LEGAL RULES CREATED BY COURTS: AN OVERVIEW

NORMAS JURÍDICAS CRIADAS POR CORTES: UMA VISÃO GLOBAL

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Convidados

ABSTRACT: We seek to understand the definition of legal rules created by national and international courts. We seek to look into the content of legal rules in Russian legal doctrine by classifying them into three groups. The authors consider the importance of historical background of this issue due to the changes in the international judicial system and Russian procedural legislation. We seek to analyze the phenomenon of a legal rule created by the court. We found out that all the legal rules created by courts could be divided into three main groups, depending on the source: the rules fixed in the normative legal acts of the courts; the rules fixed in normative judicial decisions; and customary legal rules approved by the courts. In general, each of the listed groups of rules has its own characteristics, which are much similar to those of by-laws, precedents, and customs respectively. The legal effect of the rules created by the court is various and depends on what body introduces a rule. The authors concluded that the rules fixed in the Resolutions of the Russian Constitutional Court are ranked between constitutional rules and legislative rules. The rules coming from the Russian Supreme Court are ranked between the rules of law and the rules of by-laws. When it comes to the rules created by international courts, two important points must be taken into account. First, international courts, on the one hand, create new rules of international law based on other more general rules and principles. On the other hand, due to the lack of a clear hierarchy of rules in international law, such rules, unlike the norms of by-laws in Russian law, do not have a dependent (subordinate) nature. Second, the principle of the supremacy of the Russian Constitution over international regulations allows us to place international rules between the Russian Constitution and Russian laws. The authors considered that this approach makes it possible to integrate the new category of rules into the general regulatory system. The researchers found out that important characteristics of the rules created by the court are their subsidiary nature and retrospective nature. The rule-making freedom of the court is limited by other applicable legal rules. The court usually creates a rule only in cases where there are no other rules to govern the

disputed legal relation. That is why the life of the rules created by the court is often short. When a legislative or executive body adopts another rule on the same issue, the previously created court rule is usually considered to be cancelled. The researchers came to the conclusion that Russian legal experts have no common opinion on the issue of the normative value of the legal provisions developed through the Resolutions of the Plenums of the Supreme Courts of the USSR and the Union Republics. Following a review of the content, we raised possible problems, strategies, suggestions and guidelines for the legal rules created by courts. The authors conclude that the analysis makes it possible to distinguish a special group of rules created by courts. This special group of rules is a regulatory reality that many experts in the field of general theory of law and international law have been paying attention to in recent decades. The authors conclude that the regulation of this area at the legislative level would greatly contribute to strengthening the principle of judicial practice unity. We also point out that the concepts of the legal position and of the rules created by the court can coincide only when the acts of higher judicial bodies are in question. If we consider the concept of the legal position in the broader sense used in practice, it becomes obvious that it also covers other aspects that are in no way rules. When it comes to similar concepts, for example, precedential rules and interpretative rules, they can be considered as varieties of the rules created by courts. The authors come to the conclusion that court decision references to the provisions fixed in the previously adopted judicial acts of the aforementioned judicial bodies have become the legal basis for making a decision. This means that the normative value of judicial acts has been recognized at the legislative level. Otherwise, there is no need for legislative provisions of this sort. The researchers encourage to recognize the phenomenon of a legal rule created by the court, and to differentiate it from other similar concepts used in jurisprudence. The closest to this category is the aforementioned concept of the court's legal positions. The research uses general scientific and special cognitive techniques wherein legal analysis and synthesis, systemic, formal-legal, comparative-legal, historical-legal and dialectical methods are applied.

Keywords: Legal rules. Legal system. Legal positions. Russian legal science. Legal doctrine. Normative judicial decisions. Concept in jurisprudence. Constitution of the Russian Federation. Supreme Court. International courts. New category of rules. General regulative system.

