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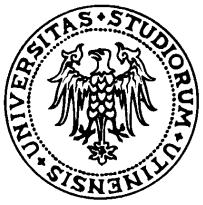

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PhD Thesis

Natural Law Theory in Russia in the Late Nineteenth and the Early Twentieth Century

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CHAPTER I: INTRODUCTION

Today it is still rather common to separate Russia from the Western world, to see it as the West's Other, with the ideas of liberalism and democracy viewed as something extrinsic and historically alien to Russia. Johanna K. Schenner from the University of Kent even suggests that Edward Said's concept of Orientalism, which originally was used to describe erroneous assumptions by Western countries about the Middle East, can also be applicable to the image of Russia.[1] Despite this misconception, the history of Russian liberalism dates back to, at least, the times of Pëtr I, and can boast with some truly bright minds in this filed. However, the realm of the Russian liberalism, and particularly of the natural law theory, still gets not as much attention as it deserves, not only in the West, but eve in Russia itself. I would like to make my humble contribution to filling this gap, so in this thesis I am analyzing the Russian school of natural law – or jusnaturalism.

The aim of this thesis is to explore the Russian school of natural law of the late nineteenth and the early twentieth century, with its commonalities and peculiarities, and to analyze its role in the political and social life of the last decades of the Russian Empire. From the standpoint of legal theory and philosophy, this period of the Russian jusnaturalistic thought is usually referred to as the revived natural law school

[1] Johanna K. Schenner, "Birth of Russian Conservative Liberalism," Center for Entrepreneurship's *Entrepreneurship Insights e-Bulletin*, 15 (2012): 1, accessed 17 February 2013, http://www.cfe.ru/en/resource_center/bulletin/issue1791/1804.htm.

(*škola vozroždënnogo estestvennogo prava*).[2] The main time framework of my thesis is the period between the 1880s, representing the start of the active phase of B.N. Čičerin's and V.S. Solov'ëv's legal philosophy, and the 1917, when the Bolshevik Revolution effectively shut down all liberal thought in Russia. It should be noticed, however, that some of the works related to the analyzed school were written after the 1917, in the emigration, but they still make an integral part of this legal teaching. Besides this, in order to understand the background and the sources of this school of legal philosophy, the events and figures of the eighteenth and earlier nineteenth century are studied. Considering the analysis of the implementation of these ideas, the period of the First Russia Revolution is taken, that is from 22 January 1905 to 16 July 1907. This period represents the culmination of institutionalization of the jusnaturalistic ideas in Russia. The primary focus is made on the two documents of constitutional nature – the Manifesto of 17 October (Manifest ob usoveršenstvovanii gosudarstvennogo porjadka)[3] and the Fundamental Laws of the Russian Empire of 23 April 1906 (Svod zakonov Rossijskoj imperii).[4]

In her article about the emergence of conservative liberalism in Russia, Schenner discerns three main periods of Pre-Revolutionary Russian liberalism. The first wave of liberalism she associates with the Russian Age of Enlightenment under the rule of Catherine the Great (1762-1796), and subsequently with the figure of Mihail Speranskij, who is often considered the father of Russian liberalism. According to Schenner, the second period was caused by a regime crisis after the defeat of Russia in the Crimean War. This period is marked by the Great Reforms of Aleksandr II, which included the Emancipation Reform of 1861. Among the most prominent thinkers of this period was Boris Čičerin. Another Aleksandr II's reform, the establishment of local self-government (*zemstva*), triggered the third wave of

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[2] See, e.g.: Svetlana Alekseevna Pjatkina, "Škola 'vozrojdënnogo estestvennogo prava' v Rossii," *Pravovedenie*, 6 (1969); Andrej Vasil'evič Poljakov, "Vozroždënnoe estestvennoe pravo v Rossii: Kritičeskij analiz osnovnyh koncepcij" (PhD diss. synopsis, Leningradskij gosudarstvennyj universitet, 1987).

[3] *Polnoe Sobranie Zakonov Rossijskoj Imperii, sobranie 3-e (1881-1913)* (Sankt-Peterburg: Tipografija II Otdelenija Sobstvennoj Ego Imperatorskogo Veličestva Kanceljarii, 1908), tom 25, čast' 1, № 26803.

[4] *Svod Zakonov Rossijskoj Imperii (izd. 1832 g.)* (Sankt-Peterburg: Tipografija II Otdelenija Sobstvennoj Ego Imperatorskogo Veličestva Kanceljarii, 1832), tom 1, čast' 1.

liberalism in Russia. Schenner highlights introduction by Vladimir Solov'ëv of the "right to a dignified human existence" as a sign of liberalism gaining more social tinge.[5] This period saw a whole constellation of prominent thinkers elaborating on the ideas of natural law and liberalism, including Novgorodcev, Struve, Frank, Gessen, Bulgakov, Berdjaev, and others. This wave of liberalism culminated in the Revolution of 1905, the October Manifesto, the creation of a representative body, the State Duma, with a multi-party system and the rudiments of a constitutional monarchy. These initiatives were frozen by the conservative monarchists, later saw a short revival, in the form of the Provisional Government, after the February 1917 Revolution, which collapsed in the chaos of the internal unrest stirred up by the World War I, and the same year was violently cut short "losing the race" to the Bolsheviks. Russian liberal thought continued to develop in the emigration, however, practically without real possibility to have any tangible effect on Russian political life.

My hypothesis is that regardless of the prevalence of conservative and radical doctrines, in Russia during the 1905-1907, the original doctrine of the revived jusnaturalism began to penetrate into the Russian political and social spheres, and, most importantly, into the Russian legislation. In order to check this hypothesis, I try to show that Russian jusnaturalistic theories of the late nineteenth and the early twentieth century, while being influenced by Kantian and Hegelian philosophy, also draw inspiration from Russian thought, and in particular religious philosophy, resulting in a self-sufficient philosophical school of the revived natural law. Then, I show that the Russian school of revived jusnaturalism represents a range of diverse theories, which nevertheless share some common principles and concepts interpreted in their own manner, which include justice, freedom, inalienable natural rights and *pravovoe gosudarstvo*. The latter concept is derived from the German *Rechtsstaat* ("law-bound state") and represents a closely related to, yet different from the Anglo-Saxon principle of rule of law.[6] The principle of *pravovoe gosudarstvo* is so far one of the founding principles of today's Russian constitutionalism. Finally, I demonstrate that during the first years of the twentieth century, jusnaturalism began to infiltrate

[5] Schenner, "Birth of Russian Conservative Liberalism," 1-2.
[6] Richard Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism," *Studies in East European Thought*, 48-2/4, (1996): 116.

into the political and social spheres, and, most importantly, into legislation of the Russian Empire. This infiltration was gradual, but still it had the potential to change the order in Russia, but this progressive motion was cut short by the autocratic government. In the view of the coming Bolshevik Revolution, it may seem that the Marxism was the only viable ideology in the pre-1917 Russia; however, during my research I became inspired by the idea that "liberalism was a possible alternative to revolutionary radicalism."[7]

In this dissertation, I use such methods as historical analysis, legal analysis, comparative method, and synchronic method. As primary sources, I analyze the works of the representatives of the jusnaturalistic school on question, namely Nikolaj Aleksandrovič Berdjaev, Sergej Nikolaevič Bulgakov, Boris Nikolaevič Čičerin, Jurij Stepanovič Gambarov, Vladimir Matveevič Gessen, Ivan Aleksandrovič Il'in, Aleksandr Semënovič Jaščenko, Bogdan Aleksandrovič Kistjakovskij, Sergej Andreevič Kotljarevskij, Maksim Maksimovič Kovalevskij, Iosif Vikent'evič Mihajlovskij, Pavel Ivanovič Novgorodcev, Lev Iosifovič Petražickij, Iosif Alekseevič Pokrovskij, Vladimir Sergeevič Solov'ëv, Pëtr Berngardovič Struve, Evgenij Nikolaevič Trubeckoj, and Pavel Gavrilovič Vinogradov. My primary sources also include works by Aleksandr Petrovič Kunicyn, Mihail Mihajlovič Speranskij, and Lev Nikolaevič Tolstoj.

Besides the works by these thinkers, my primary source is Russian prerevolutionary legislation. First of all it is The Manifesto on the Improvement of the State Order (*Manifest ob usoveršenstvovanii gosudarstvennogo porjadka*) of 17 October 1905;[8] then, the Fundamental Laws of the Russian Empire (*Osnovnye Gosudarstvennye Zakony Rossijskoj Imperii*) of 23 April 1906;[9] next, the old version of the latter, the Code of Laws of the Russian Empire (*Svod zakonov Rossijskoj imperii*) of 1832;[10] in addition, analyze numerous decrees (*ukaz*), regulations (*položenie*), rules (*pravila*) and other legal acts of the Russian Empire.

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[7] Marc Raeff, "Some Reflections on Russian Liberalism," *Russian Review,* 18-3 (1959): 219.
[8] *PSZRI, sobranie 3-e (1881-1913)*, tom 25, čast' 1, № 26803.
[9] *Svod Zakonov Rossijskoj Imperii (izd. 1906 g.)* (Sankt-Peterburg: Tipografija II Otdelenija Sobstvennoj Ego Imperatorskogo Veličestva Kanceljarii, 1906), tom 1, čast' 1.
[10] *SZ (izd. 1832 g.)*, tom 1, čast' 1.

In order to explore the institutionalized manifestations of jusnaturalistic ideas, I study the programs of the Russian political parties of the period, namely the Constitutional Democratic Party (*Konstitucionno-demokratičeskaja partija*), the Democratic Union of Constitutionalists (*Demokratičeskij sojuz konstitucionalistov*), the Party of Free-Thinkers (*Partija svobodomysljaščih*), the Union of 17 October (*Sojuz 17-go oktjabrja*), the Progressive-Economic Party (*Progressivno-ekonomičeskaja partija*), the Russian Social Democratic Labor Party (*Rossijskaja social-demokratičeskaja rabočaja partija*), and the Moderate Progressive Party (*Umerenno-progressivnaja partija*).

The secondary sources that I use include, first of all, studies dedicated to the Russian revived school of natural law. Such studies were done by E.A. Gnatenko, E.Ju. Solov'ëv, A.F. Losev, P.V Gurevič, K.A. Gusev, S.A. Pjatkina, A.V. Poljakov, A.N. Savinov, V.D. Zor'kin, V.N. Žukov, J.K. Schenner, J.D. Kornblatt, and A. Walickij. Other works on legal theory and philosophy in general include the works by M. Rosenfeld, N. Bobbio, M.N. Marčenko, D. Composta, A. Christoyannopoulos, A. Donati, P.D. Barenbojm, V.S. Nersesjanc, F.C. Beiser, G. Del Vecchio, F. D'Agostino, and J. Hampton.

For the historical component of the research, I utilize work by such historians and legal historians as V.V. Zen'kovskij, L. Schapiro, R. Sakwa, M. Raeff, N.M. Azarkin, J. Berest, G. Codevilla, M. Ganino, S.E.A. Howe, M.G. Korotkih, D. Lieven, R. Lesaffer, J.R. Millar, M. Perrie. Bibliography and footnotes are formatted according to the Chicago Style.

I will start my work by analyzing the preconditions of development of the jusnaturalistic theories of the late nineteenth and the early twentieth century.

CHAPTER II: PRECONDITIONS OF DEVELOPMENT OF THE NATURAL LAW THEORIES IN RUSSIA IN THE LATE NINETEENTH AND EARLY TWENTIETH CENTURY

In this chapter I begin my research by exploring the most influential methodological trends and philosophical teachings that determined the development of natural law ideas in Russia in a certain direction, as well as socio-political and legislative background, in order to understand what actual live events were impacting the thinking of these philosophers. I also make a brief excursus into the history of jusnaturalism in Russia.

2.1. SOCIO-POLITICAL AND LEGISLATIVE BACKGROUND

In order to better understand the process of evolution of jusnaturalistic ideas at the edge of the 19th and 20th century, I would like to focus first on the socio-political and legislative background of the period. Despite the abolition of serfdom and the implementation of land, municipal, judicial and other bourgeois-liberal reforms of the 1860s-1870s, by the beginning of the 20th century a police state regime was

established in Russia on political and legal levels.[11] The absolutist form of government, reluctance of autocracy to move towards the direction of establishing a constitutional monarchy, and the estates system all predetermined sharp inequality of rights and responsibilities of various groups of Russian society.

2.1.1. SOCIAL INEQUALITY. SERFDOM

Back from the 18th century social life in Russia was characterized by the so-called "estates system" (*soslovnyj stroj*). Each of the estates (*soslovija*) possessed a certain set of rights (*privilegii*) and duties (*povinnosti*) attributed only to this category. Classification of the estates was based on different factors such as occupation (clergy, merchants, peasantry); nature of the duties in front of the state ("*podatnye soslovija"* – assessable estates: peasantry, petty bourgeois; *"nepodatnye soslovija"* – unassessable estates: nobility, clergy); real or alleged descent and merits of ancestors (hereditary nobility).[12]

Special place of each social group (nobility, clergy, freemen, merchants, petty bourgeois, workers, peasantry) in the life of the society and their rights and duties were defined and maintained by numerous legal norms that were included into the *Svod zakonov Rossijskoj imperii* ("the Code of Laws of the Russian Empire") of 1832 and ran till the October Revolution.[13]

Most of the rights were enjoyed by nobility. Article 35 of the Charter on the Rights, Liberties and Privileges of the Noble Gentlefolk (*Gramota na prava, vol'nosti i preimuščestva blagorodnogo Rossijskogo Dvorjanstva*) approved as far back as on 21

[11] Erih Jur'evič Solov'ëv, "The Humanistic-Legal Problematic in Solov'ëv's Philosophical Jpurnalism," *Studies in East European Thought*, Vol. 55, No. 2 (2003): 125.
[12] Evgenij Alekseevič Skripilev, "Prava ličnosti v Rossii do oktjabrja 1917 g.," in *Prava čeloveka: vremja trudnyh rešenij*, ed. Elena Andreevna Lukaševa, and Mark Moiseevič Slavin (Moskva: IGP RAN, 1991): 176.
[13] James R. Millar, ed., *Encyclopedia of Russian History* (New York: Macmillan Reference, 2004), 840-841.

April 1785[14] was dedicated almost exclusively to the privileges of nobility. Only one article was dedicated to duties: "on the first call of the autocratic power, to spare neither efforts nor life itself for the government service."[15] Privileges of the nobility included: exclusive right to hold some public posts (marshals of the nobility); advantage among members of other estates in occupying posts of the heads of *zemstvo*; dominance in *zemstvo* self-government; establishment of privileges for noble land ownership by the means of a state nobility bank; corporative organization (province noble societies with their own bodies – nobility associations etc.).[16]

A lot of statutes established class isolation and abjection of peasantry. One of the most serious and continuous violations of human rights was serfdom. That is why a very important event in the history of implementation of liberal ideas in monarchist Russia was the Emancipation Reform of 1861 that abolished serfdom.[17] On February 19, 1861 the emperor approved several legislative acts concerning specific provisions of the Emancipation Reform.[18] Later local acts were adopted in order to regulate the procedure and the conditions of liberation of the peasants and of transfer of land to them. Their main provisions were: the peasants gain personal freedom; until the redemption deal with the landowner,[19] the peasant has the right to use the land. Allotment with land was carried out on the basis of voluntary mutual agreement between the landowner and the peasant.[20] Regardless of the numerous serious imperfections of the reform, such as extremely high redemption payments that made

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[14] *Polnoe Sobranie Zakonov Rossijskoj Imperii, sobranie 1-e (1649-1825)* (Sankt-Peterburg: Tipografija II Otdelenija Sobstvennoj Ego Imperatorskogo Veličestva Kanceljarii, 1830), tom 22, № 16187.
[15] Ibid.
[16] Ibid.
[17] Manifest "O vsemilostivejšem darovanii krepostnym ljudjam prav sostojanija svobodnyh sel'skih obyvatelej, i ob ustrojstve ih byta" ot 19 fevralja 1861 g., in *Polnoe Sobranie Zakonov Rossijskoj Imperii, sobranie 2-e (1825-1881)* (Sankt-Peterburg: Tipografija II Otdelenija Sobstvennoj Ego Imperatorskogo Veličestva Kanceljarii, 1908), tom 36, čast' 1, № 36650; Vysočajše utverždennoe "Obščee položenie o krest'janah, vyšedših iz krepostnoj zavisimosti" ot 19 fevralja 1861 g., in *PSZRI, sobranie 2-e (1825-1881)*, tom 36, čast', № 36657.
[18] See: *PSZRI, sobranie 2-e (1825-1881)*, tom 22.
[19] Millar, ed., *Encyclopedia of Russian History*, 1273-1274.
[20] Igor' Aleksandrovič Isaev, *Istorija gosudarstva i prava Rossii. Učebnik*. 3-e izdanie, pererabotannoe i dopolnennoe (Moskva: Jurist", 2004), 424

liberation actually possible for a very low percentage of the peasants,[21] or the maintenance of the *obsščina* (commune) system,[22] from the point of view of consistency of jusnaturalistic principles' practical realization the reform has de jure eliminated serfdom-based dependence of a person, has removed one of the main causes of unfreedom,[23] and thus has stimulated significant advancement of Russian society on the democratic route.

Concerning the problems of legal status of individual in the conditions of police state it should be mentioned that alongside with the above-stated very serious violations of human rights can be observed in the criminal law sphere and in criminal procedure. For many decades formal theory of evidence[24] originating in the Military Regulations (*Voinskij ustav*) of Peter I (1716) was the prevailing approach.[25] It established different evidential value for different types of evidence that were obligatory for the courts to follow.

It has to be admitted that inequality of citizens before the court existed, and it spanned not only on the defendant and the accuser or the plaintiff and the respondent, but also on the witnesses. "With equal degree of credibility of lawful witnesses, in the case of their contradiction advantage should be given: 1) to male over female; 2) to noble over not noble; 3) to educated over uneducated; 4) to ecclesiastical over lay."[26] Class belonging of an individual was important not only for determination of penalty but also during serving one's sentence: the conditions of imprisonment were different for different classes. Another example of violation of human rights was the existence of limiting one's rights after the imprisonment term.[27]

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[21] Jurij Pavlovič Titov, ed., *Istorija gosudarstva i prava Rossii. Učebnik* (Moskva: Prospekt, 2003): 199;
[22] Leonard Schapiro, "The Pre-Revolutionary Intelligentsia and the Legal Order," *Deadalus vol. 89, no. 3, The Russian Intelligentsia* (1960): 462- 464.
[23] Millar, ed., *Encyclopedia of Russian History*, 1366-1368.
[24] Isaev, *Istorija gosudarstva i prava Rossii*, 480
[25] Ustav voinskij ot 30 marta 1716 g., in *PSZRI, sobranie 1-e (1649-1825)*, tom 5, № 3006.
[26] *Svod Zakonov Rossijskoj Imperii (izd. 1857 g.) (*Sankt-Peterburg: Tipografija II Otdelenija Sobstvennoj Ego Imperatorskogo Veličestva Kanceljarii, 1857), tom 15, art. 333.
[27] Isaev, *Istorija gosudarstva i prava Rossii*, 474-475.

Corporal punishments were widely used in Russia. They could be carried out in the form of beating with birch, lash, whip or by flogging. Nobles, clergy and merchants of the first and second guilds could not be subjects to corporal punishments.[28] In 1863 the reform of corporal punishments took place. It increased the level of personal immunity in Russia by extending the category of persons that could not be subjects to corporal punishments. This category was expanded even to peasants holding public positions.[29] Corporal punishments were abolished for women. The reform also cancelled additional corporal punishments and stamping of criminals. Usage of birch was also limited.[30] However, birch as official form of punishment disappeared completely only in 1885. And only in 1900 corporal punishments were formally abolished for vagrants as well. Nevertheless, birch was practiced informally in places of imprisonment till the February Revolution.[31]

2.1.2. THE JUDICIAL REFORM OF 1864: THE ATTEMPTS OF DEMOCRATIZATION

The most radical of all the so called Great Reforms of autocracy in Russia was undoubtedly the judicial reform of 1864[32] that played an important role in forming the legal status of individual and in implementation of jusnaturalistic ideas. The judicial reform proclaimed for the first time in Russian history the principle of equality subjects before the court. Publicity and openness of trial and competitiveness of the legal procedure established by the reform were of great importance for democratic development of Russian judicial system. In district courts (uniting several *uezd*) for hearing of criminal cases jury trial has been introduced. First department of the Senate has turned into the superior body of administrative justice where complaints on the

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[28] Millar, ed., *Encyclopedia of Russian History*, 329-330.
[29] Mihail Grigor'evič Korotkih, "Otmena telesnyh nakazanij v Rossii: reforma 1863 g.," *Sovetskoe gosudarstvo i pravo,* № 8 (1988): 106-111.
[30] Isaev, *Istorija gosudarstva i prava Rossii*, 442.
[31] Millar, ed., *Encyclopedia of Russian History*, 329-330.
[32] Vysočajše utverždënnoe "Učreždenie sudebnyh ustanovlenij" ot 20 nojabrja 1864 g., in *PSZRI, sobranie 2-e (1825-1881)*, tom 39, čast' 3, № 41475; Ustav ugolovnogo sudoproizvodstva ot 20 nojabrja 1864 g., in *PSZRI, sobranie 2-e (1825-1881)*, tom 39, čast' 3, № 41476.

actions of administration of different levels were submitted. As a result the overall quality of judicial system increased drastically.[33]

The status of judges has changed. The irremovability principle started to function in relation to them. According to article 243 of the Establishment of Judicial Regulations (*Učreždenie sudebnih ustanovleniy*) the judges could not be neither transferred to work in different judicial office without their agreement nor dismissed without their own application. They could be subjects to removal or dismissal only by a sentence of criminal court.[34] Thus, we can speak about establishment of courts in Russia as public institutions independent from administrative authorities. Establishment of jury and barristers improved the conditions of the accused (defendant) and thus was a major step forward.[35]

However, just few years after the enactment of the Judicial Regulations there was tendency that liberal thinkers such as Kistjakovskij nicknamed "spoiling" of the regulations.[36] In 1872 the Senate established the Special Presence the Governing Senate for Hearings of Cases about State Crimes and Illegal Societies (*Osoboe prisutstvie pravitel'stvujuščego Senata dlja suždenija del o gosudarstvennyh prestuplenijah i protivozakonnyh soobščestvah*).[37] Beside chairmen and five senators the bench included the so-called estate representatives (*soslovnye predstaviteli*): one province and one district marshal of the nobility, provincial mayor (*gubernskij gorodskoj golova*) and rural foreman (*volostnoj staršina*) of the St. Petersburg Province (*Sank-Peterburgskaja Gubernija*). They were appointed by the Tsar himself on recommendation of the Minister of Internal Affairs and Justice for one-year term. Although the "Special Presence" used the rules of criminal procedure of the Judicial Regulations (Law On the procedure on cases on crimes and offences), majority of the respective cases were tried behind closed doors or with invitation of "quite loyal"

[33] Titov, ed., *Istorija gosudarstva i prava Rossii*, 201-205.
[34] Vysočajše utverždënnoe "Učreždenie sudebnyh ustanovlenij. ot 20 nojabrja 1864 g., in *PSZRI, sobranie 2-e (1825-1881)*, tom 39, čast' 3, № 41475; Ustav ugolovnogo sudoproizvodstva ot 20 nojabrja 1864 g., in *PSZRI, sobranie 2-e (1825-1881)*, tom 39, čast' 3, № 41476.
[35] Millar, ed., *Encyclopedia of Russian History*, 604.
[36] Bogdan Aleksandrovič Kistjakovskij, "V zaščitu prava (Intelligencija i pravosoznanie)," in *Vehi. Sbornik statej o russkoj intelligencii*, ed. Mihail Osipovič Geršenzon (Moskva, 1909), electronic version, accessed 19 May 2012, http://www.vehi.net/vehi/kistyak.html.
[37] *PSZRI, sobranie 2-e (1825-1881)*, tom 27, čast' 1, № 50956.

public.[38] Some of the reports about political cases were printed in abridged form. In August 1878 the government transferred the consideration of political cases to the military district courts that had faster procedure and secretive trial.[39] These courts were often adjudging death sentences.[40]

Generally speaking, it should be noted that in tsarist Russia a pretext for any kind of restraint of individual liberty and even for application of criminal penalties could often be not actually commitment of a crime, but just the so-called political unreliability. A characteristic feature of Russia was extensive, even pervasive police surveillance, implemented first by the Third Division of His Imperial Majesty's Own Chancellery, and later by the Police Department. There were several types of such surveillance: secret surveillance; open surveillance assigned by administrative procedure; surveillence, imposed by the court as an additional punishment; and surveillence as a preventive measure against evasion from investigation and from trial.[41]

Examining the projected tendency of democratization of Russian judicial system it should be mentioned that 1880s saw retreat from the proclaimed principles of the judicial reform. First of all, withdrawals from the standard judicial procedure were increasingly practiced in order to transfer cases to special and emergency courts.[42] Back in 1866 the cases about press were taken from jury trial, and administrative authorities were forcing prosecutors to institute legal proceedings against most daring publicists and editors. In 1887 the courts were granted with the right to close the doors of sessions declaring the case been heard as "delicate", "confidential" or "secret".[43] In 1889 the "Regulations on district heads of *zemstvo*" comes into force destroying the idea of separate administrative and judicial powers. This act first of all damaged the system of magistrate courts.[44]

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[38] Ibid.
[39] *PSZRI, sobranie 2-e (1825-1881)*, tom 3, čast' 1, № 58778.
[40] Isaev, *Istorija gosudarstva i prava Rossii*, 447, 453.
[41] Isaev, *Istorija gosudarstva i prava Rossii*, 447-448.
[42] Millar, ed., *Encyclopedia of Russian History*, 336-337.
[43] Isaev, *Istorija gosudarstva i prava Rossii*, 455.
[44] Titov, ed., *Istorija gosudarstva i prava Rossii*, 211.

However, some liberalization still was occurring within the judicial system. In 1885 public executions were abandoned. In 1886 the jury gains broader rights in the procedure: it gains opportunity to participate in statement of questions (earlier only the crown court could do it). And in 1899 obligatory presence of the defender in the court chamber is introduced.[45]

2.1.3. THE ISSUE OF THE FREEDOM OF MOVEMENT

Concerning development of guaranties of personal freedoms we should pay our attention to legal regulation of system of supervision over population movement in the Russian Empire.[46] Its functions in relations to Russia are given in the *Svod ustavov o pasportah i beglyh* ("Code of Regulations on Passports and Escapees") of 1857.[47] It has collected all the numerous rules beginning from the times of Pëtr I and even earlier. The principle of assigning residence to Russian subjects was included in the first article of the Code with reference to Pëtr I's decree *Ukaz o poimke beglyh dragun, soldat, matrosov i rekrut* of October 30, 1719,[48] which stated that no one could leave his place of residence without legalized permit, or a passport.[49]

According to 1857's Code movement was usually allowed for business or for the reason of other occupational purposes. For personal or philanthropic motives traveling was prohibited. The rules classified subjects according to social, regional and ethnic differences.[50] Tsar's authorities followed with great attention those who were not registered properly, so the sanctions introduced in the 18th century were still in force.

