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Are Russian Courts Capable of Creating Precedents? Overcoming Inconsistency in Case Law

Kirill Koroteev

Abstract

This article discusses the issue of the consistency of judicial decisions in two of Russia's highest courts: the Supreme Court and the Higher *Arbitrazh* Court. The President of the latter has been especially vocal in advocating for the "introduction of the doctrine of precedent into Russian law". This idea, understood as the power to bind lower courts by judgments in individual cases, has even received support from the RF Constitutional Court. However, this article stresses that before discussing whether there may—or may not—be a place for judicial precedent in Russia, the judgments of the two highest courts must be consistent. We examine one particular issue that lends itself to a number of possible solutions: the judicial review of internal circulars from federal bodies of executive power. The case law of the two courts has been marked by U-turns in dealing with this matter. They sometimes have issued completely different judgments in similar cases over a short period of time, while failing to explain why their rulings differ from earlier judgments. The author argues that this inconsistency gives witness to a number of fundamental flaws in judicial decision-making in Russia and undermines any discourse in support of precedent in Russia.

Keywords

administrative law, doctrine of precedent, judicial review, Russian Higher Arbitrazh Court, Russian Supreme Court

1. Introduction

There has been no lack of discussion of precedent in Russian law in the last twenty years at the very least. As the author has argued elsewhere, this issue has become so divisive that a scholar's opinion on this matter has even become a criterion for being placed among the "liberals" (those who recognize the authority of precedent, at least with respect to the judgments of the Constitutional Court) or the "conservatives" (those who do not).[1] Traditionally, legal scholars would ponder whether judgments of the Constitutional Court or plenary resolutions of the Supreme Court and the Higher *Arbitrazh* Court constitute a 'source of law' or an 'interpretative precedent' or both.[2] With respect to the RF Constitutional

1 Kirill Koroteev, "Pravovye pozitsii Konstitutsionnogo Suda RF: Element protsessa ili norma prava?", 9 *Zakon* (2009), 61-68, at 61-62.

2 See, for example, Mikhail Marchenko, "Iavliaetsia li sudebnaia praktika istochnikom rossiiskogo prava?", 12 *Zhurnal Rossiiskogo prava* (2000), 11-21; Natal'ia Podolskaia, "K voprosu o poniatii pretsedenta kak istochnika prava (obshcheteoreticheskii aspekt)", in *Sudebnaia praktika kak istochnik prava* (Iurist,

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Court, it is clear that judgments that strike down a statutory provision (or that are, in general, capable of striking it down) create new legal rules,[3] for, as clear as it is, "annul a statute means create a general legal rule, because abolishing a statute has the same general effect as its enactment".[4] With respect to the RF Supreme Court, a recent study argues that plenary resolutions, indeed, are infra-legislative (administrative) regulatory acts internal to the judicial branch.[5]

What remains completely beyond debate are the judgments of the Supreme Court and (albeit to a lesser degree, where commercial law is concerned) the Higher *Arbitrazh* Court in individual cases. Undoubtedly, just like the St. Petersburg-based Constitutional Court does, when they strike down a regulatory act from the executive (both have jurisdiction to do so), they create a new legal rule. The concern of Russia's top courts is, however, much more ambitious: to bind lower courts (and, when this conerns the RF Constitutional Court, also to bind the two Moscow-based courts of last resort) by the reasoning of their judgments as if they were precedents producing *erga omnes* effects. The Higher *Arbitrazh* Court has been especially active in the field, developing its own legal opinions which are intended to be binding on lower courts and even successfully lobbying for amendments to the 2002 RF *Arbitrazh* Procedure Code allowing the judges exercising supervisory review to refer cases back to the commercial courts of the federal circuits (competent to hear appeals on points of law) without considering whether the Presidium of the Higher *Arbitrazh* Court has issued a judgment on the matter in another case. The constitutionality of these provisions was upheld by the Constitutional Court in early 2010 in its *"Bereg"* judgment,[6]

Moscow, 2000), 149-153, at 152; and Will Pomeranz and Max Gutbrod, "The Push for Precedent in Russia's Judicial System", 37(1) *Review of Central and East European Law* (2012), 1-30. A former Vice President of the Supreme Court has argued that the *jurisprudence* (or case law) can only be found in the resolutions of the plenary of the Supreme Court. See Viktor Zhuikov, "K voprosu o sudebnoi praktike kak istochnike prava", in *Sudebnaia praktika kak istochnik prava* (Iurist, Moscow, 1997), 16-23, at 16. *Jurisprudence* in italics is used to denote the French meaning of the term, *i.e.*, a body of judicial decisions (usually made by the court of last resort in a given jurisdiction).

3 As regards the binding force of 'legal opinions', many scholars welcome it, and the Constitutional Court insists on it, even though there is no basis for it in either the Constitution or in the statutes applicable to the proceedings before the Constitutional Court (which no longer contain the notion of legal opinions). For an overview of legal scholarship on the matter, see Ol'ga Kriazhkova, *Pravovye pozitsii Konstitutsionnogo Suda Rossiiskoi Federatsii: Pravovye osnovy i praktika realizatsii sudami Rossii* (Formula prava, Moscow, 2006), 41-47. The author of the present article took a position that denied the binding force (but not interpretative value) of the reasoning of the Constitutional Court in *supra*, note 1, 64-68.

4 Hans Kelsen, "La garantie juridictionnelle de la Constitution (la justice constitutionnelle)", 2 *Revue du droit public* (1928), 197-257, at 224. Unless otherwise noted, all translations in this article are by the present author.

5 A detailed analysis of the nature of the plenary resolutions of the Supreme Court of the USSR, the Russian Soviet Federative Socialist Republic and the Russian Federation can be found in Anton Burkov, *Konventsiia o zashchite prav cheloveka v sudakh Rossii* (Wolters Kluwer, Moscow, 2010), 111-115.

6 RF Constitutional Court, Postanovlenie (21 January 2010) No.1-P, *ZAO Proizvodstvennoe ob"edinenie "Bereg" et al., Sobranie zakonodatel'stva Rossiiskoi Federatsii (SZ RF)* (8 February 2010) No. 6 item 699.

hailed (or decried) by the practitioners and scholars concerned as confirmation of the precedent-setting value of the judgments of the Higher *Arbitrazh* Court.[7]

It should be noted at the outset that Russia's top courts function independently of one another, that there is no body (yet) entrusted with the task of harmonizing their *jurisprudence*. The RF Supreme Court and the RF Higher *Arbitrazh* Court, relatively often, may apply the same substantive—but not procedural—law, and issue joint plenary resolutions. However, such resolutions are extremely rare and require consensus be reached between the two courts, which may be lacking on a number of issues (some of which will be examined in this article). The Constitutional Court is competent to strike down unconstitutional statutory provisions, but it has no power to quash judgments of the other two top courts.

Obviously, the question whether a particular judgment may be qualified as precedent in the legal sense depends not only on the applicable rules of procedure but, also, on the way in which the court provides reasons for its decisions. If a higher court has consistent *jurisprudence* and routinely quashes lower courts' judgments which are at variance with the higher court's approach, lower courts will have to follow the reasons adopted by the higher court—at least out of the fear that, otherwise, their judgments might be quashed.[8] To summarize, this is just an application of the constitutional principle of legal certainty, and concern for this can be found in most high courts in continental systems. It is not the author's intention to develop here a consistent and comprehensive theory of the meaning of precedent; because the notion necessarily refers to common-law systems, the author will limit himself to the observation that, in the latter, the role of the courts also includes making decisions by comparing the facts of the case at hand to the facts of previous cases. The reasons for judgments matter whatever the system is.[9]

What the author intends to discuss in this article is that precisely the *jurisprudence* of both the Supreme Court and the Higher *Arbitrazh* Court lack this crucial latter element [The reader will not recall with precision which this 'latter' element is. Please specify here.] and, what is even worse, the judges on these courts rarely show any concern about the consistency in the approaches to

7 See, *inter alia*, Gadis Gadzhiev, "Metodologicheskie problemy 'pretsedentnoi revoliutsii' v Rossii", 4 *Zhurnal konstitutsionnogo pravosudiia* (2013), 5-8; Ol'ga Makarova, "Pravilo pretsedenta i ego primenenie v praktike Rossiiskikh arbitrazhnykh sudov", 1 *Zakony Rossii: opyt, analiz, praktika* (2012), 23-27; Aidar Sultanov, "Vosstanovlenie narushennykh prav i pravovaia opredelennost'", 4 *Rossiiskaia iustitsiia* (2011), 58-61; and Aleksandr Vereshchagin, "O znachenii Postanovleniia Konstitutsionnogo Suda Rossiiskoi Federatsii ot 21 ianvaria 2010 g. N1-P dlia sudebnoi sistemy Rossii", 3 *Vestnik grazhdanskogo prava* (2010), 183-197.

