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THE LEGACY OF CLASSICAL NATURAL LAW IN RUSSIAN DOGMATIC JURISPRUDENCE IN THE LATE 19TH CENTURY[*]

The paper examines the inconspicuous influence of the legacy of the classical natural law of the 18th century on Russian dogmatic jurisprudence of civil law, taking as an example the authoritative "Course on civil law" (1868-1880) by Konstantin Pobedonostsev. Despite the dogmatic purpose of the course and the hostility of its author towards European liberal doctrines of natural law, some striking similarities between them can be found, especially in the general provisions and principles of contract law, the method of its exposition and the recourse to justice and supra-positive ideal.

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In the course of the modernization of the Russian Empire after the defeat in the Crimean War (1853-1856) the imperial government under tsar Alexander II undertook a series of reforms in the 1860s and 1870s. One of them introduced the staple Western European rules of judicature and so created a demand for skilled lawyers. This demand led to the emergence of western-like jurisprudence, which was most sophisticated in the domain of civil law as this was the most susceptible to foreign influences and the most urgent for developing a capitalist economy. The trend carried on until the Bolshevik revolution of 1917, which led to elimination of capitalism and the so-called 'bourgeois' jurisprudence in Soviet Russia.

However, during the relatively short period from the 1860s to 1917 Russian legal thought developed so intensively that it laid the foundations of modern national jurisprudence, including that of Russian civil law. Its legacy was clandestinely leaned on in matters of legal education in Soviet times and has become an object of admiration in contemporary Russia.

The jurisprudence of this golden age was to a large extent dogmatic, that is concerned with interpretation and systematization of the positive law embodied in the Digest of Laws of the Russian Empire.[2] Many researchers called attention to the influence of the German Historical School and the Pandectists on the style of legal studies in Russia.[3] This, apparently, leaves no place for the idea of natural law except from a purely philosophical or historical perspective.

In this paper, however, we will argue that the legacy of classical natural law had an influence on Russian dogmatic jurisprudence, although, this influence was not manifested or welcomed by scholars of the time. Instead of a general overview of commentaries, books and articles of that time we will focus on the most revered dogmatic treaty on civil law, written by Konstantin Pobedonostsev.

By classical natural law, we understand the theories developed around the idea of natural law in the 17th and 18th centuries by such prominent European thinkers as Hugo Grotius, Samuel Pufendorf, Christian Thomasius, Christian Wolff, Daniel Nettelbladt, Jean Domat, Robert Pothier. Scientific rationalism, a secular background, and a logical coherence distinguished their theories from the antique philosophical contemplations and medieval religious doctrines. It was the legacy of classical natural law which famously paved the way for the first codifications in Western Europe and was largely embraced by legislators.

[2] On the meaning of dogma in Russian jurisprudence of the 19th century see our paper: Dogma and Legal History in Russian Science of Civil Law, in: Journal on European History of Law (1) 2011, p. 61-65. On the Digest of Laws see n. 13 below.

[3] For general details see; Butler W., Russian Law, 3d ed., Oxford, 2009, p. 108-131; for history of civil law jurisprudence in Russia see: Rudokvas A.D, Kartsov A.S., The development of civil law doctrine in Imperial Russia under the aspect of legal transplants (1800-1917), in: Rechtwissenschaft in Osteuropa. Studien zum 19. und frühen 20. Jahrhundert. Sonderdruck, Frankfurt am Main, 2010, p. 291-333; Avenarius M., Rezeption des römischen Rechts in Rußland, Göttingen, 2004; Tomsinov V. (a series of articles on civil law jurisprudence and education), in: Zakonodatelstvo, (12) 2012, (1-4) 2013 (in Russian); Shershenevich G., History of Russian science of civil law. Kazan, 1893 (in Russian).

In this paper we will outline the fate of *ius naturale* in Russia up to the early 20th century, then we will introduce the outstanding personality of Konstantin Pobedonostsev and his *magnum opus* – the Course on Civil Law, and finally we will examine the legacy of natural law in this Course.

I. Natural Law in Russia before 1917

The idea of natural law underwent a long evolution in Russia in two different traditions – the Orthodox and the classical Western European. The Orthodox tradition, starting with the christianization of Rus' in 988 under the Byzantine influence, was the leading ideological force in Russia until the reforms of Peter the Great in the early 18th century. The idea of natural law existed in the frame of religious dichotomy of the ever just God's grace and often unjust human laws. This dichotomy was contemplated by the Orthodox clerics and heretics mostly with religious and moral aims in mind. Moreover, the sources on the subject are scarce.

Metropolitan Ilarion of Kiev was probably the first author in Kievan Rus' to articulate the dichotomy of positive law and higher religious standard through the notions of 'truth' vs 'statute' ('*pravda*' vs '*zakon*') in his treaty "A word on *zakon* and God's grace' (mid 11th century). This was not a legal treaty in the modern sense but rather a commentary on the Christian doctrine intended for Kievan princes.[4]

In the following centuries the concept of a higher moral and religious standard was actively invoked by several heretics, such as Strigolniki, the sect of Skhariya the Jew (14th to early 16th century), Nil Sorsky (1433—1508), Maksim Grek (mid 16th century), Feodosij Kosoj (mid 16th century) and others[5]. These monks or clerics envisaged natural law as a reflection or embodiment of Christian truths in nature and human life which should prevail over all positive laws. Some scholars argue that this was the first articulated thesis about the supremacy of a higher law over positive laws in Russian history, which paved the way for a distinct branch of legal though, even of the innate and inalienable rights of man.[6] However, from the 16th to 18th centuries these visions of natural law did not produce any legal literature.

Jurisprudence as a distinct branch of knowledge began to take shape in Russia under the influence of the Western European classical natural law starting from the reign of Peter the Great

[4] For more details and literature see: http://www.pravenc.ru/text/389115.html
[5] For more information on this subject see: Zolotukhina N., Development of Russian medieval political and legal thought, Moscow, 1985 (in Russian); Momotov V., Formation of Russian medieval law in the 9th to the 14th centuries, Moscow, 2003 (in Russian).
[6] Zolotukhina N., Op. cit. n. 2, p. 76.