After the Emancipation Reform and other liberal reforms of Aleksandr II the old passport system had in fact become official obstacle to subjects' movement across the

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[45] Isaev, *Istorija gosudarstva i prava Rossii*, 521-522.
[46] See: Ol'ga Vasil'evna Rostovščikova, "Svoboda peredviženija i vybora mesta žitel'stva i garantii eë obespečenija i zaščity v Rossii" (PhD diss. synopsis, Volgogradskaja akademija MVD Rossii, 2001).
[47] *SZ (izd. 1857 g.)*, tom. 14.
[48] *PSZRI, sobranie 1-e (1649-1825)*, tom 5 , № 3445.
[49] *PSZRI, sobranie 3-e (1881-1913)*, tom 14, № 10102.
[50] Ibid.

territory, and thus hindered the development of market relations. Therefore, on June 3, 1894 the new *Položenie o vidah na žitel'stvo* ("Regulations on Residence Permits") was adopted at the initiative of the State Council.[51] In 1897 the effect of these Regulations spread to the whole territory of the Russian Empire with some exceptions regarding Poland and Finland.[52]

The Act of April 7, 1897 *Ob otmene sborov, vzimaemyh v polzu kazny s vidob na žitel'stvo*[53] abolished the passport fees; thus, passport lost its fiscal importance. But its role as a means of political supervision and in the system of mutual responsibility remained. However, in general by the beginning of the 20th century the vast majority of subjects had no means to move and choose their place of residence entirely at their sole discretion without special permits and supervision.[54]

2.1.4. Associations in the Second Half of the Nineteenth Century

Another area of individual and social freedom is the work of public organizations and unions. The legislation of autocratic Russia, as elsewhere, contained the following division of societies: a) lawful societies, societies "permitted by law", and b) unlawful, illegal, "secret" or even "criminal" societies.[55] The attitude of the autocracy to these two types of of societies was different. If organization and activities of of societies of the first kind was considered permissible and even was encouraged, the attitude to "illegal" societies was sharply negative. They, of course, were banned, their activities were suppressed by the police and by the administrative and judicial measures.[56]

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[51] *PSZRI, sobranie 3-e (1881-1913)*, tom 14, № 10709.
[52] "Položenie o vidah na žitel'stvo 1894," *GoodHistoria*, accessed 12 February 2012, http://www.goodhistoria.ru/goodhs-13-1.html.
[53] *PSZRI, sobranie 3-e (1881-1913)*, tom 17, № 13932.
[54] Millar, ed., *Encyclopedia of Russian History*, 1368.
[55] *PSZRI, sobranie 2-e (1825-1881)*, tom 42, № 44402.
[56] Ibid.

Among the reforms of the second half of the 19th cintury there was no specific law on legal public organizations. However, significant changes have also occurred in this area. Earlier the articles of such organizations were usually approved by the emperor himself. From the 1860s the right of approval gradually moved to ministers. Finally, in the 1890s some of the articles could be approved by local authorities. The legal status of pre-revolutionary public organizations and their inner activities and relationships with the administration were determined by the Statutes approved by ministers, mainly the Minister of Internal Affairs.[57] In addition to the tolerated and persecuted societies in Russia, there were privileged society as well. Several dozen of societies were called "imperial." They could refer to the emperor, received solid grants and had certain privileges. Some societies were registered under the patronage of some person from the royal family, who was elected as chairman or honorary chairman (honorary president).[58]

By the beginning of the 20th century the number of legal associations has increased a hundredfold. Together they formed a very prominent part of the institutional structure of society. These organizations could operate in virtually all areas of life apart from political one. The majority of legitimate organizations did not have a pronounced ideological tinge, but the very fact of their existence (taking into consideration the voluntary nature of membership, election of leadership, the possibility of debate, publicity and openness) contributed to a certain liberalization of society, albeit a small part of it.[59]

The freedom of press was not provided with In Russia. For many decades Russian literature was being strangled by the grip of the government (secular, ecclesiastical, military, etc.) censorship. However, the censorship reform[60] has expanded to some

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[57] Anastasija Sergeevna Tumanova, "Obščestvennye organizacii imperskoj Rossii: sovremennoe pročtenie istorčeskogo opyta formirovanija graždanskogo obščestva" (paper presented at the *Centr issledovanij graždanskogo obščestva*, 16 September 2009): 1-8.
[58] Aleksandr Davidovič Stepanskij, *Samoderžavie i obščestvennye organizacii Rossii na rubeže XIX-XX vv.* (Moskva: Moskovskij gosudarstvennyj istoriko-arhivnyj institut, 1980), 12.
[59] Ibid.
[60] Vysočajše utverždennye "Vremennye pravila po cenzure" ot 12 maja 1862 g., in *PSZRI, sobranie 2-e (1825-1881)*, tom 37, čast' 1, № 38270; Imennoj ukaz "O darovanii nekotoryh oblegčenij i udobstv otečestvennoj pečati" ot 6 aprelja 1865 g., in *PSZRI, sobranie 2-e (1825-1881)*, tom 40, čast' 1, № 41988; Vysočajše utverždennoe mnenie Gosudarstvennogo Soveta "O nekotoryh peremenah i

extent the possibilities of liberal activities in the private publishing industry, in the post-reform period in Russia, there are numerous book publishing company. Many of them dealt with the release of the liberal-oriented scientific and educational literature. Mamy book publishing companies emerge in Russia during the post-reform period. Considerable part of them was publishing liberally oriented scientific and educational literature.[61]

2.1.5. Municipal reform, Zemstvos: Rudiments of a Representative Local Self-Government

The municipal reform of the nineteenth century can be regarded as essential step on the way of democratization of Russian society and of institutionalization of liberal and jusnaturalistic ideas. In 1964, Aleksandr II enacted a decree establishing a system of *zemstva*[62] – local elected councils. These multiclass assemblies helped to fill the void formed after the removal of seignorial authority.[63] Even though *zemstvo* institutions were by no means local self-government in a full sense as they were under strict control of the provincial administration, still some important functions were passed to their competence, such as education, health, statistics, agronomy and veterinary services, roads, firefighting and other issues.[64] Despite all the limitations, *zemstvo* reform can be considered as a basis for the formation of legal state, as a body of *zemstvo* leaders was formed provided with a minimum of rights and freedoms (civil and political). It seems possible to speak about a new vector of development of statehood in Russia - from centralization to decentralization, to local self-government. *Zemstvos* actually were restricting power of the bureaucracy in lawmaking (as many control functions nevertheless moved to them) even by the very fact of their

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dopolnenijah v dejstvujuščih nyne cenzurnyh postanovlenijah" ot 6 aprelja 1865 g., in *PSZRI, sobranie 2-e (1825-1881)*, tom 40, čast' 1, № 41990.

[61] Millar, ed., *Encyclopedia of Russian History*, 217.

[62] Vysočajše utverždennoe "Položenie o gubernskih i uezdnyh zemskih učrezhdenijah" ot 1 janvarja 1864 g., in *PSZRI, sobranie 2-e (1825-1881)*, tom 39, čast' 1, № 40457.

[63] Lieven, Dominic, ed. *The Cambridge History of Russia. Volume II: Imperial Russia, 1689-1917*. Cambridge: Cambridge University Press, 2006, 258.

[64] Isaev, *Istorija gosudarstva i prava Rossii*, 427-428.

existence. *Zemstvos* expressed not only the interests of nobility and had to act in the interests the entire local population. It would not be totally right to speak about their all-class nature; but exactly by the means of *zemstvo* self-government institutions it could become possible to overcome class division in the conditions of monarchical power and to come to civil society.[65] Following *zemstvos* municipal dumas with similar functions were created in 1870 as well as their executive bodies – town councils headed by mayors.[66]

Zemstvo movement became the basis for the formation of liberal and democratic political parties in Russia. In 1879 the big *Zemstvo* Congress was held in Moscow, that resulted in forming the *Society of the Zemstvo Union and of Self-government* (*Obščestvo zemskogo sojuza i samoupravlenija*) or simply *the Zemstvo Union* (*Zemskij sojuz*). Zemstvos insisted on their inclusion in the network of public institutions.[67] In 1881 (after the assassination of Aleksandr II) *Zemstvo Union* has formulated its basic political principles: rejection of governmental and revolutionary terror, decentralization of public administration; central popular representation (State Duma); abolition of the autocracy. Since 1900 the zemstvo opposition, regardless of government institutions, began its regular congresses. The secret organization *Sojuz osvoboždenija* ("Liberation Union") that emerged in 1902 as a result of these conventions, in 1904 has already legally formulated its demands: destruction of the autocracy and establishment of a constitutional regime; the right of nations to self-determination, democratic political reforms. An appeal to the emperor containing constitutional desires was issued.[68]

Many of these gentry liberals were influenced by such thinkers as Čičerin and kept to individualism principle, advocating individual self-help by means of proper education, sanitation, legal equality and political participation of provincial

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[65] Ibid., 430-431.
[66] Vysočajše utverždennoe "Gorodovoe položenie" ot 16 ijunja 1870 g., in *PSZRI, sobranie 2-e (1825-1881)*, tom 45, čast' 1, № 48498.
[67] Isaev, *Istorija gosudarstva i prava Rossii*, 493-494.
[68] Ibid.

representatives.[69] In 1905 the *zemstvo* movement is even more active. The demands are issued to replace autocracy with "free democratic system"; granting of rights and liberties; distrust to government agencies. In May 1905 the "Union of Unions." is formed in Moscow. All the congresses demanded the creation of a representative central body - the State Duma, elected by universal, equal and secret voting. In September 1905 a congress of zemstvo and municipal figures is held. On this congress the party program was outlined and was named Constitutional Democratic. Besides, in 1865-1866 there were attempts by liberal bureaucrats to limit the absolute power of the monarch (appeal of the Moscow nobility in January 1865; statement on St. Petersburg provincial zemstvo assembly in December the same year; statements of the Ryazan provincial noble assembly in January and of the St. Petersburg provincial noble assembly in March 1866).[70]

The 1870s saw a new surge of development of various projects of political reorganization of Russia. The most impressive one was the Loris-Melikov's "Constitution" of 1881.[71] The Constitution suggested to create a Commission of representatives from the *zemstvos* with the right of deliberative vote for drafting laws proposed by the tsar. However, the monarchy's loss of proactive role in reformation became evident when on March 8, 1881 The Council of Ministers was held headed by Aleksandr III. This Council completely buried all constitutional hopes. On April 29, 1881 the Manifesto "On the Inviolability of the Autocracy" written by K.P. Pobedonostsev with the participation of M.N. Katkov was published. This Manifesto predetermined the turn to counter-reforms.[72]

Thereby, by the end of the 19th century a strong system of permanent limits to state power in Russia still was absent. Rights and freedoms of people were not established legally in their entirety, and violations were occurring almost everywhere. At the same time the abolition of serfdom that led to granting of personal freedom to the

[69] Thomas S. Fallows, "The Russian Fronde and the Zemstvo Movement: Economic Agitation and Gentry Politics inthe Mid-1890's," *Russian Review*, 44-2 (1985): 138.
[70] Isaev, *Istorija gosudarstva i prava Rossii*, 493-494.
[71] Mihail Tarielovič Loris-Melikov, "Vsepoddannejšij doklad gr. M.T. Loris-Melikova (1881 god)," in *Konstitucionnoe pravo Rossii. Osnovnye zakony, konstitucii i dokumenty XVIII-XX vekov. Hrestomatija*, ed. Aleksej Petrovič Ugrovatov (Novosibirsk: Izd-vo JuKEA, 2000), 248-253.
[72] Millar, ed., *Encyclopedia of Russian History*, 336-337.

peasants; the creation of self-government institutions (*zemstvos* and municipal ones); the creation of independent court that consisted in its separation from the administrative power, have prepared the conditions for introduction of foundations of the constitutional system in Russia, for building a law-bound state, and for legal recognition of the natural (inalienable) rights of man and citizen.

2.2. EVOLUTION OF RUSSIAN JUSNATURALISTIC AND LIBERAL THOUGHT

2.2.1. INTRODUCTION OF JUSNATURALISTIC IDEAS IN RUSSIA AND EARLY RUSSIAN LIBERALISM

Up until the eighteenth century, Russia lacked a jusnaturalistic tradition.[73] It was only under Pëtr I's reign when courses of natural law began to appear in Russian universities. First natural law courses appeared in Russia with the opening of the Academy of Science in 1725, with the help of Christian Wolff. The government's decision to introduce such a course was purely utilitarian – training government officials.[74] The choice of German Enlightenment tradition with particular emphasis on the absolutist philosophy of Christian Wolff[75] was nonrandom, as Pëtr I planned to reform Russia into a well-ordered police state.[76] At this stage, it was accomplished by inviting German professors to Russian universities.[77] During the reign of Ekaterina II, who was very preoccupied with her noble subjects' legal education, the teaching of natural law became even more systematic.[78]

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[73] Poljakov, "Vozroždënnoe estestvennoe pravo v Rossii: Kritičeskij analiz osnovnyh koncepcij," 11.
[74] Julia Berest, *The Emergence of Russian Liberalism: Alexander Kunitsyn in Context, 1783-1840* (New York: Palgrave Macmillan, 2011), 110.
[75] Berest, *The Emergence of Russian Liberalism*, 105.
[76] Ibid., 110-112; Marc Raeff, "The Well-Ordered Police State and the Development of Modernity in Seventeenth- and Eighteenth-Century Europe: An Attempt at a Comparative Approach," *The American Historical Review*, 80-5 (1975): 1234.
[77] Nikolaj Mihajlovič Korkunov, *Lekcii po obščej teorii prava* (Sankt-Peterburg: Izd. N.K. Martynova, 1894), 22.
[78] Berest, *The Emergence of Russian Liberalism*, 110-112.

It is worth mentioning that by speaking about such concepts as common good and legal order that were still new for the autocratic Russia, Wolffian natural law theory still had its enlightening influence upon the young nobility. Nevertheless, in a long run Wolffian philosophy in Russia played a role of an antidote against more liberal philosophical trends.[79]

Around the end of the eighteenth century, Wolffian ideas in German universities began to be superseded by more individual-oriented philosophy and liberal natural law such as the ideas of French physiocrats and Adam Smith. Thus, the emphasis shifted from social obligations and paternalistic order to economic freedom and individual initiative. This transitional nature of German philosophy reflected in Russian academic philosophy, which was becoming highly eclectic. The natural law courses that German teachers were giving, even if preserving a large portion of the conservative Wolffian moral and political theory, were blended with ideas of Smith, Fichte and even Kant. Surprisingly, the latter's teaching was met rather calmly by Russian authorities. Julia Berest assumes that probably the authorities simply were not very familiar with Kant's liberal ideas. Seeking to overcome language barrier, some of the German professors had their textbooks translated and published in Russia. These textbooks played a crucial role in spreading Kantian philosophy among Russian students.[80]

Concerning Russian jusnaturalistic researches, among the first works on the issues of natural law were *The Abridgement of Natural Law* ("*Sokraščenie estestvennogo prava*," 1764) by Vladimir Trofimovič Zolotnickij, *The System of Natural Law* ("*Sistema estestvennogo prava*," 1811) by Vasilij Semënovič Filimonov,[81] *A Short Theory of Laws* ("*Kratkaja teorija zakonov*," 1810) and *The Foundations of Natural Law* ("*Pervye načala prava estestvennogo*," 1816) by Lev Alekseevič Cvetaev, and,

[79] Ibid.
[80] Berest, *The Emergence of Russian Liberalism*, 110-115.
[81] Anton Mihajlov, "'Vozroždënnoe estestvennoe pravo' v dorevoljucionnoj Rossii," *Pravo.ru blog*, 18 March 2013, http://blog.pravo.ru/blog/theory/6852.html.

most notably, *Natural Law* ("*Pravo estestvennoe*," 1818-1820) by Aleksandr Petrovič Kunicyn.[82]

Aleksandr Kunicyn (1783-1840) was a professor at *the Imperial Lyceum in Carskoe Selo* ("*Imperatorskij Carskosel'skij licej*") near St. Petersburg. Among his students was the great Russian poet and writer Aleksandr Sergeevič Puškin, for whom the former constituted a major inspiration.[83]

Kunicyn's *Pravo estestvennoe*[84] distinctly stands out among other jusnaturalistic works of this period in Russia, as he emphasizes liberal individualism.[85] It was this book, after which Russian authorities changed their attitude towards natural law, as well as banning Kunicyn from teaching.[86] In his book, Kunicyn extensively uses Kantian[87] teaching, as well as the ideas of Adam Smith.[88] His legal thought is based on the principles of private property, self-regulating economy, competition, and entrepreneurial freedom for everyone. His focus is negative freedom, i.e. the individual's right to act freely within his/her private domain and the right to choose one's occupation. One's freedom is limited by the rule of law and Kantian categorical imperative. Kunicyn accepted Kant's concept of dignity applying it every individual regardless of social rank or economical situation.[89]

Kunicyn's book became a catalyst for the conservative reaction in Russia, which affected not only Kantianism, but also the whole discipline of natural law. Berest believes that even being rather moderate in comparison with European works on natural law of the same period, Kunicyn's "Pravo estestvennoe" "was bolder than anything that had been published earlier on the subject of legal philosophy in

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[82] Berest, *The Emergence of Russian Liberalism*, 113-115; Poljakov, "Vozroždënnoe estestvennoe pravo v Rossii: Kritičeskij analiz osnovnyh koncepcij," 11; Mihajlov, "'Vozroždënnoe estestvennoe pravo' v dorevoljucionnoj Rossii."
[83] Berest, *The Emergence of Russian Liberalism*, 10.
[84] Aleksandr Petrovič Kunicyn, "Pravo estestvennoe," in *Russkie prosvetiteli (Ot Radiščeva do Dekabristov). Sobranie proizvedenij v dvuh tomah*. Tom 2, ed. Ivan Jakovlevič Ščipanov. Moskva: Mysl', 1996.
[85] Ibid., 2.
[86] Nemeth, "Kant in Russia: The Initial Phase (Cont'd)," 316.
[87] Korkunov, *Lekcii po obščej teorii prava*, 22; Berest, *The Emergence of Russian Liberalism*, 2.
[88] Berest, *The Emergence of Russian Liberalism*, 2.
[89] Ibid., 4-5.

Russia."[90] While the superlative degree may reflect Berest's personal opinion, her emphasis on the novelty, the audacity and the overall importance of Kunicyn's legal theory is hard to argue with. As Poljakov justly notes, this form of jusnaturalism basically repudiated the existing foundations of the Russian society of the period[91] and posed a danger to the state authority. Thus, the flowering of jusnaturalistic ideas could not last long. The authorities reduced the previously granted university self-censorship and began to censor academic teachings on natural law, including scrutiny and banning of some of already circulating textbooks. Kunicyn himself was banned from teaching and saw his academic rehabilitation in 1838, just two years before his death.

Though devoid of possibility to spread his liberal ideas through teaching, Kunicyn made a rather successful career in state service: in 1826 he was invited to the Second Section of His Imperial Majesty's Own Chancery (*Vtoroe otdelenie Sobstvennoj Ego Imperatorskogo Veličestva kanceljarii*) to take part in the codification of Russian laws. However, the codification did not give Kunicyn the opportunity to promote jusnaturalistic and liberal ideas as he hoped, since Russian codification had different connotations than its European counterparts did.

During the Enlightenment, natural law gave a stimulus to the codification and simplification of the legal system.[92] The codification movement of the eighteenth century Europe was essentially different from that of Justinian in that it was not merely a compilation of existing law, but was aimed at actual introduction of new law. The modern codification movement to a certain extent represented the bringing of the jusnaturalistic ideas into practice, with the conceptions of natural law emphasizing the obligations of members of society to the community.[93] This new system was thought to prove that man was capable of formulating a complete,

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[90] Ibid., 106.
[91] Poljakov, "Vozroždënnoe estestvennoe pravo v Rossii: Kritičeskij analiz osnovnyh koncepcij," 11.
[92] Horst Klaus Lucke, "The European Natural Law Codes: The Age of Reason and the Powers of Government," *University of Queensland Law Journal*, Vol. 31, No. 1 (2012), accessed 09 January 2013, http://www.questia.com/library/1G1-302114045/the-european-natural-law-codes-the-age-of-reason.
[93] Raeff, "The Well-Ordered Police State and the Development of Modernity in Seventeenth- and Eighteenth-Century Europe," 1240.

consistent, clear and comprehensible to all legal system, which was intended to be universal, at least on the level of its main principles.[94] However, this was not the case with Russia, as the autocracy did not want to make way for liberal reforms. Like Mihail Speranskij, though not to similar scale, Kunicyn sought to introduce reforms and promote rule of law through the codification, contrary to the conservative official policy (backed by the historical school of jurisprudence), according to which the codification was merely intended to systematize existing legislation, but he did not gain much success in this initiative.[95]

With the racket around Kunicyn's book, the government turned to more conservative policy in relation to legal education. In order to counteract the spread of Kantian ideas, in the early 1820s the outdated Wolffian philosophy was re-established.[96] The Decembrists Revolt (*Dekabristskoe vosstanie*) in 1825 caused a harsh reactionist policy, which lasted until the very end of Nikolaj I's reign in 1855, and any liberal thinking was suppressed.[97] Measures were taken in order to popularize the German historical school of jurisprudence[98] founded by Freidrich Carl von Savigny. The historical school, which denies universal principles and believes that law is determined by historical circumstances and represents an integral part of the nation's unique spirit,[99] presented a suitable alternative to the freethinking jusnaturalism.[100] At the same time, following the trends in German legal philosophy, legal positivism began to gain more and more popularity among Russian thinkers.[101]

Speaking about the beginning of the nineteenth century, it does not seem possible not to mention the person widely regarded as the most outstanding political figure during

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[94] Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (Cambridge: Cambridge University Press, 2009), 452-453.
[95] Berest, *The Emergence of Russian Liberalism*, 187-189.
[96] Ibid., 106.
[97] Fedor Rodichev, "The Veteran of Russian Liberalism: Ivan Petrunkevich," *The Slavonic and East European Review*, 7-20 (1929): 316.
[98] Igor' Ivanovič Car'kov, "Estestvenno-pravovaja koncepcija Džona Lokka i eë vlijanie na formirovanie pravovyh idej v XVIII – načale XX veka" (PhD diss., Samarskaja gosudarstvennaja ordena "Znak Počëta" ekonomičeskaja akademija, 1997), 150.
[99] Korkunov, *Lekcii po obščej teorii prava*, 105.
[100] Berest, *The Emergence of Russian Liberalism*, 190.
[101] Poljakov, "Vozroždënnoe estestvennoe pravo v Rossii: Kritičeskij analiz osnovnyh koncepcij," 11.

the reign of Aleksandr I – Mihail Mihajlovič Speranskij (1772-1839).[102] As Aleksandr I' closest adviser, during the 1809-1812 he tried to liberalize Russian government system through a set of reforms.[103]

Speranskij was well-informed and was influenced by a range of Western European models and theories, including French constitutionalism, the ideas of Jeremy Bentham and Baron vom Stein,[104] as well as Smithian views on free trade.[105] From Bentham, for example, Speranskij he adopted the idea of building a well-organized legal system.[106] Coming from a priest's family and having studied in a seminary,[107] he was also influenced by religious philosophy, which can be illustrated by the fact that he translated Thomas a Kempis' Imitatio Christi.[108]

Speranskij highlights the importance of the ethical and spiritual basis of legislation.[109] He seeks to protect the Russian people from the arbitrariness of the bureaucracy by clearly defining its competence and subjecting it to legislation.[110] As for the rationalism of the eighteenth century, Speranskij considers it to be too utilitarian and superficially mechanistic.[111] The substance of his reformist plans was reflected in the plan that he presented to the Tsar in 1809.[112]

Mihail Speranskij believes that the government should have a unity of approach and action, which he sees in enacting laws based on the principles of justice and executing them accordingly, without pursuing selfish interests. This justice is absolute and its source lies in the divine natural law of social life. However, according to Speranskij, the power founded on such absolute justice is also absolute and cannot be an outcome

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[102] Marc Raeff, "The Political Philosophy of Speransky," *The Slavonic and East European Review*, 12-1 (1953): 1.
[103] Raeff, "The Political Philosophy of Speransky," 6.
[104] Ibid., 6-7.
[105] Sonia E. Howe, *A Thousand Years of Russian History* (London: Williams and Norgate, 1915), 206; Berest, *The Emergence of Russian Liberalism*, 46.
[106] Raeff, Ibid.
[107] Howe, *A Thousand Years of Russian History,* 229.
[108] Ibid., 232; Marc Raeff, "The Philosophical Views of Count M. M. Speransky," *The Slavonic and East European Review*, 31-77 (1953): 437.
[109] Raeff, "The Political Philosophy of Speransky," 6.
[110] Ibid., 7.
[111] Raeff, "The Political Philosophy of Speransky," 11.
[112] Ibid., 7.

of a social contract. Speranskij believes the achievement of the government's higher spiritual goals is only possible through rule of law. Hence his proposals for making a well-structured code of law.[113]

Speranskij largely based his legislative reforms on the Napoleonic Code. The constitutional reforms drafted by Speranskij were not passed, as his conservative opponents considered them to be imitation of French practices alien to Russian traditions,[114] claiming that it was derogatory for Russia to adopt something foreign.[115]

However, Speranskij was not merely imitating foreign practices, as he believed that in order to introduce a working legal system, a thorough study of the roots and principles of the national legal tradition was necessary.[116] (Ironically, *Istoričeskoe izobraženie drevnego sudoproizvodstva v Rossii*, a book on Russian legal history by Kunicyn, followed for some reason the fate of his notorious work on natural law: the author could not get the approval for publishing of his historical work for several years, and the book was actually published only after his death)[117] Marc Raeff, for instance, even emphasizes this dimension of Speranskij's legal thought much more than the influence of Western ideas, considering his legislation proposals to have merely formal resemblance with the Napoleon's reforms and claiming that Speranskij believed an ideal legal system for Russia to be based primarily on the national historical tradition.[118] So, was it Western or Russian tradition that inspired Speranskij for his large-scale reformist plans? It is hard, if possible, to measure the ratio of these influences without dedicating a separate detailed research, but it seems rather evident that it was a combination and interlacing of different ideas that shaped legal thought of the great reformist.

It seems that Raeff describes Speranskij as a supporter of the historical school of jurisprudence. Speranskij believes laws are not to be manufactured by legislator, but should reflect the norms that already have developed in the society. The legislation

[113] Ibid., 10-11.
[114] Berest, *The Emergence of Russian Liberalism*, 188.
[115] Howe, *A Thousand Years of Russian History,* 230-231.
[116] Berest, *The Emergence of Russian Liberalism*, 191.
[117] Ibid.
[118] Raeff, "The Political Philosophy of Speransky," 11.

should preserve and enforce them, while eliminating their deficiencies. Fundamental laws should represent the embodiment of the changing forms that derive from the unchanging norms of moral natural law.[119] One could wonder how this way of thinking brought Speranskij to the idea of reforms. However, adherence to historical traditions did not make Speranskij a conservative. Speranskij believes that the form of government must correspond with the degree of social development. It is the government that should adapt to the society, not the other way round.[120] In the beginning of the nineteenth century, surrounded by the ideology of autocracy and serfdom, he saw the urgent need for constitution in Russia.[121] Thus, Speranskij realized that the state system in the imperial Russia did not correspond to the state of development of Russian society and in order to overcome this disalignment it needed to be reorganized.