RESUMO: Buscamos entender a definição de normas jurídicas elaboradas por tribunais nacionais e internacionais. Buscamos analisar o conteúdo das normas jurídicas na doutrina jurídica russa, classificando-as em três grupos. Os autores consideram a importância do enquadramento histórico desta questão devido às mudanças no sistema judiciário internacional e na legislação processual russa. Buscamos analisar o fenômeno de uma norma jurídica criada pelo tribunal. Constatamos que todas as normas jurídicas criadas pelos tribunais podem ser divididas em três grupos principais, dependendo da fonte: as normas fixadas nos atos normativos dos tribunais; as regras fixadas nas decisões judiciais normativas; e normas jurídicas consuetudinárias aprovadas pelos tribunais. Em geral, cada um dos grupos de regras listados tem suas próprias características, que são muito semelhantes às de estatutos, precedentes e costumes, respectivamente. O efeito jurídico das regras criadas pelo tribunal é variado e depende de qual órgão introduz uma regra. Os autores concluíram que as regras fixadas nas Resoluções do Tribunal Constitucional russo estão classificadas entre as regras constitucionais e as regras legislativas. As regras provenientes da Suprema Corte da Rússia são classificadas entre as regras da lei e as regras dos estatutos. Quando se trata das regras criadas pelos tribunais internacionais, dois pontos importantes devem ser levados em consideração. Em primeiro lugar, os tribunais internacionais, por um lado, criam novas regras de direito internacional com base em outras regras e princípios mais gerais. Por outro lado, devido à falta de uma hierarquia clara de regras no direito internacional, tais regras, ao contrário das normas estatutárias do direito russo, não têm natureza dependente (subordinada). Em segundo lugar, o princípio da supremacia da Constituição russa sobre os regulamentos internacionais nos permite colocar regras

internacionais entre a Constituição russa e as leis russas. Os autores consideraram que esta abordagem permite integrar a nova categoria de regras no sistema normativo geral. Os pesquisadores descobriram que características importantes das regras criadas pelo tribunal são sua natureza subsidiária e retrospectiva. A liberdade normativa do tribunal é limitada por outras regras legais aplicáveis. O tribunal geralmente cria uma regra apenas nos casos em que não há outras regras para reger a relação jurídica contestada. É por isso que a vida das regras criadas pelo tribunal costuma ser curta. Quando um órgão legislativo ou executivo adota outra norma sobre a mesma questão, a norma judicial criada anteriormente é geralmente considerada anulada. Os pesquisadores chegaram à conclusão de que os juristas russos não têm opinião comum sobre a questão do valor normativo das disposições legais elaboradas por meio das Resoluções dos Plenários dos Supremos Tribunais da URSS e das Repúblicas da União. Após a revisão do conteúdo, levantamos possíveis problemas, estratégias, sugestões e diretrizes para as normas jurídicas criadas pelos tribunais. Os autores concluem que a análise permite distinguir um grupo especial de regras criadas pelos tribunais. Esse conjunto especial de regras é uma realidade regulatória à qual muitos especialistas no campo da teoria geral do direito e do direito internacional vêm prestando atenção nas últimas décadas. Os autores concluem que a regulamentação desta área a nível legislativo muito contribuiria para o reforço do princípio da unidade da prática judiciária. Ressaltamos também que os conceitos de posição jurídica e de regras criadas pelo tribunal só podem coincidir quando se trate de atos de órgãos judiciais superiores. Se considerarmos o conceito de posição jurídica no sentido mais amplo utilizado na prática, torna-se evidente que ele abrange também outros aspectos que não são de forma alguma regras. Quando se trata de conceitos semelhantes, por exemplo, regras de precedência e regras interpretativas, elas podem ser consideradas como variedades das regras criadas pelos tribunais. Os autores chegam à conclusão de que as referências da decisão judicial às disposições fixadas nos atos judiciais anteriormente adotados dos órgãos judiciais acima mencionados tornaram-se a base legal para a tomada de uma decisão. Isso significa que o valor normativo dos atos judiciais foi reconhecido no nível legislativo. Caso contrário, não há necessidade de disposições legislativas deste tipo. Os pesquisadores incentivam a reconhecer o fenômeno de uma norma jurídica criada pelo tribunal e a diferenciá-la de outros conceitos semelhantes utilizados na jurisprudência. O mais próximo dessa categoria é o já mencionado conceito de posições jurídicas do tribunal. A pesquisa utiliza técnicas científicas gerais e técnicas cognitivas especiais, onde são aplicados métodos de análise e síntese jurídica, sistêmicos, jurídico-formal, jurídico-comparativo, jurídico-histórico e dialético.