(1682-1725). The tsar himself admired German doctrines of natural law, commissioned professors from abroad, and subsidized translation of treaties on natural law.[7]

However, the fate of classical natural law in Russia was not fortunate. During the heyday of *ius naturale* in Europe, Russia was not ready to embrace this doctrine for a number of reasons, including the authoritarian governance, an estate-based society, the serfdom of the majority of the peasants, a predominantly subsistence economy, and the lack of universities. Moreover, the first professors of law were Austrians or Germans who knew as good as nothing about Russian law.[8]

In the 19th century, when new universities were founded[9], the first Russian professors took their chairs,[10] more European literature was translated,[11] and even the first project of the civil code was drafted, the ideology of natural law lost much of its appeal in the West and in Russia following the turmoil of the Napoleonic wars and the suppression of revolutionary movements by the Holly Alliance. In the reign of Nicholas I (1825-1855) the Russian government advanced the conservative ideology called 'Official Nationality' which supported the values of Orthodoxy, Autocracy, and Nationality in contrast to Western liberalism and individualism.[12] Under the new University Charter of 1835 the teaching of natural law and moral philosophy was suppressed, and legal education was essentially limited to the study of positive statutes recently compiled as the Complete Collection of the Laws of the Russian Empire in 45 volumes and the Digest of Laws of the Russian Empire in 15 volumes.[13] This change was backed up by the growing

[7] In 1717 Peter the Great offered a position at the newly established Russian Academy of Sciences in St.Petersburg to the leading German natural law thinker of the age, Christian Wolff, who turned it down. See: Wieacker F., A history of private law in Europe with particular reference to Germany, Oxford, 1995, p. 253. In 1726 the first Russian translation of Samuel Pufendorf's treaty "On duty of man and citizen according to natural law" was published.

[8] Hans Gross (1725-1731) was the first European professor to read lectures on moral philosophy and natural law at the Russian Academy of Sciences. An Austrian Philipp Heinrich Dilthey (1723-1781), the first and only professor at the faculty of law of the newly founded Moscow University (1756-1766). He was the first and only professor of law. He spoke no Russian and taught Western European jurisprudence. Regional universities followed the same pattern. For example, Heinrich Bünemann (1752-1808) and Johann Finke (1773-1814) gave lectures at Kazan University.

[9] In 1805 new universities were founded in St.Petersburg, Kazan, and Kharkov. European natural law (modeled after the theories of the 18th century) was a major part of the curriculum in legal studies.

[10] After the first compilations on natural law (e.g. Zolotnitsky, An abridged exposition of natural law, composed from works of different authors for the benefit of Russian society, 1764) Russian scholars made the first efforts to apply the doctrine to Russian laws. See, for example, the works of two professors of Moscow University Semyon Desnitsky (c. 1740–1789) in "A word on the correct and concrete way to study jurisprudence" (1766) and Lev Tsvetajev in "An outline of theory of laws" (1810) and "First principles of natural law" (1816); professor of St. Petersburg Pedagogical Institute Vasily Kukolnik in "Foundations of Russian private civil law" (1815). At Demidov Lyceum in Yaroslavl professor Pokrovsky taught Roman law on the basis of Johann Gottlieb Heineccius (1681-1741). All of them by and large understood natural law as part of a philosophy which treats laws as discovered by pure reason in order to make them basis of positive laws.

[11] Most notably "Natural private law" (1809) by Franz von Zeiler, professor at Vienna University and the leading member of the codification commission in the Austrian Empire.

[12] The triad of Official Nationality was announced by Minister for Education count Sergey Uvarov (1786-1855). He was among the convinced supporters of the German Historical School.

[13] The model of the Digest may seem to be inspired by Justinian's Digest. Although, Butler argues (with reference to the head of the compilation committee Mikhail Speransky) that the precepts for its compilation were drawn from the writings of English jurists, Sir Francis Bacon and Jeremy Bentham (see Butler W., Op. cit. n. 3, p. 31). It was not until 1885 that the 16th volume with procedural laws (based on one of the Great Reforms) was added. For more information see: Borisova T., The Digest of Laws of the Russian Empire: The Phenomenon of Autocratic Legality, in: Law and History Review 30 (03) 2012, p. 901-925.

popularity of the Historical School under the leadership of F.C. von Savigny in Germany[14] and the critical assessment of the classical natural law by Russian scholars.[15]

In the Age of the Great Reforms (1860-70s) under Alexander II (1855-1881) Russian judicature was substantially westernized. The four Regulations of 1864 introduced such staple principles of modern European judicature as judicial monopoly on law enforcement, the principle of equality of the parties involved; public hearings, jury trial; and the institution of a professional advocate. To support these institutional changes, some efforts were made to modernize, or in fact to establish a proper national jurisprudence, including that of the civil law.[16] All this happened under the decisive influence of the German Pandectists, advocating the study of positive law instead of the abstract ideas of natural law.

Only in the late 19th and the early 20th centuries did Russian legal thought experience a revival of natural law as a response to, and critique of, the dominant legal positivism. Contemporary scholars tend to explain this phenomenon by means of a combination of reasons, including a consolidation of the schools of thought in Western Europe, the popular support of the reforms in Russia, the formation of civil society, the rise of social consciousness, and an intensified struggle between social groups. In their attempt to challenge the monopoly of legal positivism, the leaders of the revived school of natural law (Pavel Novgorodsev, Evgeny Trubetskoy) argued for an absolute social ideal or standard which could not and should not be reduced to a specific historical period and, thus, prevented any attempts to pursue specific unrealistic ideals.[17]

However, the Bolshevik revolution of 1917 put an end to any speculations in the field of natural law, along with the development of jurisprudence along Western models. The victory of Marxism-Leninism meant the indiscriminate repeal of the bourgeois laws and theories.[18]

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[14] The first Russian students were sent to the University of Berlin to study under supervision of Savigny. See: Tomsinov V., Development of Russian jurisprudence in the second third of the 19th century, in: Zakonodatelstvo, (9-10, 12) 2008, (1-12) 2009, (in Russian); Avenarius M., Op. cit. n. 3. S. 19.

[15] For example, Alexey Blagoveschensky (1800-1835) in his "History and method of the study of laws in the 18th century" wrote that natural law was a highly uncertain theory and education in Russia based on natural law was useless because it followed either the elements Roman law (*ius civile*) or the abstract theories thought out by German smart-heads without any recourse to history" (i.e. a priori) (cited by Shershenevich G. Op. cit. n. 3, p. 30).