8 Other reasons may also be relevant; see, for example, Pauline Kim, "Lower Court Discretion", 82 *New York University Law Review* (2007), 383-442.

9 For a thorough study of the contemporary meaning of the notion of precedent in English law, see, for example, Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, Cambridge, 2008), especially at 58 *et seq*.

law which they endorse. After a brief discussion of the Constitutional Court's treatment of the powers of the ordinary high courts to bind lower courts by their judgments, the author will turn to a discussion of the matters of the consistency of the *jurisprudence* of the two Moscow-based top Russian courts on one matter common to them both: their jurisdiction to hear applications for judicial review of ministerial circulars. A very brief discussion of a more general question of the definition of a regulatory act by both courts will be required beforehand.

2. Constitutional Powers to Bind Lower Courts?

By a 2008 Plenary Resolution (No.14),[10] the Higher *Arbitrazh* Court introduced a measure for dealing with applications for supervisory review: it allowed a filtering panel of three judges to refer cases back to the commercial courts of the federal circuits for a fresh hearing of appeals on points of law if, within six months after the original judgment of the federal circuit court, there was a supervisory review judgment of the Higher *Arbitrazh* Court in another case in which a new interpretation of the applicable law was given, as if this new interpretation was a new circumstance calling for the reopening of the case.

This arrangement has been challenged before the Constitutional Court, which upheld its constitutionality. According to the majority ruling in *"Bereg"*,[11] the requirement that the lower commercial courts refer, in their reasoning, to the judgments of the Higher *Arbitrazh* Court handed down in other individual cases was a mere reflection of the latter's role with respect to providing clarification on matters related to the application of the law enshrined in Article 127 of the Constitution, and the courts' obligation to apply statutes if any lower norms (implying the judgments or legal opinions of the Higher *Arbitrazh* Court) were deemed contrary to them remained unaffected. Assessing the constitutionality of the challenged arrangements, the Constitutional Court noted that they had only been adopted to facilitate the filtering of applications for supervisory review. It further observed that:

> "in the Russian legal system, the interpretation of statutes by higher judicial bodies has an important influence on the creation of *jurisprudence*. As a general rule, [the interpretation of the higher courts] is, based on the higher courts' powers to quash or modify judicial decisions, *de facto* binding on the lower courts for the future".[12]

The Constitutional Court then elaborated a number of criteria concerning the possibility of the retrospective application of judicial interpretation, *e.g.*, the ne-

10 RF Higher *Arbitrazh* Court (plenary session) (14 February 2008) No.14, "O vnesenii dopolnenii v Postanovlenie Plenuma Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii ot 12.03.2007 N17 'O primenenii Arbitrazhnogo protsessual'nogo kodeksa Rossiiskoi Federatsii pri peresmotre vstupivshikh v zakonnuiu silu sudebnykh aktov po vnov' otkryvshimsia obstoiatel'stvam'", *Vestnik VAS RF* (hereinafter, "*VVAS*") (2008) No.3, 54.

11 *"Bereg" et al., op.cit.* note 6.

12 *Ibid.*, para. 3.4 of the Court's reasoning.

cessity to comply with the constitutional prohibition of retrospective aggravation of the situation of taxpayers (Art.54 of the Constitution) and that the Presidium of the Higher *Arbitrazh* Court should explicitly identify which of its judgments are susceptible to retrospective application.

The paragraph on the constitutional power of higher courts to bind lower courts with their interpretations could have sparked a debate among judges. This was the first time in Russian legal history that such a declaration had been made. The *de facto caveat* was clearly necessary. The drafting history of the 1993 Constitution makes it clear that no judicial reasoning is binding on the courts (the operative parts of judicial review judgments are obviously not concerned by these considerations), however inconvenient this may be. Indeed, the idea is that plenary resolutions of the high courts no longer are "guiding explanations on matters of the application of law" but mere "explanations".[13] Article 120(2) of the Constitution strengthens this message by requiring the courts to apply statutes and not lower norms if there is a contradiction between the two. Contrary to the expectation of a heated debate, the only dissent in the *Bereg* case was that of the judge-rapporteur, Gennadii Zhilin (a former Supreme Court judge specializing in civil matters) who (quite rightly) objected to the procedure for the adoption of the filtering arrangements. In his view, it fell on the legislature, not the plenary session of the Higher *Arbitrazh* Court, to adopt them.[14]

But the aim of the present article is not to challenge the Constitutional Court's finding that the other two top courts have constitutional powers to bind lower courts by their interpretations. Assuming, for the sake of argument, that this is possible under the 1993 Constitution, the main focus will be on the question of whether the Supreme Court and the Higher *Arbitrazh* Court create consistent *jurisprudence* which the lower courts reasonably may be required to take into account in rendering their own judgments. Only if this condition is satisfied can further inquiries be made into whether the two higher courts are capable of creating case law by comparing the facts of different cases.

There are some branches of law in which both high courts operate simultaneously (civil law, taxation, administrative offenses, etc.), but they often apply different rules (the Supreme Court applies rules concerning natural persons, while the High Commercial Court applies those concerning legal persons and entrepreneurs). But both courts exercise judicial review of the regulatory acts of the federal executive, and the criteria for admissibility of applications against

13 This was raised on numerous occasions during the meetings of the Constitutional Convention (*Konstitutsionnoe Soveshchanie*) in 1993 and found little opposition.

14 There is one more separate (*osoboe*), but not dissenting, opinion, authored by Justice Mikhail Kleandrov, himself a former commercial court judge. He took the position that the Constitutional Court had wrongly avoided an opportunity to recognize the positive obligation of the commercial courts to refer to the supervisory review judgments of the Higher *Arbitrazh* Court. Separate Opinion of Judge Kleandrov in the *"Bereg" et al.* case, *op.cit.* note 6.

those acts—albeit found in different codes of procedure—are worded similarly. For that reason, acceptance or refusal to hear cases involving the judicial review of ministerial circulars is an issue which can be used to compare the approaches of the two courts. Several preliminary remarks concerning the notion of regulatory acts should be made, however, before dealing with the bulk of the relevant cases.

3. Definition of a Regulatory Act

Russian scholars of legal theory have provided an abundant choice of definitions of *normativnyi akt* ("regulatory acts"), all of which include the following elements: rules contained in a regulatory act are addressed to an unidentifiable number of persons, the act is intended to be applied a non-predetermined number of times, and it is valid regardless of the existence of specific legal relations (*pravootnosheniia*).[15] As will be shown below, the fact that doctrine, legislation and case law focus on the notion of regulatory acts—rather than on that of legal rules—leads to controversies as to whether an act which contains a legal rule (but is not in the form of a regulatory act) can be challenged by way of judicial review.

The Supreme Court itself defines a regulatory act as:

> "an act adopted according to a prescribed procedure by a duly empowered body of state power, of local government or by a public official, which establishes legal norms (rules of conduct) binding on an unidentifiable number of persons and intended for repeated application".[16]

It should be noted that the Higher *Arbitrazh* Court defines the notion of a regulatory act in precisely the same way.[17] However, when it comes to the application of the general idea in specific cases, the two highest courts arrive at very different conclusions (see, in particular, the issue of ministerial circulars, below).

