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The Push for Precedent in Russia's Judicial System

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Abstract

Russia is currently undergoing a spirited public debate over the role of precedent in a civil-law system. This article examines this debate from a theoretical and practical standpoint, exploring the nature of Russian court decisions and the extent to which they correspond to the Anglo-American theory of precedent. The article further analyzes how the Russian Higher *Arbitrazh* Court has carved out a narrow right to issue binding precedent and how this authority could impact Russia's civil-law understanding of such concepts as separation of powers and judicial independence.

Keywords

civil law, common law, judicial independence, precedent, Russian Constitutional Court, Russian judiciary, separation of powers

On 19 March 2010, the Chairman of Russia's Higher *Arbitrazh* (Commercial) Court, Anton A. Ivanov, delivered a major address calling for a move toward a precedent-based system of justice.[1] Speaking at a public lecture sponsored by the Russian Constitutional Court, Ivanov argued that increased reliance on precedent (*pretsedent*) would produce several advantages including:

(1) promoting the stability of the legal system;
(2) confirming the judiciary's place in the separation of powers, a prerequisite for a democratic society; and
(3) decreasing the pressure on the courts from outside sources.

In his speech, Chairman Ivanov hearkened back to the pre-revolutionary Civil Cassation Department of the Ruling Senate, which regularly had engaged in the formulation of judicial precedent.[2] Unfortunately, added Ivanov, the Bolsheviks annulled this practice, and now, 100 years later, Russia has been forced to revisit the exact same question.

1 Anton A. Ivanov, "Rech' o pretsedente", Senatskie chteniia (19 March 2010), available at <http://www.ksrf.ru/Info/Reading/Pages/PerformanceIvanov.aspx>. An abridged version of Ivanov's speech was published in *Vedomosti*: Anton Ivanov, "Grazhdanskoe pravo: Rech' o pretsedente", *Vedomosti* (19 March 2010), available at <http://www.vedomosti.ru/newspaper/article/2010/03/19/228520>.

2 For a history of the Civil Cassation Department during the tsarist period, see William G. Wagner, *Marriage, Property, and Law in Late Imperial Russia* (Clarendon Press, Oxford, 1994).

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Ivanov's remarks put a public face on a legal and academic debate that has been percolating for years in Russia on the law-creating powers of the judiciary.[3] While Chairman Ivanov has used his influence to push for precedent within the *Arbitrazh*-court system—the courts assigned responsibility under the Russian Constitution to resolve economic disputes between businesses, as well as between businesses and the state—the debate over precedent also extends to Russia's other two court structures (the Constitutional Court and the courts of general jurisdiction). In all these discussions, scholars and practitioners alike have weighed the relative merits of recognizing judicial decisions as a primary source of law (*istochnik prava*). Even Chairman Ivanov, an outspoken advocate of change, has recognized the potential negative consequences that might accompany a move to a precedent-based system—particularly as it relates to Russia's separation of powers and the legislature's position as the primary law creator within the civil-law system. Retired Constitutional Court Justice Tamara Morshchakova also has argued strongly against any sudden conversion to a system of precedent. Such a shift, she warns, would infringe on the autonomy of individual judges who, under the 1993 Russian Constitution, are subordinated to the law, not to high-court decisions.[4]

In reality, Ivanov's remarks tapped not only into Russia's longstanding theoretical debate over precedent but, also, into recent legal developments on the ground. His speech occurred in the aftermath of the Russian Constitutional Court's landmark decree of 21 January 2010, which formally established the right of the Higher *Arbitrazh* Court to issue binding precedent in specific instances.[5] In arriving at this decision, the Constitutional Court addressed many of the fine points of Russian civil procedure. Nevertheless, as Ivanov and Morshchakova's comments indicate, the Constitutional Court's recognition of even the limited use of judicial precedent has much broader policy implications, striking at the very heart of the Russian legal system and the power of the judiciary. This article will address both how the Higher *Arbitrazh* Court, under Chairman Ivanov's leadership, has asserted the right of precedent and on what basis the Constitutional Court ultimately has affirmed this principle. In the process, the article offers a comparative analysis of how civil-law and common-law systems view judicial decision-making. It also examines the broader legal consequences

3 Svetlana K. Zagainova, "O Pretsedentno-pravoprimenitel'noi prirode sudebnykh aktov v grazhdanskom i arbitrazhnom protsesse", 10 *Gosudarstvo i pravo* (2009), 14-20, at 18.

4 Tamara Morshchakova, "Pretsedent: podskazka ili ukazka", *Iurist* (26 April 2010), available at <http://www.gazeta-yurist.ru/article.php?i=1134>.

5 Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 21 ianvaria 2010 g. No.1-P po delu o chasti 4 stat'i 170, punkta 1 stat'i 311 i chasti 1 stat'i 312 Arbitrazhnogo protsessual'nogo kodeksa Rossiiskoi Federatsii v sviazi s zhalobami zakrytogo aktsionernogo obshchestva "Proizvodstvennoe ob"edinenie 'Bereg', otkrytykh aktsionernykh obshchestv 'Karbolit', 'Zavod Mikroprovod', i 'Nauchno-proizvodstvennoe predpriiatie 'Respirator'", *Rossiiskaia gazeta* (10 February 2010), available at <http://www.rg.ru/2010/02/10/postanovlenie-sud-dok.html> (hereinafter, the "Decree").

that would accompany any dramatic shift to a system of precedent within the Russian Federation.

1. The Role of Precedent

1.1. Common Law and Precedent

Black's Law Dictionary defines precedent as "a decided case that formulates a basis for determining later cases involving similar facts and issues".[6] This venerable concept, however, comes with an extensive and complicated history. Scholars have long debated to what extent common-law judges simply 'find' the law in past decisions or whether they actually 'make' law through the issuance of binding precedent. US common-law judges, in particular, have used their precedent-making ability to assume the role of 'policymaker' despite charges that the judiciary lacks the expertise—and political mandate—to exercise such broad powers.[7]

Several rationales have been suggested as to why the Anglo-American tradition follows precedent. Supporters have pointed to its ability to encourage consistency, efficiency, and predictability in judicial decision-making, attributes that in turn convince people to rely on a legal system. Other commentators have explained precedent in terms of rational self-interest, that by relying on previous decisions, judges not only take advantage of the work of their predecessors but, also, receive an implicit seal of approval for any resulting judgment.[8] Precedent also brings in notions of equality and formal justice, ensuring that all similar cases are treated alike.[9]

While there are, in fact, multiple explanations as to why common-law judges ultimately follow precedent, what is lacking is an all-encompassing theory of precedent, since the foundation of any precedential system is inevitably built on shifting ground. As the US legal scholar Ronald Dworkin has noted, British and American lawyers distinguish between a *strict* and *relaxed* doctrine of precedent: the *former* obliges a judge to follow the earlier decisions of certain other courts (even if they believe that those decisions are wrong), while the *latter* demands only that a judge give some weight to past decisions on the same issues.[10]

6 *Black's Law Dictionary* (West Group, St. Paul, MN, 9th ed. 2004), 1295.

7 Michael Herz, "Choosing Between Normative and Descriptive Versions of the Judicial Role", 75(4) *Marquette Law Review* (1992), 725-765; Donald L. Horowitz, *The Courts and Social Policy* (The Brookings Institution, Washington, DC, 1977), 22-56; and J. Craig Youngblood and Park C. Folse, "Can Courts Govern? An Inquiry into Capacity and Purpose", in Richard Gambitta, Marlynn May, and James Foster (eds.), *Governing Through Courts* (Sage Publications, Beverly Hills, CA and London, 1981), 23-62.

8 See, for example, Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, New York, NY, 2008), 158.

9 *Ibid.*, 170.

10 Ronald Dworkin, *Law's Empire* (Harvard University Press, Cambridge, MA, 1986), 24-25.

The underlying untidiness of the doctrine of precedent—"that precedents ought to be followed except when they should not"—ultimately allows for a very fluid legal system, one that evolves incrementally as social and economic conditions change.[11] Precedent itself takes on numerous characteristics: it can be binding, persuasive, or simply illustrative, depending on the facts of the individual case involved. Moreover, under the Anglo-American system, precedent can be found in a single decision or (more convincingly) in a series of cases that address the same issue.[12] Precedent also can be both vertical and horizontal within the hierarchy of a particular jurisdiction, with the entire judiciary playing a role in shaping and interpreting the law.[13] Finally, precedent requires a high degree of transparency: all judicial opinions, including the reasoning employed by each judge, must be readily available and widely published, so that judges and lawyers alike can have access to all relevant previous decisions.

Restraint within a common-law system comes not only from deference to past decisions but, also, from the observance of certain well-established procedural rules. Most notably, the court requires a live dispute between two parties before it can provide an interpretation of law. At the same time, there is no immediate sanction for a common-law judge who distinguishes, overrules, or even ignores precedent.[14] Such discretionary power means that precedent rarely moves in a straight line. Instead, as Theodore Benditt has observed, what judges usually find "are ragged and often inconsistent judicial histories which leave them no alternative but to choose among precedents".[15] The creative nature of precedent ultimately endows common-law judges with a significant amount of discretion—and independence—to distinguish between past decisions, even in the face of an existing precedent.

1.2. Civil-Law versus Common-Law Jurisdictions

Any discussion of comparative law invariably addresses the role that judicial decision-making plays in common-law and civil-law jurisdictions. Legal historians have identified the French Revolution as the clear dividing line between these two legal systems. In order to decrease the authority of the French judges, who were deemed too corrupt and excessively subservient to the state, revolutionary France promulgated the Code Napoleon and directly subordinated the

11 Richard Wasserstrom, *The Judicial Decision: Toward a Legal Justification* (Stanford University Press, Stanford, CA, 1961), 46, as quoted in Duxbury, *op.cit.* note 8, 13.

12 Theodore Benditt, "The Rule of Precedent", in Laurence Goldstein (ed.), *Precedent in Law* (Clarendon Press, Oxford, 1994), 89-106, at 97.

13 Duxbury, *op.cit.* note 8, 28.

14 *Ibid.*, 16.