[16] On the rise of Russian jurisprudence generally see: Rudokvas A., Kartsov A., Der Rechtsunterricht und die juristische Ausbildung im kaiserlichen Russland, in: Juristenausbildung in Osteuropa bis zum Ersten Weltkrieg, ed. Zoran Pokrovac, Series: Studien zur europäischen Rechtsgeschichte 225. Rechtskulturen des modernen Osteuropa. Traditionen und Transfers 3, Frankfurt am Main, 2007, S. 173-316; Kartsov A., Das Russische Seminar für römisches Recht an der juristischen Fakultät der Friedrich-Wilhelms-Universität zu Berlin, in: Juristenausbildung in Osteuropa cit. S. 317–356. On the study of civil law see: Tomsinov V., The jurisprudence of civil law in the 1860s and 1880s, in: Zakonodatelstvo, (1-2) 2013, (12) 2012; Avenarius, Martin, Op. cit. n. 3, S. 35-47.

[17] See Pavel Novgorodsev's "On social ideal" (published in "Issues of Philosophy and Sociology" in 1911-1913, no. 109-136). In another of his works "Introduction to the history of the philosophy of law" (reprinted in St.Petersburg, 2000) Novgorodsev saw the cause of the crisis of the contemporary legal consciousness as an imbalance between the diminishing public credibility of the State and its ever growing powers and functions in the age of the dominant positivistic paradigm (op. cit., p. 332-333). For more details on this school led by Novgorodsev see: A history of political and legal thought, ed. Oleg Leist, Moscow, 2004, p. 474-486 (in Russian).

[18] In the Soviet Union publications focusing on theories of natural law did not appear until Gorbachev's perestroika.

Lawyers and other intellectuals who did not comply with the Marxist paradigm were either persecuted for political reasons or forced to emigrate, as was the case with Pavel Novgorodsev who died in exile in Prague in 1924.

All in all, an ideology of *ius naturale* never exercised the kind of influence it had in the West during the Age of Reason. However, by mid 19th century a good deal of its legacy became a part of codified laws and to some extent 'common sense' for European lawyers. As such classical natural law entered Russian dogmatic jurisprudence, including Pobedonostsev's Course on Civil Law.

II. Dogmatic jurisprudence in Pobedonostsev's Course on Civil Law

The author's extraordinary personality

Konstantin Petrovich Pobedonostsev (1827–1907) was an outstanding Russian statesman, practitioner, and scholar in the second half of the 19th century. He is better known and remembered as an ultra-conservative statesman. In their memoirs Pavel Milukov, the leader of the Constitutional Democratic Party, and Maurice Paléologue, French diplomat and ambassador in Russia during WWI, called him 'Russian Torquemada'. He became the symbol of the counter-reforms in Russia undertaken as a response to the assassination of Alexander II on March 1, 1881. General public may have a clearer picture of him thanks to the character of rigid and conservative husband of Anna Karenina in Leo Tolstoy's great novel who was arguably inspired by no other than Pobedonostsev. Historians generally subscribe to this profile,[19] although not unanimously.[20]

Pobedonostsev's curriculum vitae is impressive. From 1874 he was the long standing member of the State Council of the Russian Empire, in 1880 he was appointed as head of the Holy Synod of the Russian Orthodox Church (its supreme administrative governing body). From 1881 until the outbreak of the first Russian revolution in 1905 he was the power behind the throne of Alexander III and Nicholas II. Pobedonostsev's immense influence is largely attributed to his role as a tutor in law of the crown prince of the Russian Empire Alexander (later crowned

[19] For more information on Pobedonostsev life and career see (in English): Byrnes, Robert, Pobedonostsev. His life and Thought. Bloomington, London, 1968; Idem, Russian Conservative Though Before the Revolution, in: Stavrou, Theofanis. Russia Under the Last Tsar, University of Minnesota Press, 1969. For his own observations see: Reflections of a Russian Statesman by Konstantin Petrovich Pobedonostsev, Published by G. Richards. University of Michigan Press, 1964.

[20] For an alternative assessment of Pobenonostsev as a true patriot of Russia and a passionate advocate of its historically determined particularity see Vladimir Tomsinov's foreword in the republished Pobedonostsev's Course on Civil Law (Moscow, 2003, vol. 1, p. V-XXVIII).

Alexander III). This is how he won the trust and respect of the tsar and could make his conservative political views heard.[21]

Pobedonostsev is less known as a practitioner of Russian law. Before obtaining the position of tutor of the crown prince in law in 1866 he made his career at the Moscow division of the Governing Senate (the Appellate Court for the regions of Central Russia), starting as an assistant secretary until attaining the rank of the head of this division.

Pobedonostsev's scientific convictions began to take shape at the prestigious Imperial School of Jurisprudence, where he studied in 1841-1846. The School was founded in St. Petersburg in 1835 with the mission to prepare young Russian noblemen for public services. Legal education was at the core of its curriculum which was based on the ideas of German Historical School.[22]

From 1859-1865 he was a part-time lecturer in civil law and civil procedure at Moscow University, praised by students and colleagues for a clear exposition and a practical perspective on legal matters. The unique experience of practicing and teaching law was likely to have secured him the position of tutor in law of the crown prince.

Pobedonostsev's colleagues more than once attested to his deep analytical mind capable of giving perspicuous explanations of intricate legal issues. As a scholar, he was very pragmatic in methods of study. His academic creed was to see the main aim of Russian laws through study of their historical background, their comparison with Roman law and contemporary European legislation, and then to suggest corrections of positive laws through the standards of rationality and justice.

He was an admirer of both the German Historical School and the French School of Exegesis. In particular he praised Savigny's "System des heutigen Römischen Rechts" for its theoretical consistency and the commentaries of the French School of Exegesis on the positive laws for their clear and concise style [23]. However, he persistently called attention to the specificity of Russian laws and Russian legal history. He recommended law students to begin with the study of national legal history and set the pattern by being very knowledgeable about Russian laws and their historical development.

Alongside legal history, a comparative approach stood at the core of Pobedonostsev's methodology. Studying the laws of the leading nations of his time together with their Roman

[21] Pobedonostsev believed that Western liberal institutions (parliamentarism, constitutionalism, jury trial) and values (individualism, freedom of speech) were not meant for Russia where they could only lead to anarchy. In his view, Russia needed autocratic rule under an Orthodox and morally conscious Tsar.