Raeff also considers the characterization of Speranskij as a liberal to be a little exaggerated. However, he does not view him as conservative either. He describes Speranskij as a supporter of the organic view who believes in progress toward a higher goal, which is beyond earthly existence.[122] Indeed, such features of Speranskij's thought as denial of the social contract theory and reluctance to fully embrace the separation of powers (even if the reorganization had happened in the way Speranskij planned, the Emperor would have still retain the power over all three branches), but still his ideas were very bold for this period in the context of the Russian autocracy. In addition, as Julia Berest points out (the idea that was expressed by Raeff himself),[123] in that historical context, the term "liberalism" was much more fluid and vague that it is now and embraced a wide stratum of political thought, diverse but united by its opposition to the Russian absolutism.[124]

Unfortunately, the Emperor did not agree to introduce a constitution. On the one hand, the conservative opposition was very strong, and on the other, Aleksandr I,

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[119] Ibid., 17.
[120] Howe, *A Thousand Years of Russian History*, 239-240.
[121] Raeff, "The Political Philosophy of Speransky," 11.
[122] Ibid.
[123] Raeff, "Some Reflections on Russian Liberalism," 222.
[124] Berest, *The Emergence of Russian Liberalism*, 7-9.

while understanding the need for a constitutional rule, was not interested in it that much as to take resolute measures and confront this opposition.[125]

Speranskij had large-scale plans of reforming Russian governmental system. He is an opponent of serfdom. Admiring the English system of government with its powerful aristocracy, he believes that nobility privileges should be defined not merely by means of inheritance, but according to actual merits. He begins to introduce a literacy qualification for those seeking high administrative posts. Speranskij tries to introduce (even if not to full extent, at least not yet) the separation of powers principle. He envisions the state power in Russia separated into legislative, administrative and judiciary power with the Emperor standing above all three. Each of the branched is to be presented on all levels, starting with village council, village *starosta*s and village tribunal, and ending with the national Duma and the Imperial Council, the Council of Ministers and the Senate respectively. Of this ambitious reorganization plan, only the Imperial Council was established in 1811. It took almost a hundred years for the representative Duma to finally appear within the Russian governmental system. In theory, the creation of the Imperial Council should have led to the establishment of a limited monarchy, but Aleksandr I was reluctant to share his power, so such a transformation did not happen.[126]

With his bold reforms, Speranskij made a lot of enemies. Each step he was undertaking met a strong opposition of the conservatives. Finally, 1811 marked the beginning of his downfall, and in 1812 the Tsar, with a heavy heart, dismissed his talented advisor and old friend and banished him to a distant eastern province.[127] The fall of Speranskij marked the beginning of the reactionary period of the Aleksandr I's reign.[128] The Tsar, having showed himself as rather liberal-minded during previous years, appeared to have changed his mind about reforming the empire on the route of rule of law and popular representation, as he neither wanted to reduce his autocratic

[125] Howe, *A Thousand Years of Russian History*, 239-240.
[126] Ibid., 230-231.
[127] Ibid., 232.
[128] Ibid., 240.

power, nor did actually believe that Russian subjects were ready to enjoy civil and political rights.[129]

As for Speranskij himself, in 1816 he was rehabilitated and appointed the Governor of Siberia (*General-gubernator Sibiri*).[130] During the reign of Nikolaj I, Speranskij, while having a successful political career, still did not have such possibilities to implement his reformist ideas as during Aleksandr I's reign. However, being appointed the head of the Second Section of His Imperial Majesty's Own Chancery,[131] by 1830 Speranskij produced the 45-volume of the first Complete Collection of Russian Laws – *Polnoe sobranie zakonov Rossijskoj imperii*.[132]

Mihail Speranskij left a considerable imprint on political thought and practice in Russia.[133] Were all of his reforms realized, it is very probable that Russia go a different path. However, even with his attitude of gradual implementation of the designated reorganization, the reforms of Speranskij proved too dramatic for being realized within the context of the autocratic Russia.[134]

2.2.2. Crisis of Natural Law of the Early Nineteenth Century and the Prevalence of Legal Positivism

Due to the theoretical crisis of the natural law school in the first quarter of the 19th century and to the consolidation of the historical school of law and legal positivism in jurisprudence, in Europe natural law was regarded as misbelief. In Germany in 1830s-1840s the statist doctrines triumphed.[135] Natural law was superseded by legal

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[129] Berest, *The Emergence of Russian Liberalism*, 63, 188.
[130] Howe, *A Thousand Years of Russian History*, 233.
[131] Ibid., 264.
[132] *PSZRI, sobranie 1-e (1649-1825)*.
[133] Raeff, "The Political Philosophy of Speransky," 20-21.
[134] Ibid.
[135] Jurij Stepanovič Gambarov, "Svoboda i eë garantii: Populjarnye social'no-juridičeskie očerki," in *Antologija mirovoj pravovoj mysli: v 5 tomah.* Tom 5, ed. Igor' Andreevič Isaev (Moskva: Mysl', 1999), 307.

positivism.[136] The object of protection was not freedom of individual but freedom of state. In Russia in the first half of the 19th century it was prohibited to teach natural law philosophy in the universities. In the 19th century a new dogmatic school even has set a task to create philosophy of positive law.[137]

The denial of natural law and of the whole rationalistic legal philosophy of the seventeenth – eighteenth century meant the immediate implementation of the basic methodological principles of legal positivism: firstly, elimination of essential problems of law, and secondly, of axiological approach to law. To a certain extent this feature of legal positivism was a step forward in the development of general legal theory. Following the historical school of law, positivists were destroying the naively dualistic versions of jusnaturalism. Positivists have shown that the corresponding jusnaturalistic theories and the legislative acts based on them contain a lot of unrealistic statements used as ideological fictions. After criticism of natural law by the historical school of law it was not difficult for positivists to disprove naively dualistic versions of natural law presented as a sort of pre-defined code alongside positive law. (However, not all jusnaturalistic theories of the seventeenth – eighteenth century were recognizing the dualism of legal systems in such a naïve way as presented by positivists).[138]

During the second half of the nineteenth century positivistic methodology and legal philosophy based on it were prevalent in Russian legal thought.[139] However, these ideas proved incapable of solving urgent legal issues and failed to offer constructive ways to reform Russian socio-political system. In the words of Erih Solov'ëv, during the last two decades of the nineteenth century the prevalence of legal positivism "plundered" the ideas of the rights of man and the citizen.[140] Many of the prominent

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[136] Lucke, "The European Natural Law Codes: The Age of Reason and the Powers of Government."
[137] Gambarov, "Svoboda i eë garantii: Populjarnye social'no-juridičeskie očerki," 307.
[138] Mihail Nikolaevič Marčenko, *Teorija gosudarstva i prava. Učebnik,* 2-e izdanie (Moskva: Prospekt, 2004), 123-124.
[139] Pavel Ivanovič Novgorodcev, "Lekcii po istorii filosofii prava," in *Pavel Ivanovič Novgorodcev. Sočinenija*, ed. Modest Alekseevič Kolerov, and Nikolaj Sergeevič Plotnikov (Moskva: Raritet, 1995), 115.
[140] E. Solov'ëv "The Humanistic-Legal Problematic in Solov'ëv's Philosophical Jpurnalism," 118.

moral philosophers attacked the positivist tradition popular in Germany.[141] This crisis of positivistic methodology resulted in the revival of jusnaturalistic ideas, the methodological basis of which includes religious philosophy,[142] Neo-Kantianism[143] and the philosophy of Hegel.[144] After the reactionary policy of the middle of the nineteenth century, it was only the 1860s when Russian jusnaturalistic thought got back on track, first of all thanks to the works of Boric Čičerin and Vladimir Solov'ëv.[145]

2.3. INFLUENCE OF THE EUROPEAN LEGAL THOUGHT

Western European philosophy constitutes a very important theoretical legacy for the representatives of Russian jusnaturalistic philosophy. It is impossible to imagine Russian advocates of the Natural Law Theory outside the context of intellectual experience of Europe. Jusnaturalistic philosophy was developing not merely influenced of Western European ideas. Western gnosiological, ontological and axiological ideas were critically examined and reworked within the framework of Russian jusnaturalism. The amount of Western European sources that affected the formation and development of Russian jusnaturalistic philosophy is extremely big. Nevertheless, we can speak about the most important, system-forming figures without which the jusnaturalistic philosophy in Russia would hardly exist. If we start with antiquity, such key figures for Russian authors were Socrates, Plato and Aristotle. All these philosophers developed ideas of Natural Law, and the main problems for them were problems of justice and the dichotomy of *jus* and *lex*.[146] For example, Pavel

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[141] Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism," 116.
[142] Vjačeslav Nikolaevič Žukov, "Filosofija estestvennogo prava v russkoj pravovoj mysli pervoj poloviny XX veka" (PhD diss., Moskovskij gosudarstvennyj universitet imeni M.V. Lomonosova, 2001), 22.
[143] Pjatkina, "Škola 'vozrojdënnogo estestvennogo prava' v Rossii," 102.
[144] Anatolij Nikolaevič Savinov, "Svoeobrazie russkoj filosofii pravakonca XIX – načala XX vekov (estestvenno-pravovaja tradicija)" (PhD diss., Rostovskij juridičeskij institut, 2000), 8.
[145] Poljakov, "Vozroždënnoe estestvennoe pravo v Rossii: Kritičeskij analiz osnovnyh koncepcij," 11-12.
[146] Žukov, "Filosofija estestvennogo prava v russkoj pravovoj mysli pervoj poloviny XX veka," 23.

Novgorodcev highly appraises Ancient Greek philosophy, arguing that it opened the question of finding the best state system possible and brought the level of elaboration on politics to an incredibly high level.[147]

The works of those who formed classical liberal ideology were of very high importance sources for Russian jusnaturalistic philosophy. These authors include John Locke, Charles Montesquieu, Jean-Jacque Rousseau, Jeremy Bentham, Benjamin Constant, Alexis de Tocqueville, John Stuart Mill and others. Representatives of Russian jusnaturalistic school admitted their genealogical affinity with these thinkers and accepted many of their ideas as axioms.[148]

Among the figures of Western European philosophy of early modern period whose influence on the shaping of Russian jusnaturalistic ideas is most significant are Kant and Hegel.[149] From the end of the 19th century the intellectuals of Europe and Russia tired of the prevalence of atheism, positivism and radical socialism have accepted enthusiastically the contemporary German slogan: "Back to Kant!" Neo-Kantianism was becoming one of the most influential schools of humanist thought. The originality of Russian Neo-Kantianism is constituted in the fact that the followers of this school were not mere popularizers and imitators of a "trendy" philosophy but were quite independent digesters and successful rivals of the German colleagues.[150]

2.3.1. KANT AND NEO-KANTIANISM

Immanuel Kant created his metaphysics of law based on legal theory of transcendental idealism, which was to become the new metaphysics of law with religious and ethical character.[151] Transcendental metaphysics of law is designed to

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[147] Pavel Ivanovič Novgorodcev, *Političeskie idealy drevnego mira* (Moskva: Moskovskoe naučnoe izdatel'stvo, 1919), 23.
[148] Žukov, "Filosofija estestvennogo prava v russkoj pravovoj mysli pervoj poloviny XX veka,"27.
[149] Ibid., 25.
[150] Lev Ivanovič Filippov, "Neokantianstvo v Rossii," in *Kant i kantiancy: kritičeskie očerki odnoj filosofskoj tradicii*, ed. by Aleksandr Sergeevič Bogomolov (Moskva: Nauka, 1978), 286.
[151] See: Immanuel Kant, *Groundwork for the Metaphysics of Morals*, trans. ed. Allan W. Wood (New Haven: Yale University Press, 2002).

study the characteristics of the transition of man into the system of juridical and legal knowledge and the construction of conditions of legal experience by our cognitive ability. Kant contrasts transcendental with transcendent, which remains outside of possible experience, beyond knowledge, and lies outside the law.[152]

Comprehension of what is the essence of the laws established by the state, has become one of the most important aspects of Kant's philosophy of law. As a basic grounds the idea is postulated that everyone certainly knows how he should behave and what is his duty. Ought is expressed as a set of moral standards, to which each person must subordinate his behavior.[153]

Morality, therefore, lies in the "internal legislation" as the imperative of moral standards while law needs "external legislation" as well. A combination of "external" and "internal" legislation which may include state coercion to compulsory normative behaviour constitutes the area of law. Thus the Kantian law doctrine is a combination of laws for which external legislation is possible.[154]

The connection of Kantian legal ethics with his theoretical philosophy is set in the context of the concept of individual freedom and autonomy of morality, of obligatoriness as the central deontological category.[155] Kant gives priority to the obligatoriness over value in morality. This is how he sees the peculiarity of morality. Morality of a person is reduced to ability to realize the necessity of certain actions and force oneself to them. The identification of morality and freedom (as capability of a person to give laws to himself) bring to formalism in the interpretation of morality.[156] Kant also lowers the role of good intentions reducing them to instincts that should not be overestimated although should be praised since there are too many egoistic people in the world.[157]

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[152] Savinov, "Svoeobrazie russkoj filosofii pravakonca XIX – načala XX vekov (estestvenno-pravovaja tradicija)," 17.
[153] Ibid., 15.
[154] Kant, *Groundwork for the Metaphysics of Morals*, 50-51.
[155] Erih Jur'evič Solov'ëv, *Kant: vzaimodoponitel'nost' morali i prava* (Moskva: Nauka, 1992), 5.
[156] Kant, *Groundwork for the Metaphysics of Morals*, 61-62.
[157] Savinov, "Svoeobrazie russkoj filosofii pravakonca XIX – načala XX vekov (estestvenno-pravovaja tradicija)," 17.

Kant's legal ethics include the doctrine of autonomy of morals. Being free a person acts as creator of its own moral and legal world; it prescribes its rules of conduct be itself. A person is truly moral and law-abiding only when it fulfills its duty not for some external thing but for the sake of duty itself. Internal coercion is something lacking in natural law. Kant regards the moral ability to "free self-coercion" as a virtue; and a deed deriving from such attitude is a virtuous deed.[158]

In this case, Kant reduces moral principle merely to subjective acknowledgement of duty. Duty is pure duty and should be fulfilled only because of respect to it. In other words, morality should exist quite separately and independently of religion. Morality has its own specific motives not reducible to lay or religious practicality. Thus Kant tries to unite coercion and freedom; obligatory universal laws with freedom of everyone. On the first sight, this formula shows belonging of Kant's legal philosophy to liberal utopias. However, we should not forget that according to Kant the existence and guaranteeing of rights and freedoms is possible only thanks to guardianship of the state. If a person (separate individual) wants to implement fully its rights and freedoms, it should submit part of them to the jurisdiction of their state.[159]

In his conception of law as freedom and equality Kant indicates the difference between the laws of nature and the laws of freedom. The first are mandatory and necessary. The second ones do only oblige, but do not force. Hence, the categorical imperative (the unity of freedom and necessity) of the behavior of the human will.[160]

A lot of representatives of Russian jusnaturalistic philosophy were more or less influenced by Kantian ideas. The Natural Law Theory developing within the rationalistic framework since Spinoza and Grotius reaches its higher point of evolution in Kant's legal philosophy. Since the Natural Law Theory in Russia was accepted within this rationalistic tradition, Kant's philosophy has become fundamental for Russian jusnaturalistic school. Kantian moral transcendentalism and the idea of categorical imperative have become one of the development vectors of

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[158] Immanuel Kant, "Metafizika nravov," in *Sočinenija v 6 tomah*, tom 4, čast' 2, trans. ed. V.F. Asmus, A.V. Gulyga, and T.I. Ojzerman (Moskva: Mysl', 1965), 329.
[159] Ibid., 239-240.
[160] Ibid., 329.

Russian political and legal thinkers. Most of the jusnaturalism advocates in Russia were drawn towards Baden School. This predetermined their treatment of state and law from deontological point of view. Russian Neo-Kantians were examining state and law through the prism of teleology and axiology, thus raising their legal and political ideals to unattainable level. Putting state into the sphere of ought brought to the dominance of moral component over political and legal in their philosophy. The world of laws and politics was being moralized, thus reducing the value of real law and real state. The paradox is that Russian jusnaturalists' attempts to subordinate Russian social mentality to the imperatives of Kantian ethics resulted not in changes in society itself but rather in their own loss of contact with reality.[161]

However, we should say that Kant's substantiation of the ideas of legal protectability of a person, of popular sovereignty, and of the *Rechtsstaat* from the perspective of transcendentalism made the ideas of Russian legal philosophers more systematic and fundamental. The Kantian ideas of self-value of personhood, of necessity to subordinate both person and state to moral law, and of establishment of limits for the state power found their successful development in the works of Berdjaev, Novgorodcev, Struve, Frank, E.N. Trubeckoj and others.[162]

2.3.2. HEGEL'S LEGAL PHILOSOPHY

The basis of the philosophical and legal reasoning of Hegel is expressed in his thesis: "The concept of right… is to be taken as a given."[163] Hegel is interested in the problem of conceptual identification of law and its implementation in existence on the way objectification of spirit.[164]

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[161] Žukov, "Filosofija estestvennogo prava v russkoj pravovoj mysli pervoj poloviny XX veka," 25-26.
[162] Ibid.
[163] Georg W.F. Hegel, *Elements of the Philosophy of Right*, trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1991): 25-26.
[164] Ibid.

Hegel's concept of right includes within its content not the will of a separate individual, but some general will, which is sheer in and for itself, which has independent existence in space and time, and which expresses objective rationality.[165]

The same is for freedom, which being the sphere of objective spirit appears as ideal legal reality. Thus, Hegel's legal philosophy is first of all philosophy of Natural Law. This is what differs it from jurisprudence, which is positive law. It is built on the following scheme: abstract law proceeding into the area of morality is later canceled by it.[166]

The subject of Hegelian legal philosophy is ideal law existing on the level of objective spirit where it equals positive law. Free will acts as concept and form of existent being, thus its manifestations also make part of the content of legal philosophy.[167] When internal and external being of freedom, of abstract law and of morals reach concrete unity, then law rises to the level of morality.[168] Thus, morality acts as the idea of freedom; this allows to conclude that development of law in Hegel's interpretation follows the path of the world spirit. In this context, the goal of legal philosophy is to understand functioning of mind in grasping the ideas of law.

It is interesting that Hegel recognized only formal equality among the people: they are actually equal, but only as subjects, which means the they are equal only in relation to their possessions that is private property.[169] Thus private property is the basis for personal independence. But the freedom itself should be limited by the state because for Hegel the state is something rational, and freedom finds itself inside it in the form of highest universal right.[170]

Hegel's main points about state are the following: 1) the state is not a contractual formation aimed on defending life and property of individuals; it demands voluntary

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[165] Savinov, "Svoeobrazie russkoj filosofii pravakonca XIX – načala XX vekov (estestvenno-pravovaja tradicija)," 36.
[166] Vladik Sumbatovič Nersesjanc, *Filosofija prava Gegelja* (Moskva: Jurist'', 1998), 51-52.
[167] Georg W.F. Hegel, *Elements of the Philosophy of Right*, 120.
[168] Ibid., 80.
[169] Ibid., 52.
[170] Ibid.,140.

self-sacrifice from its subjects in favor of itself as the highest value; 2) absolute devotion of individual in this case is a universal duty, a sort of payment for the opportunities of self-realization.

The freedom of individual and especially its free will exist only as long as it is built into the world history of absolute (world) spirit's evolution. The rational state described by Hegel and thought as constitutional monarchy from the concrete historical perspective, from the philosophical perspective constitutes the realization of ides of law, i.e. a state ruled by law. Hegel praises the state as an idea (meaning reality) of law and as such organization of the freedom of will where the mechanisms of governance and coercion are mediated and submitted to law.

Criticizing Kantian legal philosophy Hegel notes that universal moral law contradicts multiple particular reality. Thus natural law represents the idea of mind, and therefore doctrine of law turns into doctrine of legal ideal. Against this Hegel gives justification of value and significance of concrete legal institutes and of the system of obligations. If laws were previously regarded as a sort of regulations of the nature itself, then in Hegel's philosophy this regulations are introduced by human. If we are going to insist on the gap between reality and necessity, then the world of real human deeds (the entire sphere of law) loses its meaning. If legal ideal and objective reality are far from each other, then how are we going to find a sphere where true law and good are implemented? Kant viewed this sphere in the person's inner world and not in external legality and regularity that do not matter for true morality. Hegel instead sought to give determining meaning to concrete actions, to its legality. Law does not act, the person acts. And if we try to assess human actions the only important thing is to what extent he made this law his own belief.[171]

It can be concluded that the concept of moral state do not fit into totalitarian conceptual model of law-understanding and state-building, because abstract law in correlation with concrete and substantial law in Hegel's legal philosophy are closer to

[171] Savinov, "Svoeobrazie russkoj filosofii pravakonca XIX – načala XX vekov (estestvenno-pravovaja tradicija)," 61.

Kant's theory of the state ruled by law, or the *Rechtsstaat,* but do not have dominant liberal orientation.

Hegel's influence on Russian jusnaturalistic philosophy was less than that of Kant's ideas, but still rather strong. Among Russian authors Novgorodcev and Il'in openly showed affinity of their legal philosophy with Hegel's philosophy.[172] For example, Novgorodcev was trying to synthesize Kant's ideas of absolute value of personhood with Hegel's statism.[173] Il'in showed his Hegelian ideas when he was trying to present person as a citizen substantially connected to the state and living for it. Also Hegelian influence can be found in the positive attitude towards strong state power among some of the Russian jusnaturalists, including Pëtr Struve, Ivan Il'in, Sergej Kotljarevskij and to some extent even Nikolaj Berdjaev,[174] mostly in his later works. Legal philosophy of Solov'ëv also contains signs of attempts to mix Kantian and Hegelian ideas.[175]

2.4. RUSSIAN PHILOSOPHY

It was not only Western thought that influenced the Russian jusnaturalism of the end of the nineteenth and the beginning of the twentieth century. For example, the ideas of such representatives of early Russian liberalism as Kunicyn and Speranskij certainly had their influence on these thinkers. Besides this, the philosophers involved into the elaboration on the natural law concept were influenced by the nineteenth-century Russian philosophical schools of the Westernizers and, especially, the Slavophiles. During the first half of the nineteenth century, but especially between 1826 and 1855, Russia's struggle for national identity crystallized in the two rival philosophical

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[172] Žukov, "Filosofija estestvennogo prava v russkoj pravovoj mysli pervoj poloviny XX veka," 26-27.
[173] Pavel Ivanovič Novgorodcev. *Kant i Gegel' v ih učenijah o prave i gosudarstve. Dva tipičeskih postroenija v oblasti filosofii prava* (Moskva: Universitetskaja tipografija, 1901), 216.
[174] Žukov, "Filosofija estestvennogo prava v russkoj pravovoj mysli pervoj poloviny XX veka," 26-27.
[175] Kirill Anatol'evič Gusev, "Idei socialnogo liberalizma i politiceskogo idealizma v filosofii Vl. Solov'ëva" (paper presented at the international conference *Minuvšee i neprehodjaščee v jizni i tvorčestve V.S. Solov'ëva* of the Sankt-Peterburgskoe filosofskoe obščestvo, Sankt-Peterburg, Russia, 14-15 February 2003): 199.

schools: the Slavophiles (*Slavjanofily*) and the Westernizers (*Zapadniki*).[176] The Slavophiles (Ivan Vasil'evič Kireevskij, Aleksej Stepanovič Homjakov, Konstantin Sergeevič Aksakov),[177] following the tradition of the German Romanticism, became fascinated with Russian folk-traditions and medieval history, thus underlining Russian cultural uniqueness and independence from the West. The Westernizers (Pëtr Jakovlevič Čaadaev, Vissarion Grigor'evič Belinskij, Valerian Nikolaevič Majkov),[178] in their turn, refused to believe in Russia having its own, unique way and viewed it as a part of Europe. On this basis, they wanted to import Western democratic principles.[179] Among the Westernizers also was jusnaturalists Boris Nikolaevič Čičerin.[180]

It turns out that the influence of the Slavophiles and the Westernizers on the Russian jusnaturalists involved, again, indirect influence of Hegel. Ana Siljak argues that the well-known Russian debate between the Slavophiles and the Westernizers is rooted in the philosophy of Hegel, as his philosophy affected how both sides viewed the process of historical development.[181] Following Hegelian idea of contrasting East and West, the Slavophiles and the Westernizers perceive Russia as standing exactly on the border between those, waiting to make the choice. According to Siljak, those who believed in Hegel's idea that the West would build the Kingdom of God turned to Westernizer philosophy, those opposing him tried to find the unique Russian way.[182] In addition, such prominent figures of religious philosophy as Fëdor Dostoevskij and Lev Tolstoj could by no means be ignored by the Russian jusnaturalists. However, while the influence of the messianic worldview of the former could be read through the context of the reception of religious philosophy of the Russian theorists of natural

[176] Lieven, ed., *The Cambridge History of Russia. Volume II*, 126.
[177] Andrzej Walicki, "Russian Social Thought: An Introduction to the Intellectual History of Nineteenth-Century Russia," *Russian Review*, 36-1 (1977): 8-10.
[178] Ibid., 6-7, 11, 13-14.
[179] Ana Siljak, "Between East and West: Hegel and the Origins of the Russian Dilemma," *Journal of the History of Ideas*, 62-2 (2001): 358.
[180] Ibid., 13.
[181] Siljak, "Between East and West: Hegel and the Origins of the Russian Dilemma," 358.
[182] Ibid.

law,[183] the latter, being an implacable critic of law, was rather perceived as an ideological opponent.

Speaking about Russian philosophy of the end of the nineteenth century, it does not seem possible to avoid the figure of Tolstoj. Besides being a world-renowned novelist, Lev Nikolaevič Tolstoj (1828-1910) during the last thirty years of his life was also a very passionate critic of modern society from the standpoint of Christian anarchism. After converting to Christianity around 1879, Tolstoj bases his new worldview on Jesus' Sermon on the Mount; he finds Jesus' principle of nonresistance as a new revolutionary way for people to handle any kind of evil. The principle of nonresistance becomes the cornerstone for him. Tolstoj believes that the "destructive cycle of evil, anger and revenge" should be replaced by the "patient cycle of love, forgiveness and sacrifice."[184] However, Tolstoj takes a very original approach to Christianity, a very rationalistic one. He considers Jesus' teaching to be very rational. However, the Bible, Tolstoj believes, is filled with superstitions aimed at obscuring this rational essence from the reader. Thus, for Tolstoj religion is reduced to morality, and Jesus's Sermon on the Mount is the embodiment of the latter.[185]

Based on his new understanding of Christianity, Tolstoj gets a new outlook on social reality. He develops a keen criticism of the state, the economy, the church, as well as the main revolutionary currents of the time. Criticizing the state, Tolstoj believes it to be inseparable from violence. He concludes that state is an unchristian institution, as it contradicts such principal Jesus' exhortations as not to resist, not to swear oaths, not to judge, and to love one's enemies. According to him, the guiding principle should be not justice, which he considers to be an elusive concept imposed by the state, but love. Thus, if Christians acted in their social life as Jesus taught, that is according to the principles of love, forgiveness and charity, such thing as a state would be unnecessary. Neither does Tolstoj believe in democratic reforms. For him, the fact

[183] Evgenij Aleksandrovič Gnatenko, "Filosofskij proekt pravovogo gosudarstva v kulture predrevolucionnoj Rossii" (PhD diss., Rossijskaja akademija nauk, Institut filosofii, 2002),143.
[184] Christoyannopoulos, "The Contemporary Relevance of Leo Tolstoy's Late Political Thought," 3-6.
[185] Ibid.

that a decision is made by a majority of people does not make the decision more just.[186]

Logically following the criticism of the state, Tolstoj rejects law as well, thus being a legal nihilist. (Noteworthily, even in modern Russia, the problem of legal nihilism in broad sense, that is of the lack of respect for law, represents one of the most serious legal problems)[187] In response to a student's letter concerning the psychological theory of law of Lev Petražickij, Tolstoj characterizes "natural law, state law, civil law, criminal law, ecclesiastical law," and any other type of law as "the most rude excuse for the violence committed by one people to other people."[188] To the "superstition and lies of 'law'" he contrasts with the "moral religious truth," which gets not only concealed, but also distorted by the former.[189] Tolstoj attacks not only legislators, but also legal scholars (Tolstoj sarcastically puts the word "scholars" in quotation marks, as well as the word "law" itself), who, according to him, propagate these false beliefs: "When some [despots] kill thousands of people, it is horrible, but still not as horrible as what Messrs. Petražickij-s and like do. Those kill not people, but all the sacred inside them."[190]

While Tolstoj's moral philosophy is founded on religion, conventional Christianity is not the source of it. As mentioned above, Tolstoj develops his own peculiar interpretation of Jesus' teaching and Christianity, which is void of any mysticism and is based on rationalism. On this premise, Tolstoj criticizes the official church, in particular the Orthodox Church, for betraying true Christianity and cooperating with state power. For the same reason he distances himself from other anarchists, who used violence as one of their main methods.[191]

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[186]Ibid., 7-8.
[187] Kathryn Hendley, "Who Are the Legal Nihilists in Russia?" *Post-Soviet Affairs*, 28-2 (2012): 150, accessed 9 January 2013, http://dx.doi.org/10.2747/1060-586X.28.2.149.
[188] Lev Nikolaevič Tolstoj, "Pis'mo studentu o prave," in *Polnoe sobranie sočinenij* (Moskva: Gosudarstvennoe izdatel'stvo "Hudožestvennaja literatura," 1936), tom 38, 54-55.
[189] Ibid., 57.
[190] Ibid., 56.
[191] Christoyannopoulos, "The Contemporary Relevance of Leo Tolstoy's Late Political Thought," 9.