Palavras-chave: Regras jurídicas. Sistema jurídico. Posições jurídicas. Ciência jurídica russa. Doutrina jurídica. Decisões judiciais normativas. Conceito em jurisprudência. Constituição da Federação Russa. Suprema Corte. Tribunais internacionais. Nova categoria de regras. Sistema normativo geral.

In Soviet legal science, court-made legal rules that were applied to resolving disputes when there was no appropriate legislative regulation were called legal provisions. The introduction of this legal category was regarded as one of the achievements of the Soviet legal theory. In 1973, S.S. Alekseev wrote that the concept of a legal provision was a kind of theoretical discovery, a significant prospective scientific construction. This construction made it possible to draw a clear distinction between the rules of law and specific forms of legal practice. S.N. Bratus and A.B.Vengerov defined the legal provision as a concept, covering such legal arrangements as guiding explanations and precedents of interpretation, a concept, which came close to legal rules but did not coincide with them completely.

The main difference between legal provisions and rules of law was usually reduced to the following elements:

- Legal provisions are developed through law enforcement but not law-making. They come from the interpretation of the rule and should not introduce anything new into the interpreted rule.
- Legal provisions are tied to certain rules, taking a subordinate position. Therefore, they have a sub-normative character.

However, it should be noted that Russian legal experts, just as it was the case in Soviet times, have no common opinion on the issue of the normative value of the legal provisions developed through the Resolutions of the Plenums of the Supreme Courts of the USSR and the Union Republics. Currently, the same is true for the Resolutions of the Plenum and the Presidium of the Supreme Court of the Russian Federation. One standpoint is reduced to the fact that the resolutions of this sort have always been interpretative acts that do not contain new rules. Another standpoint ranks the resolutions as subordinate normative acts that are among the sources of law. V.I. Leushin believes that legal provisions contained in the Supreme Courts' Resolutions are not only about the interpretation of the law. When reviewing their own practice, the Supreme Courts not only disclose the content of the law but also develop rules that specify the law along with procedural rules and instructions aimed at ensuring uniformity in eliminating legislation deficiencies.

However, despite the general trends to recognize the normative nature of the legal provisions created by the higher courts, many experts are still in favor of "classical approaches" to this legal category. These are the approaches developed in the 1960s-1970s. For example, V.P. Reutov believes that it is preferable to use the term "legal provision" only in the context of stable provisions developed by judicial practice. Such stable provisions are the defined regulations, specifying the rules contained in normative acts or other official forms of law. The regulations in question also provide solutions based on the analogical principles of the law. We think that Reutov's approach to legal provisions would limit the pretensions of the Russian Supreme Court to create, under the guise of specifying, essentially new legal rules. It is well known that neither the Russian Constitution nor the doctrine of separation of powers implies such powers in the judiciary.

In the 1990s, in connection with the establishment of the Russian Constitutional Court, the category of legal positions became common in Russian law and actually replaced the concept of the legal provision. Though much attention has been paid to the study of the legal positions, which the Russian Constitutional Court takes, nonetheless, no unified approach to the nature of this legal phenomenon has been developed to this day. Experts define the term "legal position" in different ways: a system of legal arguments and legal provisions as well as samples (rules) of a precedential character, general legal guidelines, summarized views of the Court on specific constitutional issues; the legal principles that are applicable to solving a number of cases; the systems of the findings and arguments presented during the Court's examination of specific cases on many issues, etc. Thus, legal positions are acceptable and useful for considering similar issues.

Meanwhile, some authors believe that the normative nature of legal positions is their most important element. B.A. Starshun claims that the Constitutional Court's legal position is a binding prescription for both the legislator and the law enforcement officer. According to N.S. Bondar, the legal position of the Constitutional Court reflects the essence as well as the normative and doctrinal quintessence of the adopted decision. L.V. Lazarev considers legal positions to be normative and interpretative constructions. Other authors think that legal positions are of normative and precedential character. According to N.S. Volkova and T.Y. Khabrieva, the precedential nature of the Constitutional Court's decisions, along with with the general obligation implied in them, makes legal positions normative in their essence.