This definition presupposes that the necessary procedures that need to be followed in order to adopt an act have been observed, *i.e.*, if a material stage of procedure has not been observed, a document cannot be considered a regula-

15 See, *inter alia*, Valerii Lazarev and Sergei Lipen', *Teoriia gosudarstva i prava* (Spark, Moscow, 1998), 235; Anatolii Vengerov, *Teoriia gosudarstva i prava* (Iurist, Moscow, 1998), 406; and Aleksandr Cherdantsev, *Teoriia gosudarstva i prava* (Iurait, Moscow, 1999), 219.

16 RF Supreme Court (plenary session) (20 January 2003) No.2, "O nekotorykh voprosakh, voznikshikh v sviazi s priniatiem i vvedeniem v deistvie Grazhdanskogo protsessual'nogo kodeksa Rossiiskoi Federatsii", *Rossiiskaya gazeta* (25 January 2003), para. 19. This definition can be found verbatim in V.M. Korelskii and Viktor Perevalov (eds.), *Teoriia gosudarstva i prava* (Infra-M, Norma, Moscow, 2000), 297. The Supreme Court's definition refers to the 'bodies of state power' as authors of regulatory acts, which is overly restrictive. Indeed, Arts.10(1) and (2) of the RF Constitution specify that 'state power' in Russia is exercised by the President of the Russian Federation, the Federal Assembly, the Federal Cabinet, the courts and the regional legislatures and executives. Federal and regional ministries and other executive agencies do not exercise state power under the Constitution. It would have been more correct to say in the definition that state bodies (including both those bodies that exercise state power and those that do not) can author regulatory acts.

17 RF Higher *Arbitrazh* Court (23 December 2002) No.9181/02, *Obshcherossiiskii soiuz obshchestvennykh organizatsii invalidov*; and (13 February 2003) No.10462/02, OOO *Iuridicheskaia firma "Pravovoi Profil" v. MinFin RF v litse YFK Saratovskoi oblasti*, both *VVAS* (2003) No.5.

tory act and thus cannot be challenged as such. According to Viktor Zhiukov, a former Vice President of the Supreme Court:

> "If a legal act does not correspond to certain criteria, whether in substance or in form, procedure of adoption and publication, it cannot be considered as a regulatory act, be applied or challenged as such."[18]

One consequence of this approach is the confusion which is created between one criterion for admissibility with respect to an application for judicial review (for an act to be challenged, it must be adopted in accordance with the required procedure) and another criterion related to the legality of regulatory acts (an act adopted following an incorrect procedure is illegal and should be declared null and void).

An issue highlighting a contradiction between the form of regulatory acts and their substance arose in a 2006 case decided by the Constitutional Court. A regional publicly owned company challenged the regional statute which had provided for the company's privatization. The regional court first ruled that the challenged act—albeit adopted in statutory form normally reserved for regulatory acts—indeed was an individual act, so that the case had to be examined by a district court in the first instance. The Supreme Court ordered the case to be examined on its merits because the act adopted in the form of a statute was to be considered as regulatory *per se*. In the second set of proceedings, the regional court suspended the consideration of the case and applied to the Constitutional Court for a preliminary ruling. The latter, however, dismissed the referral, ruling that the case lacked uncertainty, the decision whether a regional statute containing individual rules was an individual (regional court's position) or a regulatory (Supreme Court's position) act had to be decided by the courts of common jurisdiction in order to determine which of them was competent to hear the case, a matter with which the Constitutional Court could not interfere.[19] Even though more guidance from the Constitutional Court could have been expected on this issue, its refusal to consider the case on its merits meant that the Supreme Court's approach—according to which even an individual rule contained in a statute does not affect its regulatory nature—remained in force.[20]

18 Viktor Zhuikov, *Problemy grazhdanskogo protsessual'nogo prava* (Gorodets, Moscow, 2001), 120-121.

19 RF Constitutional Court, Opredelenie (12 July 2006) No.181-O, "Ob otkaze v priniatii k passmotreniu zaprosa Kaliningradskogo oblastnogo suda o proverke konstitutionnosti polozhenii pumkta 2 chasti pervoi stat'i 26 i chasti pervoi stat'i 251 Grazhdanskogo protsessual'nogo kodeksa Rossiiskoi Federatsii" (unpublished), available at www.ksrf.ru. All unpublished judgments of the Russian Constitutional Court referred to in this article are available on the Court's website <www.ksrf.ru>.

20 The original case eventually was heard, but the Supreme Court terminated the proceedings because the application concerned a rule which no longer was valid. RF Supreme Court (17 January 2007) No.71-G06-35, *OAO FPK"Kaliningradprom" and OOO TPK "Stroiservis" (*unpublished), available at <www.supcourt.ru>. All unpublished judgments of the RF Supreme Court to which reference is made in this article are reproduced at <www.supcourt.ru>. Further measures aimed at the privatization of regional public property, adopted in the form of a statute containing individual rules, were considered on their merits by the RF Supreme Court (13 August 2008) No.71-G08-19, *OAO FPK"Kaliningradprom".*

4. Judicial Review of Executive Circulars

An issue that has been raised by the definition of regulatory acts—which has been provided in the case law of both the Supreme Court and the Higher *Arbitrazh* Court since the beginnings of judicial review in Russia—is whether it is open for both individual applicants and public authorities to seek judicial review of ministerial circulars.[21] These are acts that are normally internal to the relevant ministerial administration and are issued in the form of letters (or even telegrams) from the relevant minister to her or his subordinates and the ministry's regional departments. The 1997 Regulatory Acts Adoption Rules[22] for the first time explicitly prohibited the issuing of regulatory acts in the form of letters or other circulars which were not subject to official registration with the Ministry of Justice. No such prohibition could be found in presidential edicts or those of the Federal Cabinet adopted prior to 1997.

It may be said that, in view of this prohibition, these circulars cannot contain legal norms and they cannot be challenged before a court for this very reason. However, is there a sanction if ministers do not observe this prohibition? The case law of both the Supreme Court and the Higher *Arbitrazh* Court is ambiguous and inconsistent. In some cases, judges indeed declare inadmissible applications for judicial review which are directed against these circulars since the applications do not challenge a valid regulatory act. In other cases, they have admitted applications and struck down the circulars for failing to adopt legal rules in accordance with the required procedure (due form, publication, official registration with the Ministry of Justice). In yet other cases, the judges involved have assessed the conformity of the legal rules found in challenged circulars with the applicable statues and hierarchically superior secondary legislation. In the face of such diverse case law, the author will seek to discover whether there are general principles which can help make sense out of apparently contradictory individual judgments.

4.1. Judicial Review of Pre-1997 Circulars by the Supreme Court

The author asserts that most of the cases where pre-1997 circulars had been issued implicitly followed a pattern of analysis which can be formulated by induction. The entry into force of the Regulatory Acts Adoption Rules on 18 August 1997 is the borderline date which may explain most of, but not all, the judgments of the Supreme Court on the judicial review of circulars (currently more than 25

21 The first publicly available judgment in a case on this matter dates back to 1996: RF Supreme Court (26 December 1996) No.GKPI 96-325-339 and No.GKPI 96-325-346 (Presidium) (3 June 1998), *V.G. Zharov et al.*

22 Postanovlenie Pravitel'stva RF "Ob utverzhdenii pravil podgotovki normativnykh pravovykh aktov federal'nykh organov ispolnitel'noi vlasti i ikh gosudarstvennoi registratsii" (13 August 1997) No.1009, *SZ RF* (1997) No.33 item 3895 (hereinafter the "1997 Regulatory Acts Adoption Rules" or the "1997 Rules").

judgments are publicly available on the matter). The vast majority of Supreme Court cases of the judicial review of circulars (at least 18 judgments by the Civil Division, five of which were considered by the Appeals Division) concern circulars which were adopted prior to the adoption of the 1997 Rules. Consequently, the prohibition on issuing regulatory acts in the form of circulars did not apply to them. Instead, the Supreme Court carries out a three-fold review process with respect to older circulars.

First, the Court ensures that the impugned circular contains a legal rule that affects the rights and interests of the applicant (if there is no such rule, the application is dismissed for lack of legal interest to bring a judicial review case). If there is such a rule, however, the Court moves on to the *second stage*, determining whether the circular under review has been published and, if necessary, officially registered with the Ministry of Justice. Contrary to its above-mentioned approach to the judicial review of unpublished decrees, rather than dismissing the application as directed against a document which lacks the features of a regulatory act, the Court will strike down the circular for violating procedure. When faced with a published circular (officially registered with the Ministry of Justice, if required), however, the Court, at the *third stage*, assesses the conformity of the legal rule found in the circular with hierarchically superior legal rules.