Modern capitalist system is fundamentally unjust, according to Tolstoj, as he views a laborer always being in slavery to those who control taxes, the land and legislation. However, he is critical of his fellow leftists as well, as they overlook moral and religious component. And most importantly, revolutionaries, according to Tolstoj, must by any means avoid using violence. Otherwise they would bring into life merely a new, but equally unjust dictatorship.[192]

From Tolstoj's own words, he dissociates himself from any kind of law, including natural law. Surprisingly, he openly accepts the idea of natural rights. In his 1905 essay *A Great Iniquity* ("*Velikij Greh*;" this essay translated as *A Great Iniquity* was published in The London Times the same year[193]), reflecting on the futility for Russia to follow the Western model, he writes that the main evil, from which people suffer in Russia, as well as in Europe and America, is that the majority of the people are deprived of "the indubitable natural right of every human (*estestvennogo pravo*) to use a part of the land on which one was born."[194]

From the above quote, an interesting paradox arises. Tolstoj is against the concept of natural law – as well as any existing notion of law –, but appeals to the notions of natural rights. It may be that, the philosophy of Tolstoj is not as alien to jusnaturalism as it may seem and maybe even as Tolstoj thought himself. While rejecting any concept that involves the term "law" in some form, Tolstoj submits the fullness of the regulation of social life to the absolute authority of morality rooted in rationalist Christianity. This appeal to moral norms as the source of social regulation displays similarity with the jusnaturalistic approach. However Tolstoj's belief in the morality that is intrinsic to people is so high, that he automatically rejects any possible mediators, including law, the state, and the church. Certainly, it is only a hypothesis, and in order to check it, a detailed research dedicated to the comparison of Lev Tolstoj's philosophy with jusnaturalism is needed.

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[192] Ibid.,11.
[193] Leo Tolstoy, *A Great Iniquity*, trans. V. Tchertkoff and I.F. Mayo (New York: B.W. Huebsch Inc., 1920), 3.
[194] Lev Nikolaevič Tolstoj, "Velikij greh," in *Polnoe sobranie sočinenij* (Moskva: Gosudarstvennoe izdatel'stvo "Hudožestvennaja literatura," 1936), tom 36, 207.

Russian jusnaturalists do address the philosophy of Tolstoj, but only in a polemical and critical manner. A sort of philosophical debate takes place between Tolstoj and another prominent religious philosopher - Vladimir Solov'ëv. This argument revolves around the essence of religion, and among the issues related involves a legal one – the principle of nonresistance. As Evgenij Gnatenko points out, Solov'ëv heavily criticizes Tolstoj's idea of peaceful anarchy believing that it would inevitably evolve into a nonepeaceful one.[195] Nikolaj Berdjaev, in his essay *The Spirits of the Russian Revolution* (*Duhi russkoj revoljucii*) published in *Iz glubiny*, a 1918 volume dedicated to the criticism of the Bolshevik Revolution and its analysis, heavily criticizes Tolstoj's ideas, blaming Tolstoyism ("*tolstovstvo*") for the outcome of this revolution, while appraising Dostoevskij for his prophetic vision of the coming revolution and for revealing – according to Berdjaev – the dangers of Russian nihilism and socialism.[196] The post-revolutionary work of Ivan Il'in entitled *On Resistance to Evil with Force* ("*O soprotivlenii zlu siloju*"), is also founded upon the criticism of Tolstoj's philosophy.[197]

[195] Gnatenko, "Filosofskij proekt pravovogo gosudarstva v kulture predrevolucionnoj Rossii," 91.
[196] Nikolaj Aleksandrovič Berdjaev, "Duhi russkoj revoljucii," in *Iz glubiny. Sbornik statej o russkoj revoljucii*, ed. Pëtr Berngardovič Struve (Moskva-Petrograd: Russkaja mysl', 1918), electronic version, accessed 05 March 2013, http://www.vehi.net/berdyaev/duhi.html.
[197] Gnatenko, "Filosofskij proekt pravovogo gosudarstva v kulture predrevolucionnoj Rossii," 172.

CHAPTER III: FEATURES OF THE RUSSIAN NATURAL LAW THEORIES OF THE PREREVOLUTIONARY PERIOD

3.1. METHODOLOGICAL BASIS OF THE REVIVED NATURAL LAW IN RUSSIA

By the end of 19th and beginning of the 20th century positivist methodology and the philosophy based on it started to be in a crisis. This fact entailed the need to re-establish the rich heritage of Russian legal though on the methodological foundations of German classical philosophy. This trend corresponded with European criticism of positivism, which was often taking place with a reference to Neo-Kantianism. At large, the ideas of Neo-Kantianism became not less diffused among Russian legal thinkers than positivism. Most of the Russian jusnaturalists (including Novgorodcev, Kistjakovskij, Struve, Frank, Trubeckoj and others; Il'in might be considered an exception) openly acknowledge that Russian legal philosophy has appropriated the ideas of human dignity and of protection of human rights from Immanuel Kant. His categorical imperative being an a priori form of consciousness demands treatment of person as value. Kant's individualistic interpretation of natural law largely influenced the process of theoretical analysis of the state/person dilemma. Another methodological source for the consideration of these issues is Christianity. The end of the 19th and the beginning of the 20th century saw a lot of legal theories based on religious philosophy. Russian religious philosophers made a significant contribution to the natural law theory, to the evolution of the idea of human rights and their recognition. With their works they promote the revival of interest to various aspects of natural law, and to moral and legal problems concerning person. Some researches,

however, view it as a sign of the crisis of Russian liberalism.[198] While such thinkers as Bogdan Kistjakovskij, Nikolaj Alekseev, Pëtr Struve, and to some extent Pavel Novgorodcev try to adapt the achievements of Neo-Kantian methodology to Russian thought, other philosophers, for example Vladimir Solov'ëv, Nikolaj Berdjaev, Sergej Bulgakov, Evgenij Trubeckoj and Semën Frank incline more towards religious interpretation. With this, various theories are developed aimed at conceptualization of law on philosophical and religious basis. A characteristic feature of the followers of Russian jusnaturalistic philosophy of the period in question is that they advocate the individualism principle while trying to combine it with public and state interests.[199]

The evolution of natural law experienced its ups and downs during the course of various historical periods. By the turn of the 20th century, the interpretation of natural law as eternal and unchangeable gets replaced by the notion of natural law with changing content.[200] However, the notion of justice seems to be prevalent throughout these theories, which jusnaturalists substantiate on the grounds of faith or metaphysical premises. Religious faith was at the foundations of the jusnaturalistic theories of such Russian philosophers as Vladimir Solov'ëv, Evgenij Trubeckoj, and Iosif Mihajlovskij, while the explanation of natural law through metaphysical principles can be exemplified by such thinkers as Boris Čičerin, Pavel Novgorodcev, or Bogdan Kistjakovskij. Be it faith or metaphysics that are used as grounds for natural law, it nevertheless retains its rational nature. As another Russian pre-revolutionary legal philosopher Fëdor Taranovskij claims, faith and metaphysics were accepted by jusnaturalists only to the extent when they still remained rational and thus eligible for understanding for the cognizing mind."[201]

The main emphasis of the Russian jusnaturalistic theories of the edge of the 19th and 20th century was on the essential and axiological aspects of law, on the irreducibility of law to statutes, and on the principles that determine the development of positive

[198] Igor' Andreevič Isaev and Natal'ja Mihajlovna Zolotuhina, *Istorija političeskih i pravovyh učenij Rossii XI-XX vv.* (Moskva: Jurist, 1995), 289.
[199] Žukov, "Filosofija estestvennogo prava v russkoj pravovoj mysli pervoj poloviny XX veka," 194; Pjatkina, "Škola 'vozrojdënnogo estestvennogo prava' v Rossii," 104, 107.
[200] Marčenko, *Teorija gosudarstva i prava*, 123-124.
[201] Fëdor Vasil'evič Taranovskij, *Učebnik enciklopedii prava* (Jur'ev: Tipografija K. Mattisena, 1917), 222.

law. These issues were analyzed through Neo-Hegelian and especially Neo-Kantian versions of natural law.

Pavel Novgorodcev draws parallels between how the raisings of natural law usually corresponded with radical changes in legal thinking in history and how the similar process of turning to abstract ideas of law symbolizes the transformations in Russian society of that time. In his work *Crisis of the Modern Legal Consciousness* (*Krizis sovremennogo pravosoznanija*) Novgorodcev writes that the prevalent legal theories, by which he intends legal positivism, were still operating on the ideas of the 18th century and were unsatisfactory in their conservatism and stagnation, while the moral consciousness of society of the time made a significant advance in its demands to law. He believes that there were a lot of new demands and a need for new theories that would bring the way out of the "crisis of legal consciousness."[202] Novgorodcev advocates the revival of natural law theories ("*vozroždenie estestvennogo prava*").[203] He foresaw the renaissance of jusnaturalistic philosophy that took place throughout the 20th century.

Seeking to create a synthetic concept of law, Bogdan Kistjakovskij also criticizes its interpretation from purely positivistic position. He views traditional positivist theory as a dogmatic teaching about omnipotence of laws. Kistjakovskij believes a positivist to view law as something to be implemented even it contradicts the conditions of real life.[204] According to Kistjakovskij, the main methodological characteristic of the revived natural law theory is that it concerns not just the problems of power as such, but following the ideology of the French Revolution turns directly to the human. It does so by focusing on the inviolable rights of person, thus acquiring actual juridical regulative value.[205]

As mentioned above, the main methodological trend among the theorists of the revived natural law in Russia was Neo-Kantianism. It was appropriated by Russian

[202] Pavel Ivanovič Novgorodcev, *Krizis sovremennogo pravosoznanija* (Moskva: Nauka, 1997), 1,2.
[203] Pavel Ivanovič Novgorodcev, *Iz lekcij po obščej teorii prava. Čast' metodologičeskaja* (Moskva: Izdatel'stvo studenčeskoe, 1904), 12.
[204] Bogdan Aleksandrovič Kistjakovskij, *Socialnye nauki i pravo. Očerki po metodologii socialnyh nauk i obščej teorii prava* (Moskva: M. i S. Sabašnikovy, 1916), 114.
[205] Ibid., 508.

jusnaturalists first of all in its interpretation by the Baden School and Heinrich Rickert. According to this approach, social phenomena are to be studied not only as they are, but also as they should be. As a result of adopting this approach, the concept of 'ought' becomes crucial for the Russian revived natural law ideologists.[206]

As mentioned in the previous chapter, another influence that played especially important role for Vladimir Solov'ëv and Boris Čičerin – Russian pioneers of natural law of the end of the 19th century – is philosophy of Hegel.

Vladimir Solov'ëv attempts to unite Kant's autonomous ethics with universalism of Hegel's moral and legal theory. Agreeing with Kant, he regards every human as the ultimate purpose.[207] At the same time he points out at the formalism of Kant's categorical imperative, the same way as Hegel did.[208] In general, Solov'ëv's attitude to Kant is an ambiguous question (that is not surprising, taking into consideration Solov'ëv's complexity as a person and as a thinker). His researchers' opinions vary from recognizing him as a pure Kantian[209] to almost opposing him to Kant.[210]

Solov'ëv's attempt to blend Kantian and Hegelian ideas was developed further by Pavel Novgorodcev.[211] Novgorodcev develops the Kantian teaching about the person as the center of the Universe complementing it with the notion of legal state and the historical approach. He believes social structures to be an inherent part of the society's intellectual life. These social structures, according to him, act as "the binding cement" indispensable for both social progress and personal development.[212] Thus, the Russian philosopher has managed to overcome the dualism of the Kantian "is" and "ought" and the Hegelian abstract idealism through ontologization of law and morality and through revealing of a particular legal order as determined by creative

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[206] Pjatkina, "Škola 'vozrojdënnogo estestvennogo prava' v Rossii," 102.
[207] Gusev, "Idei socialnogo liberalizma i politiceskogo idealizma v filosofii Vl. Solov'ëva," 199.
[208] Frederick C Beiser, *The Cambridge Companion to Hegel* (Cambridge: Cambridge University Press, 1993), 197.
[209] Erih Jur'evič Solov'ëv, "Filosofsko-pravovye idei V.S. Solov'ëva I russkij 'novyj liberalism,'" in *Istorija filosofii.* Učebnoe posobie, edited by Erih Jur'evič Solov'ëv (Moskva: Frnomrnologija-Germenevtika, 2000), 20.
[210] Aleksej Fëdorovič Losev, *Vl. Solov'ëv* (Moskva: Mysl', 1983), 79-84.
[211] Gusev, "Idei socialnogo liberalizma i politiceskogo idealizma v filosofii Vl. Solov'ëva," 199.
[212] Pavel Ivanovič Novgorodcev, *Ob obščestvennom ideale* (Moskva: URSS, 1991), 202-203.

forces of national culture. It means that the personal legal ideal should be inherently and externally connected to the national ideal.[213]

The influence of Orthodoxy is very strong and it involves all categories of Russian jusnaturalists of the period in question. For some philosophers religious component was the main one (Solov'ëv, Bulgakov, Berdjaev, Il'in, Frank, Trubeckoj, Spektorskij, Vyšeslavcev, Fedotov). For some it was of secondary importance (Novgorodcev, Struve). For others it had teleological value (Kistjakovskij, Mihajlovskij, Kotljarevskij, Jaščenko).[214] The most common religious ideas shaping the jusnaturalistic thought of many of the Russian philosophers at the end the 19th and the beginning of the 20th century were the idea of Moscow being the "Third Rome," and idea of Christianity being an integral element of an ideal legal system.[215] As a result of prevalence of religious thinking among Russian jusnaturalists, they resulted in being rather conservative. While in the 18th-19th century Europe jusnaturalistic ideas were based on rationalism, in Russia they turned towards religion.[216] Russian jusnaturalists of the turn of the 20th century can be generally characterized as conservative liberals.

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[213] Vladimir Anatol'evič Cvyk, "Nravstvenno-religioznoe obosnovanie obščestvennogo ideala v filosofii P.I Novgorodceva," in *Čelovek. Filosofija. Gumanizm. Tezisy dokladov i vystuplenij Pervogo Rossijskogo filosofskogo kongressa (4-7 ijulja 1997 g.). V 7 tomah*, tom 4, ed. Ivan Timofeevič Frolov (Sankt-Peterburg: izd. SPbGU, 1997), 224-225.
[214] Žukov, "Filosofija estestvennogo prava v russkoj pravovoj mysli pervoj poloviny XX veka," 21-22.
[215] Ibid.
[216] Ibid.

3.2. DIFFERENT POINTS OF VIEW ON THE ESSENCE OF NATURAL LAW

Peculiarities of the methodology of Russian jusnaturalism define the specificity of conceptions of natural law within the framework of the doctrine in question. The idea of law is interpreted through moral ought and is usually defined by the advocates of this theory through such concepts as equity, justice, freedom and reason.[217]

Vladimir Sergeevič Solov'ëv is a prominent Russian philosopher of the end of the 19th century who played a crucial role in the development of Russian philosophy and poetry of that period. He is one of the key figures of Russian cultural renaissance of the end of the 19th and the beginning of the 20th century also known as the "Silver Age."[218] Solov'ëv pays much attention to the correlation of law and morality and to the rights of human.

In the words of Pavel Novgorodcev, in the conditions of the crisis of legal thinking in Russia in the end of the 19th century, prominent Russian philosopher Vladimir Solov'ëv made a rather fruitful attempt to stand up for the "ideal essence of law" ('*ideal'nuju suščnost' prava*')[219] and to rehabilitate the trust to the idea of law."[220]

Solov'ëv promotes the idea of human dignity. He believes that true human dignity and moral progress is not possible without personal freedom. According to Solov'ëv, a human being can develop its freedom and morals only within the conditions of social environment. He thinks that the moral interest requiring personal freedom at the

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[217] Pavel Ivanovič Novgorodcev, "Nravstvennyj idealizm v filosofii prava," in *Problemy idealizma*, ed. Pavel Ivanovič Novgorodcev (Sankt-Peterburg: Izd. Moskovskogo psihologičeskogo obščestva, 1902), 281; Vladimir Matveevič Gessen, "O nauke prava," in *Vvedenie v izučenie socialnyh nauk*, ed. Nikolaj Ivanovič Kareev (Sankt-Peterburg: Tip. akc. obšč. Brokgauz-Efron, 1903), 139; Evgenij Nikolaevič Trubeckoj, *Enciklopedija prava* (Sankt-Peterburg: Jurid. in-t, 1998), 111; Boris Nikolaevič Čiččerin, *Filosofija prava* (Moskva: Tipo-litogr. T-va Kušnereva i Ko., 1900), 89; Aleksandr Semënovič Jaščenko, *Teorija feodalizma. Opyt sintetičeskoj teorii prava i gosudarsta* (Jur'ev: Tipografija K. Mattisena, 1912), 106.

[218] "Vladimir Sergeevič Solov'ëv," *Biblioteka "Vehi"*, accessed 10 September 2012, http://www.vehi.net/soloviev/index.html.

[219] Pavel Ivanovič Novgorodcev, *Ideja prava v filosofii Vl. Solov'ëva* (Moskva: Raritet, 1995): 285.

[220] Ibid., 295.

same time requires that this freedom should not contradict the conditions of the existence of society.[221]

Considering the relations of law and state, Solov'ëv agrees with Hegel that state is indispensable for law's functioning, because only inside a state law can find the necessary conditions for its existence. However, state for Solov'ëv is not a separate self-sufficient value independent from people. He does not elevate the role of state to such an absolute as Čičerin does. Solov'ëv believes that state must obey to the moral principles; it should recognize everyone's right to dignified existence and free development of one's positive powers.[222]

Pavel Novgorodcev, while acknowledging the high significance of the philosophy of Solov'ëv, criticizes some of his concepts and ideas as being too vague and not actually scientific, for example Solov'ëv's formula, according which a state is represented as a "collectively organized compassion."[223] According to Novgorodcev, apart from its non-juridical form this idea merely represents what Solov'ëv expected and demanded from the state.[224] Nevertheless, the philosophy of Vladimir Solov'ëv represents a significant landmark in Russian philosophy, and his ideas had a profound influence on the development of legal philosophy, including elaboration of issues of the revived natural law and substantiation of the ideas of personal freedom and legal state.[225]

A special role in Russian legal philosophy belongs to Pavel Ivanovič Novgorodcev, professor of law at the Moscow University. Pavel Novgorodcev, the author of fundamental works on legal philosophy, favored the restoring of scientific and social interest in liberal conceptions of social development, in theory of natural law and in rights of human. Supporting the idea that natural law tends to assesses reality from

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[221] Vladimir Sergeevič Solov'ëv, *Pravo i nravstvennost'. Očerki iz prikladnoj etiki* (Sankt-Peterburg: Izd. Ja. Kantoroviča, 1897), 75.
[222] Vladimir Sergeevič Solov'ëv, "Mnimaja kritika. Otvet B.N. Čičerinu," *Voprosy filosofii i psihologii*, kniga 4 (1897): 650.
[223] Novgorodcev, *Ideja prava v filosofii Vl. Solov'ëva*, 296.
[224] Ibid.
[225] Vladik Sumbatovič Nersesjanc, *Filosofija prava. Učebnik dlja vuzov* (Moskva: NORMA-INFRA, 1997), 541.

ethical point of view, Novgorodcev believes in its reformist nature and potential. He supports it by an asserting that moral views considerably outpace positive legislation, which gradually becomes obsolete and falls behind of the real life.[226] Novgorodcev attributes much value to natural law as the idea of law. He admits that by many people natural law was still regarded as an old misconception, not related to modern science. However, he believes that closer scrutiny of the subject can show that natural law represents an "ineradicable need of human mind."[227]

Developing the concept of natural law with changing content, Novgorodcev formulates the notion of legal state as an ethical minimum providing basic conditions of human communal life. He argues that freedom is natural and necessary expression of human's moral nature. Novgorodcev promotes equality that should apply to all people. A public ideal, according to him, is the principle of universal consolidation on the basis of equality and freedom.[228]

Legal and philosophical works of the philosopher, public figure and writer of political essays Evgenij Nikolaevič Trubeckoj also favored the development and dissemination of liberal and jusnaturalistic ideas. In his "Lectures on the Encyclopedia of Law" (*Lekcii po enciklopedii prava*), Trubeckoj articulates his political credo: "All written and unwritten legal codes can claim for obligatory status only in the name of natural right of human person." He believes that as soon as we deny this right and person stops being a value, the legal order will collapse.[229]

Trubeckoj believes that natural law may and should serve not only as a criterion, but also as a basis for positive law. He thinks that the attitude towards existing law is determined by whether natural law is believed in and by how it is understood.[230] He even believes natural law due to its moral content to be superior to positive law.[231]

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[226] Pavel Ivanovič Novgorodcev, "Krizis sovremennogo pravosoznanija," in *Antologija mirovoj pravovoj mysli: v 5 tomah*. Tom 5, edited by Igor' Andreevič Isaev (Moskva: Mysl', 1999), 363; Pavel Ivanovič Novgorodcev, *Istoričeskaja škola juristov* (Sankt-Peterburg: Lan', 1999), 6.
[227] Novgorodcev, "Lekcii po istorii filosofii prava," 115.
[228] Pavel Ivanovič Novgorodcev, *Ob obščestvennom ideale* (Moskva: URSS, 1991), 110-111.
[229] Trubeckoj, *Enciklopedija prava*, 59.
[230] Ibid. 69.
[231] Ibid.

The views of Trubeckoj on the significance and role of natural law played an important role in the development of legal theory and in raising scientific and public interest in the concepts of personal rights. Trubeckoj develops ideas of reasonable scope of state interference into rights of person.

Another Russian thinker whose legal philosophy played an important role in the development of jusnaturalism and liberalism, especially in justification of the rights of person, is Lev Petrazyckij. He is the founder of what is know as psychological theory of law, and at the center of his philosophy is the concept of person.[232] Lev Petrazyckij, who for nineteen years chaired the department of legal theory and philosophy at the Saint-Petersburg State University, was not only a prominent theoretician, but also took active part in Russian political life. He was also a member of the executive board of the Russian Constitutional-Democratic Party (The Kadets – *Kadety*) and a member of the first State Duma. His main works include the *Essays on Legal Philosophy* (*Očerki filosofii prava*) of 1900 and *Theory of State and Law in Connection with Theory of Morality* (*Teorija gosudarstva i prava v svjazi s teoriej nravstvennosti*) of 1910.[233]

Petrazyckij acknowledges natural law as the main source of his own legal theory, which focuses on psychological aspects of legal relations. He believes natural law to have big potential to reform actual legislation. He thinks that it is necessary to revive the concept of "legal policy" emerged inside the jusnaturalistic teaching.[234] Assessing the place of natural law in legal theory, Petrazyckij speaks of its advantages and disadvantages. On the one hand, he views natural law as rather naïve as it blends heterogeneous ideas and, according to him, does not fully represent the true nature of law. On the other hand, he praises the idea of assessing existing positive law from rational ("intuitive") point of view, as well as ideological side of natural law with its

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[232] "Petražickij," *Akademik*, accessed 24 July 2012, http://dic.academic.ru/dic.nsf/dic_new_philosophy/909/%D0%9F%D0%95%D0%A2%D0%A0%D0%90%D0%96%D0%98%D0%A6%D0%9A%D0%98%D0%99.

[233] Ibid.

[234] Nikolaj Mihajlovič Azarkin, *Istorija juridičeskoj mysli Rossii: Kurs lekcij* (Moskva: Juiridičeskaja literatura, 1999), 426 - 427.

focus on the notion of person and personal rights. He concludes that natural law has played a useful function of promoting the progress of law and legislation.[235]

The ideas of Petrazyckij were popular among both professionals and students who were attracted not only by his theories, but also by his political activity. Petrazyckij was involved in various projects concerning such issues as women rights, minority rights etc., and also was one of the author of the famous Vyborg Manifesto, the document signed by the members of the disbanded first State Duma in 1906, in which they called for passive civil disobedience to the government.[236]

The jusnaturalistic theory of Vladimir Gessen contributed to development of the concept of rights of person and their role in the mechanism of legal state. He advocates the creation of representative democratic based on the system of checks and balances and the principle of rule of law. He played an important role in the dissemination of the idea of constitutional monarchy in Russia. Gessen believes that in a legal state an individual is first of all the subject of rights. For him the ideal legal state is constitutional monarchy. He divides rights into three categories: "rights of freedom," positive public rights, and political rights. In the first group, or the "rights of freedom," he includes freedom of person, freedom of religion, freedom of press, freedom of assembly and association, freedom of movement, freedom of trade, freedom to choose ones profession etc. Each of these freedoms, according to Gessen, represents a "particular constitutionally guaranteed manifestation of one single right – the right of civil freedom." "Positive public rights of an individual" that form the second group, according to Gessen, are all rights to positive actions by the state in the individual's interests, for example right to protection by the court, right to social security, right to elementary education etc. The third group consists of political rights, and Gessen includes into this group such rights as the rights to elect and to be elected, and the "right to participate in the formation of the state will."[237]

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[235] Lev Iosifovič Petražickij, *Teorija prava i gosudarstvo v svjazi s teoriej nravstvennosti* (Sankt-Peterburg: Obščestvennaja pol'za, 1910), 515-516.
[236] P.V. Gurevič, "Lev Iosifovič Petražickij," *Pravovedenie*, 5 (1971): 132.
[237] Vladimir Matveevič Gessen, "O pravovom gosudarstve," in *Antologija mirovoj pravovoj mysli: v 5 tomah.* Tom 5, ed. Igor' Andreevič Isaev (Moskva: Mysl', 1999), 290-291.

Gessen considers legal state to be the crucial condition for observance of subjective public rights of individual. In his words, a legal state is a state that as a government recognizes the legal norms created, again, by the same state as legislator. The philosopher acknowledges that in a constitutional state the parliament should be considered the exponent of the people's will; the degree of representation depends on the electoral laws.[238] In addition, he also highlights that a legal state should be built upon the separation of powers principle. Negation of this principle for him means the negation of the inviolability of person as the subject of public rights.[239] Vladimir Gessen, a member of the Kadets party, defended his ideas about legal state and rights of person not only in the State Duma, but also in printed publications: *Pravo* and *Vestnik prava* journals. In his 1908 monograph *The State of Emergency* (*Isključitelnoe položenie*)[240] he criticizes the official draft law on emergency legislation because he believes that it would create ground for arbitrary rule of government and administrative oppression of the defenseless population lacking rights and for fight with the emerging public opinion.

The theoretical and historical works of Jurij Gambarov and Pavel Vinogradov also made an important contribution to the scientific elaboration, the development and the popularization of jusnaturalistic ideas. Jurij Gambarov was a professor of civil law and the pupil of Rudolf von Jhering.[241] In his work *Svoboda i eë garantii. Populjarnye social'no-juridičeskie očerki*, Gambarov analyses the up-to-date legal theories. He deduces that individual freedom was still the cornerstone of the contemporary "cultured" state, no matter how wide the scope of its activity would spread. He believes that individual freedom can exist only when state order is based on law, and when interference of state in the individual freedom of each is permissible only to as far as it could provide the freedom of everyone.[242]

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[238] Gessen, "O pravovom gosudarstve," 288-289.
[239] Ibid., 292.
[240] See: Vladimir Matveevič Gessen, *Isključitel'noe položenie* (Sankt-Peterburg: Pravo, 1908).
[241] Jurij Stepanovič Gambarov, *Graždanskoe pravo. Obščaja čast'* (Sankt-Peterburg, 1911), electronic version, accessed 17 November 2012, http://lawdiss.org.ua/books/a2136.doc.html.
[242] Gambarov, "Svoboda i eë garantii: Populjarnye social'no-juridičeskie očerki," 311-312.