15 Benditt, *op.cit.* note 12, 98.

judiciary to statutory law.[16] Henceforth, French judges theoretically would turn to the code—and not exercise any right of interpretation—in determining what the law said. In contrast, the common-law system continued to recognize case law as a primary source of law and gradually, over the course of the nineteenth century, the notion of 'binding' precedent began to be formally recognized under English law.[17]

The distinction between the common-law and civil-law traditions—and the contrasting role which the judiciary plays within each system—has preoccupied historians and legal scholars for centuries. Major differences exist, both stylistically and substantively, as to how each system treats past court decisions. Legal scholars have commented, for example, that—from a common-law perspective—civil-law court decisions do not include either a detailed description of the facts or a point-by-point analysis of prior rulings.[18] Moreover, whereas common-law systems recognize the power of a single binding precedent of a high court, civil-law jurisdictions are seen to require a 'line' (*i.e.*, multiple) decisions to settle a point of law.[19] But even in the latter case, civil-law courts will not—for a number of procedural reasons (as well as based on how they understand the law)—openly admit to their deviation from written law. In the introduction to a comprehensive study of the law of contracts, a German scholar noted that a court will not accept a seemingly positivist argument; instead, it will seek to clarify the underlying issues and "as far as possible, find the adequate place for them in our civil law".[20]

The debate over precedent ultimately highlights a fundamental distinction as to how each system understands the concept of separation of powers. The continental system recognizes "the victory of the absolutist concept of sovereignty and therewith the monopoly of the legislator to set law through legislative bodies".[21] In contrast, the Anglo-American theory of precedent provides the judiciary with significant discretion and law-creating powers, although US judges often steer clear of the more far-reaching role of policymaker. But despite these long-standing differences, legal scholars have identified areas of intersection

16 Jean-Louis Boudouin, "The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec", in Joseph Dainow (ed.), *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* (Louisiana State University Press, Baton Rouge, LA, 1974), 1-21, 7; and John H. Merryman, *The Civil Law Tradition* (Stanford University Press, Stanford, CA, 2nd ed. 1985), 14-18.

17 Jim Evans, "Change in the Doctrine of Precedent during the Nineteenth Century", in Goldstein, *op.cit.* note 12, 35-71.

18 D. Neil MacCormick and Robert S. Summers, "Further General Reflections and Conclusions", in D. Neil MacCormick and Robert S. Summers (eds.), *Interpreting Precedent* (Ashgate Publishing, Aldershot, UK, 1997), 531-550, 536-537.

19 *Ibid.*, 538.

20 Joachim Gernhuber, *Das Schuldverhältnis* (Mohr, Tübingen, 1989), III. Unless otherwise noted, all translations in this article are by the authors.

21 Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (Vandehoeck und Ruprecht, Göttingen, 2nd ed. 1996), 497.

between the two systems, especially during the latter half of the twentieth century. Common-law countries, for example, have adopted the form (although not the underlying ideology) of legal codes, while civil-law countries are seen as having become more open to the use of precedent.[22] Court decisions are now regularly cited in civil-law systems to support arguments or to fill in gaps in legislation.[23] Moreover, both systems allow for legal change and for evolution through judicial action.[24]

Therefore, while essential differences remain, the dividing line between civil- and common-law jurisdictions has become less absolute. As Neil McCormick, the editor of a major comparative study on precedent, concluded:

> "[P]recedent now plays a significant part in legal decision-making and the development of law in all countries and legal traditions [...] This is so whether or not precedent is officially recognized as formally binding or merely as having other normative force to some degree."[25]

1.3. Judicial Practice in Russia

The Russian Federation represents a relatively recent entry into this long-running debate on the role of judicial decision-making in civil-law systems. Court decisions served as gap fillers within the Soviet legal system.[26] Moreover, Soviet judges, procurators,[27] and other court officials "were counseled to read case reports in order to familiarize themselves with errors which higher courts had rectified" as part of the appellate review process.[28]

But while Soviet judicial decision-making may have contained certain elements of precedent, Soviet law did not formally recognize this concept. The Anglo-American notion of precedent clashed with the Soviet understanding of socialist legality, in particular, its requirement that the law and other legislative

22 Merryman, *op.cit.* note 16, 26-27, 46-47.

23 MacCormick and Summers, *op.cit.* note 18, 533.

24 *Ibid.*, 535.

25 *Ibid.*, 532.

26 William E. Butler, "Judicial Precedent as a Source of Russian Law", in James A.R. Nafziger and Symeon C. Symeonides (eds.), *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren* (Transnational Publishers, Ardsley, NY, 2002), 583-593, 585.

27 The Soviet procuracy (like its modern-day Russian counterpart) carried out the functions typically performed by prosecutors but also exercised certain broad supervisory powers as well. For an overview of the procuracy's history and present-day responsibilities, see Gordon B. Smith, *Reforming the Russian Legal System* (Cambridge University Press, Cambridge, 1996), 104-128; *id.*, "The Procuracy, Putin, and the Rule of Law in Russia", in Ferdinand Feldbrugge (ed.), *Russia, Europe, and the Rule of Law*, in William B. Simons (ed.), *Law in Eastern Europe*, No.56 (Martinus Nijhoff, Leiden and Boston, 2007), 1-14; and Gordon B. Smith, "The Procuracy: Constitutional Questions Deferred", in Gordon B. Smith and Robert Sharlet (eds.), *Russia and its Constitution: Promise and Political Reality*, in William B. Simons (ed.), *Law in Eastern Europe*, No.58 (Martinus Nijhoff, Leiden and Boston, 2008), 105-122.

28 Butler, *op.cit.* note 26, 585. See, also, Anton L. Burkov, *Konventsiia o zashchite prav cheloveka v sudakh Rossii* (Wolters Kluwer, Moscow, 2010), 103-105, 120.

acts be strictly observed.[29] Such a philosophy did not allow for the regular exercise of judicial discretion. Soviet law also frowned on any institution interfering with the assigned law-creating powers of the legislature, although, in practice, the Communist Party and its structures controlled the legislative process.[30] Finally, most Soviet laws and court decisions were not widely disseminated, thereby making any reliance on a system of precedent impossible from a practical standpoint.

Individual Soviet republics had already begun the process of reforming their legal systems at the time of the Soviet Union's collapse in 1991. The 1993 Russian Constitution ultimately maintained the same overall court structure as had previously existed in the Russian Soviet Federative Socialist Republic (RSFSR), with three high courts, each with their distinct (although, at times, overlapping) jurisdictions.

Broadly speaking, the Constitutional Court determines the constitutionality of laws and other normative acts; the Higher *Arbitrazh* Court (as we have highlighted above) addresses commercial disputes among businesses, as well as between businesses and the state; and the Supreme Court reviews criminal and civil appeals from Russia's courts of general jurisdiction. Like its Soviet predecessor, the 1993 Constitution did not openly recognize the power of precedent. Instead, Article 120(1) only called on the judiciary to obey the 1993 Constitution and federal law in reaching its determinations. Thus, from a constitutional perspective, the legislative branch remained the sole law-creating institution in the Russian Federation.

Yet despite such conventional views, the use of precedent has crept into Russian law from a number of sources.[31] For example, the Constitutional Court regularly issues judicial decisions that carry the weight of precedent. As Constitutional Court Chairman Valerii Zor'kin has recognized, this court's rulings "essentially have normative nature (enjoy normative force) and as such acquire precedent-setting significance".[32] The European Court of Human Rights (ECtHR) also regularly reviews individual complaints from Russian citizens against the Russian government. Furthermore, the ECtHR's case law has become part of Russian law based on Article 15(4) of the Russian Constitution, which

29 Mikhail N. Marchenko, *Istochniki prava* (Prospekt, Moscow, 2009), 379.

30 *Ibid.*

31 Peter B. Maggs, "Judicial Precedent Emerges at the Supreme Court of the Russian Federation", 9 *Parker School Journal of East European Law* (2002), 479-500; and Alexander Vereshchagin, *Judicial Law-Making in Post-Soviet Russia* (Routledge-Cavendish, Oxford, 2007), 111-126.

32 "Precedent-Setting Value of Rulings of the Constitutional Court of the Russian Federation", European Commission for Democracy through Law (3-4 September 2004), 3, available at <http://www.venice.coe.int/docs/2004/CDL-JU(2004)050-e.pdf>. For an analysis of how the Constitutional Court has exercised its power of judicial review, see Alexei Trochev, *Judging Russia: Constitutional Court in Russian Politics* (Cambridge University Press, New York, NY, 2008).

incorporates generally recognized principles and norms of international law as an integral part of the Russian legal system.[33]

One could argue that the rulings of the Russian Constitutional Court and the ECtHR stand out as legal anomalies, since neither institution finds its intellectual roots in the civil-law tradition. These two courts also only hear a tiny fraction of Russia's overall caseload. What is more revealing, in fact, is how Russia's regular courts—the courts of general jurisdiction and the *Arbitrazh* courts—have exercised powers associated with (although not identical to) precedent. While Supreme Court and Higher *Arbitrazh* Court decisions are generally not considered to be primary sources of law, they nevertheless come into play as part of each high court's constitutionally assigned role of creating judicial practice (*sudebnaia praktika*).[34] Russian law contains no precise definition of 'judicial practice'. According to legal scholar Svetlana Boshno, this term refers to a type of legal activity that deals with the application of legal norms. It specifically seeks to uncover the sense and contents of these applied norms and, if necessary, articulate these norms in a precise and concrete manner.[35] Boshno adds that the notion of judicial practice further encompasses the sum total of all legal positions.[36]

Boshno and other scholars distinguish between legal precedent—a source of law—and judicial practice, which Boshno describes as the experience of applied law that can be used by legislators in their law-creating activities.[37] But, even though these terms are not identical, the underlying reality is that the concept of judicial practice—and the critical role that courts play in shaping judicial practice—has pushed Russian case law in the direction of precedent.[38] As Professor Pavel Guk has noted, judicial practice inevitably involves a law-creating (*pravotvorchestvo*) aspect, whether it be filling in gaps in legislation or interpreting legal norms.[39] Thus, concludes Guk, the judicial practice created by the Russian Supreme Court in resolving individual cases possesses "a precedential character and has become a source of law for the courts of general jurisdiction in the examination of specific cases".[40]

Legal scholars have been in the forefront in arguing that judicial practice represents a source of law in Russia today, although support for this proposition

33 Alexei Trochev, "All Appeals Lead to Strasbourg: Unpacking the Impact of the European Court of Human Rights", 17(2) *Demokratizatsiya* (2009), 145-178.

34 Pavel A. Guk, *Sudebnyi pretsedent: teoriia i praktika* (Iurlitinform, Moscow, 2009), 121.

35 Svetlana V. Boshno, *Teoriia gosudarstva i prava* (Eksmo, Moscow, 2007), 125.

36 *Ibid.* See, also, Vereshchagin, *op.cit.* note 31, 95-96.

37 Boshno, *op.cit.* note 35, 125.

38 Pavel A. Guk, *Sudebnoe normotvorchestvo: teoriia i praktika* (Penzenskii gosudarstvennyi universitet, Penza, 2009), 48.