It seems that a legal position is a kind of legal rule, which is expressed in its own distinctive features associated with the specifics of their origin characteristic of judge-made rules.

The experts who used to be in favor of other opinions are coming to similar conclusions. For example, S.S. Alekseev has changed his views on the legal nature of legal provisions. In 2000, he wrote that Russia had a prospect of mastering the values of modern legal culture and there were reasons to abandon the echoes of the shameful slyness expressed in the notion of the legal provision. A legal provision, no matter how experts play with words, is a rule in any case since the provision developed by courts begins to be used by them as a typed solution to this or that life issue. Therefore, the concept of the legal provision can be retained to mean and characterize only those realities in the field of law that, by way of interpretation or analogy, are created by courts for this or that case. But as soon as the realities acquire a general meaning, what we get is legal rules in the form of typified solutions to relevant life issues.

In the last decade, the concept of the legal position has been extensively used in relation to the provisions created by the Russian Supreme Court and the Russian High Arbitration Court. These provisions have been fixed in the decisions of the Presidium or the Plenum.

An important milestone in perceiving legal positions as legal rules was the adoption of the Law "On Amendments to the Arbitration Procedural Code of the Russian Federation" (APC) of December 23, 2010. The Law amended Article 311 of the APC to bring it in line with the Constitutional Court Ruling of January 21, 2010. It introduced the obligation for courts to review cases in order to make them fit the determination or change in the Resolution of the High Arbitration Court Plenum or in the Resolution of the High Arbitration Court Presidium. Thus, the practice of applying the legal rule was fixed in legislation. Consequently, Russian courts are obliged to be guided by the legal positions that have been taken by the Russian High Arbitration Court by the time a case is tried.

Similar provisions related to the Resolutions of the Plenum and the Presidium of the Russian Supreme Court were introduced by Federal Law No. 353-FZ of December 09, 2010. The Law amended Article 392 of the Russian Civil Procedure Code. Later, the Russian High Arbitration Court was repealed. In 2014, corresponding amendments were made to Article 311 of the APC. The Resolutions of the Plenum and the Presidium of the High Arbitration Court were replaced with the Resolutions of the Plenum and the Presidium of the Supreme Court. This provision is also identically set out in Article 350 of the Russian Code of Administrative Judicial Procedure (CAJP) adopted in 2015.

Article 180 of the CAJP outlines the right of a court to include the Constitutional Court decisions as well as the Supreme Court Plenum and Presidium decisions into its reasonings. Such references are supposed to ensure the unity of judicial practice and its legality. Similar provisions are set out in the Concept of the Unified Civil Procedure Code approved by the Russian State Duma Committee for Civil, Criminal, Arbitration, and Procedural Legislation (Resolution No. 124(1) of December 08, 2014).[1]

So, the possibility of using judicial acts as a basis for law enforcement decisions is now fixed in Russian legislation. This cannot be underestimated due to the fact that the duty of the court is to resolve legal conflicts on the basis of law. During legal proceedings, the court must make a legal assessment and categorization of the examined facts and actions, i.e. compare them to the regulations applicable to the situation in question. In total, the regulations make up law. Hence, we come to the conclusion that court decision references to the provisions fixed in the previously adopted judicial acts of the aforementioned judicial bodies have become the legal basis for making a decision. This means that the normative value of judicial acts has been recognized at the legislative level. Otherwise, there is no need for legislative provisions of this sort.

[1] Consultant Plus Assistance System. (In Russian).

The analysis we have conducted makes it possible to distinguish a special group of rules created by courts. This special group of rules is a regulatory reality that many experts in the field of general theory of law and international law have been paying attention to in recent decades.[2]

Meanwhile, we are obliged to admit that Russian legal science has not paid due attention to the study of this type of rules. Most experts addressing the issue of judicial rule-making are quite unanimous in their conclusions about the normative nature of the rules developed by the higher courts. Nonetheless, their research is usually limited to studying only the sources of judicial rule-making or the specifics of the way the rules created by courts are implemented. The researchers do not usually deal with the rules themselves that come from these sources.