Pavel Gavrilovič Vinogradov (or Sir Paul Vinogradoff, as he is known in the United Kingdom[243]) in his *Essays on Legal Theory* (*Očerki po teorii prava*) pays attention to the epistemological and reformative aspects of natural law. According to him, the documents based on natural law had a powerful impact on the formation of international law, on the democratization of public law that evolved from the social contract theory, and on the radical transformations of the rights of private status that evolved from the idea of universal equality before the law.[244] Vinogradov believes that while the content of natural law constantly changes, its purpose remains permanent and this purpose is justice.[245]

Nikolaj Berdjaev, a religious and political philosopher, also made an important contribution to the jusnaturalistic theory, and his works furthered the evolution and understanding of the idea of natural rights. In his teaching on freedom, the notion of person plays a determinative role. He makes a clear distinction between the notions of individual and person. According to Berdjaev, while the notion of individual reflects the biological, social and natural essence of human, the notion of person reflects its spiritual essence.[246] He is convinced that person is not a given but the goal and the ideal for human. The philosopher views person as being irrational, thus claiming that it should be exceptional, and "no law is applicable to it."[247] This way Berdjaev believes that person is a profoundly "revolutionary element."[248]

At the center of Berdjaev's legal philosophy is his concept of absolute and inalienable rights of human. He believes these rights to be derived not from earthly origins like nature, society or state, but are of divine nature and come directly from God. According to him, freedom can only come from God.[249] On the contrary, Berdjaev

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[243] W.S. Holdsworth and Bernard Pares, "Sir Paul Vinogradoff," *The Slavonic Review* 4-12 (1926), 529.
[244] Pavel Gavrilovič Vinogradov, "Očerki po teorii prava," in *Antologija mirovoj pravovoj mysli: v 5 tomah*. Tom 5, edited by Igor' Andreevič Isaev (Moskva: Mysl', 1999), 406.
[245] Ibid., 407.
[246] Nikolaj Aleksandrovič Berdjaev, "O rabstve i svobode čeloveka," in *Carstvo Duha i carstvo Kesarja* (Moskva: Respublika, 1995), 21.
[247] Ibid., 22.
[248] Ibid.
[249] Ibid.

views the "power of man over man" as a "product of sin" that "does not belong to the Kingdom of God."[250]

In Berdjaev's interpretation, the concept of human rights comes in direct confrontation with the state. According to him, there can be no ideal form of statehood, and "all utopias of perfect state are completely fallacious."[251] He believes that only relative improvements are possible, which can be accomplished by the limitations that are to be put on the state. However, according to him, any state "in its demonic will to power always tends to exceed its boundaries and become absolute monarchy, absolute democracy, absolute communism.[252] In this particular formula even the expression "absolute democracy" implies negative meaning.

Berdjaev believes that the perpetual conflict between the human aspiration for having absolute unalienable rights and the state seeking to limit those rights is not possible within this world. Thus, he makes a rather pessimistic conclusion that a perfect society is possible only in a perfect world, "as the New Jerusalem, as the coming of the Kingdom of God," [253] but not as an actual social order existing in the real world.[254] Despite seemingly anarchic nature of his views, Berdjaev does not advocate anarchism, but harshly criticizes it as being destructive.[255] The ideas of Berdjaev about natural law, about the inalienable rights of person, played a significant role in forming new approaches to the issues of person and personal rights in legal theory and philosophy.[256]

Pëtr Struve, who made his way from a Marxist to a liberal conservative, describes the substance of his jusnaturalistic and liberal ideas in the article entitled *V čëm je istinnyj*

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[250] Nikolaj Aleksandrovič Berdjaev, *O naznačenii čeloveka* (Moskva: Terra, 1998), 173.
[251] Ibid.
[252] Ibid.
[253] Ibid. 202.
[254] Ibid. 202.
[255] Nikolaj Berdjaev, *Filosofija neravenstva. Pis'ma k nedrugam po socialnoj filosofii* (Paris, YMCA-Press, 1990), accessed 10 September 2012, http://www.vehi.net/berdyaev/neraven/index.html.
[256] Nersesjanc, *Filosofija prava*, 552; Isaev and Zolotuhina, *Istorija političeskih i pravovyh učenij Rossii XI-XX vv.*, 323-325, 339-340.

nacionalizm? ("What is True Nationalism?") written in 1901.[257] Struve believes that natural law lies at the core of any liberal thinking. He develops the ideas of personal autonomy and human rights. He substantiates the idea of legal autonomy of person with Kantian ethics, namely with the idea that the formal justification of morality is freedom of thought and action. Absolute personal autonomy for Struve means that person is vested with natural and absolute rights. According to him, these rights are absolute in that they cannot be alienated by the state. State power should be limited in its competence, and these limits are embodied in the notion of personal rights. Struve believes that natural rights should be described in detail in a constitution. He exemplifies this by the legal system the United States.[258]

3.3. DIVERGENCE FROM THE CLASSICAL INTERPRETATION OF NATURAL LAW

Though inheriting the ideas of classical natural law theory, such as appealing to nature and human reason, finding an ideal criterion, a priori methodology, revived natural law school has some significant differences from the classical one. The principal distinction is that the advocates of the revived jusnaturalism do not accept the 18th century idea of natural law as eternal and unchanging norms.[259]

One of the most prominent and influential Russian legal philosophers was Boris Čičerin. Johanna K. Schenner even calls him "the main Russian liberal philosopher of the 19th century.[260]

Using Neo-Hegelianism as a starting point for his legal philosophy, Čičerin suggests the concept of natural law with changing content. Later a similar idea, but based on

[257] Pëtr Bergardovič Struve, *Na raznye temy (1893-1901). Sbornik statej* (Sankt-Peterburg: Tipografija A.E. Kolinskogo, 1902), 524.
[258] Jaroslav Borisovič Golovin, "Filosofija i socialnye vozzrenija P.B. Struve" (PhD diss., Moskovskij gosudarstvennyj universitet imeni M.V. Lomonosova, 2001), accessed 12 May 2012, http://golovin1970.narod.ru/disertation.htm.
[259] Marčenko, *Teorija gosudarstva i prava*, 123-124; Pjatkina, "Škola 'vozrojdënnogo estestvennogo prava' v Rossii," 105.
[260] Schenner, "Birth of Russian Conservative Liberalism," 1.

Neo-Kantianism, was suggested by Rudolf Stammler.[261] Thus, the generally accepted notion among Russian jusnaturalism of that period is that each epoch has its own natural law as the idea of justice, equity and good. [262]

Čičerin makes a fruitful attempt to overcome the contradictions of the old jusnaturalistic school. He seeks to substantiate the idea of law on metaphysical grounds. He uses Hegelian dialectic philosophy as the theoretical basis.[263] Accepting the thesis about immanent and determined self-development of the Absolute Idea, Čičerin advocates the idea that the only criterion for scientific research is metaphysics, as it reveals the eternal patterns of the development of the Absolute Spirit. According to Čičerin, reason is what serves as the origin of law and morality as it defines inalienable rights and liberties of person, as well as requirements necessary for the regulations and preservation of society. [264]

He explains the motivation for use of metaphysical principles as the following. Following Hegel, he believes that a person is a bearer of the Absolute Idea. This is believed to be a universal law of nature. Being a law of nature, its universality should be proved not through empirical logic that is fickle, but through metaphysics. According to Čičerin, only metaphysics forms true and unchanging laws of cognition of reality.[265]

Čičerin views natural law as theoretical norms of general juridical nature and ensuing from reason itself. These norms serve as guidelines for legislators, i.e. for positive law.[266] Natural law, according to Čičerin, represents rational notion about law, which includes not only what it is, but also what it should be.[267] However, it does not have

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[261] Ernest Leopol'dovič Radlov, *Očerk istorii russkoj filosofii*, (Ekaterinburg: Izdatelstvo Ural'skogo universiteta, 1991), 111.
[262] Pjatkina, "Škola 'vozrojdënnogo estestvennogo prava' v Rossii," 105.
[263] Boris Nikolaevič Čičerin, *Vospominanija* (Moskva: Izdatel'stvo Moskovskogo universiteta, 1991), 56, 57.
[264] Čičerin, *Vospominanija,* 56, 57.
[265] Boris Nikolaevič Čiccerin, *Položitelnaja filosofija i edinstvo nauki* (Moskva: Tipo-litogr. T-va Kušnereva i Ko., 1892), 18, 28-29, 97.
[266] Čičerin, *Filosofija prava*, 94.
[267] Boris Nikolaevič Čiccerin, "Psihologičeskaja teorija prava," *Voprosy filosofii i psihologii,* kniga 55(4) (1900): 366-367.

coercive power, which is a feature only of positive law.[268] He views this influence of natural law on actual social order as an immanent part of the historical development,[269] with its goal being the creation of social order found on the grounds of freedom and equality. As a Hegelian, however, Čičerin believes such a goal to be possible only within a state,[270] thus in an interesting way combining liberal and statist ideas. Pëtr Struve points out that the special role of Čičerin in Russian legal thought lies in the level of harmonization between liberal and conservative views that he has managed to achieve better than any other Russian thinker.[271]

Here, in the philosophy of Boric Čičerin, we can observe an interpretation of the idea of law that is different form the classical one. At the same time, like Hobbes and Locke, he defines law as a "mutual limitation of the freedom of persons,"[272] or as "freedom limited by legislation" (*"svoboda, ograničennaja zakonom"*).[273] In this case law acts not as a substantive norm, but as the idea of justice (*"pravda"*[274]), which defines the guiding principles of society formation and exercise of political power. In Čičerin's opinion, the essential criterion of law should not be looked for in its coercive nature, since justice cannot be coercive. Coercion is only a feature of political power and of the state as a body obliged to ensure observance of legal norms.[275] Čičerin's natural law theory was highly appreciated and supported by prominent Russian legal philosophers, including Trubeckoj, Novgorodcev, Berdjaev, Alekseev, Kistjakovskij, Mihajlovskij and others. They continued Čičerin's struggle with positivism for the revival of natural law.[276]

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[268] Čičerin, *Filosofija prava*, 94.
[269] Boris Nikolaevič Čicčerin, *Kurs gosudarstvennoj nauki*, tom 3 (Moskva: Tipo-litogr. T-va Kušnereva i Ko., 1894), 296-299.
[270] Čicčerin, *Kurs gosudarstvennoj nauki*, tom 3, 357.
[271] Pëtr Berngardovič Struve, *Patriotica. Politika, kul'tura, religija, socializm* (Moskva: Respublika, 1997), 455-456.
[272] Čičerin, *Filosofija prava*, 22.
[273] Ibid.
[274] Čicčerin, "Psihologičeskaja teorija prava," 380-381.
[275] Ibid.
[276] Iosif Vikent'evič Mihajlovskij, *Očerki filosofii prava*, tom 1 (Tomsk: V.M. Posohin, 1914), 36, 170-220; Novgorodcev, *Iz lekcii po obščej teorii prava*; Pavel Ivanovič Novgorodcev, *Krizis sovremennogo pravosoznanija*; Kistjakovskij, *Socialnye nauki i pravo*; Nikolaj Aleksandrovič Berdjaev, "O novom russkom idealizme," *Voprosy filosofii i psihologii,* kniga 5(75) (1906); ~ *Opyty filosofskie, socialnye I literaturnye* (Sankt-Peterburg: Izd. M.V. Pirožkova, 1907), 207; Evgenij Nikolaevič Trubeckoj, "Učenie B.N. Čičerina o smysle i suščnosti prava," *Voprosy filosofii i psihologii*, kniga 80 (1905).

Influenced by Hegel and the historical school of law, Solov'ëv diverges from classical concept of natural law as some legal system existing in a state of nature before the emergence of state. Solov'ëv suggests the construct of "rational natural law," which represents the common meaning of law, the logically formulated formal prerequisites of law.

In the end of the 19th and the beginning of the 20th century the process of the revival of natural law theory incorporated the experience of positivism and the historical school of law. The new incarnation of jusnaturalism, while denying the possibility of existence of an ideal legal order suitable for any times and places, follows the old theory at least in one principal idea: in the apriority of constructing an ideal. "What is needed," Pavel Novgorodcev writes, "is the revival of natural law with its a priori methodology, with the ideal aspiration, and with acknowledgement of independent significance of the moral principle and of normative consideration.[277]

Expressing his opinion about old legal philosophy and the historism approach in jurisprudence, Novgorodcev notes that legal philosophy has been developing on jusnaturalistic foundations long since. According to him, the main shortcoming of the old legal philosophy is inability to find boundaries for the notion of law. The historical school of law did not eliminate this misconception, he argues, but even fostered its strengthening in science. Novgorodcev believes their goal to be proving "not existence of the ideal, but idealness of the existing,"[278] which lead to widening of the bounds of what is. The research focus of this school was shifted to the sphere of positive law, according to him.[279]

Novgorodcev defends jusnaturalistic approach, claiming that it offers what positivism and historical school fail to provide. According to him, due to the prevalence of positivism the existence of moral principles inside law began to seem an unrealizable ideal to some thinkers.[280] Thanks to the influence of such thinkers as Savigny, natural is still regarded by many as a misconception, Novgorodcev says. He challenges this

[277] Novgorodcev, *Iz lekcii po obščej teorii prava*, 12.
[278] Novgorodcev, Istoričeskaja škola juristov, 190.
[279] Ibid.
[280] Ibid

point of view regarding jusnaturalism as an intrinsic need of human logic and as a primordial property of legal philosophy, even speculating about equating natural law with legal philosophy.[281]

Evgenij Trubeckoj also criticizes the old school of natural. He points out that its principal mistake is that it represents natural law as a code of invariable rules that derives from the nature of reason with logical necessity. This way natural law is presented as a static order. Trubeckoj states that old jusnaturalistic school does not reckon with the diversity of historical reality and does not recognize "the great law of world evolution."[282] In his opinion, natural law does not contain any predefined unchangeable juridical norms. The philosopher believes natural law to be the aggregate of moral and at the same time legal rules different for every nation and epoch.[283] Trubeckoj writes that, on the one hand, advocates of the natural law school are right in that there is moral law, or natural law, different from positive law, and, on the other hand, supporters of the contemporary historism and evolutionism are right in that there is no eternal unchanging code of natural law. Specific requirements of natural law change according to the conditions of place and time, he says. He also comes to an interesting conclusion that the possible maximum of freedom that it demands from every country and epoch is not a constant equal for everybody.[284] Trubeckoj affirms the significance of natural law by saying that by rejecting natural law we would lose any criterion to evaluate established law.[285]

[281] Novgorodcev, "Lekcii po istorii filosofii prava," 161,162.
[282] Trubeckoj, *Enciklopedija prava*, 64.
[283] Ibid.
[284] Ibid., 65.
[285] Ibid., 67.

3.4. RELATIONS BETWEEN LAW AND MORALITY

Revived natural law school in Russia was a complex phenomenon from epistemological point view, but at the core of all of its various versions was the problem of relations between law and morality.

Iosif Mihajlovskij tries to come up with a classification of views about the relations between law and morality. He discerns three types of them. The first one consists in negation of difference between law and morality, which leads to excessive state regulation of social relations. For example he puts psychological school of law of Petražickij into this category. The second one is characterized by contrasting law and morality. According to Mihajlovskij, isolation of law from its moral foundations inevitably leads to a conclusion that the only sanction of law is physical force. Finally, the third position according is regarding law as deriving from morality, as an "ethical minimum."[286]

Boris Čičerin, in a similar manner as Kant did, clearly distinguished between law and morality. He regarded coercion as the main characteristic of their difference.[287] "Unlike morality," he writes, "law is of coercive origin. Juridical norms are maintained by coercive power, while moral norms only turn to conscience. If juridical norms were not coercive, external freedom of an individual would be deprived of any protection; it would be victimized by arbitrary rule of the strongest."[288] According to Čičerin, law becomes coercive when it is recognized by a legal norm in effect, that is by positive law. Therefore it can vary in different times and in different nations. Čičerin argues for natural law to be seen not as a constant absolute norm, but as an ideal to strive for.[289] In this aspect he believes law and morality to have the same source – spiritual moral of human beings.[290]

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[286] Mihajlovskij, *Očerki filosofii prava,* tom 1, 145-157.
[287] Valerij Dmitrievič Zor'kin, "Vozzrenie Čičerina na gosudarstvo i pravo" (PhD diss., Moskovskij gosudarstvennyj universitet imeni M.V. Lomonosova, 1967).
[288] Čiččerin, *Filosofija prava*, 88-89.
[289] Boris Nikolaevič Čičerin, *Sobstvennost' i gosudarstvo, Čast' 1* (Moskva: Tipografija Martynova, 1882), 87.
[290] Čičerin, *Filosofija prava*, 92.

Vladimir Solov'ëv one of the first among Russian philosophers made an attempt to link law with morality, which became on of his most influential legal ideas. According to him, juridical law must be just not merely by its form, by also by its essence. He believes justice to be a moral concept.[291] "Legal" for Solov'ëv is a synonym of "right" or "just." However, while connecting law with morality, he did not completely reduce the former to the latter.[292] As mentioned above, in his moral philosophy Solov'ëv departs from Kant's autonomous ethics combining it with Hegelian universalism.[293]

The elaboration on moral philosophy results in that the idea of dependence of law on morality becomes the central for Solov'ëv's legal theory. However, it should be mentioned that the early period of Solov'ëv's philosophy (which was during the 1980s and is associated first of all with his work "Critique of Abstract Principles") could be characterized by his negative perception of law. During this period he does not value law much and is merely searching for an adequate place for it in his philosophical system. Such attitude to law has developed not without influence of Schopenhauer's ideas. In this period Solov'ëv tends towards formal notion of law and towards its perception as a phenomenon caused by practical necessity. At that time it exists for him separately from morality. He thinks that morally positive basis remains outside the scope of law because law does not give a positive purpose for action, but dictates merely what no one must do.[294] Thereby, a legal act expresses not real, but quantitive, mathematical justice (equal for equal). Such justice does not have value; it acts merely as a formal expression of law.[295]

However, soon Solov'ëv begins to reconsider the essence of law. He starts to depart from its negative perception and to find in it more and more links with the moral sphere. This concept will find its most complete form in his later works like *The*

[291] Vladimir Sergeevič Solov'ëv, "Opravdanie dobra," in *Sobranie sočinenij, v 10 tomah*, ed. Sergej Mihajlovič Solov'ëv and Ernest Leopol'dovič Radlov (Sankt-Peterburg: Prosveščenie, 1911-1914), tom 8, 102-104.
[292] Solov'ëv, "Opravdanie dobra," 404-408.
[293] Gusev, "Idei socialnogo liberalizma i politiceskogo idealizma v filosofii Vl. Solov'ëva," 199.
[294] Vladimir Sergeevič Solov'ëv, "Kritika otvlečënnyh načal," in *Sobranie sočinenij, v 10 tomah*, tom 2, 150.
[295] Vladimir Sergeevič Solov'ëv, "Duhovnye osnovy žizni," in *Sobranie sočinenij, v 10 tomah*, tom 3, 340.

Justification of the Good (*Opravdanie dobra*), *The Purpose of the State* (*Naznačenie gosudarstva*"), *Law and Morality: Essays from Applied Ethics* (*Pravo i nravstvennost': Očerki iz prikladnoj etiki*). In these and other his works law is now considered as a connecting link between ideal moral order and real life, as an important mechanism of embodiment of this order (expressing "the absolute good") in society.[296]

Talking about the essence and the source of morality, Solov'ëv turns to metaphysics, thus filling this notion with deep spiritual and religious meaning. At first sight his perception of morality as being a self-empowered entity may seem similar to that of Kant. However, Solov'ëv contests Kant's point of view. Kant stated that the supremacy of the a priori supreme principle of morality that guides human behavior derives from the pure reason[297]. He also proclaimed full autonomy of a subject and independence of ethics from religion. Solov'ëv instead saw self-contained power of morality in the fact that it already has grounds for its validity inside itself. These grounds are the divine will and existence of the eternal soul. He deduces his own, religious categorical imperative: "In absolute internal consent with the Higher Will, recognizing unconditional significance or value of everyone else, since they too have God's image and likeness in them, do take possibly full participation in your own and every other's perfection for the sake of final revelation of the Kingdom of God on Earth."[298] It is noteworthy that the philosopher calls to take participation not only in one's own but also in common perfection. This is the connecting link between ethic and legal spheres of human life. Solov'ëv supplements Kant's imperative principle of duty with principle of good.[299]

The main difference between law and morality, according to Evgenij Trubeckoj, can be expressed by the following. The content of law is individuals' external freedom exclusively, while the content of morality is represented by the notion of good, which

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[296] Andrej Vasil'evič Poljakov, "Estestvenno-pravovaja koncepcija V.S. Solov'ëva," *Pravovedenie,* 4 (1987): 95.
[297] Samuel J. Kerstein, *Kant's Search for the Supreme Principle of Morality* (Cambridge: Cambridge University Press, 2002), 6-7, 89-91.
[298] Solov'ëv, "Opravdanie dobra," 203.
[299] Gusev, "Idei socialnogo liberalizma i politiceskogo idealizma v filosofii Vl. Solov'ëva," 200.

can concern both people's internal and external freedom, both their actions and attitudes. According to theory of Trubeckoj, the spheres of law and morality are closely contiguous. "All those moral norms limiting arbitrariness of ones for the freedom of others are at the same time legal norms,"[300] he thinks.

Trubeckoj equates norms of natural law with moral norms. Here is what he writes: "Natural law is the same as justice; it embraces the whole range of moral norms according to which we do or do not obey to some external legal authority; it includes the whole range of such moral norms in which any authority, any human power and just any positive law finds justification or condemnation for itself."[301] Trubeckoj believes the existence of norms of moral or natural law that make up ideal basis and ideal criteria for the whole legal order to be undeniable.[302]

Introducing morality as a critical authority over positive law was a key task for Pavel Novgorodcev as well. Protecting law's own moral and cultural value not reduced to the categories of force and utility, Novgorodcev with his jusnaturalistic doctrine affirms moral dignity of a person, which is vested with freedom and responsibility. That is why at the core of his legal theory one can find the concept of autonomous moral agent, who is never the means but the ends of social development. This agent connects with other agents in a "free universalism" and thus gains its full freedom and equality.

In on of his early works "Law and Morality" Novgorodcev did not associate yet moral assessment of law with the concept of natural law, but he acknowledged the close interconnectedness of law and morality already on this stage. Law introduces the principles of limiting and equalization in relations between social classes and between individuals; but if law would fully embrace the principle of fair equalization of everybody, he claims, it would embody the pure idea of justice. According to Novgorodcev, actual law can never become such a pure embodiment of justice, but it is equally impossible for law to avoid the implementation of certain moral principles.

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[300] Trubeckoj, *Enciklopedija prava*, 33.
[301] Ibid., 59.
[302] Trubeckoj, *Lekcii po enciklopedii prava*, 58.

There can be no law without moral principles of mutual limitation and responsibility; this way there can only be force acting arbitrarily and spontaneously like forces of nature, he argues.[303]

According to Novgorodcev, justice representing the moral element of law is a force by itself sustaining other forces that connect to it. He describes a notion of justice as not being an abstract concept having nothing to do with real life saying that it is not unconditional equality appealing to people merely by its ideal attractiveness; it is instead a life principle of equating social forces, without which their communication could barely be possible.[304] Law, according to Novgorodcev, should be supported by the moral environment in which it functions; from this environment the legislator constantly gets new tasks that transform existing law. He attributes the progress of law to the progress of morality.[305]

The ideas of natural law in the context of relations between law and morality were also developed by Bogdan Kistjakovskij. He believes that it is Solov'ëv who has proven that true essence of law is of moral nature.[306] However, unlike Solov'ëv, Kistjakovskij in order to discover the ethic component of law used Neo-Kantian methodology, which is characterized by contrasting "is" with "ought." From the Neo-Kantian perspective any phenomenon can be examined from the cause-and-effect point of view. At the same time, social phenomena can be approached as well from the point of view of justice. According to Kistjakovskij, both ways of thinking are logically perfect and are equally important for the humanity.

Following Solov'ëv and Novgorodcev, Kistjakovskij claims that the historical process of development of human society demonstrates gradual implementation of the idea of justice. According to Kistjakovskij, this happens because of the aspiration for justice being inherent to human beings, who seek its implementation in social sphere

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[303] Pavel Ivanovič Novgorodcev, "Pravo i nravstvennost'," *Pravovedenie,* 6 (1995): 111.
[304] Ibid.
[305] Ibid., 112.
[306] Kistjakovskij, *Socialnye nauki i pravo*, 379.

including law. This is why he regards judgments based on the category of justice equally integral to our consciousness as the ones based on causality.[307]

Since law concerns not only causality, but also represents a product of human spirit, according to Kistjakovskij, it should be approached from teleological point of view. He marks out empirical and transcendental aims, with the latter dividing into ones intrinsic to our rationality and ones that concern our ethical conscience. Rational aims determine the form and content of law. However, according to the philosopher, the most important are ethical aims of law, which determine its nature. Unlike Čičerin and Trubeckoj, who attribute freedom first of all to positive law and justice to the sphere of natural law, Kistjakovskij believes law as such to be characterized by both ethical aims – justice and freedom. He argued for the unity of law, which is always characterized by the same inalienable ethical aims. "Law seeks to embody freedom and justice in the fullest and most perfect way," he writes.[308]

Sergej Bulgakov believes that natural law is legal and social ought; it is those ideal norms, which do not exist in objective reality, but which should exist and for the sake of its objective necessity negate actual positive law and existing social order. According to Bulgakov, criticism of law and social institutes is an inherent human need, otherwise social life would come to a stop.[309]

According to Bulgakov, the existing historically established and thus necessarily imperfect social system should be opposed with an ideal system of human relations; and it is this notion of ideal or natural law that gives a criterion of good and evil for assessment of the existing social and legal reality. From this assessment emerge ideas about certain reforms needed. He believes that the most ideal norm of human relations representing natural law as such is absolute, and thus its sanction should also be absolute.[310] Bulgakov thinks that natural law, being the absolute and ideal norm of positive law assessment, consists of certain moral axioms. These axioms include

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[307] Kistjakovskij, *Socialnye nauki i pravo*, 179.
[308] Ibid., 680.
[309] Sergej Nikolaevič Bulgakov, *Ot marksizma k idealizmu: Sbornik statej (1890-1903)* (Moskva: Obščestvennaja pol'za, 1903), 65.
[310] Ibid., 72.

equality of all the people based on the moral grounds of the notion of human dignity, every human representing an absolute value, and inviolability of person.[311]

According legal philosophy of another religious philosopher Ivan Il'in, in the natural law form "law remains law"[312] but gains the value of moral validity and thus becomes natural law. In this process, morality is not forced out or broken by law but directs its regulations.[313]

3.5. THE PROBLEM OF NATURAL AND POSITIVE LAW

When talking about natural law, one of the key issues that always cause heated debates is the relation between natural and positive law. In Russian pre-revolutionary jusnaturalism, there were two main types of theorizing: normative and constitutive. From the normative point of view, natural law is regarded as a set of a priori moral norms. Supporters of the constitutive approach were trying to interpret natural law as an idea of law that was to be found in existing positive law;[314] this approach was usually used to legitimize the existing legislation and its coercive power.[315]

Within the framework of Russian jusnaturalism of the edge of the 19th and the 20th centuries, there are different opinions about the problem of dualism of Natural and Positive Law. As a main tendency, Russian thinkers are mostly accepting the idea of dualism (Neo-Kantians were mostly in favor of the idea of dualism). By other thinkers, the dualism is not necessarily emphasized – some thinkers focused on

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[311] Ibid., 82-84.
[312] Ivan Aleksandrovič Il'in, "Obščee učenie o prave i gosudarstve (fragmenty)," *Pravovedenie,* 3 (1992): 23.
[313] Ibid.
[314] Petražickij, *Teorija prava i gosudarstva v svjazi s teoriej nravstvennosti*, tom 2, 510.
[315] Pavel Ivanovič Novgorodcev, "Pravo estestvennoe," in *Slovar' Brokgauza i Efrona*, tom. 48 (Sankt-Peterburg: Terra, 1992), 885; Novgorodcev, "Nravstvennyj idealizm v filosofii prava," 251—253; Gessen, "O nauke prava," 116; Čičerin, *Filosofija prava*, 92; Trubeckoj, *Enciklopedija prava*, 58—59; Evgenij Nikolaevič Trubeckoj, *O zadačah sovremennoj filosofii prava* (Sankt-Peterburg, 1902), 6—8; Iosif Alekseevič Pokrovskij, "Estestvenno-pravovye tečenija c istorii graždanskogo prava," *Civilističeskaja praktica*, 1(22) (2007): 38—39.

critical juxtaposition of Natural and Positive Law rather than their complete contraposition (e.g. Mihajlovskij and Jaščenko).[316]

Boris Čičerin draws a distinction between natural and positive law.