39 *Ibid.*, 118.

40 *Ibid.*, 127.

is by no means unanimous within the academic community.[41] Practitioners also have noted that Russian court decisions serve as *de facto* precedent, even though Russian law still does not formally recognize this concept.[42]

In reality, the Russian legal community has never reached a firm consensus regarding whether judicial decision-making represents a 'formal' or informal' source of law. That being said, by pushing for enhanced precedential powers, Chairman Ivanov clearly wants to resolve this debate in favor of Russia's high courts. It is only by understanding how Ivanov and the Higher *Arbitrazh* Court asserted the right of precedent, in all its procedural nuance, that one can fully appreciate the broader implications of the Constitutional Court's subsequent ruling on this subject. Such an analysis begins with an overview of the Higher *Arbitrazh* Court's decision-making process for—unlike high courts in other countries—the Higher *Arbitrazh* Court issues legal rulings through two distinct internal bodies: the plenum and the presidium. As discussed below, both of these institutions have become intimately involved in Russia's debate over precedent.

2. Judicial Review and the Higher *Arbitrazh* Court

2.1. Plenum Explanations

According to Article 127 of the 1993 Russian Constitution, the Higher *Arbitrazh* Court serves as the highest judicial organ resolving economic and other disputes heard by the lower *Arbitrazh* courts.[43] In addition to exercising judicial supervision as set forth by federal law, Article 127 also grants the Higher *Arbitrazh* Court the right to "provide explanations [*raz"iasneniia*] on issues pertaining to judicial practice".[44]

It is this latter ability to issue explanations that has been most directly associated with the power of precedent. As previously noted, the Higher *Arbitrazh* Court presides in its official capacity both as the plenum and the presidium.

41 For a recent work rejecting precedent as a formal source of law, see Sergei A. Drobyshevskii and Tat'iana N. Dantseva, *Formal'nye istochniki prava* (Norma, Moscow, 2011), 149-153. Even proponents of precedent recognize the split among Russian legal scholars as to what constitutes a formal source of law. See Marchenko, *op.cit.* note 29, 382-384, 388-392; and Guk, *op.cit.* note 38, 56.

42 "Pretsedentnoe pravo de-fakto uzhe sushchestvuet v RF – Krasheninnikov", *RAPSI* (19 March 2010), available at <http://rian.ru/general_jurisdiction/20100319/215348940.html>; and Evgeny Timofeev, "Russia to Apply Precedent-Based Law System", *The Moscow Times* (9 December 2009), available at <http://www.themoscowtimes.com/business/business_for_business/article/russia-to-apply-precedent-based-law-system/391053.html>.

43 For a review of the origins of the *arbitrazh* court and the types of cases that it handles, see Kathryn Hendley, "Remaking an Institution: The Transition in Russia from State *Arbitrazh* to *Arbitrazh* Courts", 46(1) *American Journal of Comparative Law* (1998), 93-127; *id.*, "Business Litigation in the Transition: A Portrait of Debt Collection in Russia", 31(1) *Law and Society Review* (2004), 305-347; and *id.*, "Enforcing Judgments in Russian Economic Courts", 20(1) *Post-Soviet Affairs* (2004), 46-82.

44 Art.127, "Konstitutsiia Rossiiskoi Federatsii" (with subsequent amendments), adopted 12 December 1993, *Rossiiskaia gazeta* (25 December 1993), available at <http://www.rg.ru/1993/12/25/konstituciya.html>. Art.126 provides the same grant of authority to the Russian Supreme Court.

While some members (most notably the chairman and deputy chairman of the Higher *Arbitrazh* Court) belong to both bodies, the two institutions perform different functions. The plenum generally oversees the administrative side of the Court's activities, while the presidium is primarily responsible for reviewing individual cases on appeal through the process of supervisory review. However, according to the 1995 RF Law on the *Arbitrazh* Courts, it is the plenum that is assigned the responsibility for issuing explanations.[45] Article 13(1)(1) specifically grants the plenum the right to consider prior court practice, to apply laws and different normative acts by the *Arbitrazh* courts, and to give explanations on questions of judicial practice.

The custom whereby Russia's high courts issue such instructions stretches back to Imperial Russia. While an internal legislative process existed within the tsarist bureaucracy, Russia lacked an independent legislature (until 1906) that could fulfill the public law-creating functions so essential for a civil-law system. Imperial Russia also did not possess a detailed civil code during this time period; instead, it relied on sections of the 1832 *Svod Zakonov* (Digest of Laws), which lacked "the completeness, unity, and systematic exposition of both general principles and specific norms provided by contemporary Western European legal codes".[46] The Civil Cassation Department stepped into this legislative breach in the aftermath of the Judicial Reforms of 1864 and began publishing 'guidance' (*rukovodstvo*) for lower courts on the meaning of the law, although even in nineteenth-century Russia, scholars remained sharply divided as to whether such instructions constituted binding precedent.[47]

The Soviet Supreme Court continued the tsarist tradition of issuing 'guiding' explanations of law, but the 1993 Russian Constitution dropped this term from its description of the explanatory powers both for the Russian Supreme Court and the Higher *Arbitrazh* Court.[48] Nevertheless, the Higher *Arbitrazh* Court continues to issue explanations that are generally perceived as obligatory for judges in lower *Arbitrazh* courts. That this prerogative remains open to interpretation stems in part from the awkward construction of Article 13 of the Law on the *Arbitrazh* Courts. In addition to the above-described explanatory powers, the first part of this provision describes the plenum's administrative responsibilities. These duties include electing the chairman and deputy chairman of the court, confirming

45 Federal'nyi konstitutsionnyi zakon ot 28 aprelia 1995 g. No.1-FKZ "Ob Arbitrazhnykh sudakh v Rossiiskoi Federatsii", signed 28 April 1995, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* (1995) No.18 item 1589 (hereinafter "Law on the *Arbitrazh* Courts").

46 Wagner, *op.cit.* note 2, 56.

47 *Ibid.*, 41-45.

48 Plenum decisions can no longer be considered 'guiding' since the Supreme Court and the Higher *Arbitrazh* Court can disagree on matters of judicial interpretation. In order to address such problems, joint plenum decisions have at times been issued by the two courts. See Arman I. Mkrtumian, *Sudebnyi pretsedent v sovremennom grazhdanskom prave* (Akademiia APK i PPRO, Moscow, 2009), 102-103; and Guk, *op.cit.* note 38, 121.

the court's rules, establishing court districts, and otherwise deciding questions of the organization and activities of the *Arbitrazh*-court system. Article 13(2) then concludes that, during the course of the activities enumerated in Article 13(1), the plenum makes decisions that are obligatory for all *Arbitrazh* courts within the Russian Federation.

Relying on this broad grant of authority in Article 13(2), some commentators claim that plenum explanations are mandatory for all lower *Arbitrazh* courts, despite the provision's confusing mixture of administrative and judicial functions.[49] But while the degree to which plenum decisions are obligatory remains subject to debate,[50] these explanations are regularly associated with precedent, especially since Article 170(4) of the 2002 RF *Arbitrazh* Procedure Code (*APK*) states that plenum decisions (which include explanations) can be referred to in the explanatory part (*motivirovochnaia chast'*) of an *Arbitrazh*-court decision.[51] Plenum explanations share other general characteristics of precedent as well: they provide general interpretations of judicial norms, fill in gaps in legislation, and broadly seek to coordinate a uniform application of existing legislation.

But while *Arbitrazh* judges can now directly cite plenum explanations to buttress their decisions, these high-court decrees do not necessarily fall under the category of precedent—at least how that term is generally understood in the Anglo-American context. While the plenum may gather materials and review scholarly articles before issuing an explanation, this decision is not part of a mature, live dispute between two parties nor does it focus on concrete issues. Instead, the plenum can—on its own initiative—issue a general interpretation of normative acts that directly impacts how a statute is understood and implemented. Mikhail Marchenko, who broadly upholds plenum decrees as the functional equivalent of precedent, nevertheless recognizes their distinctive (*svoeobrazie*) origins, namely that they arise not from a concrete criminal or civil case but from the more general review of judicial practice.[52]

49 Mikhail N. Marchenko, *Sudebnoe pravotvorchestvo i sudeiskoe pravo* (Prospekt, Moscow, 2011), 436.

50 Vereshchagin refers to plenum explanations as a "subsidiary source of law [...] that can be overcome by the decisions of the appropriate legislative agencies at any time". Vereshchagin, *op.cit.* note 31, 102. See, also, Viktoriia V. Dzhura, "O sudebnom pretsedente v Rossiiskoi Federatsii", 2 *Sibirskii Iuridicheskii Vestnik* (2005), available at <http://www.law.edu.ru/doc/document.asp?docID=1226724>.

51 Art.170(4), "Arbitrazhnyi protsessual'nyi kodeks Rossiiskoi Federatsii" (with subsequent amendments), No.95-FZ, signed 24 July 2002, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* (2002) No.30 item 3012 (hereinafter "*Arbitrazh* Procedure Code" or "*APK*"). The equivalent provision in the Civil Procedure Code (Art.198) contains no similar mention of an expressed right to cite Supreme Court plenum decisions. In general, judges in Russia's courts of general jurisdiction are under no obligation to refer to past Supreme Court plenum decisions, although they nevertheless are required to take these rulings into account when reaching a decision. See Burkov, *op.cit.* note 28, 120-123. "Grazhdanskii Protsessual'nyi Kodeks Rossiiskoi Federatsii" (with subsequent amendments), No.138-FZ, signed 14 November 2002, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* (2002) No.46 item 4532.

52 Marchenko, *op.cit.* note 49, 429-430.

And just as a plenum decision is not generated from below, it cannot be appealed above (other than as part of a constitutional dispute to the Constitutional Court) thereby giving plenum decisions the appearance of administrative rule-making as opposed to an actual court decision.[53] Thus, while the plenum may provide mandatory explanations of law, its decision-making process lacks the procedural constraints that one normally associates with a broader system of precedent.

2.2. Presidium Decisions

In addition to its plenum powers, the Higher *Arbitrazh* Court also writes opinion letters (*informatsionnye pis'ma*) and reviews individual disputes in its capacity as the presidium of the high court. Unlike plenum explanations, opinion letters are generally not perceived as obligatory for judges. Article 16 of the Law on the *Arbitrazh* Courts states that the presidium will examine separate questions of judicial practice and "inform" *Arbitrazh* judges of their findings. Unlike plenum decisions, however, no subsequent clause within the Law on the *Arbitrazh* Courts suggests that these opinion letters are mandatory for lower-court judges.[54]

The presidium of the Higher *Arbitrazh* Court also examines individual cases as part of the appellate process. Three separate stages exist within the Russian *Arbitrazh* appellate system: appellate review (*appelliatsia*), cassation review (*kassatsiia*), and supervisory review (*nadzor*). Pursuant to the *APK*, an initial court decision can be reviewed by an appellate court whereby the court reconsiders matters of both fact and law and then reaches a new final judgment. Thus, despite its deceptive name, an 'appeal' in the *Arbitrazh* process essentially involves a re-trial.