Against this backdrop, it is possible to note the thesis by P.A. Guk. In this research, the author has examined judicial rules and identified their characteristics. On the whole judicial rules are imposing general obligations, providing for formal certainty, coming from the highest courts through certain judicial proceedings, and ensuring uniform actions. However, while reflecting the credit the author has earned by studying the issue, it is necessary to pay attention to some of his conclusions that are objectionable. For example, according to P.A.Guk, the legal basis phrased and fixed in a judicial act through interpreting a normative act (a rule of law) as well as rules, positions, principles, and definitions, is a judicial rule.[3] It seems that if we broaden the concept of the judicial rule with the elements, which are so heterogeneous in their legal nature (e.g. the court's conclusions on the interpretation of the rule of law as well as the court's position, this will result in the loss of the fundamental characteristic of the judicial rule, namely, its normative value.

Another Guk's conclusion is even more puzzling. He states that judicial rules, being to some extent normative, should not be compared with the rules of law.[4] This statement sounds like a kind of ban on studying the problem. In our opinion, a comparison of the rules created by the courts with other types of legal rules makes it possible to identify common characteristics inherent in all rules of law. This allows one to refer to the provisions in question as to the full-fledged rules of law, bearing in mind their specifics. The study of these aspects, in its turn, makes it possible to determine the place of the rules created by courts in the general system of current legislation.

The name that might be chosen for this category of rules is also of great importance. It should be noted that in Russian legal science, no single name for these rules has been chosen so far. When describing the rule-making activity of courts, the experts usually use such terms as "judicial rules", "judge-made rules", and "rules created by the court".

The term "judicial rules" is the most common.[5] However, when describing such a complex branch of law as judicial law, the experts, dealing with the issue, understand judicial rules as the

[2] See Vereshchagin A. N. Sudebnoe pravotvorchestvo v Rossii. Sravnitel'no-pravovye aspekty [Judicial law-making in Russia. Comparative law aspects], Moscow: Mezhdunarodnye otnosheniya, 2004. 344 p.; 156 (In Russian); Ivanov R. L. Vidy aktov sudebnogo pravotvorchestva v Rossiyskoy Federatsii [Types of acts of judicial law-making in the Russian Federation]. *Vestnik Omskogo universiteta* [The Bulletin of Omsk University], The "Law" series,. 2010. No. 3. P. 6-13 (In Russian); Ispolinov A. S. Normotvorchestvo mezhdunarodnykh sudov: prichiny i predely (na primere evraziyskikh sudov) [Rule-making of international courts: causes and limits (the example of Eurasian courts)]. URL: https://zakon.ru/blog/2016/3/9/normotvorchestvo_mezhdunarodnyh_sudov_prichiny_i_predely_na_primere_evrazijskih_sudov (In Russian); Kuchin M.V. Sudebnoe normotvorchestvo: kontseptual'nye aspekty [Judicial rulemaking: conceptual aspects]. Moscow: Yurayt, 2020. 275 p. (In Russian); Lazarev V.V. Normativnaya priroda sudebnogo pretsedenta [Normative nature of judicial precedent]. *Zhurnal rossiyskogo prava* [Journal of Russian Law], 2012. No. 4. pp. 92-99 (In Russian); Marchenko M. N. Sudebnoe pravotvorchestvo i sudeyskoe pravo [Judicial law-making and judicial law]. Moscow: Prospect, 2007. 512 p. (In Russian); Sudebnaya praktika v sovremennoy pravovoy sisteme Rossii [Judicial practice in the modern legal system of Russia]. Moscow: Norma: Infra-M. 2017. 432 p. (In Russian); Entin M. L., Entina E. G. Vostrebovannost' i predely sudebnogo normotvorchestva [Relevance and limits of judicial rule-making]. *Pravo i upravlenie. XXI vek* [Law and management. XXI century], 2016. No. 3, pp.12-20 (In Russian).

[3] Ibid. P. 240.

