst superficially Regulations appear to be no more than non-binding documents "for internal use only" by the judiciary, they have great weight in the administration of justice. Partially hidden from the public eye, it is apparent that Regulations are powerful, quasi-legislative instruments— "shadow ruler" (*serii kardinal*) or real—hidden determinants of law. The Supreme Court encourages judges to use Regulations without providing references to them. This is very odd: referring to the source of law used in a judgment is the golden rule of legal technique. If one uses a Regulation by the Plenum of the Supreme Court in addition to the statute, why not acknowledge this fact? There has to be a weighty argument for such a policy.

It seems that the Supreme Court does not want to demonstrate its real legislative power. If a judge takes the text of a Regulation, pastes it into the judgement, and then does not refer to the Regulation from which the text was taken, the decision looks like a conventional application of a statute interpreted by the judge himself. As a result, we have a "uniform implementation" of statutes rather than Regulations. Officially, on the surface, implementation of Regulations appears to be judicial invocation of statutes; in reality, it is the Regulations, not the statutes, which are being implemented. Officially, under the Constitution, the State Duma is the legislature.

[86] A.M. Mitin. Chairman of Sverdlovsk Oblast College of Advocates, interview by A. Burkov. September 25, 2007.

[87] I.N. Fedorov. Deputy Chairman of Sverdlovsk Oblast College of Advocates, interview by A. Burkov. September 25, 2007.

In practice it operates alongside another, even more efficient legislative-making body: the Plenum of the Supreme Court.

Accurate and consistent implementation of Regulations is ensured by the responsibility of judges for their decisions. Both litigators and judges, when interviewed, made it clear that—for professional reasons—it is very important for a judge to ensure that his or her decisions are quashed as seldom as possible. Judges are aware that implementation of legal positions of the Supreme Court expressed in Regulations is a guarantee that their decisions will not be quashed[88].

This phenomenon has its roots in the past. During the Soviet period (and it is true today), the quality of administration of justice is measured by the stability of decisions. Todd Foglesong explained this situation:

A judge's performance rating, potential bonus, professional reputation, and future career depended closely on his rate of reversal, or on its obverse, "stability of sentences" (*stabil'nost' prigovorov*). Stability of verdicts and sentences served as the main measure of the quality of a judge's work. [...] There were also a host of "organizational conclusions" which might be drawn about judges reversed too often — such as disciplinary proceedings, a "grilling" (*razbor*) at the presidium of the regional court, and occasionally even a recall (*otziv*). The prospect of reversal in Soviet Russia thus was inherently coercive. It created strong and tangible incentives for trial court judges to both anticipate and abide by the regional court's view of the law[89].

The responsibility could be of different levels. Their decisions are likely to be quashed by a higher court if judges do not take into account legal positions expressed in Regulations. Other things being equal, the more often a judge is reversed, the less likely he or she will be promoted; the judge might even be stripped of judicial authority, or not recommended for permanent position. The consequences of not knowing and applying Regulations are concisely expressed by Chief Justice of Oktiabr'skii District Court Valova:

Judges must know and study Regulations. If judges are not familiar with Regulations, then they simply cease being judges[90].

Conclusion

The nature and practice of promulgation and execution of Regulations indicate that Regulations should be regarded as a source of law since they not only provide interpretation of laws, but go beyond. Regulations are not judge-made law, but are

[88] A.V. Demeneva. A consultant of the Administration of Ombudsman of Sverdlovsk oblast and coordinator of study programmes of NGO Sutyajnik, interview by A. Burkov. September 27, 2007.

[89] Foglesong. The Reform of Criminal Justice and Evolution of Judicial Dependence in Late Soviet Russia. p. 287.

[90] M.A. Valova. Chief Justice of Oktiabr'skii District Court of Yekaterinburg, interview.

normative, administrative acts issued by judges outside the course of administering justice.

Under the civil law tradition of the Russian Federation—and especially under the Soviet law tradition where administrative bodies, even more than legislature, played a crucial part in making legal norms—Regulations as administrative normative acts are the most appropriate form of normative acts for making judicial practice consistent.

Second, despite unclear status of Regulations and doctrinal debate in this regard, it is beyond dispute that legal professionals treat Regulations as binding. The reasons for this conclusion are: in a civil-law tradition, the non-judicial nature of Regulations as normative acts makes it easier for professionals to treat them as if they were obligatory than would be the case if they emerged from the Supreme Court's appellate functions; the substance of Regulations can, in effect, change the law contained in statutes; and there is an effective follow-up procedure for ensuring that Regulations are implemented, including general review and case-by-case cassation review of implementation of Regulations by lower courts, and adverse professional consequences for judges who do not follow Regulations.

With some exceptions, it is clearly the policy of the Supreme Court to make judges implement Regulations while discouraging them from acknowledging that they are doing so. Such practice makes Regulations a hidden source of law, effective in securing consistent interpretation of legislation by national courts, and, indeed, sometimes extending or altering the scope of legislation.