An appellate decision, in turn, can be reviewed by a federal *Arbitrazh* court acting in cassation. The *Arbitrazh* system is divided into ten regional districts (*okrugi*), each with its own cassation court. The cassation process primarily focuses on matters of law. Article 288 of the *APK* states that lower-court decisions can be overturned in instances where the cassation court finds an incorrect application of the norms of either material law or procedural law.[55] But while cassation decisions undoubtedly represent an important source of judicial interpretation,

53 Vereshchagin, *op.cit.* note 31, 107-108.

54 Dzhura, *op.cit.* note 50. Some scholars insist that information letters also contribute to judicial practice and therefore carry a general obligatory nature. See Igor A. Prikhod'ko, Aleksandr V. Bondarenko, and Vladimir M. Stoliarenko, *Kommentarii k postanovleniiu Plenuma Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii ot 12 marta 2007 g. No.17 "O primenenii Arbitrazhnogo protsessual'nogo kodeksa Rossiiskoi Federatsii pri peresmotre vstupivshikh v zakonnuiu silu sudebnykh aktov po vnov' otkryvshimsia obstoiatel'stvam"* (Mezhdunarodnye otnosheniia, Moscow, 2010), 193-198.

55 Although cassation courts are not theoretically supposed to examine factual issues, they regularly do so. See William Burnham, Peter Maggs, and Gennady Danilenko, *Law and Legal System of the Russian Federation* (Juris Publishing, Huntington, NY, 4th ed. 2009), 79-80, 84.

individual cassation courts often come to different conclusions as to the meaning of a statute, thereby creating the need for a single authoritative determination.[56]

As a result, cassation decisions may be appealed to the presidium of the Higher *Arbitrazh* Court as part of the supervisory-review process.[57] The *APK* specifically identifies the grounds for overturning a cassation-court decision: the presidium can only change a judicial act that has already entered into legal force if that act: (1) violates the uniform interpretation and application of a norm of law by the *Arbitrazh* courts; (2) violates the rights and freedoms of individuals and citizens in accordance with the generally recognized principles and norms of international law and international agreements of the Russian Federation; or (3) violates the rights and legal interests of an undefined group of people or other public interests.[58]

Critics of *nadzor* fault the supervisory-review process for being more concerned with promoting stability within the legal system than with resolving actual questions of law.[59] Nevertheless, the presidium reviews individual cases and issues decisions in its capacity as the highest court in the *Arbitrazh* system with the primary goal of creating a unified understanding and application of legal norms. Yet, while promoting a more uniform legal system, these *nadzor* decisions again fall short of the Anglo-American concept of precedent.[60] According to Article 305(3) of the *APK*, any instruction (*ukazanie*) issued by the presidium during

56 Irina V. Kharlamova, *Arbitrazhnyi sud: tseli kassatsionnogo proizvodstva* (Statut, Moscow, 2009), 86. While the Higher *Arbitrazh* Court receives numerous *nadzor* applications, it actually reviews only a small number of cases. In 2009, for example, 20,948 supervisory-review petitions were filed within the *arbitrazh*-court system. Only 401 cases, however, were transferred to the presidium, which then overturned the previous decision in 319 instances. In 2010, 21,913 appeals for supervisory review were filed, of which only 432 were transferred to the presidium for further consideration. The presidium ultimately changed 350 judicial acts. See Higher *Arbitrazh* Court statistics at <http://www.arbitr.ru/_upimg/C3BE76A77691BE77464AB698E9ABFE47_3.pdf>.

57 The *nadzor* process itself comes with a long and controversial history. During the Soviet period, supervisory review supported the procuracy's oversight powers by giving it the right to appeal (or re-open) a case at any time even if a final judgment had already entered into legal force. Such uncertainty undermined any notion of the finality of judgments in the Soviet Union, since cases could be re-opened years after they had concluded and without the participation of the parties themselves. Although the supervisory process in Russia's ordinary courts has undergone substantial procedural reform since 1991, its preservation has served as a major source of contention between the Russian government and the European Court of Human Rights, so much so that the ECtHR does not require Russian litigants to exhaust the *nadzor* process before submitting a complaint to Strasbourg. Overall, the *nadzor* process in the *Arbitrazh* courts has been much less controversial than its counterpart in the general courts, primarily because the *APK* imposed a short time limit (generally three months) on the process and further restricted supervisory review to only one court (the presidium). Burnham, Maggs, and Danilenko, *op.cit.* note 55, 64; and William Pomeranz, "Supervisory Review and the Finality of Judgments under Russian Law", 34(1) *Review of Central and East European Law* (2009), 15-36.

58 Art.304, *APK*.

59 Kharlamova, *op.cit.* note 56, 138-139.

60 Dzhura, *op.cit.* note 50.

the course of its examination of a case—including any interpretation of law—is only obligatory for the *Arbitrazh* court examining that specific case.

Thus, according to Russian law, a presidium decision only affects the specific case before the court and does not serve as a broader precedent for other related cases. Since no binding precedents are set, judges theoretically retain their independence when reviewing similar disputes. This does not mean, however, that these decisions have no impact on judicial practice as a whole. Every high-court determination is officially published, and the *Arbitrazh* court further maintains a comprehensive database on its website of all previous upper- and lower-court decisions.[61] Indeed, even before the establishment of these electronic resources, judges and practitioners in the 1990s were reading the Higher *Arbitrazh* Court's journal (*Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii*) and paying increased attention to the potential impact of presidium decisions on judicial practice.[62]

Thus, unlike in Soviet times, complete judicial decisions are now widely available to members of the judiciary, practicing lawyers, and the general public. Moreover, any ambitious Russian judge knows that s/he runs the risk of being overturned (thereby affecting their long-term career prospects) if they do not follow past presidium decisions.[63] As a result, while presidium decisions are not explicitly mandatory in other cases—and, therefore, do not constitute binding precedent—they still contribute to creating norms of judicial practice and can thereby serve as a *de facto* source of law.

3. The Creation of Binding Precedent under Russian Law

3.1. The Higher Arbitrazh *Court Asserts the Right to Precedent*

The debate over precedent moved from theoretical to practical with a Higher *Arbitrazh* Court plenum decree of 14 February 2008.[64] A dramatic increase in

61 See the website of the Higher *Arbitrazh* Court at <http://www.arbitr.ru/as/pract/post_pres>.

62 William Butler identifies how presidium decisions in the 1990s influenced Russia's new commercial practices, most notably in the areas of credit contracts and forward transactions. See Butler, *op.cit.* note 26, 590-592.

63 Peter. H. Solomon, Jr. and Todd S. Fogelsong, *Courts and Transition in Russia: The Challenge of Judicial Reform* (Westview Press, Boulder, CO, 2000) 49-51; Peter H. Solomon, Jr., "Informal Practices in Russian Justice: Probing the Limits of Post-Soviet Reform", in Ferdinand Feldbrugge (ed.), *Russia, Europe, and the Rule of Law*, in William B. Simons (ed.), *Law in Eastern Europe*, No.56 (Nijhoff, Leiden, 2007), 79-92, 84-85; Kathryn Hendley, "Are Russian Judges Still Soviet?", 23(3) *Post-Soviet Affairs* (2007), 240-274, 262-263; and Elena V. Novikova (ed.), *Rule of Law in Russia: Issues of Implementation, Enforcement, and Practice* (Statut, Moscow, 2010), 43.

64 Postanovlenie Plenuma Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii "O vnesenii dopolnenii v postanovlenie Plenumy Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii ot 12.03.2007 No.17 'O primenenii Arbitrazhnogo protsessual'nogo kodeksa Rossiiskoi Federatsii pri peresmotre vstupivshikh v zakonnuiu silu sudebnykh aktov po vnov' otrkyvshimsia obstoiatel'stvam'" (14 February 2008) No.14, available at <http://www.arbitr.ru/as/pract/post_plenum/18671.html>. The 2008 plenum decision was itself a clarification of an earlier plenum decision: Postanovlenie Plenuma Vysshego Arbitrazhnogo Suda

the number of cases before the court, many involving similar issues, served as the primary motivation behind this action.[65] To relieve the burden of having to deal with these repeat cases, the 2008 plenum decree created an alternative appeal process that combined, as it were, two previously distinct legal processes: supervisory review (Chapter 36, *APK*) and newly discovered circumstances (Chapter 37, *APK*).

The 2008 plenum decree specifically dealt with cases (judicial acts) that were still subject to the supervisory-review process, *i.e.*, cases that had not missed the original filing deadline or were otherwise still pending before the presidium. In such limited instances, if the Higher *Arbitrazh* Court issued a plenum or presidium decree that changed the underlying application of legislation upon which a judicial act was based, that decree would serve as a newly discovered circumstance under Article 311(1) (a fact not known, or that could not have been known, at the time of the original decision).

Although the 2008 plenum decree never used the term 'precedent', the above process essentially transformed certain designated presidium decisions from a secondary to a primary source of law. The decree further stipulated that, once the presidium released this precedent-making decision, all similar pending disputes henceforth would be examined by the body responsible for recommending cases to the presidium for *nadzor*: the Collegial Body of Judges (*kollegial'nyi sostav sudei Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii*). If this body chose not to recommend a case for a full supervisory-review proceeding, it could still indicate in its rejection that the case could be re-examined by a court of first instance under the procedures set forth under Chapter 37, *APK*, for newly discovered circumstances.

In other words, the presidium decision served as a newly discovered circumstance—a binding precedent by any other name—that relieved the presidium of having to review similar cases. Instead, if the Collegial Body of Judges so indicated, such cases would be returned to the lower courts for re-examination. Cassation and appellate courts, in turn, were also required by the 2008 plenum decree to take into account these so-designated binding decisions when reviewing pending cases.

To a certain degree, the Higher *Arbitrazh* Court was merely asserting similar powers that already existed for the Constitutional Court and the ECtHR under the *APK*. Decisions by either court can, in specific instances, represent a newly

Rossiiskoi Federatsii, "O primenenii Arbitrazhnogo protsessual'nogo kodeksa Rossiiskoi Federatsii pri peresmotre vstupivshikh v zakonnuiu silu sudebnykh aktov po vnov' otrkyvshimsia obstoiatel'stvam" (12 March 2007) No.17, available at <http://www.arbitr.ru/as/pract/post_plenum/3184.html>.