[4] Ibid. P. 41.

[5] See Livshits R. Z. Sudebnaya praktika kak istochnik prava [Judicial practice as a source of law]. In *Sudebnaya praktika kak istochnik prava* [Judicial practice as a source of law], Moscow: Institute of State and Law of the Russian Academy of Sciences, 1997. P.12. (In Russian); Magyarova A. V. Raz'yasneniya Verkhovnogo Suda Rossiyskoy

whole range of rules related to courts' activities.[6] The term is not associated with a rule-making body. All this may lead to terminological confusion. The term "judge-made rules" used by some experts, [7]does not reflect the nature of these rules either because the rules in question are created by courts, i.e. governmental or intergovernmental bodies, but not by judges who are public officials. Therefore, the name "rules created by the courts" seems to be more accurate since it allows to distinguish these rules from the rules of judicial law as well as to emphasize their special legal nature.

It is possible to attribute the provisions developed by the courts to the rules of law only if they have the main features inherent in legal rules. While characterizing the rules in question, we are going to rely on the general definition of a rule of law previously phrased by the author. [8]According to this definition, a rule is a legal construction, regulating public relations and designed for repeated application of a binding prescription established and/or recognized by one or more States, or by an intergovernmental institution authorized by States and supported by State coercion.

Thus, we can distinguish the following characteristics typical of any rules of law:

- Repeated application (the effect of the rule of law cannot be exhausted by a single application);
- General obligation (the rule of law is mandatory for everyone who it is addressed to);
- Connection with the State (a rule of law cannot be created without the direct or indirect participation of a State or several States (intergovernmental institutions);

Federatsii v mekhanizme ugolovno-pravovogo regulirovaniya [Explanations of the Supreme Court of the Russian Federation within the mechanism of criminal law regulation], St. Petersburg: Law Center Press, 2002. P. 293 (In Russian); Kolokolov N. A. Sudebnaya vlast' kak obshchepravovoy fenomen [Judicial power as a general legal phenomenon]. Doctorate Thesis in Law Nizhny Novgorod, 2006. (In Russian); Sergevnin S.L. Sudebnaya norma kak rezul'tat konstitutsionnogo sudebnogo normotvorchestva [Judicial rule as a result of constitutional judicial rule-making]. In *Sovremennyy konstitutsionalizm: vyzovy i perspektivy* [Modern Constitutionalism: challenges and prospects]. Moscow: Norma, 2005. pp.433-439 (In Russian); The same author. Kategoriya “sudebnaya norma”: nekotorye obshchie zamechaniya [The category of the judicial rule: some general remarks]. *Platon* [Plato], 2015. No. 3. pp.37-39. (In Russian); Zaloilo M. V., Vlasenko N. A., Shubert T. E. Ponyatie, formy i soderzhanie sudebnoy praktiki [The concept, forms, and content of judicial practice]. In *Sudebnaya praktika v sovremennoy pravovoy sisteme Rossii* [Judicial practice in the current legal system of Russia] / edited by T.Y. Khabrieva, V.V. Lazarev. Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation: Norma: INFRA-M, 2017. P. 97. (In Russian); Lazarev V.V. Sudebnaya praktika: prognoznoe videnie [Judicial practice: predictive vision]. In *Sudebnaya praktika v sovremennoy pravovoy sisteme Rossii* [Judicial practice in the modern legal system of Russia], Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation: Norma: INFRA-M, 2017. P. 425. (In Russian); Khabrieva T.Y. Sovremennye doktriny pravosudiya [Modern doctrines of justice] In Selected texts in 10 vols. Vol. 9. Moscow: Russian Academy of Sciences, 2018. P. 664 (In Russian).