The *first two stages* of the Supreme Court's analysis may be illustrated by a 1998 case where a judge in the Civil Division struck down part of a telegram from the Ministry of Labor. Following the entry into force of new legislative acts on state pensions, the impugned telegram instructed local social-security departments not to apply specific paragraphs contained in prior ministerial regulations, which themselves had been published and registered with the Ministry of Justice. The judge ruled that this instruction was binding, and effectively put an end to the application of the published regulatory acts; so, the procedure to be followed in order to adopt it had to be the same as that of the regulations which it affected. Such a procedure (which had to include official registration of the regulatory act with the Ministry of Justice) was not followed when the telegram was sent out; so, it had to be annulled. The remaining paragraphs of the telegram, however, were only found to contain information lacking a normative nature (including the instruction to apply a new statute instead of an old one, which, according to the judge, added nothing to the legal order), and the remainder of the application was dismissed.[23]

There is also another case which failed at the first stage of the Supreme Court's analysis. An individual applicant and a company had challenged a joint instruction (adopted by a joint circular) from the Central Bank of the Russian Federation (Bank of Russia) and the State Customs Committee on control pro-

[23] RF Supreme Court (10 July 1998) No.GKPI 98-239, *Iu.V. Udotova*.

cedures for payments for imported goods in foreign currency.[24] The Ministry of Justice, a single judge from the Civil Division and a panel from the Appeals Division of the Supreme Court found that the instruction did not require official registration. The reason was that the instruction did not affect the rights and freedoms of citizens not because it was related to the internal organization of the Bank of Russia and/or the State Customs Committee, but because it applied only to legal persons and not to natural persons—however surprising this conclusion may have seemed.[25]

Another case from 1998[26] illustrates the second stage of the test. The applicant challenged a number of unpublished circulars and other acts from the Federal Migration Service (*FMS*) relating to the status of internally displaced persons (IDPs) who had left the Chechen Republic following the beginning of hostilities in late 1994. The respondent argued that the impugned acts related to the internal organization of the *FMS* and did not require registration with the Ministry of Justice and subsequent publication. The Ministry of Justice argued that all but one of the acts in question did require official registration while the remaining did not because they only indirectly affected human rights and freedoms. The Supreme Court found that the challenged acts were regulatory (notably for the reason that one of them contained a form to be filled in by potential IDPs), and determined that the applicable presidential edicts—as well as those of the Federal Cabinet [What is the Federal Cabinet in transliteration?]—made no distinction between those regulatory acts directly affecting human rights and those with only indirectly affecting individuals. The Court, thus, rejected the arguments of the *FMS* and Ministry of Justice. In upholding the applicant's claims, the Supreme Court explicitly stated that it was not called upon to rule on the compliance of particular rules contained in *FMS* acts with the relevant legislative rules.[27] It was of the opinion that such a review was not to be conducted prior to the Ministry

24 Instruktsiia Tsentral'nogo Banka Rossii i Gosudarstvennogo Tamozhennogo Komiteta RF "O poriadke osushchestvlenia valiutnogo kontrolia za obosnovannostiu platezhei v inostrannoi valiute za importiruemye tovary" (26 July 1995) No.30 and No.01-20/10538, *Vestnik Banka Rossii* (1998) No.48, and *Tamozhennye Vedomosti* (1996) No.1.

25 RF Supreme Court (1 November 1999) No.GKPI 99-790, and (16 December 1999) No.KAS 99-345, *I.V. Nebroeva and OOO "Olial"*.

26 RF Supreme Court (21 January 1998) No.GKPI 97-467, *V.D. Zolotukhin.*

27 The Supreme Court reached similar conclusions in a number of cases; in particular in the following: RF Supreme Court (18 November 1997) No.GKPI 97-398/399, *G.P. Khariuchi and E.I. Iamru*; (13 January 1998) No.GKPI 98-744, and (10 March 1999) No.KAS 99-5, *S.V. Basalaev*; (30 July 1998) No.GKPI 98-237, Gosudarstvennoe predpriiate *"Natsional'nye Fond Sodeistviia Invalidam Rossiiskoi Federatsii"*; (6 August 1998) No.GKPI 98-300, *I.V. Cherniavskaia*; (18 February 1999) No.GKPI 99-58 and (18 March 1999) No. KAS 99-9, ZAO *Reinfor Plius and O.O. Sitnin*; and (14 November 2000) No.GKPI 2000-1038, *V.K. Zabavin.* In all these cases, the major controversy between the parties concerned the question of whether the impugned acts affected the applicants' rights, freedoms and legitimate interests. Once this was established in the applicants' favor, the Supreme Court would strike down the circulars at issue without hesitation.

of Justice's examination of the conformity of said *FMS* acts with the applicable legislation in the course of the Justice Ministry's official registration procedures.

An example of the *third stage* of the judicial review of circulars can be found in a case in which a local authority challenged a joint circular from the Ministry of Finance and the Ministry of Social Protection relating to the payment of financial support for large families.[28] The circular provided, among other things, for the reimbursement of a number of social benefits which had to be offered to large families—in particular by private companies—from local council budgets. The applicant authority relied on the 1995 General Principles of Local Government Act,[29] according to which any expenditures of local authorities which follow from decisions of federal or regional bodies were to be reimbursed by those bodies. The Supreme Court examined the conformity of the circular with the Act referred to by the applicant authority, as well as with the 1998 Budgetary Code[30] and the 1997 Financial Basis of Local Government Act.[31] It accepted the reasoning of the applicant authority and annulled the impugned paragraph of the circular.[32] The Supreme Court did not rule on whether it had jurisdiction to exercise judicial review of a circular in this case, but immediately proceeded to issue a ruling on the merits of the application. Not only did the respondent ministries fail to object to the admissibility of the application, they explicitly admitted that a valid regulatory act was under the Supreme Court's review.

This is due to the fact that the circular dated back to June 1992, while the requirements of official registration and publication of regulatory acts of the federal executive were adopted and entered into force as of 1 March 1993[33] (in any event, the respondent ministries complied with these requirements) and did not contain a prohibition on issuing regulatory acts in the form of circulars until

28 Pis'mo MinFina Rossii i MinSotszashchity Rossii "O finansirovanii meropriiatii po sotsial'noi podderzhke mnogodetnykh semei" (29 June 1992) No.51 and (26 June 1992) No.1-2359-18, *Biulleten' normativnykh pravovykh aktov federal'nykh organov ispolnitel'noi vlasti Rossiiskoi Federatsii* (1992), No.11-12. Not only was the letter published, it also was officially registered with the RF Ministry of Justice.

29 RF Federal'nyi Zakon "Ob obshchikh printsipakh organizatsii mestnogo samoupravleniia v Rossiiskoi Federatsii" (28 August 1995) No.154-FZ, *SZ RF* (1995) No.35 item 3506 (hereinafter the "General Principles of Local Government Act").

30 RF Federal'nyi Zakon "Biudzhetnyi kodeks RF" (31 July 1998) No.145-FZ, *SZ RF* (1998) No.31 item 3823.

31 RF Federal'nyi Zakon "O finansovykh osnovakh mestnogo samoupravleniia v Rossiiskoi Federatsii" (25 September 1997) No.126-FZ, *SZ RF* (1997) No.39 item 4464 (hereinafter the "Financial Basis of Local Government Act").

32 RF Supreme Court (26 March 2003) No.GKPI 03-139, *Administratsiia munitsipal'nogo obrzovaniia "Primorskii Raion"*.

33 Ukaz Presidenta RF "O normativnykh aktakh tsentral'nykh organov gosudarstvennogo upravleniia Rossiiskoi Federatsii" (21 January 1993) No.104, *Sobranie aktov Prezidenta i Pravitel'stva* (hereinafter *SAPP*) (1993) No.4 item 301; and Postanovlenie Soveta Ministrov-Pravitel'stva RF "Ob utverzhdenii pravil podgotovki vedomstvennykh normativnykh pravovykh aktov" (23 July 1993) No.722, *SAPP* (1993) No. 31 item 2857.