[22] In accordance with the University Charter of 1835, major disciplines in legal curriculum were: law relating to the Orthodox church, dogma and history of Roman law, civil law, law merchant, criminal law, state law, civil and criminal procedure, encyclopedia of laws.

[23] In his works he recommended law students to read Savginy's major works carefully. See: Pobenonostsev K., Study of literature on land estates law, in: Idem, Course on Civil Law. St. Petersburg, 1868, vol. 2, part 1, p. 221.

background was indispensable to reveal the essence of legal institutions, as well as various flaws in Russian legislation enabling its critical assessment *de lege ferenda*. This academic program was carried out extensively in Pobedonostsev's principal work – Course on Civil Law.

Introducing Pobedonostsev's Course on Civil Law

Pobedonostsev's unique practical experience, academic creed, accompanied by diligence and persistence, allowed him to design and accomplish the first comprehensive dogmatic course on Russian civil law. It took him more than two decades to publish his *magnum opus* – "Property rights" (vol. 1, 1868), "Family law and succession law" (vol. 2, 1871), "Contracts and obligations" (vol. 3, 1880), all three were published in St. Petersburg, including the complete three volume set in 1896.

On the occasion of Pobenonostsev's death in 1907 the newspaper "Russia" wrote that his Course on Civil Law firmly established Russian national jurisprudence of civil law, since all previous literature on this subject either plainly echoed Western European publications or narrated civil laws without due explanations or lamely adopted European general theories of civil law.[24]

Professor of civil and commercial law Gabriel Shershenevich praised Pobedonostsev's ability to maintain and reason his own independent interpretation of the civil laws, and compared him with Roman lawyers, known for their unwillingness to generalize or to give broad definitions, for their outstanding accuracy in describing case circumstances and consistency in resolving legal issues on the basis of the established tradition.[25]

The Course on Civil Law was praised by practitioners of law and quickly became a work of authority in Russian courts, including the Governing Senate of the Russian Empire. Therefore, it gave an accurate image of the predominant doctrines of Russian civil law towards the end of the 19th century.

However, the Course on Civil Law was criticised for neglecting legal theory.[26] At first sight this critique seems to be justified by the structure and the mode of treatment adopted in the Course. Few parts of the voluminous work were intended to expound the author's academic creed and mode of treatment whereas extensive commentaries on the Digest of Laws and the decisions of the high courts were ubiquitous and often followed its logic. At the same time, the Course did not lack the implied theoretical basis with historical and comparative methodology at its core. This methodology, basically, reflected Pobedonostsev's academic creed, as stated above. In the introduction to the Course, he clearly indicated his intention to prepare a dogmatic

[24] Russia newspaper, (399) 1907, cited by V. Tomsinov in his foreword to Pobedonostsev's Course on Civil Law, vol. 1, p. XXIII.
[25] Shershenevich G., Op. cit. n. 3, p. 88-89.
[26] See Nikolsky B., Writings of K.P. Pobednonstsev, in: Historical herald, (9) 1896, p. 724-725.

work with a comprehensive exposition of the basic matters of civil law by comparing Roman, French, German laws in order to give the reader a full picture of the legal matter under examination before moving on to expose the corresponding provisions of Russian positive laws. The latter were treated through the prism of their historical development.

This combination of dogmatic, comparative and historical methods, in Pobedonostsev view, should enable any reader to see similarities and differences, correspondences and discrepancies between Russian and Western European laws.[27] In addition, such an approach should facilitate the gap filling and critique of Russian positive laws (i.e. the Digest of Laws) which Pobedonostsev regularly reprimanded for their general inconsistency, multiple out-of-date regulations, and lacunas.

In the first volume of his Course, Pobedonostsev did not explain the root of these defects, but in the introduction to the third volume he mentioned the lack of 'classical' legal knowledge ('classical foundations') at the time Russian laws were drafted and enacted.[28] By 'classical' he understood Roman law in its 19th century interpretation through the joint efforts of the Historical School and the Pandectists in Germany.

And what about natural law? So far all the purposes, sources and methodology of Pobedonostsev's Course seem to exclude any reference to supra-positive concepts. Generally, he wrote his Course as if the legacy of classical natural law had no importance for contemporary jurisprudence. However, at least two basic assumptions challenge this assumption. First, scholars are not always capable of or willing to give a comprehensive exposition of the legacy they benefit from. By the second half of the 19th century the heritage of classical natural law was ideologically and methodologically discredited as a rebellious and abstract theory which did not take into account historical experience. So, most lawyers were not willing to give it credit. Second, the European legal tradition in the 19th century was neither a stub nor an invention of the Historical School and the Pandectists but rather an amalgam of the long term development. The legacy of classical natural law was undoubtedly an important and fairly recent part of this process which was sufficiently absorbed into mainstream European jurisprudence through legal education and codification.

According to the leading German specialist in the history of European private law, professor Franz Wieacker,[29] despite many differences between the natural law of the Age of Reason and the German Historical School of the 19th century, the latter benefited from *ius naturale* by embracing:

[27] See original edition of Pobedonostsev's Course, part. 1, vol. 1, p. II (omitted in the reprint of 2003 but cited in the preface by V. Tomsinov, p. XXII).
[28] Pobedonostsev K., Op. cit.20, vol. 3, p. 6.
[29] Wieacker F., Op. cit. n. 7, p. 296-297.

1) the system of civil law which went back to the works of Joachim Darjes (1714-1791) and Daniel Nettelbladt (1719-1791), pupils of Christian Wolff, and ultimately to the natural system of Samuel Pufendorf;

2) Wolff's demonstrative method of constructing concepts, deducing legal decisions from them in a logical manner and forming them into a system (the emphasis was made on the inner coherence and a uniformity of treatment of content);[30]

3) the basic concepts of law, such as objective law, individual rights, legal transactions, synallagmatic contracts, the duty to perform, impossibility of performance, etc. (although these concepts were reformulated, they did not originated from the practical German school of usus modernus in the 18th century);

4) ethical determination of laws.[31]

Most of these remarks turn out to be relevant to Pobedonostsev's Course on Civil Law. Firstly, the overall structure of the Course generally corresponded to Daniel Nettelbladt's system. In his "Systema elementare universae jurisprudentiae naturalis" (1745, 3 ed. 1767) Wolff's pupil divided general jurisprudence into pertaining to persons, facts and things (*de personis, de factis, de rebus*). Three volumes of Pobedonostsev course overlapped with this division:

– "Family law and succession law" (vol. 2, 1871): general notions, marriage, legal parents and children, guardianship; succession law, wills;

– "Contracts and obligations" (vol. 2, 1880): general provisions on obligations (content, validity, types, modes to conclude, perform and terminate), specific contracts and delicts as the facts producing legal relations;

– "Property rights" (vol. 1, 1868): the notion of legal object; property, land property, possession, means to acquire property rights, termination of property rights, *iura in re aliena* (including pledge), intellectual property law.