65 Dmitrii Kaz'min, "VAS kak novoe obstoiatel'stvo", *Vedomosti* (15 February 2008), available at <http://www.vedomosti.ru/newspaper/print.shtml?2008/02/15/141777>; and *id.*, "Arbitrazhnaia revoliutsiia", *Vedomosti* (14 February 2008), available at <http://www.vedomosti.ru/newspaper/article/2008/02/14/141713>. The *arbitrazh* court had previously introduced accelerated procedures to reduce the heavy load of straightforward cases. See Kathryn Hendley, "Accelerated Procedure in the Russian *Arbitrazh* Courts", 52(6) *Problems of Post-Communism* (2005), 21-31.

discovered circumstance.[66] According to Chairman Ivanov, the 2008 plenum decree was motivated by the need for judicial rationality; the court henceforth would be relieved from examining routine, repeat cases and could instead focus on more complicated cases that contributed to the development of judicial practice.[67] Buried in this rather archaic procedural discussion, however, was the truly revolutionary assertion that presidium decisions not only possessed retroactive force but that they also served as precedent for future cases as well.

3.2. The Constitutional Court Weighs In

It did not take long for the Higher *Arbitrazh* Court's path-breaking declaration to be challenged in court. Between 2006 and 2007, four companies argued that they had incurred damages when Mosenergosbyt allegedly overcharged them for electricity. The legal basis underlying these decisions, however, was later overturned by the presidium of the Higher *Arbitrazh* Court. Therefore, in the aftermath of the 2008 plenum decree giving presidium rulings precedential value, Mosenergosbyt sought to re-open the cases as newly discovered circumstances. Mosenergosbyt ultimately emerged victorious and was found not to have received any unjust-enrichment payments.

The four companies ultimately appealed these actions to the Russian Constitutional Court, claiming that the 2008 plenum decree violated several constitutional provisions, including the right that all persons be treated equally both before the courts and before the law. The Court issued a decree on 21 January 2010, where it formally endorsed the importance of judicial practice as a source of Russian law.[68] The Constitutional Court began by referring to Article 127 of the 1993 RF Constitution, which grants the Higher *Arbitrazh* Court the right to give explanations regarding judicial practice to ensure a unified interpretation and application of Russian law. To deny the Higher *Arbitrazh* Court the right to give abstract interpretations of applied legal norms—and, correspondingly, to take a legal stance—would limit the court's constitutional functions and its place as the highest court in the *Arbitrazh*-court system.[69] The Constitutional Court further upheld the Higher *Arbitrazh* Court's right to issue mandatory interpretations of law. In light of its essential role in the formation of judicial practice, the majority opinion noted, the Higher *Arbitrazh* Court's interpretations were, as a general rule, obligatory on lower courts in future proceedings.[70]

66 Arts.311(6) and 311(7), *APK*.

67 "VAS sozdal pretsedent", *RBK Daily* (15 February 2008), available at <http://www.rbcdaily.ru/print.shtml?2008/02/15/focus/322080>.

68 Decree, *op.cit.* note 5.

69 *Ibid.*, para.3.1.

70 *Ibid.*, para.3.4.

Thus, just like the Higher *Arbitrazh* Court, the Constitutional Court upheld the binding nature of both plenum and presidium decisions without mentioning the word 'precedent', in the process bestowing greater legitimacy on the concept of judicial practice. The Constitutional Court also upheld the retroactive use of presidium decisions, although with some important caveats. The Constitutional Court agreed with the overall policy justification behind the Higher *Arbitrazh* Court's original 2008 plenum decree, namely that the use of judicial interpretation led to enhanced judicial efficiency; as the Court noted, the plenum decree relieved the presidium of having to examine cases already decided by a previous Higher *Arbitrazh* Court decision, thereby enabling more litigants to defend their rights and legal interests before the *Arbitrazh* courts.[71] In transferring a case back to the court of first instance, however, the Constitutional Court noted that the lower court was free to agree or disagree as to whether the higher-court ruling actually applied to a given case.[72]

Other specific conditions also had to be met before a Higher *Arbitrazh* Court decision could be given retroactive force. According to the Constitutional Court, the actual plenum or presidium decision had to indicate the possibility that the provided interpretation of norms could be applied retroactively.[73] Moreover, such a backward application could not leave the petitioner in a worse position *vis-à-vis* the state.[74] Finally, in order to preserve the stability of previous judgments, the retroactive application of presidium decisions could only take place within the time constraints set forth in Article 312 of the *APK*.[75] Thus, if the Collegial Body of Judges so provided, litigants had only three months from the time a supervisory appeal was rejected to file a petition under newly discovered circumstances.

In addition to carving out this new right for the Higher *Arbitrazh* Court, the Constitutional Court flexed its own precedential powers as well. According to the decree, a valid court decision means that, as a general rule, as soon as the Constitutional Court issues a determination, the legal norms in question "cannot be interpreted in any other way or applied in another sense".[76] The Constitutional Court also provided numerous citations not only to its own previous decisions but, also, when appropriate, to relevant decisions by the ECtHR to further support its legal arguments.[77] The interplay between common-law and civil-law traditions was clearly on display in the majority opinion, and although the

71 *Ibid.*, para.3.2.

72 *Ibid.*, para.6.

73 *Ibid.*, para.4.

74 *Ibid.*, para.5.

75 *Ibid.*, para.6.

76 *Ibid.*, para.3.3.

77 The Constitutional Court referred to the ECtHR most prominently to limit the retroactive force of the 14 February 2008 plenum decree. *Ibid.*, para.5.

Constitutional Court never referred to the longstanding scholarly debates on precedent, the decree itself marked an important shift in the boundaries of this debate going forward.[78]

3.3. Dissenting Opinions

In its majority opinion, the Constitutional Court managed to sidestep two controversial issues: it refrained from examining the dispute from a separation-of-powers perspective,[79] and it upheld the constitutionality of Article 170(4) of the *APK* (the right of judges to refer to plenum decisions in their rulings) without getting dragged too deeply into the substance of the provision.[80]

Both of these issues featured prominently in the two dissenting opinions.[81] Justice Gennadii Zhilin insisted that the Constitutional Court had overstepped its bounds and introduced legal procedures unforeseen in law. For example, under the *APK*, the Collegial Body of Judges was only assigned the task of either: (1) recommending the transfer of a case to the presidium for full supervisory review; or (2) rejecting such a case. The Collegial Body had no legal authority under the *APK* to return such cases to the regular courts under the newly-discovered-circumstances procedures, but that was exactly what had occurred as a result of the 2008 plenum decree.[82] The Russian legal system, argued Zhilin, did not grant the Higher *Arbitrazh* Court the right to ignore the will of the legislature

78 Individual Constitutional Court justices have entered the public debate on precedent, often in opposition to its expansion. Chairman Zor'kin, for example, has voiced a more traditional understanding of the role of judicial decision-making within the civil-law system, stating that judges should be subordinated to the law and not to a higher court, the plenum, or to the Supreme Court. Zor'kin added that precedent should not be used as a means to cement a judicial pyramid, where high courts dictate the law to lower courts. See Anna Pushkarskaia, "S nezavisimost'iu sudov moglo byt' i khuzhe", *Kommersant* (16 April 2010), available at <http://www.kommersant.ru/doc.aspx?DocsID=1354905>. See, also, Morshchakova, *op.cit.* note 4, available at <http://www.gazeta-yurist.ru/article.php?i=1134>.

79 Decree, *op.cit.* note 5, para.7.

80 *Ibid.*, para.1.2.

81 Constitutional Court justices may file either a concurring or dissenting opinion, also referred to as a special opinion (*osoboe mnenie*). For an analysis of the role that dissenting opinions play in Russian constitutional jurisprudence, see Donald Barry, "Decision-making and Dissent in the Russian Federation Constitutional Court", in Roger Clark, Ferdinand Feldbrugge, and Stanislaw Pomorski (eds.), *International and National Law in Russia and Eastern Europe*, in William B. Simons (ed.), *Law in Eastern Europe*, No.49 (Martinus Nijhoff Publishers, The Hague, Boston, London, 2001), 1-17; and William Pomeranz, "President Medvedev and the Contested Constitutional Underpinnings of Russia's Power Vertical", 17(2) *Demokratizatsiya* (2009), 179-192. The presidium of the Higher *Arbitrazh* Court published its first dissenting opinion in June 2011. Prior to that time, dissenting opinions were included in the case materials but not officially released. See Natal'ia Shiniaeva, "VAS RF nachinaet publikovat' osobye mneniia svoikh sudei", *pravo.ru* (2 June 2011), available at <http://pravo.ru/news/view/55006>

82 "Osoboe mnenie sud'i Konstitutsionnogo Suda RF G.A. Zhilina po delu o proverke konstitutsionnosti abzatsa 4 punkta 3 chasti 4 stat'i 170, punkta 1 stat'i 311 i chasti 1 stat'i 312 Arbitrazhnogo protsessual'nogo kodeksa Rossiiskoi Federatsii v sviazi s zhalobami OAO Karbolit, ZAO Proizvodstvennoe ob"edinenie 'Bereg', OAO Zavod 'Mikroprovod' i OAO 'Nauchno-proizvodstvennoe predpriiatie "Respirator"', *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* (2010) No.2, 23-35, at para.2, available at <http://ksportal.garant.ru:8081/SESSION/PILOT/main.htm>.

as expressed in the *APK* "even if it is the highest court in the *Arbitrazh* or the general jurisdiction system".[83]

In his dissenting opinion, Zhilin repeatedly accused the Constitutional Court of having usurped the legislature's authority. He concluded that the 2008 plenum decree ran roughshod over the 1993 Constitution's promised guarantee to protect the rights and freedoms of citizens, since the parties henceforth would be forced to participate in judicial proceedings that contradicted the established rules of procedure as set forth under Russian law.[84]

The second dissenting opinion, written by Justice Mikhail Kleandrov, focused almost exclusively on the meaning of Article 170(4) of the *APK*.[85] According to Kleandrov, Article 170(4) was quite explicit when it stated that only a plenum decree could be referenced in the explanatory part of an *Arbitrazh*-court decision. He further insisted that this provision made no allowance for citing presidium decisions and, therefore, that such references were not contemplated under the *APK*. Judges will face a terrible dilemma in the future, concluded Kleandrov, when trying to implement the 2008 plenum decree: either they will include a reference to a presidium decision as a newly discovered circumstance, and thus be in violation of the formal requirements of the *APK*, or they will opt not to cite the presidium ruling, in which case they would provide no legal justification for reviewing a final decision as a newly discovered circumstance.[86]

3.4. Precedent in Action

In its decree of 21 January 2010, the Constitutional Court called on the Russian parliament to implement its ruling within six months by enacting the appropriate legislation.[87] The Higher *Arbitrazh* Court did not wait, however, to assert its newly minted constitutional right to issue binding precedent.[88] On 2 March

83 *Ibid.*, para.3.