August 1997. In the same vein, the Supreme Court, without further elaboration, ruled on the merits of applications directed against circulars adopted between March 1993 and August 1997 which officially had been registered with the Ministry of Justice and published.[34]

Contrary to this well-established case law, in a 1999 case it was held—by a single judge from the Supreme Court's Civil Division, as well as a panel from the Appeals Division—that a challenged circular which had not been registered with the Ministry of Justice was not a valid regulatory act subject to judicial review.[35] The case concerned the 1996 Rules of Forensic Examination of Bodily Harm,[36] which listed medical criteria for establishing bodily harm and which are referred to in numerous commentaries on the articles of the Criminal Code dealing with the infliction of bodily harm. The Rules were intended to be registered, but the registration had been refused (although the refusal occurred five years after the Rules had been adopted). Whereas scholars have suggested that these Rules be used in distinguishing among grave, medium and minor bodily harm in order to qualify an impugned act under the relevant article of the Criminal Code,[37] the Supreme Court has not referred to them in either its plenary resolutions or in individual cases.[38]

34 See, for example, RF Supreme Court (15 June 2004) No.GKPI 04-729, and (16 September 2004) No.KAS 04-399, *A.M. Koshkarov*, with respect to the joint circular from the Ministry of Social Protection and the Ministry of Finance of 23 March 1993 No.1-707-18 concerning the sale of Zaporozhets cars to the physically disabled. Both the *Koshkarov* and the *Primorskii Raion* cases were heard by Judge Nikolai Romanenkov. A dozen other judgments, both before and after 2003-2004 (and as recently as in 2010), were decided in the same vein: *Zharov et al., op.cit.* note 21; (10 November 1997) No.GKPI 97-391, *V.Iu. Ushakov and AOOT "Investitsionnaia Kompaniia MIF"*; (6 May 1998) No.GKPI 98-112, *Pervvyi Zamestitel' General'nogo Prokurora Rossiiskoi Federatsii*; (30 July 1999) No.GKPI 99-542, and (31 August 1999) No.KAS 99-223, OOO *Okhrannoe predpriiatie "Zashchita" et al.*; (10 August 1999) No.GKPI 99-540, and (1 September 1999) No.KAS 99-244, ZAO *Finist-Travel*; (30 November 2000) No.GKPI 00-1270, *Murmansk Department of the Oktiabrskaia Railway [please insert the transliteration of the party's name]*; (27 February 2001) No.GKPI 00-1403, *V.S. Zorkin*; (3 February 2010) No.GKPI 09-1662 *[please insert the transliteration of the party's name]*; and (30 March 2010) No.KAS 10-137, *L.M. Kochergina*.

35 RF Supreme Court (9 March 1999) (*opredelenie*), and (6 April 1999) No.KAS 99-25, *Zh.A. Afonina*, in respect of the Rules on Forensic Examination of Bodily Harm (Prikaz MinZdrava Rossii "O vvedenii v praktiku pravil proizvodstva sudebno-meditsinskikh ekspertiz" (10 December 1996) No.407, *Meditsinskaia gazeta* (21 March 1997) No. 23).

36 Pis'mo MinIusta Rossii (15 August 2001) No.07/8280-IuD, *Biulleten' Miniusta RF* (2001), No.10.

37 See, among many other examples, Iuliia Nikolaeva, *Ugolovnoe pravo. Osobennaia chast'. Uchebnyi kurs (uchebno-metodicheskii kompleks)* (Tsentr distantsionnykh obrazovatel'nykh tekhnologii MIEMP, Moscow, 2010), paras.2.6.1-2.6.8; and Anatolii Naumov (ed.), *Kommentarii k Ugolovnomy Kodeksu RF* (Iurist, Moscow, 1996), Art.111(9).

38 The Supreme Court only twice referred to the Rules on Forensic Examination of Bodily Harm in individual cases: both references were made to the more recent and published versions of 2001 and 2008. In the first case, the Criminal Division assessed (and eventually dismissed), by reference to the 2001 Rules, which had replaced the 1996 unpublished version (or rather the 1978 version, if the 1996 Rules are to be considered as having never entered into force), the defendant's claim of a procedural irregularity in the conduct of the forensic examinations in his case (RF Supreme Court (25 September

Similarly, in 2002, Judge Vladmir Khamenkov of the Supreme Court's Civil Division dismissed an application for judicial review of a number of letters from the Ministry of Environment and Natural Resources concerning the application of regulations for calculation of environmental duties. Following the case law on unpublished acts of the executive, the judge held that under Article 15(3) of the 1993 Constitution:

> "the rules contained in the unpublished regulatory acts concerning rights, freedoms and obligations of man and citizen cannot be applied and do not produce legal effects, which is why they cannot be examined by way of judicial review".[39]

Given that the letters at issue had not been unpublished and not been registered with the Ministry of Justice, the application against them was declared inadmissible. Neither in 1999 nor in 2002 were any reasons provided as to why the judges decided to derogate from the well-established case law of the Supreme Court. The same approach (again, without any justification for the discrepancies in the case law) can be found in a further dozen cases, including those decided by the Supreme Court's Appeals Division.[40]

4.2. Judicial Review of Post-1997 Circulars by the Supreme Court

The situation regarding circulars adopted after 18 August 1997—when the prohibition on issuing regulatory acts in this form entered into force—evolved from an acceptance of judicial review to its rejection. The three cases which the Supreme Court considered in 1998 had accepted applications directed against ministerial circulars. For example, in the *Kommersant Publishing House* case,[41] a judge from the Civil Division held that the challenged circular of the State Customs Committee contained legal rules and was sent to regional customs departments, but that it was adopted under an illegal regulatory act by the Committee. Thus, it

2006) No.46-O06-63, *A.A. Stefanov*). The second case was the only one where the Medical Criteria for the Determination of Bodily Harm (Prikaz MinZdravsotsrazvitiia Rossii, "Ob utverzhdenii meditsinskikh kriteriev opredeleniia stepeni tiazhesti vreda, prichinennogo zdorov'iu cheloveka" (24 April 2008) No.194n, *Rossiiskaia gazeta* (5 September 2008) No.188), were briefly mentioned in the discussion of the substantive criminal law: the Criminal Division dismissed the defendant's argument that the forensic expert wrongly qualified the injuries inflicted on the victim as life-threatening (RF Supreme Court (2 July 2009) No.59-O09-24, *A.A. Krutelev and S.O. Siniavskii*; interestingly, the reporting judge was Ol'ga Vedernikova who had enjoyed a successful scholarly career, but who lacked judicial experience, before she was appointed to the Supreme Court). For a discussion of the legal validity of the 1996 Rules, see Roman Sharapov and Anatolii Konovalov, "Poniatie vreda zdorov'iu v usloviiakh pravovoi dezorientatsii sudebnoi ekspertizy zhivykh lits", 1 *Ugolovnoe pravo* (2001), 127-131.

39 RF Supreme Court (29 March 2002) No.GKPI 2002-367 *OOO Ammofos*.

40 See, for example, RF Supreme Court (2 October 2002) No.GKPI 02-1168 (*opredelenie*), and (5 December 2002) No.KAS 02-621, *L.F. Sukhova*; (26 March 1999) No.GKPI 99-250 (*opredelenie*), *OOO "Auditorskaia Firma MIN"*; (1 November 2002) No.GKPI 02-1283 (*opredelenie*), [seems to be in error? No decision can be found with this number: is it ZAO or OAO?] *JSC Apatit*; (11 March 2003) No.GKPI 03-680 (*opredelenie*); and (21 April 2003) No.GKPI 03-458 (*opredelenie*), *E.V. Alekseev*, as well as at least eight other decisions which were rendered between 1999 and 2003.