He believes positive law to develop under the influence of theoretical norms, which do not have coercive power but serve as guiding basis for legislators and jurists. This is where according to Čičerin the notion of natural law emerges as opposed to positive law. For him, natural law is not current – thus coercive – law, but a system of general juridical norms deriving from human reason and destined to serve as criterion and guide for positive law.[317] Thus, in Čičerin's opinion, natural law represents a system of rational conceptions of law developing in human society and acting as guidelines for legislation. He highlights that "it ascertains not only what is there, but also what should be."[318] But he also points out that only positive law is the one that has coercive power.[319]

Čičerin believes the evidence of single nature of law to be found in the historical reality. According to Čičerin, the "historical" law, the source of which was certain legal traditions and established social relations, is being replaced by rational legislation, in which social relations approximate to higher principles and ideals of civil society develop.[320] In this process the notions of freedom and equality should come to the forefront; and the social order based on these notions and ensured by strong state power is seen by Čičerin as the goal of social progress.[321]

Boris Čičerin managed to overcome the dualism of the old natural law school. He puts both the natural and positive law under a single source. Such source, according to him, is the Absolute Mind, the development of which unfolds in history. This way the division of law on positive and natural is seen not as an antagonistic contraposition, but as a product of historical progress. Čičerin views the result of this progress in

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[316] Pjatkina, "Škola 'vozrojdënnogo estestvennogo prava' v Rossii," 106.
[317] Čičerin, *Filosofija prava*, 94.
[318] Čiččerin, "Psihologičeskaja teorija prava," 366-367.
[319] Ibid.
[320] Čiččerin, *Kurs gosudarstvennoj nauki*, tom 3, 296-299.
[321] Ibid., 357.

step-by-step harmonization of positive law and natural law with political freedom of individuals approaching its maximum.

According to this theory, natural law represents a conceptual metaphysical basis developing within collective consciousness and legal practice accordingly and, at the same time, an ideal to which every free and rational being should strive for. Implementation of this ideal depends on the advance of consciousness, on the one hand, and on the variety of life circumstances to cope with, on the other.[322]

According to Čičerin, the variability of natural law does not mean that it has nothing but unstable norms that every nation or even generation understands and implements in its own ways. Justice and freedom are seen here as constant rational basis of law, with law developing according to the development of these concepts in society. The stages of development of freedom are the stages of development of law, thus unfolding of the idea of law and establishment of a rational moral order are not a basis but a product of historical progress.[323]

Vladimir Solov'ëv also rejects natural law and positive law dualism, but at the same time does not equate them. Though arguing with Čičerin, and especially his views about the role of the state, Solov'ëv shares his view of natural law as a general idea of law. Solov'ëv underlines that only this way it becomes to possible to assess law like some fact of history.[324] Natural law in this case acts as an "algebraic formula," into which history inserts variables of positive law.[325]

Ivan Il'in believes that the progress of social life to be in gradual harmonization of natural and positive law. According to him, the ideal result would be if "all the positive law would become natural (i.e. morally just), while all the natural law would become positive (i.e. would achieve recognition and implementation by the

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[322] Čičerin, *Sobstvennost' i gosudarstvo, čast' 1*, 87.
[323] Ibid. 87, 88; Čičerin, *Filosofija prava*, 94, 95; Valerij Dmitrievič Zor'kin, *Iz istorii buržuazno-liberal'noj političeskoj mysli Rossii vtoroj poloviny XIX – načala XX v. (B.N. Čičerin)* (Moskva: Izdatel'stvo Moskovskogo uneversiteta,1975), 20, 39.
[324] Solov'ëv, "Opravdanie dobra," 402-403.
[325] Solov'ëv, *Pravo i nravstvennost'. Očerki iz prikladnoj etiki*, 98.

government).”[326] Rational legal consciousness always seeks for the free, right and just law and makes people struggle for it, Il’in argues. In this struggle, reason discovers not only the objective sense of positive law, but also the objective sense of natural law. Hence, reason starts seeking to adjust the “sense” of law in accordance with the “idea.”[327] According to Il’in, natural law is characterized through the categories of morality.[328]

Il'in thinks that such a true correspondence is hard to be achieved in reality, though not impossible. In his opinion, the objective of moral improvement of law stands before the whole humanity. Here is what he writes: “To create natural law is an ideal, which is being gradually implemented throughout history, but which is still far from becoming reality.”[329] He exemplifies this by the abolition of those legal norms that permitted slavery, torture, corporal punishments, serfdom, deprivation of rights of women etc. According to him, these examples show that further advancement is both necessary and possible.[330]

According to Il’in, it is necessary to see the existing but partial presence of the “idea” hidden within the “sense” and to find such a formula that would “reproduce the essence of the idea in a precise and undistorted manner.”[331] This way two notions of law emerge within the framework of Il’in’s theory: the notion of positive law, corresponding to its “sense,” and the notion of natural law, reflecting its “idea.”[332] Nevertheless, Il’in does not argue for the positive law and natural law dualism. At first he admits that behind these two “subjectively experienced concepts” two “objectively significant legal values” are found that seem to be in discrepancy and even opposition to each other. At first glance, he writes, it may seem possible to find “inevitable” dualism of positive and natural law, which one could regard as

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[326] Ivan Aleksandrovič Il’in, *Sobranie sočinenij, v 10 tomah*, tom 4, ed. Ju.T. Lisica (Moskva: Russkaja kniga, 1994), 101.
[327] Ibid.
[328] Il’in, “Obščee učenie o prave i gosudarstve (fragmenty),” 23.
[329] Ibid., 24.
[330] Ibid.
[331] Ibid., 27.
[332] Ibid.

"hopelessness for legal consciousness."[333] However, Il'in believes that natural law is concealed within positive law at least in three forms: firstly, as a certain "minimum of rightness;" secondly, in the form of its main categories; and, thirdly, in the form of its immanent but yet unfinished task. He concludes that the unity of natural law and positive law is already give, even if in its primordial form.[334]

Novgorodcev contrasts natural and positive law. He explains this contrasting by the perpetual conflict of the ideal with the reality, which in the case of law is deepened even more due to some characteristics of positive law. He views the main problem of positive law in its inertness. According to Novgorodcev, no matter how perfect positive laws are, they become obsolete as time passes, while social life progressively advances and requires new concepts and new laws; positive laws can not cope with the pace of historical development. According to him, this is the reason of conflicts between old positive law and new progressive aspirations. Novgorodcev believes these conflicts to be the source of search for natural law as representing the demands for reforms and changes in the existing order.[335]

Viewing natural law as certain legal norms, Trubeckoj does not mix them up with law as such. He argues that natural law is the superior form of law different from positive law regardless of any authority,[336] while Pavel Vinogradov believes that natural law manifests itself not by means of positive law but through human reason.[337]

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[333] Ibid.
[334] Ibid.
[335] Novgorodcev, "Lekcii po istorii filosofii prava,"163.
[336] Trubeckoj, *Enciklopedija prava*, 480.
[337] Pavel Gavrilovič Vinogradov, *Očerki po teorii prava* (Moskva: Skl. Izd. A.A. Levenson, 1915), 146.

3.6. KEY CONCEPTS OF THE RUSSIAN SCHOOL OF REVIVED NATURAL LAW

3.6.1. DEFINING NATURAL LAW THROUGH THE NOTION OF JUSTICE

As can be seen from the analysis of some of the key jusnaturalistic theories, the notion of justice represents a key concept in Russian natural law doctrine of the end of the 19th and the beginning of the 20th century. Boris Čičerin views natural law as the idea of justice, upon which society and political power should be founded. He defines it be the word *pravda*,[338] which in Russian means not only "justice" but also "truth." Vladimir Solov'ëv, being among the first Russian philosophers to connect law with morality, views justice as a moral term. During his earlier period, he does not connect law with morality, which results in that he considers law to represent merely formal "mathematical" justice.[339] With the progress of his philosophical and legal views, Solov'ëv subsequently changes his negative position towards law. Now he equates the word *pravovoe* ("legal," "jural") with *pravoe* ("right," "just"),[340] as the words are also related etymologically in Russian. Evgenij Trubeckoj equates natural law and justice – the notion that, according to him, includes all the norms that define obedience or disobedience to a certain authority.[341] Even before embracing the ideas of natural law, Pavel Novgorodcev recognizes the connection between law and morality, and claims that if law would embrace the principle of universal equality, it would embody the idea of justice.[342] Bogdan Kistjakovskij tries to combine two methodological approaches to law, trying to grasp it from the point of view of cause-and-effect and from the standpoint of justice, which he grounds on the Neo-Kantian ideas about the contraposition of "is" and "ought."[343] Supporting the idea of natural law with changing content, Pavel Vinogradov also underlines that justice remains its principal goal despite all the transformations that this content undergoes. He believes

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[338] Čiččerin, "Psihologičeskaja teorija prava," 380-381.
[339] Solov'ëv, "Duhovnye osnovy žizni," 340.
[340] Solov'ëv, "Opravdanie dobra," 404-408.
[341] Trubeckoj, *Enciklopedija prava*, 59.
[342] Novgorodcev, "Pravo i nravstvennost'," 111.
[343] Kistjakovskij, *Socialnye nauki i pravo*, 379.

that natural law is expressed not through positive law directly, but through human reason.[344] However, this does not mean ephemerality of natural law, because, as Vinogradov continues, "who obtains the power over minds of the people eventually will rule their institutions."[345] Thus, in the Russian school of jusnaturalism, the concept of justice plays a crucial role and serves as a premise for the elaboration on the idea of natural rights.

3.6.2. FREEDOM AS THE CENTRAL CATEGORY

Another central category within the framework of Russian natural law doctrine of the pre-revolutionary period is the concept of freedom. Departing from the concept of freedom developed in classical jusnaturalistic theories, Russian legal thinkers interpret it in their own way according to Russian intellectual, ethic and legal tradition. As Iosif Pokrovskij, a major legal scholar of the period, states, moral progress is only possible with individual freedom. The highest purpose of law, Pokrovskij continues, is creation of such a social order where this creative freedom would find the best conditions for its fulfillment.[346]

In the works of Russian jusnaturalists of the end of the nineteenth and the beginning of the twentieth century, the concept of freedom is most commonly defined as freedom of an individual to determine his/her actions in relation to the demands of the ought. It is referred to as the individualism principle.[347] The idea of freedom and the individualism principle became crucial for the Russian jusnaturalists. It seems especially important in the context of statism and autocracy in Russia at that period.[348]

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[344] Vinogradov, *Očerki po teorii prava*, 146.
[345] Ibid.
[346] Iosif Alekseevič Pokrovskij, *Osnovnye problemy graždanskogo prava* (Sankt-Peterburg: Pravo, 1917), 78.
[347] Novgorodcev, "Nravstvennyj idealizm v filosofii prava," 281-282.
[348] Pjatkina, "Škola 'vozrojdënnogo estestvennogo prava' v Rossii," 104.

The main postulate of Boris Čičerin is that "a rational being means a free being."[349] He explains the freedom of human by the presence of two opposite elements and their interaction. These elements are the infinite and the finite. The notion of internal freedom of a rational being grounds on the idea of the absolute that is intrinsic to the mind, Čičerin argues. According to him, the absolute principles manifesting themselves in human cognition constitute the foundation of morality because they regulate the practical activity of people.[350]

Concerning external freedom, Čičerin believes that it becomes law only because this external freedom constitutes a phenomenon of the absolute internal freedom of person. Čičerin believes that human must be recognized as free in the external world because he/she is free inside himself/herself and because such is his/her supersensory nature. On this, Čičerin grounds the respect for person, which he believes to be the source of any law. According to him, human can demand respect for himself/herself only because he/she is a bearer of the absolute principle of freedom. Thus, law is considered an ideal requirement in the name of an ideal principle. Hence the juridical equality of people, Čičerin thinks.[351]

Čičerin declares that true justice consists in the recognition of equal human dignity and freedom for all.[352] However, Čičerin's notion of freedom is not "freedom of an animal in the wild" but freedom of a citizen obeying to law.[353] Čičerin strongly leans to the right as he claims that people are equal only in relation to their free nature, but in all other aspects they are not equal. According to him, all natural definitions lead to inequality; and since these definitions fill human activity with content, then law accepts actual inequality alongside formal equality. This is how Čičerin was trying to resolve the complicating issue of freedom, equality and inequality of people under law.

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[349] Andrej Mihajlovič Veličko, "Razvitie idei estestvennogo prava v trudah Čičerina B.N.," *Pravovedenie*, 3 (1994): 45.
[350] Ibid.
[351] Ibid.
[352] Ibid.
[353] Ibid.,106.

Pëtr Struve, an advocate of the natural law doctrine, was also one of the most consistent supporters of the protection of human rights. In 1901, several years before the 1905 Revolution, he acknowledges the urgent need for recognition of "rights of human as such" by positive legislation that was brewing in the minds of Russian intelligentsia and common people.[354] He views it as the task of Russian people "that has finally crystallized in Russian social thought after long ordeals and hesitations."[355] He draws parallels between the emergence of this idea and the idea of liberation of peasants from serf dependence that spread across Russian public during the period prior to the 1861 Emancipation Reform.[356] Through the Kantian teaching about freedom, which implies the distinction between the "Is" and the "Ought," Struve comes to metaphysics. Hence Struve's thesis about the irrationality of objective reality, as well as of human freedom.[357]

Struve believes the principle of protection of person and personal rights to be at the core of the culture formation process. One of the central ideas in the works of Pëtr Struve is that culture helps humanity out of the animal condition and produces active and responsible personality. As Žukov notes, Struve actively appeals to the individualistic culture established in the European societies.[358] According to Struve, only free people are capable of creating culture that would incorporate strong statehood, powerful economy, and the rule of law principle. He underlines that for a Russian liberal, freedom is not unrestrictedness and irresponsibility, but, first of all, a conscious self-restriction and ability to compromise with other persons, the society or the state. He exemplifies it by European culture. He characterizes European legal culture as being built upon the principles of agreement, equivalents and compromise; it implies autonomy and self-government within the bounds of law, he adds. Struve believes that person's ability to voluntarily submit to authority constitutes the basis for the rule of law regime.[359]

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[354] Struve, Na raznye temy (1893-1901), 524.
[355] Ibid.
[356] Ibid.
[357] Piama Pavlovna Gajdenko, "Pod znakom mery (liberal'nyj konservatizm P.B. Struve)," *Voprosy filosofii*, №12 (1992): 59-60.
[358] Žukov, "Filosofija estestvennogo prava v russkoj pravovoj mysli pervoj poloviny XX veka," 195.
[359] Gajdenko, "Pod znakom mery (liberal'nyj konservatizm P.B. Struve)," 59-60.

Žukov believes Struve's interpretation of human rights to have the highest level of correspondence with European liberal thought among Russian thinkers.[360] At the same time, the views of Struve seem to have common ideas with Čičerin. Struve connects the respect for human rights with the presence of strong state power, with strict law and order, and with culture of discipline and self-discipline. He defines discipline as conscious submitting of a person or a social group to certain common obligatory rules deriving from the content of a current objective cultural task. Discipline and order are endowed with very high significance by him. In 1908 in an essay called *Culture and Discipline* (*Kultura i disciplina*) Struve writes that "discipline is equally tightly coupled with culture as order with state," while giving a rather statist interpretation of discipline and thus of social order.[361] Žukov tries to explains this position by pointing out that Struve was writing these words in 1908 in the conditions of latent civil war still continuing after the 1905 Revolution. Struve's stand was caused by urge to reconcile the authorities and the people as he believed that the two were supposed to inherently merge, Žukov argues.[362] Started as a Marxist, Struve gradually shifts to the right and after the mentioned revolution becomes a liberal conservative. Even though Struve's call for the reconciliation do not appear to be realistic for that particular historical period, as Russia was propelling towards escalation of the conflict, his support for legal protection of person as being a crucial element of stable and effective law and order is a major contribution to Russian liberal thought.[363]

In his legal philosophy, Solov'ëv pays much attention to the concept of person. According to him, only a free person consciously serving good can be its bearer.[364] He interprets person as a being that cannot be means for someone, but is a purpose in itself and for itself. An indispensable attribute of a person is freedom.[365] This freedom is what lies in the basis of law. At the same time, Solov'ëv also attributes equally high

[360] Žukov, "Filosofija estestvennogo prava v russkoj pravovoj mysli pervoj poloviny XX veka," 196.
[361] Struve, *Patriotica. Politika, kul'tura, religija, socializm,* 88.
[362] Žukov, "Filosofija estestvennogo prava v russkoj pravovoj mysli pervoj poloviny XX veka,"196.
[363] Ibid.
[364] Gusev, "Idei socialnogo liberalizma i politiceskogo idealizma v filosofii Vl. Solov'ëva," 200.
[365] Solov'ëv, "Opravdanie dobra," 296-300.

value to society.[366] Law comes into existence only when a free action of one person meets a free action of another person. Thereupon, denying other's freedom one cannot have basis for his/her own freedom. Thus, Solov'ëv argues that true freedom can be ensured only by equality. He views freedom bounded by equality as a principle of law. However, this equality is not absolute. Not simple equality lies in the basis of law, according to Solov'ëv, but equality in realization of the ought; thus, for him equality means justice.[367]

Evgenij Trubeckoj also believes that individual freedom cannot be unrestricted; otherwise there can be no law. According to him, law is characterized by a norm that limits freedom.[368] He points out that external freedom of an individual should be guaranteed not merely by law, but by moral norms as well; Trubeckoj indicates that there are certain moral norms limiting arbitrary rule of ones in the name of external freedom of others.

3.6.3. The Notion of Inalienable Rights in Russian Jusnaturalism

As mentioned before, one of the key methodological principles used by the Russian pre-revolutionary natural law thinkers in development of the notion of freedom is the individualism principle. On the premise of this principle, Russian jusnaturalists come up with a set of inalienable or natural rights of person, which becomes one of the central ideas of this doctrine. The source of these rights is considered to be the free person and his/her belonging to the world of the "ought."[369] As Pavel Novgorodcev argues, inalienable rights are the expression of the "absolute value of person," which belongs to him/her regardless of the form of statehood.[370] According to Novgorodcev,

[366] Gusev, "Idei socialnogo liberalizma i politiceskogo idealizma v filosofii Vl. Solov'ëva," 199.
[367] Solov'ëv, "Opravdanie dobra," 296-300.
[368] Trubeckoj, *Enciklopedija prava*, 16.
[369] Pjatkina, "Škola 'vozrojdënnogo estestvennogo prava' v Rossii," 106-107.
[370] Novgorodcev, "Nravstvennyj idealizm v filosofii prava," 294-295.

the state cannot infringe on these rights without losing the moral grounds of its existence.[371]

Most of the Russian jusnaturalists include into the list of these inalienable rights the rights and liberties usually associated with classical liberalism, such as personal immunity, freedom of movement, right to assembly and association, freedom of speech and press, freedom of conscience, right to private property, freedom of contract etc.[372]

Russian jusnaturalists advocate the recognition of the rights of a citizen, which would be limited only by the court. Most often, the rights and liberties of a citizen were categorized into three main groups. The first group included individual liberties, which beside freedom of person included freedom of residence, privacy of correspondence, the right to choose one's profession, and freedom of movement. The second group was social liberties, including freedom of conscience and religion, freedom of speech and press, right to assembly, and freedom of association. The third group consisted of economic liberties and embraced right of property, the right to work, freedom of industry, and freedom of trade. Concerning the guarantees of the mentioned liberties and the protection of an individual and the society, the Russian scholars of the period in question recognized the crucial role of the court, which should regulate and guarantee this protection through a determined procedure.[373]

While some Russian thinkers, for example Čičerin, consider this list of constitutional rights to be exhaustive,[374] others seek to expand it. Vladimir Solov'ëv expands the traditional set of constitutional rights and liberties with another jusnaturalistic concept. From the Christian ethics,[375] he deduces the right of every individual to a dignified existence (*dostojnoe suščestvovanie*)[376] within the framework of a society

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[371] Ibid.
[372] Pjatkina, "Škola 'vozrojdënnogo estestvennogo prava' v Rossii," 107.
[373] Aleksej Karpovič Dživelegov, *Prava i objazannosti graždan v pravovom gosudarstve* (Moskva: Trud i volja, 1906), 5.
[374] Čičerin, *Filosofija prava*, 112—120.
[375] Lieven, ed., *The Cambridge History of Russia. Volume II*, 134-135.
[376] Solov'ëv, "Opravdanie dobra," 373-381; Solov'ëv, "Mnimaja kritika. Otvet B.N. Čičerinu," 650.

and state formally ruled by law.[377] For this reason, his ideology is often labeled social liberalism.[378] Greg Gaut even believes that by proclaiming this right Solov'ëv anticipates modern liberalism and the idea of welfare state developed in Europe in the post-war period.[379] After Solov'ëv, this concept of dignified existence becomes central for the Russian liberal movement.[380] Solov'ëv interprets this right as the following. From moral point of view, according to him, it is necessary that that every human would have not only sufficient means of subsistence and enough physical rest, but also that he/she could use leisure time for his/her moral development.[381] He believes that "the sole moral norm" is "the principle of human dignity, or the absolute value of every person, which results in the definition of society as intrinsic, free consent of all."[382]

Pavel Novgorodcev continues to elaborate on this concept. He indicates that the declaration of rights existing at that time lack one important right, which is the above-mentioned right to dignified existence.[383] He believes proposes to introduce this right on legislative level.[384] Novgorodcev continues to develop the notion of right to dignified existence together with Iosif Pokrovskij. For Novgorodcev, this right involves right to work, right of trade unions and social welfare services by the government to helpless and disabled people.[385] Pokrovskij interprets the "right to dignified human existence" as universally recognized and state guaranteed standard of life for disabled workers, the elderly and the sick, including the right to work, as well as labor legislation and workers' insurance. According to Pokrovskij, all this should be provided by employers.[386] Trying to define jusnaturalistic grounds for the right to

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[377] Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism," 116.
[378] Ibid.
[379] Greg Gaut, "Christian Politics: Vladimir Solovyov's Social Gospel Theology," *Modern Greek Studies Yearbook*, 10/11 (1994/1995), electronic version published on *The Transnational Vladimir Solovyov Societyi* website, accessed 17 January 2013, http://www.valley.net/~transnat/gautfp.html.
[380] Gusev, "Idei socialnogo liberalizma i politiceskogo idealizma v filosofii Vl. Solov'ëva," 201.
[381] Solov'ëv, "Opravdanie dobra," 380.
[382] Solov'ëv, "Opravdanie dobra," 298.
[383] Pavel Ivanovič Novgorodcev, "Pravo na dostojnoe čelovečeskoe suščestvovanie," *Obščestvennye nauki i sovremennost'*, 5 (1993): 127.
[384] Ibid., 131.
[385] Pavel Ivanovič Novgorodcev, and Iosif Alekseevič Pokrovskij, *O prave na suščestvovanie* (Moskva, 1911), 10—12.
[386] Ibid., 29—36, 42—43.

dignified life, both Novgorodcev and Pokrovskij associate it with subjective right in legal sense. They see the right of an individual to file an action against the government.[387]

3.6.4. The Concept of "Pravovoe Gosudarstvo" as a Cornerstone of the Russian Liberal Tradition

In the late Tsarist period, legal scholars were involved into the debate over the concept of *pravovoe gosudarstvo*.[388] The term pravovoe gosudarstvo is the direct translation of the German *Rechtsstaat*.[389] Due to the absence of an analogous term in English, it is usually translated as "legal state,"[390] "law-bound state,"[391] "law-based state,"[392] or "rule-of-law state,"[393] though the latter, according to some scholars, is not totally correct.[394] Each of the thinkers discussed in the current work was to greater or lesser extent involved into the elaboration of this concept.[395]

The concept of *pravovoe gosudarstvo* has rooted itself firmly in the Russian legal tradition, remaining one of the key concepts of the Russian jurisprudence to this day.

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[387] Ibid., 3, 29, 36—43.
[388] Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism," 116; Dživelegov, *Prava i objazannosti graždan v pravovom gosudarstve*, 5.
[389] Sergej Andreevič Kotljarevskij, *Izbrannye trudy,* ed. Konstantin Anatol'evič Solov'ëv (Moskva: Rossijskaja političeskaja enciklopedija, 2010), 294.
[390] Pëtr Davidovič Barenbojm, "Koncepcija Zor'kina – Tančeva o sootnošenii sovremennyh doktrin verhovenstva prava i pravovogo gosudarstva," *Zakonodatel'stvo i ekonomika*, 10 (2011): 4.
[391] Article 1, Chapter 1 of The Constitution of Russian Federation of 12 December 1993 (English translation), official electronic version, accessed 18 February 2013, http://www.constitution.ru/en/1000 3000-02.htm.
[392] Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism," 116.
[393] See, for example: Francis Neate and Holly Nielsen, eds., *The World Rule of Law Movement and Russian Legal Reform* (Moscow: Justitsinform, 2007).
[394] Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy," *Cardozo Law School, Public Law Research Paper No. 36* (2001): 1318-1319, accessed 20 February 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=262350; Barenbojm, "Koncepcija Zor'kina – Tančeva o sootnošenii sovremennyh doktrin verhovenstva prava i pravovogo gosudarstva," 10.
[395] Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism," 116; Gnatenko, "Filosofskij proekt pravovogo gosudarstva v kulture predrevolucionnoj Rossii," 46-48; Katlijn Malfliet, "Možno li sčitat' sovremennuju Rossiju pravovym gosudarstvom?" trans. Dar'ja Ernst, *Neprikosnovennyj zapas*, 5(61) (2008), accessed 7 March 2013, http://magazines.russ.ru/nz/2008/5/ma5.html; See also: Gessen, "O pravovom gosudarstve;" Dživelegov, *Prava i objazannosti graždan v pravovom gosudarstve*.