This system generally did not follow the natural law order, nor the Pandectist textbooks. It was intended to make sense of the somewhat hectic Digest of Laws and therefore retained its originality. However, the resemblance to the Pandectist system was partly acknowledge by the author himself when he wrote about the classical foundations of jurisprudence. The reversed

[30] See especially the 'pyramid of concepts' in Puchta's textbook of the Pandects ('Lehrbuch der Pandekten'), various editions.
[31] The ethical principle was adopted by Savigny. He was convinced that law promotes ethics not by 'following its commands, but by assuring the free development of the potential innate in the individual will.' See: Savigny F.C. von, System des heutigen römischen Rechts, Berlin, 1840, Bd. 1, S. 333. Despite this ethical determination it was the followers of natural law who clearly separated law from morals as a distinct entity and thus broke away with the Catholic tradition to treat moral theology as a foundation of all human laws. See: Decock W., Theologians and contract law: the moral transformation of the *ius commune* (ca. 1500-1650). Leiden, Boston, 2012, p. 26.

order of the volumes does not change the overall image since it was probably a matter of expediency.

Secondly, Pobedonostsev clearly benefited from the demonstrative method not only by declaring a consistent way of expounding legal matters, but most importantly by sticking to it within each of three volumes.

Thirdly, the Course on Civil Law featured many concepts and notions borrowed from the continental jurisprudence where they served the purpose of coherent dogmatic explanation of Russian laws. Terms like 'objective law', 'individual rights', 'legal transaction', 'duty to perform', 'impossibility of performance' surface throughout the Course, often accompanied by Latin equivalents (*res corporalis et incorporalis, conditio affirmativa et negativa, obligatio civilis et naturalis, laesio, causa debendi* etc.).

Fourthly, all through his Course Pobedonostsev emphasized the moral foundations of laws. One could hardly expect the opposite of a devoted Christian and the long standing head of the Holy Synod of the Russian Orthodox Church. "On the one hand law is a regulation, on the other, it is a Commandment; and the moral view of laws should be based on the idea of the Commandment".[32] Although Pobedonostsev carefully distinguished law from ethics or moral theology, he regarded the Commandments to be the only solid ground for positive legal regulation. In practical terms morals under the name of justice and equity became an important argument in criticizing positive laws *de lege ferenda*.[33]

Even a brief review of Pobedonostsev's Course on Civil Law reveals unmistakable parallels with the legacy of classical natural law which the author largely disliked and denied. Even more resemblance can be found in matters of contract law. In comparison with personal status, family or succession matters, this branch of law is justly believed to be less attached to a particular nation or a period in history and, hence, more appropriate for transplanting abroad.

III. Contractual doctrine in general

Systematic arrangement of contract

In Pobedonostsev's Course contract law was recognized as one of the major sub-branches of civil law within the law of obligations. He proposed a two-fold grouping of obligations according to the mode they arise, bilateral (contracts) and unilateral (delicts and all other modes).[34] The scholar intended to simplify the divisions accepted in Prussian, French, and

[32] Pobedonostsev K., Collected works. St.Petersburg, 1996, p. 317.
[33] For example, when contemplating prohibition of usury, Pobedonostsev noted that moral significance of bans set by statutes was underestimated my the public. "Statute expresses public consciousness and should not diverge from it". See: Pobedonostsev K., Op. cit. n. 20, vol. 3, p. 79)
[34] Pobedonostsev K., Op. cit. n. 20, vol. 3, p. 294.

Austrian legislations and correct the inconsistency of Russian Digest of Laws. In a sense this is an attempt to return to *summa divisio* of obligations arising from contracts and delicts in classical Gaius' Institutes (3.88).

However, the result was not convincing. In fact, Pobedonostsev dismissed the more sophisticated schemes in Roman[35], or Pandectist, or natural[36], and proposed a division of obligations which was unbalanced in favour of contracts. More than 94 percent of the third volume of the Course is dedicated to contracts, and the general part of the law of obligations turned out to be a general part of contract law.

Necessity and significance of contracts

According to Pobedonostsev, legal obligation is necessary in any society because of the need for certainty of a claim that it gives to a creditor. Such certainty is required for reaching legal goals a creditor could not achieve on his own.[37] All contracts aim at increasing one's economic power with the help of another through the legal constraint of another's will.[38] Assuming that the lawyer alluded to the natural weakness of humans, the whole explanation turns out to be almost an exact match to the major argument of the adherents of classical natural law in favour of contracts.[39]

The significance of contracts in all times was attributed to the unifying effect of voluntary agreements unlike property law, which divided people. By mid-19th century contracts became the most elaborated domain of civil law. All property, things, and values were in constant circulation. In the words of Pobedonostsev, acquiring them was no longer an end in itself but rather a means to acquire new things and values, often through contracts.[40] This trend should justify such close attention to contractual obligations at the expense of other modes of obligation.

Definition and essence of contract

Following the demonstrative method Pobedonostsev went from the significance of a contract to the definition of its essence. He defines a contract as a voluntary agreement of several persons, commonly willing to determine a legal relation among them with a particular interest in mind.[41]

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[35] Gaius, adding 'various other causes' to his two-fold scheme, D. 44.7.1 pr.

[36] For example, Grotius addressed the issue in 'Introduction to the Jurisprudence of Holland' (III, 1) as follows: obligation (*inschuld*) is divided into obligations from promise (voluntary act, *toezegging*) and from 'inequality' (*onevenheid*), including unjust enrichment or other causes, voluntary and involuntary (*misdead*), including 'wrongs by construction of the law' (former quasi-delicts).

[37] Pobedonostsev K., Op. cit. n. 20, vol. 3, p. 3

[38] Pobedonostsev K., Op. cit. n. 20, vol. 3, p. 293.