41 RF Supreme Court (1 December 1998) No.GKPI 98-570, ZAO "*Kommersant" Izdatel'skii Dom".*

lacked a legal basis and the Committee had not been competent to issue it. The circular was struck down *ex tunc*. In two other cases, the Supreme Court found that circulars that contained legal rules which has been adopted in violation of the prohibition found in the 1997 Regulatory Acts Adoption Rules and also declared them null and void *ex tunc*.[42]

By 1999, however, both the Civil and Appeals Divisions were ruling that—in view of the prohibition contained in the 1997 Rules—ministerial circulars were not regulatory acts and could not be contested as such.[43] This approach was confirmed six years later by judge Iurii Redchenko of the Civil Division who declared as inadmissible an application against a circular from the Ministry of Finance. In his opinion, the circular did not constitute a regulatory act because it had not been officially registered with the Ministry of Justice.[44] In between, there were around 50 judgments from both the Civil Division and the Appeals Division rejecting applications for judicial review of circulars adopted after August 1997.[45]

4.3. The Higher Arbitrazh Court's Original Approach

The case law of the Supreme Court on the issue of the judicial review of ministerial circulars can be contrasted with the approach adopted by the Higher *Arbitrazh* Court. The latter only acquired judicial review jurisdiction on a limited number of issues (taxation, competition law, etc.) in 2002. When confronted with a plea of inadmissibility raised by the Ministry of Taxes and Duties against an application for judicial review of one of its circulars (according to the Ministry, it only contained an explanation of the Tax Code, no legally binding rules), a panel of judges from the Administrative Division of the Higher *Arbitrazh* Court noted that the text of the circular—which was not a regulatory act in itself—"contained a provision that [was], in substance, a legal norm".[46] According to the panel, the Tax Code allowed entrepreneurs who only operated parking lots (which offered their services to individuals rather than to businesses) to opt for a uniform tax on imputed income with respect to that activity. At the same time, the impugned circular interpreted the Tax Code precisely to the contrary. That

42 RF Supreme Court (18 June 1998) *Zederbaum*, *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* (1998) No.12; and (9 September 1998) No.GKPI 98-394, *V.N. Dostal and ZAO "Kinokompaniia Kino Most"*.

43 RF Supreme Court (3 February 1999) (*opredelenie*), and (25 May 1999) No.KAS 99-78, *Irkutsk Regional Trade Union of the National Education and Research* [in transliteration please], in respect of a Letter of the Ministry of Labor (Pis'mo MinTruda Rossii (3 November 1998) No.6162-MM, unpublished).

44 RF Supreme Court (27 December 2005) No.GKPI 05-1625 (*opredelenie*), *A.G. Fedorov.*

45 See, for example, RF Supreme Court (22 March 1999) No.GKPI 99-241 (*opredelenie*), *Moscow Regional Trade Union of Police* [in transliteration please]; (17 July 2003) No.GKPI 03-839/850 (*opredelenie*), *P.L. Tserentsov et al.*; (11 October 2005) No.GKPI 05-1271 (*opredelenie*); and (7 November 2005) No.KAS 05-540, *V.A. Ushakov*, as well as at least 46 other decisions rendered between 1999 and 2005.

46 RF Higher *Arbitrazh* Court (Administrative Division) (20 May 2004) No.4719/04, *Ekaterinburgskoe MUP Avtostoianka*, *VVAS* (2004) No.8.

provision of the circular was deemed to be a legal norm that was struck down by the Higher *Arbitrazh* Court.

In other cases, the Administrative Division of the Higher *Arbitrazh* Court elaborated in more detail on its competence to hear cases of judicial review of apparently non-binding ministerial acts. With respect to the guidelines from the Ministry of Taxes and Duties on the application of the Tax Code[47] (which are mere recommendations) the Higher *Arbitrazh* Court ruled that:

> "addressed to the bodies of tax administration, these recommendations contain directives [...] the observance of which the officials of those bodies are entitled to require from the taxpayers. [...] A taxpayer is a person dependent on the behavior of an official from the tax administration. [...] Consequently, the recommendations [...] that are binding on the bodies of tax administration in their relations with taxpayers affect the rights and legitimate interests of the latter. [...] Thus, there are grounds to consider that the above-mentioned guidelines are a regulatory act by nature".[48]

The Administrative Division's approach could be said to be consistent: whenever it found a legally binding rule in a circular (or any other non-binding act), it proceeded to examine the conformity of the rule with the applicable statutes. The Higher *Arbitrazh* Court could have been even more consistent if, like the Supreme Court in the 1998 *Zolotukhin* case,[49] it would have struck down the legal norms found in circulars for violating procedure (*e.g.*, the absence of official registration with the Ministry of Justice and/or of publication), but it had the merit of maintaining some legal certainty absent in the case law of the Supreme Court.

Another merit the Administrative Division's approach is that it complied with the constitutional case law on the matter. In a case where the *Arbitrazh* Court of Moscow had dismissed an application for the judicial review of guidelines from the Ministry of Taxes and Duties (the judgment had been adopted prior to the transfer of the judicial review jurisdiction to the Higher *Arbitrazh* Court by the 2002 Code of Procedure[50]), the applicant obtained a decision from the Constitutional Court. The latter ruled that the provisions of the Tax Code (Arts.137 and 138, which allowed for judicial review of individual and regulatory acts concerning tax administration) did not prevent the review of those acts which are internal to the tax administration but, at the same time, which permit said administration to request certain conduct from taxpayers. According to the

47 RF Federal'nyi Zakon "Nalogovyi kodeks RF (pervaia chast')" (31 July 1998) No.146-FZ, *SZ RF* (1998) No.31 item 3824.

48 *Obshcherossiiskii soiuz, op.cit.* note 17. Almost exactly the same wording can be found in RF Higher *Arbitrazh* Court (Administrative Division) (16 January 2004) No.14521/03, [in transliteration please], *VVAS* (2004) No.5. In the latter case, the panel of judges from the Administrative Division also referred to the fact that the challenged guidelines were intended for repetitive application by an unidentifiable number of persons.

49 *Zolotukhin*, *op.cit.* note 26.

50 RF Federal'nyi Zakon, "Arbitrazhnyi protsessual'nyi kodeks" (24 July 2002) No.95-FZ, *SZ RF* (2007) No.30 item 3012.

Constitutional Court, the ordinary courts were under an obligation not to limit their examination of the cases to the establishment of the challenged act's addressee but to assess whether the taxpayers' rights were affected and whether the act was in conformity with the tax legislation in order to provide effective redress.[51]

4.4. The Transnefteprodukt *Judgment of the Higher* Arbitrazh *Court's Presidium*

The Presidium of the Higher *Arbitrazh* Court put an end (which proved to be short-lived, as will be seen) to the above-discussed case law in late 2006. The oil transportation company Transnefteprodukt had applied to the Higher *Arbitrazh* Court's Administrative Division, which conducted a routine examination of the legality of a Federal Tax Service (FTS)[52] circular and dismissed the application, having found no violation of the applicable provisions of the Tax Code (the FTS's objection that the application was inadmissible because the circular in question was not a regulatory act had been dismissed).[53] However, the *FTS* sought and obtained supervisory review of the case by the Presidium of the Higher *Arbitrazh* Court.

The highest commercial jurisdiction in Russia upheld the FTS's preliminary objection, declared the application inadmissible and dismissed the case.[54] At the outset, the Court provided its own definition of a legal rule as "a generally binding state directive intended for repetitive application, regardless of its permanent or temporary nature".[55] The Presidium decided that federal supervisory executive bodies, including the FTS, were not empowered to adopt regulatory acts (unlike ministries, which were the only executive bodies entrusted with this task following the 2004 administrative reform). It then referred to the 1997 Rules which prohibit the adoption of regulatory acts in the form of circulars. In the case in question, according to the Court, the FTS merely informed its territorial offices of its interpretation of the legislation on VAT reimbursements. FTS officials

51 RF Constitutional Court (5 November 2002) No.319-O, "Ob otkaze v priniatii k rassmotreniu zhaloby nekommercheskoi organizatsii-uchrezhdeniia po upravleniiu personalom 'Persona' na narushenie konstitutsionnykh prav i svobod polozheniiami punkta 2 stat'i 4 Nalogovogo Kodeksa Rossiiskoi Federatsii (hereinafter the *"Persona"* case). See, also, RF Constitutional Court (20 November 2008) No.911-O-O "Ob otkaze v priniatii k rassmotreniu zhaloby grazhdanina Gavriushenko Pavla Ivanovicha na narushenie ego konstitutsionnykh prav punktom 1 chasti pervoi stat'i 134, chasti pervoi stat'i 251, chasti vtoroi stat'i 253 i stat'i 382 Grazhdanskogo Protsessual'nogo Kodeksa Rossiiskoi Federatsii".