84 *Ibid.*

85 "Osoboe mnenie sud'i Konstitutsionnogo Suda RF M.I. Kleandrova po delu o proverke konstitutsionnosti abzatsa 4 punkta 3 chasti 4 stat'i 170, punkta 1 stat'i 311 1 chasti 1 stat'i 312 Arbitrazhnogo protsessual'nogo kodeksa Rossiiskoi Federatsii v sviazi s zhalobami OAO Karbolit, ZAO Proizvodstvennoe ob"edinenie 'Bereg', OAO Zavod 'Mikroprovod' i OAO 'Nauchno-proizvodstvennoe predpriiatie "Respirator"', *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* (2010) No.2, 36-39, 36, available at <http://ksportal.garant.ru:8081/SESSION/PILOT/main.htm>.

86 *Ibid.*, 39.

87 The *Duma* ultimately took almost a year to pass the appropriate law, but legislation was approved on 27 December 2010 and came into force on 28 March 2011. Federal'nyi zakon Rossiiskoi Federatsii ot 23 dekabria 2010 g. No.379-FZ "O vnesenii izmenenii v Arbitrazhnyi protsessual'nyi kodeks Rossiiskoi Federatsii", *Rossiiskaia gazeta* (27 December 2010), available at <http://www.rg.ru/2010/12/27/kodeks-dok.html>.

88 Zhilin noted in his special opinion that the retroactive use of Higher *Arbitrazh* Court decisions had already occurred in hundreds of cases since the 2008 plenum decree. See Zhilin's "Osoboe mnenie", *op.cit.* note 82, para.4. In fact, in 2009, 261 cases were redirected under the newly-discovered-circumstances exception; in 2010, the number was 212. See Higher *Arbitrazh* Court statistics at <http://www.arbitr.ru/_upimg/C3BE76A77691BE77464AB698E9ABFE47_3.pdf>.

2010, the presidium of the Higher *Arbitrazh* Court issued a decree concerning a credit agreement that allowed the Russian Bank of Development to unilaterally increase the interest rate charged to its customers.[89] The presidium overturned the appellate ruling as part of its supervisory-review powers, finding that the bank agreement violated Russia's consumer-protection requirements. More importantly, the Higher *Arbitrazh* Court specifically stated in its decision that the presidium's interpretation of legal norms was obligatory and must be applied by *Arbitrazh* courts in analogous cases.[90]

Arbitrazh-court judges immediately began to defer to the presidium's decision. On 26 April 2010, the cassation court of the Polvolzhskii district upheld an appellate-court decree overturning a similar bank agreement allowing for the unilateral change of interest rates, directly citing the 2 March 2010 decree.[91] In a different dispute, the presidium's gatekeeper—the Collegial Body of Judges—cited the 2 March 2010 decree as precedent and subsequently refused to transfer a case involving a one-sided interest agreement to the presidium.[92] According to *Kommersant*, this citation to the previous decision was sufficient to return the case to the lower courts as a newly discovered circumstance.[93]

Kommersant reported in the same article, however, that the Collegial Body of Judges was already beginning to distinguish the 2 March 2010 decree. In a dispute involving a similar credit agreement, the Collegial Body of Judges also refused to transfer the case to the presidium for supervisory review. In this instance, however, no mention was made either to the 2 March 2010 decree or that the case could be re-considered in the court of first instance as a newly discovered circumstance.[94] Without such a reference, the case was over, and *Kommersant* noted that these two contrasting decisions involving similar credit agreements served as an example of the "serious problems with the formation of judicial

89 Postanovlenie Prezidiuma Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii, No.7171/09, 2 March 2010, available at <http://assys.arbc.ru/bras/filepage.asp?id_doc=78596a67-df06-42ce-a283-dd67f795720d&filename=78596a67-df06-42ce-a283-dd67f795720d.pdf>.

90 The full text in Russian read as follows: "Soderzhashcheesia v nastoiashchem postanovlenii Prezidiuma Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii tolkovanie pravovykh norm iavliaetsia obiazatel'nym i podlezhit primeneniiu pri rassmotrenii arbitrazhnymi sudami analogichnykh del." *Ibid.*

91 Postanovlenie Arbitrazhnogo suda kassatsionnoi instantsii (26 April 2010) No.A55-31247/2009, available at <http://kad.arbitr.ru/?id=8FEF263A-058C-4140-8BA5-FC08A26536B2>; see, also, Postanovlenie Arbitrazhnogo suda kassatsionnoi instantsii (30 April 2010) No.A55-27837/2009, available at <http://kad.arbitr.ru/?id=696F3B23-AE04-485A-8EBE-216BDE0CD1F1>.

92 Postanovlenie Prezidiuma Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii (27 April 2010) No.VAC-4530/10, available at <http://kad.arbitr.ru/?id=4C3C2769-91C0-4629-B8FB-22E035E600C0>.

93 Svetlana Dement'eva and Ol'ga Pleshanova, "Sud perechital kreditnye dogovory", *Kommersant* (8 June 2010), available at <http://www.kommersant.ru/doc.aspx?DocsID=1382995>.

94 Postanovlenie Prezidiuma Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii (7 April 2010) No.VAC-1359/10, available at <http://kad.arbitr.ru/?id=97F9567D-01CD-4613-AA44-D9AACFCE009D>.

practice" in Russia. In other words, as has long been recognized in common-law jurisdictions, the use of precedent does not necessarily lead to uniformity in judicial decision-making.

4. The Impact of Precedent on the Russian Legal System

4.1. The Character of Russian Precedent

The recent emergence of the Higher *Arbitrazh* Court—led by Chairman Ivanov—as an outspoken advocate for precedent represents an important landmark in post-Soviet Russian jurisprudence.[95] While recognizing the significance of this development, however, one also must understand the limits of the terminology involved, especially within the Russian legal context. To begin with, the concept of judicial practice—and the role the judiciary plays in shaping judicial practice—means that court decisions already play a role in the creation of legal norms in Russia. These decisions may not share the same elevated status as common-law precedents, but judicial practice nevertheless can be seen as a source of law in the Russian civil-law system. Furthermore, through the supervisory-review process, Russia's high courts are responsible for ensuring uniformity within the nation's legal system. As a result, high-court decisions *de facto* possess precedential value, and lower-court judges (as we have mentioned above) know that in order not to be overruled—and to advance their careers—they need to follow these high-court rulings.

Thus, in many ways, Russia can be seen as another example of the interplay between civil-law and common-law jurisdictions, particularly as it relates to their mutual recognition of the importance of judicial decision-making. At the same time, Russia's limited recognition of plenum and presidium decisions as precedent should not be inflated into some sort of affirmative step toward a common-law, precedent-based system, as the philosophical and procedural gulf remains too wide. As pursuant to the Constitutional Court's findings, Higher *Arbitrazh* Court plenum decrees contain an explanation of law that generally is obligatory for lower courts. Plenum decisions also can be referred to by courts in justifying a decision, as set forth in Article 170(4) of the *APK*, further giving them the appearance of precedent. However, as previously noted, plenum explanations do not arise from a specific case or set of facts, a critical limitation that has long served as a major restraint on common-law judges. Instead, the plenum

95 The Russian judiciary as a whole appears to be less enthusiastic about the introduction of precedent than the Higher *Arbitrazh* Court. In a survey of judges conducted between 2003 and 2006, 46.7 percent of judges responded negatively to the question: "Do you think that the Russian Federation could recognize in legislation the precedential model of a legal system?" Alternatively, 28.5 percent answered positively to the question, while 24.8 percent expressed no particular opinion on the subject. See Svetlana V. Boshno, "Pretsedent, zakon, i doktrina (opyt sotsiologo-iuridicheskogo issledovaniia)", 4 *Gosudarstvo i pravo* (2007), available at <http://dlib.eastview.com/util/printarticle.jsp?id=12012797>.

can issue explanations on its own initiative, making the plenum a distinctively Russian institution with no true equivalent in common-law or civil-law countries.

Presidium decisions—like plenum explanations—also can be distinguished from common-law precedents. To begin with, even after the 2008 plenum decree, the standard presidium decision under the *APK* still possesses no formal precedential value but only relates to the individual case before the court. In addition, the presidium's recently enumerated limited right to issue binding precedent remains a very top-down process, with the court affirmatively indicating which cases should be considered precedent. In contrast, the approach to formulating precedent under the common law is a much more fluid, creative process, with multiple courts participating in the process that ultimately culminates in the establishment of precedent. The Constitutional Court did insert a degree of judicial discretion into the process by allowing lower courts to agree or disagree as to whether the presidium decision actually applied to a given case when being reconsidered under the newly-discovered-circumstances exception.[96] Yet, despite the Constitutional Court's late concession to the lower courts, it must be emphasized that the underlying motivation behind the 2008 plenum decree itself was not to grant judges greater leeway in interpreting the law but, instead, to promote uniformity of practice—the primary jurisdictional basis for a presidium decision under the supervisory-review process.

In the final analysis, the Higher *Arbitrazh* Court's 2008 plenum decree can rightly be called revolutionary in that it introduced an element of binding precedent into the Russian notion of judicial practice.[97] In limited circumstances, presidium decisions no longer serve as *de facto* precedent but as a primary source of law. What the 2008 plenum decree did not signify, however, was some sort of revolutionary step toward a wider acceptance of the common-law theory of precedent, with all its internal dynamism and procedural constraints. Russia essentially has followed the path of other civil law countries that have introduced elements of precedent without crossing the civil-law/common-law divide. As such, Russia has stayed much closer to its historical legal roots than the various public pronouncements on precedent might suggest.

4.2. A More Assertive Judiciary

The recognition of a limited right of precedent may bring some clarity to Russia's long-running academic debate over 'formal' *versus* 'informal' sources of

96 The role of judicial discretion—and how it relates to the overall independence of the Russian judiciary—is discussed below in Section 4.4. For a more general review of the discretionary powers of Russian judges, see Aleksandr V. Smirnov and Artem G. Manukian, *Tolkovanie norm prava* (Prospekt, Moscow, 2008), 109-114, 118-119.