The very first article of the current Russian Constitution (*Konstitucija Rossijskoj Federacii*, 12 December 1993) reads, "The Russian Federation - Russia is a democratic federal law-bound State (*pravovoe gosudarstvo*) with a republican form of government." [396] Valerij Zor'kin, the President of the Russian Federation Constitutional Court, says that the concept, like the rest of the Russian legal tradition, is largely based on the German jurisprudence. According to Zor'kin, this influence has taken place since the transformations in the Russian legal system that began in the middle of the nineteenth century with the reforms of Aleksandr II.[397] However, as we could observe earlier in the thesis, the German influence started much earlier – at least with the reforms of Pëtr I.[398]

Though the concept of *pravovoe gosudarstvo*, or the Rechtsstaat, is closely related to the concept of the "rule of law," they are not equal.[399] While the familiar rule of law principle comes from the Anglo-American tradition, the *Rechtsstaat* represents its German counterpart,[400] which – as an evidence of the nonequality of the terms – is usually translated in English with phrases like "the legal state" or "the law-bounded state." [401] The concept of Rechtsstaat is deeply rooted in Immanuel Kant's philosophy.[402]

Michel Rosenfeld, a Professor of Human Rights at the Benjamin N. Cardozo School of Law, New York, describes the similarities and differences between the concepts of the rule of law and the *Rechtsstaat*. Both concepts have the same relationship between the state and the institutionalization of a legal regime, which means that the state

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[396] Article 1, Chapter 1 of The Constitution of Russian Federation of 12 December 1993 (English translation), official electronic version, accessed 18 February 2013, http://www.constitution.ru/en/10003000-02.htm.
[397] Valerij Dmitrievič Zor'kin, "Rule of Law and Legal Awareness," in *The World Rule of Law Movement and Russian Legal Reform*, ed. Francis Neate and Holly Nielsen (Moscow: Justitsinform, 2007), 46.
[398] Berest, *The Emergence of Russian Liberalism*, 110-112; Raeff, "The Well-Ordered Police State and the Development of Modernity in Seventeenth- and Eighteenth-Century Europe," 1234.
[399] Alberto Donati, *Giusnaturalismo e diritto europeo* (Milano: Giuffrè, 2002), 198-199. Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism," 116.
[400] Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy," 1318.
[401] Barenbojm, "Koncepcija Zor'kina – Tančeva o sootnošenii sovremennyh doktrin verhovenstva prava i pravovogo gosudarstva," 10.
[402] Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy," 1319; Barenbojm, "Koncepcija Zor'kina – Tančeva o sootnošenii sovremennyh doktrin verhovenstva prava i pravovogo gosudarstva," 6

bears a duty to wield its power based on the fundamental principles of legality. These principles, Rosenfeld writes, include the consistent implementation of generally applicable rules that are publicly disseminated, informing citizens of what actions are subject to legal sanctions, guaranteed by fair procedures.[403] Considering the differences between the rule of law and the *Rechtsstaat* concepts, the particular difference lies in the relationships between the state and the law. While the rule of law principle focuses on contrasting the state and the law, the Rechtsstaat is based on their symbiosis. Thus, in the *Rechtsstaat*, law is inseparably tied to the state representing the only legitimate channel through which the state can exercise its power. Rosenfeld claims there are not just one Rechtsstaat concept, but three different concepts, or rather three stages of its development. The first one is based on Kantian philosophy, which was applicable to any form of government, be it monarchic or democratic. The second one he associates with the late nineteenth century and Bismarck's Germany.[404] This notion is much more positivistic, deprived of a need for moral justification. Rosenfeld points out that this understanding of Rechtsstaat brought Germany to a crisis.[405] And the third one is the modern notion of Rechtsstaat, which combines both Kantian and positivistic approaches. On the one hand, it enshrines fundamental rights above ordinary laws, and, on the other hand, institutionalizes legality. In addition, Rosenfeld argues, the contemporary Rechtsstaat introduces new qualities, such as promotion of constitutional values and of welfare.[406]

In an article analyzing the achievements and shortcomings of the current Russian Constitution, as well as its philosophical foundations, Richard Sakwa speaks of the *pravovoe gosudarstvo* as a positivist term. He supports this idea by citing Donald D. Barry, who says that the notion of *Rechtsstaat* represents the state as the highest source of law. Following Harold J. Berman, Sakwa contrasts *pravovoe gosudarstvo* with the rule of law by referring to the former as to the "rule by law."[407] As opposed to *pravovoe gosudarstvo*, the rule of law, according to Sakwa, is founded on the

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[403] Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy," 1318-1319.
[404] Ibid.
[405] Ibid., 1324.
[406] Ibid., 1329.
[407] Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism," 116.

theory of natural law by suggesting that there is a law that is higher than the statutory, positive law.[408] However, it is not the Anglo-Saxon rule of law, but the German Rechtsstaat concept that the Russian jusnaturalists of the end of the nineteenth and the beginning of the twentieth century choose to use in order to describe the correlation of law and the state. Thus, it is rather remarkable how Russian prerevolutionary legal scholars have embraced a seemingly positivist concept and have incorporated it into their jusnaturalistic worldview.

For example, Evgenij Gnatenko in his PhD thesis entitled *The Philosophical Project of Law-bound State in the Prerevolutionary Russian Culture* (*Filosofskij proekt pravovogo gosudarstva v culture predrevoljucionnoj Rossii*) examines the peculiarities of adoption of the *Rechtsstaat* concept by Russian prerevolutionary jusnaturalists within the framework of religious philosophy, focusing, first of all, on the pioneering idealistic philosopher of the period, Vladimir Solov'ëv. Supporting his hypothesis by a quote from Novgorodcev, Gnatenko points out that Solov'ëv rejects the Slavophile utopia, appraising the Western ideal of the *pravovoe gosudarstvo*.[409] Gnatenko shows that Solov'ëv, while partly accepting the philosophy of such Slavophiles as Aleksej Homjakov, rejects their idea of incompatibility of the church with the state and law. Citing Novgorodcev, Gnatenko writes that Solov'ëv criticizes both the Slavophile idea that some peoples blessed by God do not need law, and Tolstoj's idea that law is harmful and immoral in any case. Thus, as Gnatenko shows, Solov'ëv concedes the possibility of a *pravovoe gosudarstvo* based on religion, as well as that based on autonomous ethics.[410]

Solov'ëv's idea of the right to a dignified existence leads him to developing a social liberalist approach, which should unflold in a society and state ordered by law. According to Sakwa, this drove him away from the revolutionary socialism and, instead, brought him closer to the Rechtsstaat liberals of Bismarck's Germany.[411]

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[408] Ibid.
[409] Gnatenko, "Filosofskij proekt pravovogo gosudarstva v kulture predrevolucionnoj Rossii," 46.
[410] Ibid., 96.
[411] Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism," 116.

According to Sergej Bulgakov, power cannot not be based on arbitrariness of the rulers. Not any content can be inserted into the coercive form of law, but only that content which corresponds to the moral norms. Power and law are conjoined and correlative. If law has its source in power, then the power comes to life through the law.[412] Here, the idea of symbiosis of the state and law, which, according to Rosenfeld, is intrinsic to the Rechtsstaat, is evident.

According to Sergej Andreevič Kotljarevskij, "the power must be limited by law in the name of justice."**[413]** This justice should be filled with active good will, deriving from the moral qualities of human beings. Kotljarevskij views pravovoe gosudarstvo as a transitional state to a higher form of community (*obščežitie*) that would correspond to the spiritual needs of people. For him, this transitional role of pravovoe gosudarstvo serves as its main justification. Kotljarevskij believes in Solov'ëv's idea of "organized compassion," seeing some signs of it to be already in effect.[414] Kotljarevskij also defines pravovoe gosudarstvo not by what it does, but by how it operates, leaving a lot of freedom for different kinds of social policy.[415]

Speaking about Kant, Kotljarevskij says that his notion of social contract is void of any historical connotations. He associates Kantian Rechtsstaat with republicanism and the separation of powers. Kotljarevskij criticizes, the Lockean and Pufendorf's historicist notions of social contract, arguing that according to it any state could be considered a pravovoe gosudarstvo.[416] On the other hand, he also denies the notion of state as the only possible source of law.[417]

As we can see, despite its positivistic implications, the idea of pravovoe gosudarstvo was organically incorporated into the Russian jusnaturalistic school of the edge of the nineteenth and the twentieth century. By combining moral foundations of law,

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[412] Sergej Nikolaevič Bulgakov, *Svet nevečernij: Sozercanija i umozrenija* (Moskva: Respublika, 1994), 337-338; Gnatenko, "Filosofskij proekt pravovogo gosudarstva v kulture predrevolucionnoj Rossii," 156.
[413] Kotljarevskij, *Izbrannye trudy*, 611.
[414] Ibid.
[415] Kotljarevskij, *Izbrannye trudy,* 554.
[416] Ibid., 297-298.
[417] Ibid., 274-275.

intrinsic to Kant and the jusnaturalistic theory, with the principles of legality and strong state power, characteristic of legal positivism, as well as introducing such an idea as the promotion of social welfare, with Solov'ëv's right to a dignified existence, the concept of pravovoe gosudarstvo developed by the Russian prerevolutionary legal philosophers seem to be rather close – according to Rosenfeld's classification – to the modern understanding of Rechtsstaat.

Marc Raeff, reflecting on various notions of liberalism and trying to apply them to the late period of Russian Empire, suggests equating it to the notion of Rechtsstaat (however, in rather positivist form) or, in his terms, with "legalist liberalism," which he describes as legality and judicial guarantees of individual and property rights. However, he claims that in the West the a priori acceptance of such fundamental legal norms as respect of individual rights and the inviolability of property was occurring on historical grounds, namely as an outcome of scientific and industrial revolutions. Meanwhile, in Russia, with its historical heritage of arbitrary autocracy and bureaucratic tyranny, Raeff argues, establishment of a Rechtsstaat could only be achieved by overthrowing the existing regime.[418] Basically, this is what happened with the Russian Empire. The regime was overthrown, however, the pravovoe gosudarstvo was not established. The reasons for this are so many and they are so entangled that within the context of the current research their analysis seems barely possible. However, in order to retain connection with the historical context, I am occasionally returning to these issues throughout the following chapters where I analyze the realization of jusnaturalistic and liberal ideas in the Russian political life and their implementation in the legislation of the period.

[418] Raeff, "Some Reflections on Russian Liberalism," 222-223.

CHAPTER IV: INFLUENCES OF JUSNATURALISTIC IDEAS ON THE EARLY TWENTIETH-CENTURY RUSSIAN LEGISLATION

4.1. IMPLEMENTATION OF JUSNATURALISTIC IDEAS IN THE PROGRAMS OF RUSSIAN POLITICAL PARTIES

Speaking about the practical significance of jusnaturalism in Russia, it seems appropriate to approach it as a political ideology. From this point of view, revived natural law theory in Russia of the edge of the 19th and 20th centuries can be analyzed in different functional levels: conceptualization, policy-making, and actualization.[419] On the conceptualization level the main concepts and principles are being worked out that characterize the values and ideals of the jusnaturalistic school. The previous chapter illustrates that on this level natural law was deeply elaborated by a number of prominent philosophers.

Concerning the policy level, the principles of the revived natural law are realized in the political programs and demands of political parties and their leaders. Alongside this, to a certain extent the mentioned level of functioning of the jusnaturalistic ideology also finds its implementation in legislation, which by embodying its ideas stimulates the society to embrace the ideas constitutional state and natural rights.

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[419] Vasilij Pavlovič Pugačëv, Aleksandr Ivanovič Solov'ëv, *Vvedenie v politologiju* (Moskva: Aspekt Press, 1997), 292; V.K. Kovalenko, and A.I. Kostin, "Političeskie ideologii: istorija i sovremennost'," *Vestnik Moskovskogo universiteta, Serija 12. Političeskie nauki* №2 (1997), 49.

This way, natural law gets institutionalized and formalized. This occurs in the following forms: legal consciousness,[420] i.e. when naturally and socially conditioned norms are recognized and become prototypes of positive law; legislative initiative,[421] which comes from members of political elite or leaders of political parties and movements; actual legislation,[422] when the principles of natural law become embodied in positive law. The policy level of the natural law doctrine in Russia of the edge of the 19th and 20th century conditioned by state reforms and revolution had its peak in the 1905-1907. This period is often considered to be the period of Russian constitutional,[423] or rather semi-constitutional[424] monarchy, which provided for a certain level of institutionalization of the jusnaturalistic ideas in politics, state-building and legislation.

The ideas of the revived natural law were accepted by a number of leading Russian liberal parties. Some of them reproduced, even if in different ways, the notions of constitutional state, and civil and political rights. For example, *Konstitucionno-demokratičeskaja partija* nicknamed Kadety ("Constitutional Democratic Party," the Kadets) paid much attention to the basic rights of the citizens. The members of the party included such prominent contributors to jusnaturalism as Pëtr Struve,[425] Lev Petražickij,[426] and Pavel Novgorodcev,[427] the principal Russian legal positivist Gabriel' Šeršenevič,[428] as well as Sergej Muromcev,[429] the advocate of sociological approach to law and the future chairmen of the first State Duma. The Kadets sought the inclusion of basic democratic principles into the Fundamental Laws of the Russian Empire and to provide them with judicial protection.[430] Their program establishes

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[420] Ibid.
[421] Ibid.
[422] Ibid.
[423] Valerij Vinogradov, "Stanovlenie konstitucionalizma v monarhičeskoj Rossii (synopsis of a PhD diss. Volgogradskaja akademija gosudarstvennoj služby, 2002).
[424] Lieven, ed., *The Cambridge History of Russia. Volume II*, 446.
[425] Millar, ed., *Encyclopedia of Russian History*, 319-320.
[426] "Petražickij," *Akademik*.
[427] Vladik Sumbatovič Nersesjanc, *Istorija političeskih i pravovyh učenij, Učebnik dlja vuz*ov, izd. 2e (Moskva: NORMA-INFRA, 1998), 599.
[428] "Šeršenevič," *Peoples.ru*, accessed 23 May 2012, http://www.peoples.ru/state/lawyers/gabriel_shershenevich/.
[429] Sergej Aleksandrovič Stepanov, "Kadety (Konstitucionno-demokratičeskaj partija)," *Vestnik Rossijskogo universiteta družby narodov. Serija: Politologija*, №8 (2006): 82.
[430] Millar, ed., *Encyclopedia of Russian History*, 319-320.

these principles as the following. First of all, the Kadets proclaim the principle of equality of the Russian citizens before the law regardless of sex, belief or nationality, supported by abolishment of all class differences and property rights restrictions between social groups ("Poles, Jews and any other separate population group without exception"). Next, every citizen has to be provided with freedom of conscience and religion. There should be no persecution for profession of religion or beliefs, for changing or abandoning one's creed. Performance of religious rites and propagation of religious beliefs should be free, unless the accompanying actions contain a criminal offence. The Kadets also promote secularism. Next, they support freedom of expression. Their program says that everyone is free to express his/her thoughts verbally or in writing, as well as to make them public and to disseminate them by printing or elsewise. The Constitutional Democrats are strictly against censorship in any form. Any offences caused by means of speech or print should be addressed only by court. The Kadets also advocate freedom of assembly, both indoors and outdoors, and freedom of associations, which can be organized without an official permit. Individuals' and groups' right of petitions should be recognized, they believe. The Constitutional Democrats pay especial attention to personal immunity. They declare immunity of person and of residence, prohibiting intrusion in private property, search, seizure and opening of private correspondence not according to the law and without a court order. A detained person within twenty-four hours for cities and other seats of judiciary or three days for other areas of the empire must be either set free or sent to the judiciary. As a guarantee for this, the Kadets vest detainees with a right to compensation for any unfounded detention or a detention exceeding statutory period. Next, nobody should be prosecuted and punished other than according to the law and by legitimate trial; no emergency courts should be allowed. In addition, the Kadets advocate freedom of movement, including the right to go abroad. The platform of the Kadets demands that all the mentioned rights should be included into the Fundamental Laws of the Russian Empire and be guaranteed by the court.[431]

[431] Polnyj sbornik platform vseh russkih političeskih partij. S priloženiem vysočajšego manifesta 17 oktjabrja 1905 g. i vsepoddanejšego doklada grafa Vitte (Moskva: Gosudarstvennaja publičnaja istoričeskaja biblioteka Rossii, 2001), 56-65.

The platform of the Democratic Union of Constitutionalists (Demokratičeskij sojuz konstitucionalistov) also contains a set of the basic rights and freedoms that should be guaranteed to the population. The Union promises to develop and protect as national heritage the liberties proclaimed in the October Manifesto. This party advocates abolition of class privileges, equality of all Russian citizens before the law, and advance and guaranteeing of the fundamental principles of civil freedom. These fundamental principles, according to them, include immunity of person and residence; freedom of movement; freedom of trade; freedom of speech and press; freedom of assembly, associations and petitions; and abolition of censorship. They also advocate wider development of local self-government and its advance to all areas of the Russian Empire.[432] Similar set of rights and liberties can be found in the program of the Union of 17 October (Sojuz 17-go oktjabrja), or the Octobrists (*Oktjabristy*).[433]

The Party of Free-Thinkers (*Partija svobodomysljaščih*) also has a similar set of rights in their platform. Alongside freedom of expression verbally or by print, they also highlight the freedom of artistic expression. Speaking about equality, their platform specifically mentions educational differences, as well as specifically highlighting equal succession rights for men and women, as well as liquidation of patronage over the peasantry.[434]

Universal civil equality, the fundamental rights and liberties, the need for establishment of certain forms of democracy, the significance of political reforms in Russia are also recognized by the programs of the Party of Socialist-Revolutionaries (*Partija socialistov-revoljucionerov*) or the SRs (*esery*),[435] the Progressive-Economic Party (*Progressivno-ekonomičeskaja partija*),[436] the Russian Social Democratic Labor Party (*Rossijskaja social-demokratičeskaja rabočaja partija*), [437] the Moderate Progressive Party (*Umerenno-progressivnaja partija*)[438] and others. However, these

[432] Ibid., 66-73.
[433] Ibid., 91-101.
[434] Ibid.,30-55.
[435] Ibid., 17-27.
[436] Ibid.. 81-85.
[437] Ibid.. 9-16.
[438] Ibid., 75-80.

tendencies were accompanied by simultaneous forming of conservative parties loyal to the government and opposed to the democratic and liberal ones.[439]

4.2. THE MANIFESTO OF 17 OCTOBER 1905: A STEP TOWARDS CONSTITUTIONAL MONARCHY

On the 17 October 1905, Russian Emperor Nikolaj II, under the threat of worker and peasant unrest, enacted The Manifesto on the Improvement of the State Order (*Manifest ob usoveršenstvovanii gosudarstvennogo porjadka*),[440] signifying the first serious fruit of the Russia's long struggle for constitutionalizing state power.[441] The October Manifesto is a document rather hard for formal classification. It does not really fit into traditional framework of positive law, since it only expressed intentions to perform certain actions, but not the actions per se. From the formal standpoint, it did not limit the autocracy, because the creation of a representative elective body was not actually enacted but only intended. However, in the Manifesto Emperor Nikolaj II promised to follow the constitutional course, and he was bind by this promise. The power of the Russian Emperor, while remaining unrestricted de jure, became limited de facto.[442]

Though not being a law formally, the October Manifesto played a key role in Russian lawmaking. It defined all the constitutional legislation of the subsequent period in Russia. The Manifesto was neither a constitution nor even a constitutional law, but by its juridical features it resembled the European constitutional charters that stimulated popular participation and recognition of natural rights during the periods of constitutional reforms. [443]

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[439] Isaev, *Istorija gosudarstva i prava Rossii*, 486.
[440] *PSZRI, sobranie 3-e (1881-1913)*, tom 25, čast' 1, № 26803.
[441] Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism," 117.
[442] R.M. Dzidzoev, "Pervyj konstitucionnyj dokument Rossii," *Gosudarstvo i pravo* №6 (1997), 112.
[443] Igor Kravec, *Konstitucionalizm i rossijskaja gosudarstvennost' v načale XX veka* (Tomsk: Tomskij gosudarstvennyj universitet, 1999), 87

The October Manifesto of 1905 became the first document to embrace all estates, as it declared basic political rights and liberties that were to be acknowledged for all subjects of the Russian Empire regardless of their social status. In the words of Kravec, if civil slavery was abolished in Russia by the Manifesto of 19 February 1861, the Manifesto of 17 October 1905 abolished political slavery.[444]

The Emperor publicly pledged to acknowledge "the essential foundations of civil liberty based on real personal immunity, freedom of conscience, speech, assembly and association."[445] It was the first time such provisions were declared in Russian legislation, even though they seem to concern political liberty rather than civil liberty. The principal concessions of the Emperor was the promise to establish an elective legislative body, the State Duma (*Gosudarstvennaja Duma*), and to recognize electoral rights of social groups who did not have these rights recognized for them, promoting the development of universal suffrage. The Manifesto also said that popular representatives should have possibility to oversee the lawfulness of government activity.

The October Manifesto was a document of big political significance. It can be viewed as certain a success of liberal-democratic ideology influenced by jusnaturalistic ideas. However, the Emperor, officially declaring rights and liberties of Russian subjects and the beginning of development of constitutional system, did not give tangible guarantees of those.

Politician Maksim Maksimovič Kovalevskij in his work *Russian Constitution* evaluates the content of the October Manifesto. He acknowledges the importance of the rights liberties promised in the Manifesto. Appealing to the experience of Western countries, he believes these rights and liberties to be indispensable for a constitutional order and for conscious and sincere expression of needs and desires by the people. However, he admits: "Our 'great charter of liberties,' like any other charter of a

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[444] Igor Aleksandrovič Kravec, "Konstitucionalizm i rossijskaja gosudarstvennost' v načale XX veka" (PhD diss., Tomskij gosudarstvennyj universitet, 1999), 87
[445] *PSZRI, sobranie 3-e (1881-1913)*, tom 25, čast' 1, № 26803.

similar kind, will become reality only when the principles that it promises will be brought to life by set of new legislative acts."[446]

For example, freedom of conscience promised by the October Manifesto could not be considered fully established in the state, according to Kovalevskij, since the status of new religious sects was far from that of the Orthodox Church and of the Old Believers. The former still lacked the possibility to propagate their beliefs. Kovalevskij believed that in Russia full equality of people in the issues of faith was not possible until the principle of separation of church and state would be brought at the forefront of the reforms.[447]

Another freedom promised by the October Manifesto is freedom of assembly. Kovalevskij believes that implementation of right of assembly could compensate for the imperfection of the Russian electoral system.[448] Freedom of association mentioned in the Manifesto Kovalevskij defines as the right to establish small or large communities designed for continuous existence and aimed at reaching lawful goals by the means of common effort.[449]

Claims that the October Manifesto became Russian constitution[450] seem to be an exaggeration. The Manifesto on its own did not constitute the transition from autocracy to limited monarchy but acted as a precursor to it. The transition itself depended on the actual state of affairs, first of all on whether the convocation of the State Duma would take place,[451] and on how the declared rights and liberties would be guaranteed.

Minutes of the Special Meeting under the Emperor's personal guidance dedicated to the draft law on the new establishment of the State Council and on the changes

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[446] Maksim Maksimovič Kovalevskij, "Russkaja konstitucija," in *Antologija mirovoj pravovoj mysli: v 5 tomah. Tom 5*, ed. Igor Andreevič Isaev (Moskva: Mysl', 1999), 292-298.
[447] Ibid.
[448] Ibid.
[449] Ibid.
[450] K.K. Pažitnov, "K voprosu o russkoj konstitucii," *Obrazovanie* № 12 (1907), 95, 98; V. Nečaev, "Manifest 17-go oktjabrja i forma pravlenija," *Poljarnaja zvezda* № 4 (1906), 294.
[451] N.I. Lazarevskij, *Lekcii po russkomu gosudarstvennomu pravu. Tom 1: Konstitucionnoe pravo, 2-oe izd.* (Sankt-Peterburg: Tipografia akcionernogo obšestva "Slovo," 1910), 107.

concerning the establishment of the State Duma reflects the opinion of count Sergej Vitte, the Chairman of the Council of Ministers. His opinion was also supported by some of the other members of the Meeting. First of all, Vitte did not agree that the October Manifesto represented a constitution. Concerning the State Council reform, he noted that it was aimed not at the advance of constitutional principles, but to ensure the conservative state order, because the reform was going to limit the competence of the Duma.[452] Vitte's opinion on some other issues regarding the October Manifesto also contained this idea that reforms should not be feared of, but rather be used to reinforce the existing order.[453]

The October Manifesto of 1905 due to its brevity does cover all aspects concerning future constitutional development of the state. It bypasses many important issues. For example, when speaking about the status of the State Duma, there is nothing said about its budgetary competence. The list of the "basic civil liberties" lacks such essential constitutional principle as inviolability of private property. Many researchers also pointed out that such democratic principle as equality before the law was also missing.[454]

Meanwhile, after the October Manifesto the notions of "essential foundations of civil liberty" ("*nezyblemye osnovy graždanskoj svobody*"),[455] and of constitutional state started gaining popularity not only among jurists, but also among politicians.[456] This idea embodied in the movement towards political and legal reforms. Constitutional state began to be regarded as an alternative to tyranny and dictatorship.[457]

The Manifesto can be viewed as a sign that Russian government, as it was deciding between two possible scenarios of military dictatorship and liberal concessions,

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[452] Bella Galperina et. al., eds., *Sovet Ministrov Rossijskoj Imperii. Dokumenty i materialy. 1905-1906* (Leningrad: Nauka, 1990), accessed 15 July 2012, http://lib.rus.ec/b/123848/read.
[453] Ibid.
[454] N.I. Vasil'eva, G.B. Gal'perin, A.I. Korolev, *Pervaja rosijskaja revoljucija i samoderžavie (Gosudarstvenno-pravovye problemy)* (Leningrad: Izdatel'stvo Leningradskogo universiteta, 1975), 87.
[455] *PSZRI, sobranie 3-e (1881-1913)*, tom 25, čast' 1, № 26803.
[456] See, for example: The platform of the Union of the 17 October in Polnyj sbornik platform vseh russkih političeskih partij, op.cit., 91-92, 94,100; the platform of the Democratic Union of Constitutionalists, ibid., 66-67, 69.
[457] Millar, ed., *Encyclopedia of Russian History*, 1087.

started to realize the need for reforms that would act as a first step towards resolution of the revolutionary situation in favor of constitutional system and recognition of basic rights and liberties of the citizenry.[458] Establishing a constitution in Russia and a system of effective laws in support of it was the first necessary condition for building a democratic state that would embody the ideas of the natural law doctrine.

The ideas of freedom, civil and political rights and of *pravovoe gosudarstvo* as the basis of the revived natural law found their institutionalization in the October Manifesto of 1905. This supports the idea that the natural law doctrine in conjunction with constitutionalism within the framework of Russian liberal-democratic thought can be regarded as ideological basis for the possible attempts of political and legal reforms towards the building of democratic state and the forming of civil society in Russia with a true respect for natural rights.

However, it seems appropriate to agree with Bogdan Kistjakovskij who points out that from the text itself the Manifesto on the Improvement of the State Order does not actually consist of legal norms.[459] In the Manifesto the Emperor explicitly assigns "to the responsibility of the government" the execution of his will. This statement is followed by the list of what is to be done. Kistjakovskij concludes that still laws should be passed by the force of which the principles listed in the Manifesto would be implemented.[460] Thereby the regulations of the October Manifesto became legally valid only after introduction of changes into the Fundamental Laws of the Russian Empire on 23 April 1906.[461]

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[458] Ibid., 1080.
[459] Bogdan Aleksandrovič Kistjakovskij, *Gosudarstvennoe pravo (obščee i russkoe)* (Sankt-Peterburg: Russkij hristianskij gumanitarnyj institute, 1999), 521.
[460] Ibid.
[461] *PSZRI, sobranie 3-e*, op. cit., tom 26, čast' 1, № 27805.

4.3. ESTABLISHMENT OF A REPRESENTATIVE BODY

Though the period of constitutional reforms in Russia was very short, some principles of the October Manifesto of 1905 were implemented, even if not always very willingly. Thus, on the 6 August 1905, the Tsar issued the Imperial Manifesto On the Establishment of the State Duma (*Vysočajšij Manifest Ob učreždenii Gosudarstvennoj Dumy*)[462] together with the Regulations on the State Duma Elections (*Položenie o vyborah v Gosudarstvennuju Dumu*),[463] with which he tried to establish a consultative (*"zakonosoveščatel'nyj"*) rather than a legislative body promised in the October Manifesto. In addition, the voting right was limited, as it included only three electoral colleges (*kurija*), namely the landowning, the urban, and the peasant colleges. This Manifesto caused a wide public discontent, thus, new decrees followed soon.

The Decree On Changing of the Regulations On the State Duma Elections (*Ukaz "Ob izmenenii položenija o vyborah v Gosudarstvennuju Dumu"*) of 11 December 1905[464] changed the number of electoral colleges (*kurija*) from three to four, adding labor college to the landowning, urban and peasant colleges, as well as increased the number of voters of the urban college. However, it was still far from universal suffrage, since the electorate did not include women, military personnel, young people under twenty five, and some of the national minorities (for example, nomadic peoples). Elections were indirect and consisted of two stages for landowners and townsfolk, and of three and four stages for working people and peasants respectively. With this new system a total of 524 members were elected, including 488 from the fifty three provinces of the European part of Russia and 36 from distant national regions in accordance with local customs.[465]

The Manifesto On the Changing of the Establishment of the State Council and the Revision of the Establishment of the State Duma (*Manifest Ob izmenenii učreždenija*

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[462] *PSZRI, sobranie 3-e*, op. cit., tom 25, čast' 1, № 26656.
[463] Ibid., № 26662.
[464] *Ibid.,* čast' 2, № 27029.
[465] Ibid.