52 In 2004, the Ministry of Taxes and Duties was transformed into the Federal Tax Service (*Federal'naia Nalogovaia Sluzhba*) under the authority of the Ministry of Finance.

53 RF Higher *Arbitrazh* Court (Administrative Division) (31 May 2006) No.3894/06, *OAO AK "Transnefteprodukt"*.

54 RF Higher *Arbitrazh* Court (Presidium) (14 November 2006) No.11253/06, *OAO AK "Transnefteprodukt"*, *VVAS* (2007), No.2.

55 The Presidium of the Higher *Arbitrazh* Court referred to the application of the State *Duma* to the Constitutional Court, which was officially published ((11 November 1996) No.781-II GD, *SZ RF* (2 December 1996) No.49 item 5506); but this itself is a written pleading rather than a binding legal norm.

were not able to require taxpayers to observe the provisions of the impugned circular. Consequently, the Presidium of the Higher *Arbitrazh* Court held that the circular could not be viewed as a regulatory act containing legal rules in the sense of the definition given in its judgment, and the Administrative Division could not carry out a judicial review in this case.

It can be argued that the Presidium of the Higher *Arbitrazh* Court—as the highest instance of the commercial branch of the Russian judiciary—could legitimately review the previous case law of subordinate jurisdictions and, not being bound by such case law, render a new judgment which departed from it. Nevertheless, in *Transnefteprodukt*, this appeared procedurally complicated. Indeed, the Presidium heard the case upon the respondent's application for supervisory review, an extraordinary procedure, recourse to which had been limited under the 2002 *Arbitrazh* Procedure Code in order to preserve legal certainty, as required by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[56] Under Article 304 of the 2002 Code, the Presidium could quash the final judgments of commercial courts if one of three conditions was fulfilled: (1) if the impugned judgment violated the uniformity of the case law; (2) if it prevented the Court from reaching a lawful judgment in another case; or (3) if it violated the rights and lawful interests of an indefinite number of persons or public interests. In quashing the judgment of the Administrative Division, the Presidium ruled that it violated the uniformity of the case law, which is the most-often-invoked provision under Article 304. In the case in question, however, it was the Presidium that departed from the well-established case law and not the Administrative Division.

4.5. Post-2006 Case Law of the Higher Arbitrazh *Court*

As will be shown below, the *Transnefteprodukt* judgment of the Presidium of the Higher *Arbitrazh* Court gave rise to inconsistent and controversial practices in the Administrative Division. Within only two years, it had rendered two rulings which followed *Transnefteprodukt*[57] and, in between, four judgments which departed from it and instead which followed the pre-2006 case law.[58] None of these six judgments made any explicit reference to the 2006 judgment of the Presidium in the *Transnefteprodukt* case or the 2002 ruling of the Constitutional

56 5 *European Treaty Series* (1950). See, for example, William E. Pomeranz, "Supervisory Review and the Finality of Judgments under Russian Law", 34(1) *Review of Central and East European Law* (2009), 15-36.

57 RF Higher *Arbitrazh* Court (Administrative Division) (13 November 2007) No.12238/07, *OOO Goliaf L;* and (17 October 2008) No. 10265/08, OOO *Novgorodskii Stomatologicheskii Tsentr*.

58 RF Higher *Arbitrazh* Court (Administrative Division) (17 October 2007) No.8464/07, *OOO Kniginvest*; (24 January 2008) No.16720/07, *OAO Saratovskii avtobusnyi park et al.;* (6 August 2008) No.7696/08, *O.V. Bedenko;* and (30 September 2008) No.11461/08, *OOO Iuridicheskaia firma "Parshikov, Port and Lobach"*.

Court on the application of the 2002 *Persona* case;[59] rather, they simply repeated the reasoning of the Presidium in order to dismiss the applications for judicial review of executive circulars or of the pre-2006 Administrative Division in order to uphold them.

This case law appears all the more confusing if the composition of the Division is taken into account. The second case of the two that followed the Presidium, that of the *Novgorodskii Stomatologicheskii Tsentr*.(*Novgorod Dentistry Center)*, was decided by a panel consisting of judges Galina Poletaeva, Ol'ga Murina and Oleg Naumov. However, Judge Poletaeva also had sat on the 2007 *Kinginvest* case, which had considered an application for judicial review directed against an executive circular on its merits and granted it, while Judges Murina and Naumov had formed part of the panel in the similar 2008 *Bedenko* case, presided over by Judge Nadezhda Vyshniak, who had taken part in the *Transnefteprodukt* case in the Presidium. Finally, Judge Naumov also jad adjudicated the 2008 *Saratovskii avtobusnyi park (Saratov Bus Park) et al.* case, and Judge Murina the *Transnefteprodukt* case in the Administrative Division, which had considered the applicant company's case on its merits. No dissenting opinions (at least, no publicly available dissenting opinions) were recorded in any of those cases.

These votes, however, only make sense if Judge Vyshniak dissented from the 2006 Presidium judgment and either Judge Murina or Judge Naumov—but not both—dissented in *Bedenko*, but was in the majority in *Novgorod Dentistry*. Judges Murina and Naumov could not both be in favor of judicial review of circulars because in such a case *Novgorod Dentistry* could not stand. They could not both be against review because then *Bedenko* could not stand. Consequently, one of them must have been in favor of review, while the other against. In order for *Bedenko* to stand, Judge Vyshniak must have been in favor of the review, which means that she had dissented from *Transnefteprodukt* in the Presidium. It is more likely that Judge Murina was against review: in that case, she must have dissented from *Transnefteprodukt* in the Administrative Division, which could have led to the acceptance of the case for supervisory review by the Presidium.

More recently, the consistent approach reflected in a number of cases within the Administrative Division leads one to the conclusion that the Higher *Arbitrazh* Court has begun to accept applications for judicial review of executive circulars. Four cases raising this issue were considered on their merits between mid-2010 and mid-2011.[60] Just as in the 2007-2008 cases, however, no reasoning was provided as to why the judges followed the case law which allowed the judicial review rather than that the case law which had denied it.

59 *Persona*, *op.cit.* note 51.

60 RF Higher *Arbitrazh* Court (Administrative Division) (16 June 2010) Nos.VAS-6978-6979/10, *JSC ARLET and JSC Producing Centre "City Media" [transliteration please]*; (9 February 2011) No.VAS-17662/10, *OOO Barii*; (29 April 2011) No.1765/11, *OAO AREMZ-1;* and (19 May 2011) No.3943/11, OAO Agropromyshlennaia kompaniia *"SibKhlebProm"*.

4.6. Judicial Review of Circulars in 2012: The Higher Arbitrazh *Court Starts with* Tabula Rasa

As if there was not enough inconsistency in the various approaches to judicial review of circulars so far this century, in a 2012 judgment, a freshly composed panel from the Administrative Division (Judges Valeria Kiriushina, Valentin Aleksandrov and Oksana Gvozdilina) have suggested a new set of criteria to determine whether the Higher *Arbitrazh* Court has jurisdiction to review circulars.[61] They established general criteria stating that the jurisdiction (or lack thereof) to conduct judicial review would depend on the particular contents of the circular at issue, on the circumstances under which it is applicable and on whether it would be capable of affecting the rights and obligations of an indefinite number of persons in the commercial and entrepreneurial spheres. This differed from both the pre-2006 approach—which involved assessing, on their merits, the legality of legal rules found in circulars—and the *Transnesteprodukt* ruling, which said that the commercial courts had no jurisdiction to hear cases of judicial review of the legality of ministerial circulars. Under the new criteria, circulars containing definitions of the terms used in primary federal legislation—if no definition was given by the legislature—would be amenable to judicial review. It also may be relevant that an executive agency's position on a point of law reflected in a circular was consistently repeated over time and that the agency's departments and officials were bound by it. Thus, in one case, the Administrative Division of the Higher *Arbitrazh* Court heard, on its merits, a case where it was established that the Ministry of Finance had reiterated its guidance for calculating land tax in five circulars and letters issued for over four years.[62] If the court found new legal rules in the challenged circular, it would be within the judicial review jurisdiction of the Higher *Arbitrazh* Court.[63] The new general criteria for establishing judicial review jurisdiction of the Higher *Arbitrazh* Court were regularly reiterated and applied to different circulars throughout 2012. The Court has still not delivered a ruling under the new criteria, however, on what constitutes a circular over which it would *not* have judicial review jurisdiction. Thus, it will only be possible to assess the overall consistency of this approach once such 'negative' case law emerges which also faithfully applies the general principles outlined above.