97 The historical importance of the Constitutional Court's determination to uphold the 2008 plenum decree led to detailed discussion in the journal *Zakon*. See "Pretsedent v Rossii: Pozitsiia Konstitutsionnogo Suda", *Zakon* (February 2010), 11-33; see, also, Aleksandr N. Vereshchagin, "Rybok k pretsedentu: o postanovlenii KS RF ot 21.01.2010 No.1-P," *Zakon* (March 2010), 89-96.

law. A narrow focus on terminology, however, should not obscure the broader significance of the push for precedent in Russia. Most notably, the process by which the Higher *Arbitrazh* Court declared this right bespeaks of a more assertive Russian judiciary than existed during the Soviet period. The Higher *Arbitrazh* Court essentially claimed this privilege all by itself, issuing a self-implementing plenum decree that identified a supplemental process of judicial review otherwise unrecognized by the *APK*. The Constitutional Court upheld this right in its subsequent decision, further demanding that the Russian *Duma* pass legislation to transform this right into law. Finally, so as not to be left behind, the Russian Supreme Court in 2010 also asserted its own right to issue precedent in civil cases, stating that a Supreme Court plenum or presidium decision could serve as a basis to re-examine a case under the newly-discovered-circumstances exception.[98]

Thus, Russia's three high courts appropriated for the judiciary a right that even the legislature would not, without serious hesitation, convey to itself, namely, the right to promulgate rules that were not known at the time the relevant facts occurred and, therefore, that could be seen as having a retroactive effect. Such actions testify to a more proactive Russian judiciary, one that is seeking to expand its authority even if it collides with the prerogatives of the legislative branch. But while the Higher *Arbitrazh* Court emerged with enhanced powers, the ultimate beneficiary may just be the Constitutional Court. Now that presidium decisions potentially represent binding precedent and are not just relevant for the individual case before the court, more commercial disputes are likely to end up before the Constitutional Court, since it will represent the last source of appeal for companies disagreeing with the Higher *Arbitrazh* Court's interpretation of a statute.[99]

Other constituent parts of Russia's legal hierarchy have greeted the growing assertiveness of the Russian judiciary with skepticism and outright opposition. Both the Ministry of Justice and the procuracy have openly contested the Constitutional Court's decree, arguing that the Higher *Arbitrazh* Court had interpreted the *APK* too broadly and essentially assumed the role of the legislature.[100] The defense bar (*advokatura*) has expressed mixed views on attempts to move to a precedential system in Russia. Some defense lawyers have noted that Russia essentially already relied on a system of precedents, while others have insisted that, as a code-based country, practitioners should always turn

98 Postanovlenie plenuma Verkhovnogo Suda Rossiiskoi Federatsii "O vnesenii v Gosudarstvennuiu Dumu Federal'nogo Sobraniia Rossiskoi Federatsii proekta federal'nogo zakona 'O vnesenii izmenenii v Grazhdanskii protsessual'nyi kodeks Rossiiskoi Federatsii'" (14 July 2010) No.20, available at <http://www.supcourt.ru/Show_pdf.php?Id=6721>.

99 Ol'ga Pleshanova and Anna Pushkarskaia, "Poslednee pribezhishche biznesmenov", *Kommersant* (5 July 2010), available at <http://www.kommersant.ru/doc.aspx?DocsID=1407733>.

100 Ol'ga Pleshanova and Anna Pushkarskaia, "Sudebnyi pretsedent stal konstitutsionnym", *Kommersant* (22 January 2010), available at <http://www.kommersant.ru/doc.aspx?DocsID=1307870>.

to the code first in order to find the law.[101] Mikhail Barshchevskii, the Russian government's plenipotentiary representative before the high courts, has further insisted that any shift to a system of precedents must be predicated by a merger of the *Arbitrazh* courts and the courts of general jurisdiction. Otherwise, notes Barshchevskii, "no one could guarantee that the precedents taken by them would not contradict one another".[102]

As previously noted, the Constitutional Court's majority opinion demanded that its decision be reduced to law within six months. Both the Supreme Court and the Higher *Arbitrazh* Court quickly proposed legislation to that effect.[103] The judiciary's right of legislative initiative under Article 104 of the 1993 Constitution represents an additional right assigned to the courts that is not equally shared by all other legal institutions, most notably, the procuracy.[104] Indeed, one can argue that the judiciary has largely eclipsed the procuracy—the former eyes and ears of the state—as the primary enforcer of uniformity within the Russian legal system.[105] Therefore, while one must be careful as to how one characterizes Russian

101 "Mneniia advokatov po voprosu o pretsedentnom prave v Rossii razdelilis'", *RAPSI* (19 March 2010), available at <http://www.rian.ru/general_jurisdiction/20100319/215323768.html>.

102 *Ibid.* The debate over precedent—and the practical implications of the judiciary's assertion of this right—has continued to engage Russian scholars and practitioners. See Iurii A. Timofeev, "Pravovye pozitsii kak osnovanie dlia peresmotra sudebnogo akta," *Arbitrazhnyi i Grazhdanskii Protsess* (2011) No.5 and 6, 24-28, 30-35; Grigorii P. Chernyshov, "Izmenenie ili opredelenie praktiki primeneniia pravovoi normy kak osnovanie dlia peresmotra vstupivshikh v silu sudebnykh aktov," *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii* (2011) No.11, 59-76; Vadim Volkov, "Extra Jus: Kak sud'i prinimaiut resheniia," *Vedomosti* (7 July 2011), available at: <http://www.vedomosti.ru/newspaper/article/2011/07/07/263507>; Genrikh Padva and Andrei Rakhmilovich, "Pravo i sudebnaia praktika: Upravliaemoe pravo", *Vedomosti* (6 July 2011), available at: <http://www.vedomosti.ru/newspaper/article/2011/07/06/263418>; and Eduard Olevinskii, "Tsennost' pretsedenta," *Rossiiskaia gazeta* (30 August 2011), available at: <http://www.rg.ru/2011/08/30/arbitrag.html>.

103 Anna Pushkarskaia, "Chem VAS nameren ukrepit' pretsedentnoe pravo", *Kommersant* (22 March 2010), available at <http://www.kommersant.ru/doc.aspx?DocsID=1341235>; and Anastasiia Kornia, "Pretsedent v zakone", *Vedomosti* (15 July 2010), available at <http://www.vedomosti.ru/newspaper/article/2010/07/15/240612>.

104 In order to address this imbalance, the procuracy has asked to be given the same right to propose legislation under Art.104; so far, to no avail. See Konstantin Andrianov, Viktor Khamraev, and Vladislav Trifonov, "Genprokuraturu nadeliaiut zakonnoi siloi", *Kommersant* (11 February 2010), available at <http://www.kommersant.ru/doc.aspx?DocsID=1319826>.

105 Art.164 of the 1977 Soviet Constitution assigned the procuracy the supreme power of supervision for the strict and uniform observance of laws in the Soviet Union. Such broad powers are conspicuously absent from the 1993 Russian Constitution, although subsequent legislation did return much of the procuracy's supervisory powers, with the notable exception of its right to supervise the courts. In recent years, the procuracy's overall public standing has been further diminished by former President Vladimir Putin's decision in 2007 to transfer the procuracy's investigative power to a separate committee. Since that time, the procuracy has been engaged in a permanent tug-of-war with the investigative committee (*Sledstvennyi komitet*) over the right to supervise the committee's activities, thereby allowing the courts to assume a more influential role in promoting uniformity within the Russian legal system. Smith, "The Procuracy, Putin, and the Rule of Law in Russia", *op.cit.* note 27, 2; and Ethan Burger and Mary Holland, "Law as Politics: The Russian Procuracy and its Investigative Committee", *New York University Public Law and Legal Theory Working Papers* (2008) No.108, available at <http://lsr.nellco.org/nyu_plltwp/108>.

court decisions—especially from a procedural standpoint—the declaration by Russia's high courts of the right to issue precedent can be seen as a sign of a more confident, assertive Russian judiciary.

4.3. Separation of Powers

A stronger judiciary naturally raises questions about the separation of powers in the Russian Federation, in particular the relationship between the legislative and judicial branches. Constitutional Court Justice Zhilin sounds this warning in his dissenting opinion, where he repeatedly argues that, in asserting the right of precedent, the judiciary has ignored the will of the legislator.

The civil-law tradition puts a premium on public debate and the accompanying legislative process that result in the establishment of the abstract legal principles that serve as the foundation of the legal system. As the German sociologist Nicolas Luhman noted, the "ambiguity in relation to norms" is only resolved through a spirited process of charges and counter-charges, an (at times) heated exchange that ultimately allows for the evolution of new norms.[106] In late-nineteenth-century Germany, the establishment of individual commissions charged with the drafting of legislation contributed significantly to the public discussion and the overall quality of the German Civil Code.[107] Clear limits exist, however, as to how far to push this debate. According to Joachim Gernhuber, the codification process cannot get ahead of behavioral patterns that have yet to fully mature in society.[108]

This vibrant, and often lengthy, public debate—so essential in the German civil-law tradition—ultimately is concentrated in the legislature, which historically has been assigned the responsibility to promulgate the abstract principles that constitute the foundation of the civil-law system. How well the current Russian legislature fulfills this task of representation remains beyond the scope of this article.[109] The Russian legislature's central position in Russia's legal hierarchy,

106 Nicolas Luhman, *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt/Main, 1993), 257-258.

107 Joachim Gernhuber, *Neues Familienrecht* (Mohr, Tübingen, 1977), 34.

108 *Ibid.*

109 Aleksei Avtonomov, the editor of *Gosudarstvo i pravo*, has argued that the legislative process has largely been taken over by the executive branch. Speaking at a conference marking the fifteenth anniversary of the 1993 Russian Constitution, Avtonomov noted that, during the El'tsin presidency, the *Duma* retained the initiative in the legislative process. This situation began to change with the election of President Putin, so that today, when confronted with a question regarding the introduction of legislation, Avtonomov advises people to work through the presidential administration. "It is a waste of time to approach the parliament with problems like this", noted Avtonomov, "because most of its members are in the majority, the ruling United Russia party, and they normally do not do anything without direction from the administration." See F. Joseph Dresen and William E. Pomeranz (eds.), "The Russian Constitution at Fifteen: Assessments and Current Challenges to Russia's Legal Development", *Kennan Institute Occasional Paper* (2009) No.304, 20. For a further analysis of executive-legislative powers under the 1993 Constitution, see M. Steven Fish, *Democracy Derailed in Russia: The Failure of Open Politics* (Cambridge University Press, New York, NY, 2005), 198-220; and Sarah Whitmore, "Parliamentary Oversight in Putin's Neo-patrimonial State. Watchdogs or Show-dogs?", 62(6) *Europe-Asia Studies* (2010), 999-1025.