[6] See Vitruk N. V. Sistema rossiyskogo prava (sovremennye podkhody) [The system of Russian law (modern approaches)]. *Rossiyskoe pravosudie* [Russian Justice], 2006. No. 6. P. 28. (In Russian); Gaididei Y. M. Sudebnoe pravo kak sostavlyayushchaya sudebnoy sistemy [Judicial law as a component of the judicial system*]*. *Gosudarstvo i pravo v XXI veke* [State and law in the XXI century], 2017. No. 3. P. 35 (In Russian); Guskova A. P., Muratova N. G. Sudebnoe pravo: istoriya i sovremennost' sudebnoy vlasti v sfere ugolovnogo sudoproizvodstva [Judicial law: the past and the present of the judiciary in criminal proceedings]. Moscow: Lawyer Publishing Group, 2005. 176 p. (In Russian); Semikin D. S., Litvinova K. A. Sudebnoe pravo i sudebnaya politika [Judicial law and judicial policy]. *Rossiyskaya yustitsiya* [Russian Justice], 2012. No. 9, pp. 44-46. (In Russian).

[7] See Fokina M.A. Rol' sudebnoy praktiki v sovershenstvovanii dokazyvaniya [The role of judicial practice in improving evidencing]. *Arbitrazhnyy i grazhdanskiy protsess* [Arbitration and civil procedure], 2005. No. 4. (In Russian); Guk P. A. debnoe normotvorchestvo: voprosy teorii i praktiki [Judicial rule-making: theoretical and practical issues]. *Lex Russica*, 2016. No. 7. P. 20. (In Russian); Kuptsova S. N. Sudeyskoe pravo: obshcheteoreticheskiy i sravnitel'nyy aspekt [Judicial law: general theoretical, and comparative aspects], Candidate Thesis in Law, Penza, 2017. (In Russian).

[8] See KUCHIN M. V. Yuridicheskaya priroda pravovoy normy: integrativnyy podkhod [The legal nature of a legal rule: an integrative approach]. *Zhurnal rossiyskogo prava* [Journal of Russian Law], 2017. No. 12. pp. 31-42 (In Russian).

- The effect of a rule of law is protected. If necessary, this effect is ensured by the authority of the State.

The rules created by the highest domestic and international courts fully meet all the aforementioned criteria.

When it comes to the characteristics inherent in these rules, first of all, it is necessary to proceed from the heterogeneity of the rules created by the court. The heterogeneity stems from the difference in the forms of judicial rule-making. In this context, all the rules covered in this study can be divided into three main groups, depending on the source[9]:

1. The rules fixed in the normative legal acts of the courts;
2. The rules fixed in normative judicial decisions;
3. Customary legal rules approved by the courts.

The court is a primary entity uniting the rules of this sort. However, only the highest judicial body of a State or an inter-State court, having the right to make final decisions, can make judicial rules. On top of it, there mustn't be any higher organizations capable of canceling or changing an adopted judicial act.

Another important characteristic of the rules created by the court is their subsidiary nature. The rule-making freedom of the court is limited by other applicable legal rules. The court usually creates a rule only in cases where there are no other rules to govern the disputed legal relation. That is why the life of the rules created by the court is often short. When a legislative or executive body adopts another rule on the same issue, the previously created court rule is usually considered to be cancelled.

Another important feature of the rules created by the court is their retrospective nature. Their effect rolls back in time, regardless of when they appeared.

In general, each of the listed groups of rules has its own characteristics, which are much similar to those of by-laws, precedents, and customs respectively.

For example, the tool for creating rules fixed in the Plenum Resolutions of the supreme judicial bodies is much similar to adopting normative by-laws. These activities often result in the emergence of new abstract law-specifying or law-fulfilling rules that are mandatory for all the parties to a regulated legal relation. The rules of this sort may subsequently be amended or annulled by the court that adopted them. Procedural rules, included in the acts of courts (regulations, statutes, etc.) and regulating the activities of these courts, can be attributed to the same category. This is true for both international and domestic courts.

Another kind of rule created by the court can be found in normative judicial decisions. The difference from the previous category is that such rules are always phrased by the court while considering a particular case and are necessary to resolve the case. These rules can be divided into precedents contained in judicial reasonings, and non-precedents, which include the legal provisions contained in the operative paragraphs. The operative paragraphs annul, change, or establish rules. A special characteristic of the rules of this category is that officials cannot abolish them. A rule of this sort can be made invalid only through the adoption of another rule on the same issue.