However, in dealing with the merits of the cases described in the previous paragraph, the Higher *Arbitrazh* Court rushed to show that consistency may not be its primary consideration, if it is a consideration at all. In the first three cases

61 RF Higher *Arbitrazh* Court (Administrative Division) (29 March 2012) No.VAS-16112/11, G*PU "Glavnoe upravlenie stroitel'stva Krasnodarskogo Kraia"*.

62 RF Higher *Arbitrazh* Court (Administrative Division) (28 June 2012) No.VAS-4569/12, *OOO Konnect and OOO Raritet-Torg.*

63 RF Higher *Arbitrazh* Court (Administrative Division) (3 July 2012) No.VAS-4065/12, *Komitet Gosudarstvennogo zakaza Nenetskogo AO* [*Nenets Autonomous Okrug] and GPU "Glavnoe upravlenie stroitel'stva Krasnodarskogo Kraia* (hereinafter the "*Nenets Okrug Committee of Public Procurement"* case).

decided under the new criteria, the Court—once it deemed an application for judicial review of a circular admissible—proceeded to assess whether the rules found in the circular were in compliance with the applicable federal legislation. But six days after the judgment in the 2012 *Nenets Okrug Committee of Public Procurement* case,[64] having once again found that it had jurisdiction to exercise judicial review of challenged circulars, the same panel of the Administrative Division (Judges Kiriushina, Aleksandrov and Andreeva) unconditionally struck down the circulars. They held that a circular which contains a legal rule is contrary to the 1997 Regulatory Acts Adoption Rules. This was regarded as a violation of procedure which did not require the Court to examine the conformity of the rule contained in the circular with the hierarchically superior rules.[65] The Higher *Arbitrazh* Court came to the same point as the Supreme Court when the latter—having referred to the 1997 Rules—struck down *ex tunc* the circulars which contained new legal rules, as in the 1998 cases *Zederbaum* or *Dostal and Kino-Most*.[66]

Just as with the previous changes in the case law of the Higher *Arbitrazh* Court—the 2006 *Transnefteprodukt* judgment being the only exception—in none of the 2012 cases were reasons provided which justifyied the need to depart from the previous case law. Every panel approaches every new case as if nothing had ever been decided on the matter before—even if it had been decided by those same judges that very week.

5. Assuming They Exist, Do Precedents Matter?

Inconsistencies in the case law on just one matter highlighted in the sections above are fundamental and create significant uncertainty. If a potential party to judicial review proceedings were to review the full case law—including the most general principles—in relation to a particular matter every few months, they would still not be able to predict, with any certainty, the consequences of bringing a case or of adopting a circular. It is important to note that both the Supreme Court and the Higher *Arbitrazh* Court fail to provide any guidance whatsoever to the executive as to what the contents of circulars may or may not be. And because of the inconsistencies in their respective case law, they have not been able to stem the flow of applications: the fact that it is impossible to understand the criteria applied to the judicial review of circulars results in applicants bringing every possible case since—even if their application might appear hopeless on the basis of existing case law—the Courts might indeed change their approach while the case is pending.

64 *Ibid*.

65 RF Higher *Arbitrazh* Court (Administrative Division) (9 July 2012) No.VAS-6122/12, *Departament Gosudarstvennogo zakaza KhAMO* [*Khanty-Mansiisk Autonomous Okrug*]*-IUgry*.

66 *Zederbaum* or *Dostal and Kino-Most*, *op.cit.* note 42.

It is not clear what accounts for such inconsistency in case law. One possible explanation might be found in the specifics of legal education in Russia; indeed, judicial decisions struggle to make their way into the curricula of Russian law schools. References to—but not thorough discussions of—the judgments of the European Court of Human Rights, the Russian Constitutional Court and the Higher *Arbitrazh* Court on commercial matters may appear in textbooks and university courses; but a student may graduate without ever reading a judicial review judgment in the field of administrative law. Judgments of the Supreme Court in individual cases are rarely referred to in textbooks or scholarly papers; so, judges do not feel that they are under the constant scrutiny of legal scholars and compelled to provide elaborate reasons for their judgments. This does not explain the inconsistency of the case law, however: the cases discussed in this article were decided not by yesterday's law students but by highly qualified lawyers at the peak of their careers.

It is relevant, however, that judicial decisions bound to become precedents are seen in Russia as judgments that announce a clear-cut general legal rule rather than that assess a set of facts against more or less elaborate criteria or anything else.[67] According to this perception, a judge creates general legal rules in almost the same way as the legislature or the executive. Given that the legislator may change the rules she lays down whenever she decides to, Russian judges treat their 'precedents-to-be' in the same way—so that consistency is not taken into account.

Another consideration may be relevant, even if lacking evidence. Judges on the three-judge panels may follow the judge-rapporteur, whatever their personal opinion of the case may be. The culture of separate opinions—even if they are authorized by law—is virtually non-existent outside the Constitutional Court.[68] So, instead of dissenting (for fear that dissent would be negatively viewed by their colleagues), judges vote for the position supported by the judge-rapporteur. However, the Higher *Arbitrazh* Court does not publish the names of judge-rapporteurs in the cases heard by the Administrative Division,[69] which makes it impossible to ascertain whether or not there is consistency in the opinions of judge-rapporteurs.

67 For a thorough discussion of this perception, see Leonid Golovko, "Sudebnyi pretsedent kak nenormativnyi sposob legitimatsii sudebnykh reshenii", 6 *Vestnik grazhdanskogo prava* (2010), 6-34, at 6-7.

68 For a discussion of dissent in ordinary Russian courts, see, for example, Alexander Vereshchagin, *Judicial Law-Making in Post-Soviet Russia* (Routhledge Cavendish, Abingdon, UK, 2007), 159-160, with further references.

69 In the cases decided by the Presidium of the Higher *Arbitrazh* Court, the names of judge-rapporteurs are public; but the Presidium has dealt with only one case on the matter examined in this article.

6. Conclusion

The enactment by the legislator of formal powers mandating lower courts to follow the *jurisprudence* of higher courts (if the 2008 Plenary Resolution No.14 of the Higher *Arbitrazh* Court and the 2010 judgment of the Constitutional Court upholding its constitutionality were to be interpreted broadly) is not enough to create precedents; rather, legal reasoning is what matters.

This article has analyzed the interpretation of a general rule found in the legislation which allowed for a number of approaches to the judicial review of circulars to be adopted. If the Supreme Court and the Higher *Arbitrazh* Court had not failed the case-law consistency-test in their interpretation and application of a pre-existing statutory provision, it would be possible to consider whether they might be able to create precedents in the common-law meaning of the term, by comparing different cases on their merits and deciding them accordingly.

However, the reality is that Russia's two Moscow-based top courts not only provide inconsistent (and thus unconvincing) decisions, they also fail to explain why they refuse to follow the interpretation found in previous judicial decisions, including those of the highest instances within them, the Appeals Division of the Supreme Court and the Presidium of the Higher *Arbitrazh* Court. All the more striking is the fact that the same judges vote for contradicting approaches in cases separated by several months' time, but they may be merely following judge-rapporteurs with whom they do not necessarily agree. There is a much more urgent task for Presidents Viacheslav Lebedev and Anton Ivanov than speaking about precedents: ensuring at least the very basic consistency in their respective courts' judgments.