however, remains undisputed, even among those scholars who see court decisions as a source of law. According to Mikhail Marchenko, the court's law-creating powers are not intended to replace the will of the legislature; instead, these judicial powers are used to "supplement [...] and enrich" existing legislation.[110] Other commentators have insisted that—in the process of issuing a presidium decision—the court does not expound upon general legal principles but, instead, reaches decisions based on the concrete circumstances of the case.[111]

The Russian judiciary does not appear to be so bold as to aspire to the role of policymaker. Nevertheless, by asserting the right of precedent, Chairman Ivanov and the Higher *Arbitrazh* Court have issued an implicit challenge to the legislature and the balance of powers within Russia's civil-law system. Part of this challenge emanates from the Higher *Arbitrazh* Court's plenum powers, which enable the high court to issue mandatory explanations of law that possess precedential value. As previously discussed, this practice dates back to the tsarist period when there was no national legislature (except between 1906 and 1917) and no comprehensive civil code to regulate private transactions. For whatever reason—tradition, inertia, necessity—the 1993 Constitution upholds the right of Russia's high courts to issue mandatory explanations on their own initiative, despite the establishment of an independent parliament and the enactment of a detailed civil code. Yet, even though these plenum powers remain an anomaly among civil-law countries, this practice has now lasted for almost 150 years (and during three distinct political regimes) without fundamentally altering Russia's civil-law orientation.

In fact, it is the recently established right of the presidium to issue binding precedent that represents the more existential challenge to Russia's civil-law system and separation of powers. The civil-law tradition ultimately rests on its directness and objectivity, of knowing where to turn in order to find the law. The responsibility for setting these general principles (and organizing the debate) rests with the legislature. Of course, not every legislative session leads to a substantive debate and the successful establishment of general principles. At the same time, the need both for transparency and for balancing competing interests in the search for the best common denominator—so essential under civil law because of the abstractness and the far-reaching character of the rules in question—mandates that the legislative branch assume control over the law-creating process.

The judiciary historically has been assigned a secondary role in the legislative process within the civil-law tradition. It possesses no formal law-creating authority, although its decisions may *de facto* carry the weight of precedent. Thus, the presidium's right henceforth to issue binding precedent—and Chairman Ivanov's broader call to move toward a more precedent-based system—theoretically upsets

110 Marchenko, *op.cit.* note 29, 396.

111 Prikhod'ko, Bondarenko, and Stoliarenko, *op.cit.* note 54, 212.

Russia's separation of powers. Specifically, Russia runs the risk of replacing the abstract rules set forth by the legislature with a multitude of potentially well-intentioned, but nevertheless confusing, separate opinions. In effect, the public debate over general rules—which is already underdeveloped in the Russian case—would be replaced by a more elite debate among experts with access to Russia's highest courts.

For the time being, at least, the judiciary's precedential powers remain sharply circumscribed by practice and custom; the Constitutional Court imposed clear limits on how the presidium issues binding precedent; and, even in the aftermath of the 2008 plenum decree, Russian courts still express skepticism as to whether judicial decisions possess precedential value.[112] Therefore, while references to the term 'precedent' obviously resonate with common-law lawyers, it must be emphasized that the broad parameters of Russia's debate over judicial decision-making are still being set by civil-law principles. As a result, Russia first must resolve its understanding of the balance of powers between the legislature and the judiciary before one can talk about a more fundamental shift to a system of precedent.

4.4. The Limits of Precedent

Chairman Ivanov remains the most outspoken advocate arguing that a more assertive judiciary, armed with the power of precedent, will also be a more effective one. "A system of precedent", he argues, "would help fight pressure on the court from the side of the state and the side of the business community".[113] Furthermore, a reliance on precedent would make it much more difficult to make "doubtful decisions—[the judge] would know beforehand that [the decisions] would be changed, that someone would complain about him and investigate his links with the beneficiary of the decision".[114]

Does the fight against corruption, however, warrant a fundamental break with Russia's civil-law tradition and the accompanying sharp turn to the common-law theory of precedent? Ivanov's arguments are not without merit, especially with regard to raising the courts' standing *vis-à-vis* the other branches of government and with the general public. But, while one can appreciate the need for bold steps to establish an independent judiciary in Russia, an increased reliance on precedent may not necessarily be the answer. For example, a turn to precedent will not break existing formal and informal institutional controls over the judiciary, most notably, the outsized powers of the court chair over the careers of subordinate judges.[115] Moreover, some of the oft-stated justifications in favor of

112 *Ibid.*, 205-207.

113 Dmitrii Kaz'min, "Administrativnoe davlenie kommercheski motivirovano", *Vedomosti* (3 June 2010), available at <http://www.vedomosti.ru/newspaper/article/2010/07/15/240612>.

114 *Ibid.*

115 Solomon, *op.cit.* note 63, 79-92.

moving toward a precedential system—greater efficiency, more consistency—are not as compelling as they sound, especially if Russia adopts a narrow view of precedent without accommodating its more dynamic features as well. After all, relying on precedent as a legal shortcut may ultimately result in failing to see the differences that exist in seemingly like cases.[116] Strict consistency in observing precedent also has its drawbacks. As Neil Duxbury has observed: "The consistent decision-maker may be consistently following bad decisions."[117]

The downside of a strict precedential system is only heightened in a country like Russia, where the judicial hierarchy is already rigidly observed and where the establishment of a more formal system of binding precedent may actually undermine the traditional civil-law understanding of judicial independence. Retired Constitutional Court Justice Tamara Morshchakova voiced this concern during an earlier session of the public lecture series that later sponsored Chairman Ivanov's talk.[118] While recognizing the need for judicial consistency, Morshchakova nevertheless placed a higher value on the supremacy of law over uniformity in judicial practice. It was from general legal principles, not court decisions, that judges should decide concrete cases. If they looked to high-court decisions, cautioned Morshchakova, questions would arise as to the independence of the court and whether the court system as a whole actually retained the ability to "reveal the genuine essence of the law and the legal essence of norms".[119]

One of the fundamental differences between the precedential system and a law-driven system is that, in a civil-law system, the court is supposed to apply general principles set forth by the legislator and subsequently laid down in law. In doing so, a court may expand the principle but always in light of the given facts. In Germany, the need to rely on such founding principles extends to cases in equity (*Billigkeit*), where judicial discretion would seem to be at its highest:

> "Equity cannot be derived from the understanding of values of judges which are by no means preferable to the understanding of values by others. When the law is silent, equity has to be applied taking the conventional character of the law into account, thereby [taking] guidance from the system of values of the legal order as a whole and the moral beliefs of the people."[120]

116 Duxbury, *op.cit.* note 8, 26.

117 *Ibid.*, 177.

118 Tamara Morshchakova, "Verkhovenstvo prava i nezavisimosti sudebnoi vlasti", Senatskie chteniia (12 October 2009), available at <http://www.ksrf.ru/Info/Reading/Pages/Performance.aspx>; see, also, Morshchakova's comments in Novikova, *op.cit.* note 63, 58-70.

119 Morshchakova, "Verkhovenstvo prava i nezavisimosti sudebnoi vlasti", *op.cit.* note 118. The text in Russian reads as follows: "[...] vyiavliat' podlinnuiu sushchnost' prava i podlinnuiu pravovuiu sushchnost' normy".

120 Joachim Gernhuber (ed.), *Die Billigkeit und ihr Preis, Summum ius, summa iniuria* (Juristische Fakultät der Universität Tübingen, Mohr, Tübingen, 1963), 207-208.

Ivanov's call for precedent upsets established civil-law practice by expanding the number of sources of law from which these general principles derive—and by imposing them on the judiciary in a top-down manner. As we have seen, the former disturbs Russia's separation of powers, while the latter potentially undermines the principle of judicial autonomy. Morshchakova may be overly idealistic when she talks about the need to preserve current judicial independence, especially in a country where judges presently have a 99 percent conviction rate in criminal cases. Nevertheless, her theoretical argument contains some practical words of warning: in the Russian context, the introduction of binding precedent paradoxically could result in an increased reliance on high-court decisions at the expense of overall judicial independence.

5. Conclusion

Legal reform has been high on the Russian political agenda for some twenty years. Numerous approaches have been tried—institutional reform, internal training programs, new legislation, anti-corruption measures—but, despite these efforts, the issue of judicial reform never seems to go away. Now comes a provocative attempt at legal change spearheaded by the judiciary itself, namely the assertion of the right to issue binding precedent. Not since the days of the Civil Cassation Department in tsarist Russia has the Russian judiciary taken such a bold and, some might say, revolutionary step.

Russia is by no means alone among civil-law countries in recognizing that court decisions *de facto* represent a source of law. Other civil-law countries appear to have successfully confronted the same reality without abandoning the theoretical underpinnings of a civil-law system. Nevertheless, the comments of Chairman Ivanov and the 2008 plenum decree dramatically raised the stakes in the debate over the role of precedent within the Russian legal system. Ivanov spoke of the benefits that would accompany a move to a precedential system, such as increased prestige, greater stability, and less corruption. As this article demonstrates, however, these benefits could only come after a fundamental re-appraisal of certain core civil-law concepts, such as separation of powers and judicial independence. Moreover, from a more practical standpoint, it remains unclear whether an increased reliance on precedent would even achieve the efficiencies desired by Chairman Ivanov. The legal system could become less transparent—and more backdoor—as judges and practitioners, steeped in the civil-law tradition, are forced to review a series of ambiguous plenum and presidium decisions to determine the law.

The 2008 plenum decree does represent an important milestone in post-Soviet Russian jurisprudence, both in terms of its legal consequences and what it more broadly reveals about the growing assertiveness of the Russian judiciary. The introduction of certain elements of precedent, however, should not necessarily

be interpreted as an affirmative step toward the adoption of a broader common-law theory of precedent. The underlying character of Russian court decisions remains very different from their common-law counterparts. Plenum decisions lack certain critical procedural restraints (most noticeably, the absence of a live dispute) essential to common-law precedents, while presidium decisions seek uniformity in law without cultivating the dynamic give-and-take essential to an ever-evolving system of precedent. Therefore, despite the Higher *Arbitrazh* Court's strategic use of judicial practice as a source of law, the Russian legal community has yet to fully embrace the discretionary powers, the internal constraints, the fluidity, and the underlying untidiness of the concept of precedent.