[39] Thomasius and Domat notably pointed out that humans satisfied their needs mainly by means of contracts. See Pufendorf S., De jure naturae et gentium, II, III, § 14; Domat J., Les loix civiles. I, liv. 1.

[40] Pobedonostsev K., Op. cit. n. 20, vol. 3, p. 4-5.

[41] Pobedonostsev K., Op. cit. n. 20, vol. 3, p. 2-3.

The first and most notable feature of a contract corresponded to Pobedonostsev's belief in personal will as motivation for all civil law relations. The idea of an amalgamation of wills in contracts seems to be borrowed from Savigny.[42] However, it was the German adepts of classical natural law who shifted the focus to the will of the parties and broke away from the medieval scholastic allegiance to various formalities derived from the texts of Roman law. Grotius led this rebellion by declaring human will to be the source of all law, but stopped at defining contract through unilateral promise of the debtor.[43] This claim caused some inconsistency in treating a contract as a result of an agreement in Pufendorf's works, but finally was overcome by Thomasius and Wolff in Germany and Domat in France who regarded a contract to be the result of an agreement, i.e. a combination of the wills.[44]

The second remarkable feature of the notion of contract is its aim to establish a legal relation enforceable in courts, so that one party could control conduct of another to the extent agreed upon in the contract. Pobedonostsev asserted this thesis with a distinction between law as such (*ius strictum*) and morals (standards of behaviour unenforceable in courts) in mind. The distinction itself played an important role in the doctrines of Savigny and German Pandectists. However, the idea of distinguishing law and moral philosophy went back to the works of Thomasius and Wolff. Both asserted that natural law was a matter of consciousness rather than law in the strict sense (*ius strictum, ius perfectum, ius cogens*), because it lacked enforceability.[45]

The idea of economic interest at the heart of contractual relations separated Pobedonostsev's doctrine from the German views of the 19th century. Savginy and Pandectists advocated a broad concept of contract as a legal transaction which did not necessarily envisaged counter-performance.[46] Pobedonostsev's choice caused some inconsistency in his treatment of donation. He mentioned this transaction in the group of contracts to transfer property (*ad dare*), yet, described it in the volume on property rights without resolving the issue of its legal nature. However, we may assume that donation was primarily a mode to acquire property right.[47]

This evaluation of donation seems to be influenced by the Digest of Laws. Curiously enough, it led to some similarities with classical natural law. By rejecting many subtle but obsolete distinctions of medieval contract law in *ius commune* (such as, contracts *iuris civilis* and

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[42] "Contract is the uniting of two or more wills, whereby the legal relation between them is determined" (Savigny F.C. von, Op. cit. n. 31, Bd. 3. S. 309). Pobedonostsev did no quote Savigny immediately after the definition, but he did so on many other occasions elsewhere.

[43] The focus on promise in Grotius' theory can be explained through the influence of the Spanish late Scholastics, see Diesselhorst M., Die Lehre des Hugo Grotius vom Versprechen, Köln, 1959.

[44] For details see Nanz K.-P., Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jh., München, 1985. S. 139-165.

[45] "Lex naturalis et divina magis ad consilia pertinet, lex humana proprie dicta non nisi de norma imperii dicitur." (Thomasius Ch., Fundamenta iuris naturae et gentium. I, 5, § 34. Halle, 1718). "Jus perfectum dicitur, quod conjunctum est cum jure cogendi alterum, si obligationi suae satisfacere noluerit" (Wolff Ch., Philosophia practica universalis, Lipsae, 1751. I. 2 §§ 235).

[46] For example, Savigny did not include economic interest in his definition of contract. He defined donation as legal transaction (*Rechtsgeschäft*) or a unilateral contract. See Savigny F.C. von, Op. cit. n. 31, Bd. 2. Kap. 3. S. 4.

[47] Cf. Pobedonostsev K., Op. cit. n. 20, vol. 1, p. 317-320; vol. 3, p. 294.

iuris gentium, stricti iuris and *bonae fidei*, with or without a specific name, 'naked' or 'clothed' with a lawsuit etc.) the adherents of *ius naturale* in the 17th and 18th centuries made clear the criterion of mutual profitability of contracts in their doctrines. In doing so they actually suggested that a contract in its essence is a bargain, an exchange of values. Hence, the division of legal acts into onerous and gratuitous was the first in line as the most reasonable and evident.[48] Gratuitous promises or contracts were treated separately as rather falling out of the economic sense of contractual transactions.[49]

Additionally, it is important to notice that Pobedonostsev used a general notion of contract in his Course that was applicable to all legal transactions matching the given set of criteria. He followed the trend in German jurisprudence which gave up various terms to label agreements in *ius commune* and *usus modernus* (*contractus, pactum, conventio*) in order to build the consistent hierarchy of notions (*Begriffsjurisprudenz*). Pobedonostsev's doctrine was somewhat inconsistent in defining donation as contract but the connection with property law was due to composition of the Digest of Laws, not to the legacy of ius commune. However, it should be noted that this general notion of contract took its shape in the works on classical natural law, when Domat, Thomasius, and Wolff overcame Grotius' and Pufendorf's emphasis on promise as the basis of contractual obligation and asserted an identity between a legal agreement and a contract.

Expounding his doctrine of contract law, Pobedonostsev took advantage of many terms which Franz Wieacker regarded as the bequest of classical natural law to German lawyers of the 19th century.[50] It can be illustrated by the content of the general part of contract law.

The General Part of Contract Law

The general part of contract law in the Course on Civil Law was almost entirely a product of theoretical jurisprudence. Pobedonostsev deplored the deficiency of Russian civil laws in this regard compared to the contemporary German and French legislation. In his view, the flaw was cause by a lack of a "classical legal education" of the drafters of these laws. This was only a partial explanation. Indeed, the civil law jurisprudence did not exist in Russia before the age of the Great Reforms of the 1860-70s. However, the mastermind behind the legislative works, Mikhail Speransky, was quite knowledgable about European law, and even advocated a codification of Russian civil law after the model of the French civil code. Yet, the conservative

[48] See: Grotius H., De jure belli ac pacis libri tres, II, 12.2; Pufendorf S., De jure naturae et gentium libri octo, Amsterdam, 1688, Lib. V, cap. 2, §§ 5-7; Thomasius Ch., Institutiones iurisprudentiae divinae, II. XI, n. 59; Domat J., Les loix civiles dans leurs ordre naturel, Luxembourg, 1702, 1.1.2-7.