The rules of the third type are created by the court only indirectly. It is done by authorizing the rule that has been developed by practice. In this case, the rule itself gets formed without the participation of the supreme or international court, but it is the court that officially approves the rule. After being approved, the rule becomes normatively enforceable.

[9] See KUCHIN M. V. Formy sudebnogo normotvorchestva [Forms of judicial rule-making]. *Rossiyskiy yuridicheskiy zhurnal* [Russian Law Journal], 2018. No. 3, pp. 9-23. (In Russian).

If we recognize the phenomenon of a legal rule created by the court, we have to differentiate it from other similar concepts used in jurisprudence. The closest to this category is the aforementioned concept of the court's legal positions. First of all, it should be emphasized once again that the legal positions formulated by the supreme courts and fixed in judicial acts have a normative nature. Therefore, they are one of the types of legal rules created by the courts.

However, both in theory and in practice, the term "legal positions" refers not only to legal provisions fixed in the judicial acts of higher courts. First, even with regard to the Russian Constitutional Court, the current legislation uses this term in a twofold sense: referring to the legal positions of the court and to the legal positions of judges (Article 29 of the Federal Law "On the Constitutional Court of the Russian Federation"). Judges' legal positions are the opinions of specific persons, which become the legal positions of the court only after a corresponding legal act is adopted. Second, the term "legal position of the court" is currently applied to the activities of courts of any level, not only higher ones. The current Russian judicial practice proves that. For example, the Eighth General Jurisdiction Court of Cassation phrased its ruling No. 88-6738/2020 (May 12, 2020) [10]as follows: the Court of Appeal, supporting the legal position of the Justice of the Peace, rightly pointed out..." The Third General Jurisdiction Court of Cassation in its ruling No. 88-2255/2019 (December 04, 2019) [11] stated the following: "Having agreed in general with the legal position of the district court, the judicial board additionally pointed out errors in the conclusions of the first instance court."

These examples clearly show that the concepts of the legal position and of the rules created by the court can coincide only when the acts of higher judicial bodies are in question. If we consider the concept of the legal position in the broader sense used in practice, it becomes obvious that it also covers other aspects that are in no way rules.

When it comes to similar concepts, for example, precedential rules and interpretative rules, they can be considered as varieties of the rules created by courts.

The legal effect of the rules created by the court is various and depends on what body introduces a rule. For example, the rules fixed in the Resolutions of the Russian Constitutional Court are ranked between constitutional rules and legislative rules. The rules coming from the Russian Supreme Court are ranked between the rules of law and the rules of by-laws. When it comes to the rules created by international courts, two important points must be taken into account. First, international courts, on the one hand, create new rules of international law based on other more general rules and principles. On the other hand, due to the lack of a clear hierarchy of rules in international law, such rules, unlike the norms of by-laws in Russian law, do not have a dependent (subordinate) nature. Second, the principle of the supremacy of the Russian Constitution over international regulations allows us to place international rules between the Russian Constitution and Russian laws. In our opinion, this approach makes it possible to integrate the new category of rules into the general regulatory system.

Due to the changes in the Russian procedural legislation that have taken place in the last decade, the task of including the rules created by higher and international courts into the legal system of the State as well as determining their place in the regulatory system seems to be of great importance. The regulation of this area at the legislative level would greatly contribute to strengthening the principle of judicial practice unity. However, we are witnessing a situation where, on the one hand, the impact of the rules created by the courts on regulating legal relations is beyond doubt. On the other hand, academic interest in the study of this category of legal rules is almost lacking. It is possible to note only isolated statements of the legal theorists calling for attention to a comprehensive study of the rules created by the court. S.A. Stepanov points out that the task of modern jurisprudence is not to recognize or deny the normative nature of judicial rules but to study the new phenomenon, determining its types, content, functions, and place in the Russian legal

[10] Consultant Plus Assistance System.
[11] Consultant Plus Assistance System.

doctrine. It is also necessary to outline a place of judicial rules among the tools for legal regulation. We should recognize a comprehensive study of the essence and functions of legal rules created by the court as one of the primary tasks of Russian jurisprudence. Today's reality calls for moving from theory to practice.

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