[49] Of course, the idea of exchange is at the very centre of Roman views on contracts (e.g. see Labeo's definition of contracts as mutual obligation, *ultro citroque obligatio*, D. 50.16.19), but it was blurred by multiple other distinctions in medieval *ius commune*, and only in the late Spanish Scholasticism we can see a clear emphasis on economic exchange again.

[50] See above n. 29.

turn in Alexander I's reign after Napoleon's invasion and the succeeding conservative politics under Nicholas I blocked all western-like projects as suspicious, alien, or subversive. As a result, out of almost 500 articles on contracts in the first part of the 10th volume of the Digest of Laws only 25 articles contained general provisions on obligations. Pobedonostsev faced the outcome of the traditionalistic legal politics of the tsars but did not dare to acknowledge it to be the cause.

In an attempt to make Russian contract law more coherent, Pobedonostsev grouped up such topics as:

the content of contractual obligations and different kinds of obligations;

the conditions of validity: contractual consent, ability of the parties to act, certain and legal subject matter;

the modes of establishing obligation;

the interpretation of contracts;

the modification of conditions of contractual obligation;

the termination of contractual obligation;

the substitution of persons in obligation;

the contract and third parties;

collateral for obligations.

Although the general part bore the hallmark of German jurisprudence of the 19th century, Franz Wieacker convincingly traced its roots to the legal thought of the Age of Reason. Pobedonostsev should have benefited from this legacy, since the content of the general part in his Course often overlapped with the suggestions of the enlightened lawyers. For example, the conditions of the validity of a contract were comparable with art. 1108 of the French Civil Code which, in its turn, derived from the works of Domat and Pothier.[51]

General principles of contract law

By the 19th century contractual theory in European jurisprudence was explicitly based on general principles. In Pobedonostsev's Course on Civil Law they were not coherently expounded but invoked whenever necessary. Let us take two main principles in matters of contract law: freedom of contract and the obligatory force of all legal agreements.

Freedom of contract

Freedom of contract is widely believed to be the cornerstone of contract law in capitalist societies because it is essential for the self-regulating behaviour of the marketplace. The roots of this principle lead to the late medieval transformation of *ius commune*.[52] However, it was the

[51] See Pobedonostsev K., Op. cit. n. 20, p. 30.
[52] For more details see Decock W., Op. cit. n. 31.

adepts of classical natural law[53] who popularized the secular interpretation of natural freedom of all men to enter into a contract or to abstain from it, to choose one's contracting party, to reach the mutual consent without any imposed formalities, to settle terms and conditions in a contract.

That kind of liberal ideology gained a very narrow foothold in the Russian Empire when Pobedonostsev conceptualized Russian civil law. Even the scholar himself was hostile to it. Therefore, the principle of freedom of contract was not stated explicitly anywhere his speculations on contract law. However, a careful reader can find several essential elements of freedom of contract even in this dogmatic Course.

By mid-19th century under Russian law having the free will to enter into a contract was essential for its validity, because in any case when consent was vitiated or distorted by duress, fraud or mistake, the Digest of laws gave lawsuit for rescission of contract and for damages.[54] Parties to the contract in principle were not bound to specific formalities in order to make their agreement enforceable in courts. Pobedonostsev approvingly stated that legal formalism as a condition of enforceability of contractual agreements was repealed in all major European jurisdictions. Repeal of formalism rendered the distinction between formal contracts and informal agreements obsolete[55] and facilitated an increasing variety of transactions, which Pobedonostsev mentioned to prove the importance of the general provisions in contract law. At the same time, unlike the adepts of classical natural law, he neglected any ideological justification of freedom of contract and its elements, simply acknowledging them as a matter of Russian positive law.

Obligatory force of legal agreements

As in the case of freedom of contract, obligatory force of legal agreements (often expressed by Latin adage *pacta sunt servanda*) was disputed in medieval *ius commune*, but was raised to the level of a 'sacred' legal principle in classical natural law.[56] Grotius argued that even God himself could not break his promise and Pufendorf treated the 'sanctity of contract' as the basis for mutual trust within any society, or a guarantee of order and stability.[57] Because of this natural basis, positive law should forbid any arbitrary refusal to perform a duly formed contract and punish those who did not comply with this rule. Yet, natural law thinkers acknowledged

[53] Grotius H., De jure belli, II. 12. § 8-12 (as condition of validity of contract); Pufendorf S., De jure naturae et gentium libri octo, Amsterdam, 1688. III. VI. § 15–16 (as long as nothing is valid agains the will of free man); Thomasius Ch., Fundamenta iuris naturae et gentium, Halle, 1718. II. VII. 1, № 12; Wolff Ch., Institutiones iuris naturae et gentium, Halle, 1750. §§ 77-78. For more details see: Heinrich Ch., Formale Freiheit und Materiale Gerechtigkeit, Tübingen: Mohr Siebeck, S. 26-36; Kersting W., Der Kontraktualismus im deutschen Naturrecht, in: Das Europdische Naturrecht im ausgehenden 18. Jahrhundert. Eds. O. Dann, D. Klippel. Hamburg, 1994, S. 92-110.

[54] Pobedonostsev K., Op. cit. n. 20, p. 119.

[55] Pobedonostsev K., Op. cit. n. 20, p. 46-47.

[56] For historical overview see: Bärmann J., Pacta sunt servanda. Considérations sur l'histoire du contrat consensuel, in: Revue internationale de droit comparé, (1) 1961, p. 18-53.

[57] Grotius H., Op. cit. II.11.4.1; Pufendorf S., Op. cit. III. IV. § 1; Thomasius Ch., Fundamenta iuris naturae et gentium, Halle, 1718. I. 5. § 34.

some exceptions from the obligatory force of contract in cases like a material change of circumstances (*clausula rebus sic stantibus*) or extreme inequality between the performances under the contract which resulted in extraordinary loss (*laesio enormis*) to one party to the contract.

In Pobedonostsev's Course the validity of the principle of obligatory force of contract is beyond doubt, although it was not expressly stated anywhere, nor confirmed by extensive moralizing. The author plainly deduced the obligatory force of contract from the very essence of an obligation as *ius strictum* and omitted any philosophical explanations.[58]

Moreover, Pobedonostsev stuck to the general principle and neglected exceptions. He mentioned *clausula rebus* and *laesio enormis* in the comparative perspective but wholly dismissed both as unknown to Russian positive law, without taking sides in these issues from a theoretical perspective, as if none of them was worth a more detailed treatment.[59]

Classification of contracts

In his attempt to coherently order Russian positive law, Pobedonostsev paid great attention to the reasonable and consistent classification of contracts. This was an urgent task for jurisprudence since the Digest of Laws classified only modes to acquire property into onerous and gratuitous (see book III, sec. 1, subsec. III) instead of arranging types of contracts or contractual obligation.

Pobedonostsev suggested classifying contracts on the basis of counter-performance and the economic purpose of the parties. The first criterion served to distinguish mutual from unilateral and onerous from gratuitous contracts. The second criterion was used to subdivide contracts according to the aim of the parties: 1) to convey property (*ad dare*), 2) to perform services (*ad facere*), 3) to provide collateral.[60] The latter criterion became the linchpin in arranging a wide variety of legal transactions treated in the 3rd volume of the Course on Civil Law.

Although Pobedonostsev expressly referred to only a few scholars of the 19th century in support of his classification efforts, all the above-stated criteria were actively used by the advocates of classical natural law. Moreover, it was the advocates of *ius naturale* who popularized this classification of contracts and did away with various obsolete criteria of medieval *ius commune*. Again, in this undertaking the founders of classical natural law were

[58] Pobedonostsev K., Op. cit. n. 20, p. 2-3.
[59] For example, after examining provisions on *laesio enormis* under Roman, French and German laws, Pobedonostsev briefly remarked that Russian law did not allow rescission of contract on the ground of extraordinary loss (*laesio enormis*) resulting from an inequality between the performances under the contract, not even in the sale of real property for half the market price (Pobedonostsev K., Op. cit. n. 20, p. 189).
[60] Pobedonostsev K., Op. cit. n. 20, p. 293-294.

proceeded by Spanish late Scholastics of the 16th century most of whom found "subtle rather than useful concoctions, invented and introduced as a matter of civil law by pagans".[61]

Justice

As we have seen, Pobedonostsev upheld many legal tenets similar those of classical natural law. Obviously, he embraced this body of legal theory not as part of natural law, but rather as part of positive law in Western Europe which took shape after the first 'wave of codifications' in Europe in the late 18th – early 19th century. As such they became common sense to lawyers on the Continent. However, there was another important way to connect Russian dogmatic jurisprudence with the ideas of natural law, namely, through concept of justice.

The followers of classical natural law put great value on the principle of justice in their legal doctrines. The just nature of law was one of the axioms from which a great deal of legal doctrines was deduced. For Pobedonostsev the meaning and the role of justice in matters of contract law were more limited, yet still very notable. Although he did not formulate justice as a specific principle, its content and functionality may be deduced from numerous recourses to the word 'justice' and its derivatives in his Course on Civil Law.

The meaning of justice in Pobedonostsev doctrine seems to manifest itself via two main ideas: equilibrium of interests and standards of reasonableness.[62] It could be more narrowly defined through reference to the moral foundations of justice, its natural origins and supra-positive significance. In addition to his view of law as Commandment, Pobedonostsev mentioned some 'natural feeling of justice' which arose in the face of blunt formalism of a particular legal rule.[63] This is a rare allusion to a kind of natural order in the work of a convinced positivist.

The functions of justice render its meaning even clearer. First, justice served the purpose to correct the rigidity in human positive law by taking into account additional circumstances relevant to the case, similar to *bonae fidei* lawsuits in Roman law.[64] Second, it was a means to fill gaps in Russian positive law.[65] With its meaning and functions, justice proved to be indispensable in a dogmatic discourse which contributed to similarities between the legacy of classical natural law and Pobedonostsev's Course on Civil Law.

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[61] See Decock W., Op. cit. n. 31. p. 142, citing Molina L. De iustitia et iure. Venetiis, 1614. Tom. 2, tract. 2, disp. 258, no. 9.
[62] "Justice established balance of interests" (op. cit. n. 20, p. 79). Justice as an opposition to arbitrary behaviour (op. cit. n. 20, p. 180).
[63] Natural feeling led him to denounce the formalism of ancient Roman law stripping informal agreements from legal protection (op. cit. n. 20, p. 27).
[64] For example, 'justice demands to restore rights…' (on occasion of restitution upon rescission of erroneously concluded contract); op. cit. n. 20, p. 119, rescission of contract without actual cause (op. cit. n. 20, p. 46) or the prohibition of usury (op. cit. n. 20, p. 79).
[65] Again, examples of rescission of contract without actual cause, without clear regulations in the Digest of Laws (op. cit. n. 20, p. 46).

Conclusion

On first impression, Pobedonostsev's Course on Civil Law seems to confirm a common view that Russian civil law jurisprudence began to take shape under the decisive influence of the German Historical School and the Pandectists with an almost negligible contribution from classical natural law of the 18th century. Pobedonostsev shared the anti-liberal Russian conservative ideology of Official Nationality and embraced in his academic creed most of the tenets of the German Historical School and positivist jurisprudence.

And yet, in the Course on Civil Law we see undeniable parallels with classical natural law. Pobedonostsev adopted the same parts of the legacy of natural law which had been embraced by the German Historical School earlier. These were the overall systematic division of legal doctrine, the demonstrative method of its exposition, some basic legal concepts, and the ethical determination of laws. The doctrine of contract law reveals even more similarities, regarding arguments for the necessity and significance of contract, its voluntary nature and economic purpose, the major criteria of classification, as well as the principles of freedom of contract and its obligatory force.

What were the causes of this influence? First of all, it was mediated by Western European jurisprudence and legislation of the 19th century. Various ideas and solutions became common sense for lawyers on the Continent, and their origins were blurred. Second, natural law solutions found their way into Russian dogmatic jurisprudence by virtue of their reasonableness, sense of justice, and the need for a supra-positive ideal. Even such a conservative scholar as Pobedonostsev could not expound his doctrine of contract law without some critique of the Digest of Laws of the Russian Empire. This critique *de lege ferenda* recurrently called for justice, or supra-positive ideal of natural origin, which seemed to be indispensable to maintain an equilibrium of interests and reasonableness of laws in action.

In the late 19th and early 20th century the idea of supra-positive values was reinforced in Russia by the school of revived natural law as a reaction to plain textual positivism. In doing so Russian jurisprudence followed a trend similar to German or French jurisprudence.

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