Gosudarstvennogo Soveta i peresmotre učreždenija Gosudarstvennoj Dumy)[466] of 20 February 1906 together with the Ukaz On the Reorganization of the Establishment of the State Council (*Ukaz O pereustrojstve učreždenija Gosudarstvennogo Soveta*)[467] and the Establishment of the State Duma (*Učreždenie Gosudarstvennoj Dumy*)[468] dated the same day defined the new role of the State Council as well as the structure and competence of the newly established State Duma, which together formed the bicameral Russian parliament. The State Council was transformed from a legislative body subordinate to the monarch into an upper chamber of the parliament with a right of veto on the decisions of the Duma. The Council consisted of ninety eight members, among which: fifty were elected from the principal *zemstvos*, six from the Orthodox Church, six from the Academy of Sciences, twelve from exchange committees, twelve from trade committees, and twelve from manufactories.[469]

Another act crucial for the functioning of the State Duma is the act that established a multi-party system. In Russia, for a long time any attempt to create political party would be prosecuted as a crime against the state. For this reason, at first, they were formed illegally. The legalization of associations and unions took place after the October Manifesto and was regulated by the mentioned provisional regulations of assemblies issued on 4 March 1906.[470] According to the regulations, an association is a consolidation of several individuals who did not pursue the purpose of joint profit making but a so-called "ideal purpose." In turn, a union was defined as a consolidation of several associations, which could be also reached through their authorized representatives. This act signified the forming and development of parliamentary political parties – a rather significant step in the conditions of the autocratic Russia.[471]

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[466] *PSZRI, sobranie 3-e*, op. cit., tom 26, čast' 2, № 27423.
[467] Ibid., № 27425.
[468] Ibid., № 27424.
[469] N.P. Eroškin, Istorija gosudarstvennyh učreždenij dorevoljucionnoj Rossii (Moskva: Vysšaja škola, 1983), 266.
[470] Imennoj vysočajšij ukaz Pravitelstvujuščemu Senatu "O vremennyh pravilah ob obšestvah i sojuzah"ot 4 marta 1906 g., in Sobranie Uzakonenij, 1906, otd. 1, № 48, 308.
[471] Warren B. Walsh, "Political Parties in the Russian Dumas," *The Journal of Modern History*, 22-2 (1950): 144.

The competence of the State Duma included preliminary development of draft laws, approval of the state budget, discussion of the issues of railway construction and establishment of stock-companies. The Duma was elected for five years. The deputies were unaccountable to electors; their removal could be performed by the Council. In addition, the monarch had a right to dismiss the Duma. The right of legislative initiative belonged to ministers, panels of deputies and the State Council. State Council, being the upper chamber of the parliament, had the same rights as the Duma. All the laws after being approved by the Duma were passed for the approval of the Council. Only after the laws were approved by both chambers, they could be presented to the Emperor for his final approval.

The first Russian State Duma began its work on 23 April 1906. Since its first days the Duma tried to exert pressure on the monarch. Among the demands contained in the first address to the monarch by the Duma deputies there were such demands of cancellation of emergency laws, compulsory alienation of privately owned lands, complete amnesty of political prisoners, and abolition of capital punishment.[472]

The most acute conflict between the Duma and the government occurred around the agrarian issues. The government officials argued that projects of the Constitutional Democrats (Kadets) and the Laborists (or Trudoviks, *Trudoviki*) would provide peasants with a very small land increment, while the inevitable destruction of landowner farms would ruin the economy. In June 1906 the government made a public report concerning agrarian policy, in which the principle of land confiscation was rejected. At the same time, the Duma stated that it would not abandon this principle and demanded resignation of the government. On 8 July 1906 the Tsarist government dismissed the Duma, claiming that it only was provoking the revolt instead of calming the people. The First Duma functioned for seventy-two days.[473]

The Second Duma had much larger leftist majority than the first one, partly due to the fact that the Bolsheviks, the Mensheviks and the Socialist Democrats abandoned their

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[472] F.I. Kalinyčev, "Gosudarstvennaja Duma v period pervoj russkoj revoljucii (1905-1907)" (synopsis of a PhD diss.,,Moskva, 1965), 25.
[473] Isaev, *Istorija gosudarstva i prava Rossii*, 507-508.

boycotting of the Duma elections. The State Duma of the second convocation began its work on 20 February 1907. Between the two Dumas some legislative elaborations were made under the direction of Pëtr Stolypin, who became the new Prime Minister in July 1906, replacing the extremely conservative and very unpopular Ivan Goremykin. Unlike his predecessor, Stolypin was a reformist, though still devoted to the monarch. His main focus was on the agrarian reform, with which he planned to improve the economical conditions of peasantry and rely on this class' support for the social order under authority of the monarch.[474]

The second State Duma was also short-lived, as it existed only for a one hundred and two days, and has not succeeded in making much reforming. Still reluctant in its cooperation with the government, the Duma was dismissed by Stolypin on 16 June 1907. The official reason for the dismissal was an accusation of preparing an armed uprising. Together with the Manifesto on the Duma dismissal there were published new Regulations on elections, which was made in violation of the October Manifesto 1905 and thus signified a coup known as the Coup of June 1907 (in Russian it is usually referred to as "The Coup of 3 June," as it was this date according to the Julian calendar) and thus the end of the Russian Revolution of 1905-1907, also known as the First Russian Revolution. The coup was organized by Stolypin.[475]

[474] Pëtr Arkad'evič Stolypin, "Pervoe vystuplenie vo Vtoroj Gosudarstvennoj Dume v kačestve predsedatelja Soveta Ministrov 6 marta 1907," in *Antologija mirovoj pravovoj mysli: v 5 tomah. Tom 5*, ed. by Igor' Andreevič Isaev (Moskva: Mysl', 1999), 204.
[475] A.I. Šingarev, "Zakonodatel'naja iniciativa členov Gosudarstvennoj Dumy i Gosudarstvennogo Soveta,," *Russkaja mysl'* №9-10 (1912), 121.

4.4. THE FUNDAMENTAL LAWS OF THE RUSSIAN EMPIRE OF 1906: THE FIRST RUSSIAN CONSTITUTION

The new edition of *Osnovnye Gosudarstvennye Zakony Rossijskoj Imperii* (the Fundamental Laws of the Russian Empire) issued on 23 April 1906[476] significantly revised the original document of 1832 and became de facto the first Russian constitution. While, as Richard Sakwa rightly notices, the *Svod zakonov Rossijskoj imperii* ("the Code of Laws of the Russian Empire") of 1832[477] vested the monarch with the absolute power over the legislature, executive and judiciary,[478] the 1906 Fundamental Laws, most importantly, limited the autocratic power of the Tsar, as he had to share it with a two-housed parliament. The Fundamental Laws included most of the recent legislation of constitutional nature.[479]

At the same time it is a very peculiar and controversial document. Despite all the changes in Russian political life, the Fundamental Laws provided for the "Supreme Sovereign Power" ("*Imperatoru Vserossijskomu prinadležit Verhovnaja Samoderžavnaja vlast'*")[480] of the emperor (or the empress, in case of inheritance). There were rudiments of separation of powers and certain limits to the monarch's absolute power. As article 7 reads, the Tsar carried out legislative power together with the State Council and the State Duma.[481] Any law had to be approved by both the Council and the Duma, as article 86 said. A law could be repealed only by statutory force (art. 94).[482] In addition, the Fundamental Laws included the principle of

[476] *SZ (izd. 1906 g.)*, tom 1, čast' 1.
[477] *SZ (izd. 1832 g.)*, tom 1, čast' 1.
[478] Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism," 116.
[479] F.I. Kalinyčev, ed., Gosudarstvennaja Duma v Rossii v dokumentah i materialah (Moskva, 1957), 130.
[480] *SZ (izd. 1906 g.)*, tom 1, čast' 1.
[481] Ibid.
[482] Ibid.

countersign, which is a constitutional monarchy attribute.[483] However, the tsar still fully controlled administrative and judiciary power.[484]

Thus, a law could be enacted only with agreement of all the three mentioned public authorities, which means that the tsar could not fulfill his legislative right without the Duma's will, and vice versa. Even if the emperor still had a power to issue decrees, this power was limited to the periods between parliamentary sessions, and had to be conditioned by force-majeure; these decrees (*ukazy*) had to be submitted to the Duma within a two-month period.[485]

This decree procedure did not apply to the Fundamental Laws, neither did it to the establishment of the State Council and the State Duma. Besides this, according to the Fundamental Laws, the tsar could not change election laws[486] (however, it did not stop the emperor from the unconstitutional dismissal of the second Duma on 16 June 1907 and introduction of new voting procedure, which was caused by the tsar's desire for having a more loyal Duma).[487] In other words, under the law the emperor did not possess unlimited legislative power anymore.

Certain provisions of the Fundamental Laws show that the Russian Empire accepted and declared some ideas of constitutional state. For example, article 84 says that the Russian Empire is governed "upon a firm foundation of laws that have been properly enacted" (*"na tvërdyh osnovanijah zakonov, izdannyh v ustanovlennom porjadke"*).[488]Article 85 reads that the law is equally applicable to all Russian citizens and foreigners without any exceptions.[489] According to the Fundamental Laws, a law could not be retroactive (article 89)[490] and could become effective only after its official promulgation by the Governing Senate (article 91).[491]

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[483] Ibid.
[484] S.K. Amirbekov, "K voprosu konstitucionnogo stroja Rossii v načale XX v.," *Pravo i žizn'* № 24 (1999): 38-43.
[485] *SZ (izd. 1906 g.)*, tom 1, čast' 1.
[486] Ibid.
[487] Millar, *Encyclopedia of Russian History*, 1287-1288.
[488] *SZ (izd. 1906 g.)*, tom 1, čast' 1.
[489] Ibid.
[490] Ibid.
[491] Ibid.

However, another attempt to separate the state power in Russia into three branches according to the ideas of Charles Montesquieu's was not completed. Previously, an idea to implement the principle of separation of powers was suggested by Mihail Speranskij, the advisor of tsar Aleksandr I, when the former was preparing a project of constitutional reforms in 1809.[492] At first glance, the Fundamental Laws speak of legislative, judicial and administrative power; however, the legislative power was only partially shared by the emperor with the State Council and the State Duma, while both the administrative and judicial power were totally under his control. The Fundamental Laws explicitly state that the emperor possessed total administrative power (article 10),[493] and judicial power was "carried out in the name of His Imperial Majesty (*Ego Imperatorskogo Veličestva*)" (article 20).[494] In addition, the tsar had a right to dismiss the State Duma, which also demonstrates his advantage over the parliament. At the same time, a decisive achievement of the incipient Russian democracy was the accrediting of budget to the competence of the Duma,[495] which certainly weakened the power of the monarchy.

There were also other signs indicating the perspective of establishment of a separation of powers in Russia. In theory, the establishment of the State Duma demanded organization of a government based on a Western European model, which would not only cooperate with the Duma, but also be accountable to it. The tsar's royal command to the Cabinet of Ministers Chairman Sergej Vitte of 18 October 1905 was connected to this issue. In this document emperor Nikolaj II asked count Vitte to assume the measures for the consolidation of the ministers and pointed the necessity of passing a law on the Council of Ministers.[496] Such approach suggests creation of a new ministry board with a different status and competence.

By providing for the basic democratic institutes, including the rights and liberties of citizen, system of government, electoral system, the Fundamental Laws of the

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[492] Millar, *Encyclopedia of Russian History*, 1446-1447.
[493] *SZ (izd. 1906 g.)*, tom 1, čast' 1.
[494] Ibid.
[495] Ibid.
[496] F.I. Kalinyčev, ed., *Gosudarstvennaja Duma v Rossii v dokumentah i materialah* (Moskva, 1957), 91.

Russian Empire of 1906 were typologically similar to constitutional acts of the European countries where semi-constitutional monarchy was established with prevalence of monarchical elements. Before the reforms of the beginning of the 20th century a person in Russia did not enjoy those fundamental rights and liberties that were already acknowledged in the democratic states. It is possible to speak about proclamation of rights and liberties only since the Manifesto of 17 October 1905. The rights and liberties promised by the October Manifesto were legislatively established in a series of acts, including the Fundamental Laws of the empire in its 23 April 1906 version. The whole Chapter XVIII of the Fundamental Laws is dedicated to the rights of Russian citizens.[497]

The Code of 1832[498] did not contain anything like that. The mentioned chapter is notable, as well as the first chapter, for vividly reflecting the contradictions of the period of the First Russian Revolution. Its analysis could be a subject of a separate research. Here I would only like to notice that a characteristic feature of this edition is numerous affirmations of the supremacy of law. The fifteen articles of the chapter formally proclaimed the rights of citizens, such as right of assembly, right of association, right to express and to propagate one's thoughts verbally or in written form; and all this was provided within statute-established limits.[499]

The Fundamental Laws guaranteed Russian citizens the following rights and liberties. Articles from 72 to 74 guaranteed personal immunity and protection from arbitrary persecution.[500] Inviolability of residence was proclaimed in article 75.[501] According to article 76 Russian citizens possessed freedom to chose place of residence and profession, to have property and to travel abroad. However, this article also mentions that these rights could be subject to certain limitation that would be imposed by specific laws.[502] Article 77 acknowledged the inviolability of private property.[503] Freedom of assembly and association was acknowledged by articles 78 and 80

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[497] *SZ (izd. 1906 g.)*, tom 1, čast' 1.
[498] *SZ (izd. 1832 g.)*, tom 1, čast' 1.
[499] *Zakonodatelnye akty perehodnogo vremeni. Izd. 3* (Sankt-Peterburg, 1909), 632.
[500] *Svod Zakonov Rossijskoj Imperii, tom 1, čast' 1* (1906).
[501] Ibid.
[502] Ibid.
[503] Ibid.

respectively.[504] Article 79 provided for freedom of speech and press.[505] Finally, freedom of religion was provided by article 81.[506] There is also an article saying that foreigners residing in Russia enjoy the rights and liberties, (however, "within limitations established by law").[507] Only two articles were dedicated to the obligations of Russian subjects. Article 70 imposed universal male military service.[508] Article 71 reads that every Russian subject was obliged to pay taxes and dues. Interestingly, the latter article also has a formula that practically provided the government with a wide possibility of imposing various types of obligations at any times, since it vaguely mentions "other duties" that Russian subjects were obliged to fulfill, with these duties being regulated by lawful decrees.[509]

It should be noticed that the equality principle was not proclaimed. The principle of equality before the court was acknowledged by Aleksandr II's Judicial Regulations (*Sudebnye ustanovlenija*)[510] as far back as in 1864, but full civil equality still was not established. It is only possible to speak about the notion of equality in general in relation to the rights and liberties proclaimed in the Fundamental Laws of the Russian Empire of 1906.

It is clear that the real meaning of the rights and liberties acknowledged by the Fundamental Laws depended on the current legislation that would interpret and specify those rights and liberties, and on the corresponding administrative practice. Time and much effort were needed in order to adjust legislation and administrative practice in Russia in total accordance with constitutional principles and ideas of the revived natural law. Unfortunately, the liberals the Duma did not have much time, as the period of reforms has ended very soon. However, there were some acts of democratic nature enacted even before the convocation of the Duma and the 1906 revision of the Fundamental Laws, such as the decrees concerning print, unions,

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[504] Ibid.
[505] Ibid.
[506] Ibid.
[507] Ibid.
[508] Ibid.
[509] Ibid.
[510] *PSZRI, sobranie 2-e (1825-1881)* (Sankt-Peterburg: Tipografija II Otdelenija Sobstvennoj Ego Imperatorskogo Veličestva Kanceljarii, 1867), tom 39, čast' 2, № 41475

associations, and assemblies adopted as provisional measures in expectation of their regulation by the Duma. These also can be regarded as serious steps taken by Russian autocracy, even if reluctantly, towards democratization of the society.

While giving hope to some, the Constitution brought discontent for others, with its incompleteness. For example, Richard Sakwa cites Max Weber calling it a "sham constitution," because it did not really limit the power of the Emperor, who refused to submit himself to its provisions.[511] The Fundamental Laws of the Russian Empire were also widely criticized in French press.[512] However, Sawka claims, the Russian Constitution of 1906 should not be dismissed so fast. First of all, he writes, it introduced constitutional monarchy, even if one with considerable privileges in legislature. The monarch did not have unlimited (*neograničennaja*) power. He adds that it is the social context rather then the document itself that should be blamed in the failure of constitutionalism in the Russian Empire.[513]

In any case, on the 16 (3) 1907 the Second Duma was dismissed, and the new electoral law, enacted in contravention of the Constitution, effectively ended the short period of constitutional monarchy in Russia, signifying another period of reaction.[514]

The analysis of the legal reforms of 1905-1907 shows that during this period the problem of natural rights was not fully resolved on constitutional and legislative levels. Still, theoretical works of Russian legal scholars, such as the prominent jurists and members of the State Duma Lev Petražickij and Pavel Novgorodcev, made a significant contribution to the theoretical designing of liberal legislation on jusnaturalistic grounds. The views of some of the Russian jurists of the studied period embrace a wide range of natural rights issues and can be easily considered progressive not only for their own time.

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[511] Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism," 117.
[512] Alzona Encarnación, *Some French Contemporary Opinions of the Russian Revolution of 1905* (New York: Longmans, Green & Co., 1921), 100.
[513] Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism," 117.
[514] Arkady Joseph Sack, *The Birth of the Russian Democracy* (New York: Russian Information Bureau, 1918), 158.

In fact, if the reactionist maneuver did not happen and the Duma would continue to function as it did, some really interesting projects could emerge, which had all chances to reform the Russian legal system. For example, shortly before the coup, there was a legislative initiative introduced to the Duma that suggested abolishment of the system of social classes. The draft law acknowledged that the full-scale development of the equality and personal freedom principles requires the abolishment of classes. This way, Russian citizens would not have unequal rights depending on their descent.[515] However, the second Duma did not have time to pass this law, while the third Duma was already too reactionary for such democratic reformation.

Another example is the draft law On Personal Immunity (*O neprikosnovennosti ličnosti*)[516] was being elaborated, headed by Novgorodcev, with Petražickij being one of its masterminds. The law would open with a compact formula – Every person is immune (*"Ličnost' každogo neprikosnovenna"*).[517] Aronov points out, that the whole process of development of this project was guided by an urge to find balance between absolute power of the state and arbitrariness of the individual will.[518] The draft law was elaborated in the First, and then in the Second Duma, but due to the unfortunate fate of both the Dumas, was never passed.[519] Petrazyckij believed this act to be among the most important and necessary issues to be secured on the legislative level requiring revision and modification of a wide range of legislative acts. He sought to be personally involved not only into drafting of the law, but also into the broader process of revision the associated legislation.[520] Petražickij also became the main speaker for the recognition of the political rights of women.[521] This was supposed to be realized through equality of succession rights, of rights on education, of rights

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[515] *Gosudarstvennaja Duma. Vtoroj sozyv: Zakonodatel'nye zajavlenija* (Sankt-Peterburg: Gosudarstvennaja tipografija, 1907), 265.
[516] Pavel Ivanovič Novgorodcev, "Zakonoproekt o neprikosnovennosti ličnosti," *Pravo*, 30 (1906).
[517] Novgorodcev, "Zakonoproekt o neprikosnovennosti ličnosti," 1.
[518] Dmitrij Vladimirovič Aronov, "Neprikosnovennost' ličnosti v liberal'noj programme pravovyh reform načala XX veka," *Upravlenie obščestvom i ekonomičeskimi sistemami*, №2 (2003): 7, accessed 27 January 2013, http://umc.gu-unpk.ru/umc/arhiv/2003/2/pdf/Aronov.pdf.
[519] Aronov, "Neprikosnovennost' ličnosti v liberal'noj programme pravovyh reform načala XX veka," 18.
[520] Gosudarstvennaja Duma: Stenografičeskij otčët (Sankt-Peterburg: Gosudarstvennaja tipografija 1906), 306, 307, 319.
[521] L.I. Petražyckij, *O pol'ze političeskih prav ženščin* (Sankt-Peterburg: Tipografia B.M. Vol'fa, 1907), 7.

concerning the access to public service, and most importantly of electoral rights. He argued that vesting women with political rights and duties is a way to a higher level of culture.[522] He was also an advocate of minority rights.[523] For example, during the notorious Beilis case fabricated by anti-Semites from the Black Hundreds, Petražickij published a brochure exposing the primitive technique of ethnic hatred instigation.[524]

[522] Ibid., 11.
[523] Ibid., 7.
[524] See: L.I. Petražyckij, *O ritualnyh ubijstvah i dele Beilisa* (Sankt-Peterburg: Obščestvennaja pol'za, 1913).

CHAPTER V: CONCLUSION

5.1 RUSSIAN JUSNATURALISM OF THE EDGE OF THE NINETEENTH AND THE TWENTIETH CENTURY: A SHORT SUMMARY

As illustrated in this thesis, the Russian school of natural law of the end of the nineteenth and the beginning of the twentieth century is presented by a number of prominent thinkers. The jusnaturalistic philosophy of this period shows a diverse range of deeply elaborated theories, which highlight various aspects of the subject and advocate the recognition of inalienable natural rights.

To sum up, Russian jusnaturalistic school of the late nineteenth and the early twentieth century, which is usually referred to as the revived natural law school, was highly influenced by the philosophy of Kant, especially by its Baden school Neo-Kantian incarnation, and by the ideas of Hegel. To a various degree, they were also influence by the nineteenth-century Russian schools of the Slavophiles and the Westernizers. Another key source of the Russian natural law school is Christianity and religious philosophy. Though each of the theories making up the Russian school of the revived natural law are original and diverse, this school is marked by several common features, with which the philosophers establish themselves as an independent school of natural law.

This school, while building upon classical theories, differs from them in several aspects. Most importantly, it rejects the idea of natural law as a set of eternal and unchanging norms. Each epoch has its own idea of natural law, which reflects the notions of justice, equity and good. In addition, the revival of natural law theory in

Russia has incorporated the experience of positivism and the historical school of law. The central philosophical problem of the school in question is the correlation of law and morality. Russian prerevolutionary jusnaturalism crystallize several key concepts suitable to be brought into practice by means of legislation. One such concept is justice, which in case of the analyzed school is charged with very idealistic, even religious connotations. Another important category of the studied school is freedom, which is condition by law and limited by freedom of others. On the basis of the individualism principle, Russian jusnaturalists develop and promote the universal recognition of inalienable natural rights. While the inalienable rights that the thinkers focus on mostly include the rights and liberties usually associated with classical liberalism, the Solov'ëv's concept of right to a dignified human existence, widely accepted by the whole philosophical school in question, introduces elements of social liberalism.

Legal philosophers of the school analyzed in the current thesis bring forward the idea of a state bound by law – pravovoe gosudarstvo – derived from the German Rechtsstaat. Within the framework of pravovoe gosudarstvo, the state and law are approached in terms of an interrelated symbiosis. This concept is particularly interesting, because it plays a crucial role in the Russian legal tradition to the present day, as it is inscribed into the current Russian Constitution as one of the cornerstone principles of the Russian statehood.

Speaking about viability of the Russian jusnaturalism of the late nineteenth and the early twentieth century, Vjačeslav Žukov believes that these thinkers focus primarily on the religious ideals defining law according to them, thus giving law a supporting role and partly reducing its independent value.[525] This view may be a little exaggerated, however, still valuable, as it can be considered one of the possible reasons why jusnaturalism and liberalism, after their first rather successful steps on the level of implementation and institutionalization in the context of early twentieth-century Russia, eventually did not succeed.

[525] Žukov, "Filosofija estestvennogo prava v russkoj pravovoj mysli pervoj poloviny XX veka," 111-112.

During the first years of the twentieth century, the ideas advocated by the revived natural law school found their expression within the realm of politics, being embraced by the Russian liberal movement and included into political programs. In addition, some of the main Russian theoreticians of the revived natural law were directly involved into the country's political life. Moreover, jusnaturalistic ideas began to penetrate into legislation. The culmination of this influence was the Manifesto of 17 October 1905 and the Fundamental Laws of the Russian Empire of 23 April 1906. For the autocratic Russian Empire, these two documents, with all their shortcomings and incompleteness, were a big step in the direction of establishment of a democratic form of government.

The Manifesto on the Improvement of the State Order (Manifest ob usoveršenstvovanii gosudarstvennogo porjadka) of 17 October 1905 acknowledged "the essential foundations of civil liberty," which were to be based on "real personal immunity, freedom of conscience, speech, assembly and association."[526] This was something new for the Russian legislation, and it gave a lot of hope to those who dreamed of a democratic Russia founded upon the principles of natural law. Furthermore, with the adoption of the Constitution of 1906 (*Osnovnye Gosudarstvennye Zakony Rossijskoj Imperii* – the Fundamental Laws of the Russian Empire, issued on 23 April 1906),[527] which provided for the establishment of the State Duma (Gosudarstvennaja Duma – the first Russian parliament, with the today's parliament still bearing this name), Russia became a semi-constitutional monarchy,[528] and the Duma seemed to have all chances to become the arena for potential future reforms. The 1906 Constitution partly embraced the separation of power principle, however, the monarch still retained absolute power over each of the branches.

However, the same way as the reforms were introduced – not through a democratic procedure, but "granted" by the Tsar –, they were taken back. The Constitution remained intact, as well as the Duma still was there, but by dismissing the Duma on the 16 July 1907 and, most importantly, by arbitrarily changing – against the

[526] *PSZRI, sobranie 3-e (1881-1913)*, tom 25, čast' 1, № 26803.
[527] *SZ (izd. 1906 g.)*, tom 1, čast' 1.
[528] Lieven, *The Cambridge History of Russia. Volume II*, 446.

Constitution – the electoral law to ensure a loyal line-up, Nikolaj II basically denied all the new achievements. In addition, a period of repressions followed,[529] with the "foundations of civil liberty" turning out to be empty words.

5.2. THE 1905-1907 REVOLUTION AFTERMATH: THE POLITICAL FAILURE OF THE RUSSIAN JUSNATURALISM

Triggered by the notorious Black Sunday (*Krovavoe voskresen'e,* 22 January 1905) – shockingly violent, demonstrating the Russian government's total disdain for its subjects, let alone the recognition of their natural rights –, the First Russian Revolution broke out, forcing the Tsar to make concessions in the direction of democratization and liberalization, and establishing a semi-constitutional monarchy, just to end on the 16 June 1907 with the Stolypin's Coup. What was the outcome of the 1905 Revolution that seemed to bring a silver lining for all the liberal-minded groups of Russian society, including those hoping to reform the state and positive law on the jusnaturalistic foundations?

As the new electoral law purged the Duma line-up of the undesirable elements, as well as showed the Tsar's real attitude to the proclaimed rule of law, it became clear that the system basically remained the same.[530] According to Sack, none of the groups primarily interested in the revolution achieved their goals: political rights were not provided; the workers did not get the right to organize; the peasants did not receive any land; the minorities were discriminated against.[531] For this historical period, liberalism in Russia has failed.[532] The social tension was not resolved, but even stirred up by the disappointment and by the reactionary policy. After a decade, this tension will burst into another, much more violent revolution, or rather revolutions of 1917:

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[529] Arkady Joseph Sack, *The Birth of the Russian Democracy* (New York: Russian Information Bureau, 1918), 158.
[530] Encarnación, *Some French Contemporary Opinions*, 111.
[531] Arkady Joseph Sack, *The Birth of the Russian Democracy* (New York: Russian Information Bureau, 1918), 157-158.
[532] Raeff, "Some Reflections on Russian Liberalism," 230.

the February Revolution, which will bring another brief surge of liberal hopes, only to be swept off with the Bolshevik Revolution. However, the complex and truly inexhaustible topic of the events of 1917 and of their meaning lies beyond the modest scope of this research.

As we known, history knows no subjunctive mood. Nevertheless, it is still interesting to reflect on one of the most common questions about the 1917 Revolutions: were there any alternatives?[533] It seems that in 1905-1907 Russia had its chance to develop following liberal route. The reasons why it did not happen are, again, inseparable from the whole 1917 Revolutions debate and would need a thorough scrutiny of all historical, political, social, cultural and other circumstances. The aim of my thesis, instead, is merely to give an overview of jusnaturalistic thought of that period and put it into the context of the Russian legislation and political and social life. Thus, I will briefly name some of the ideas that I have concerning the reasons of the political failure of jusnaturalism and liberalism in general in imperial Russia.

One of the most evident reasons is the unwillingness of the autocracy to share power.[534] The question of status quo was one of a highest importance for Romanovs.[535] While thoroughly elaborated on theoretical level, Russian liberalism as a political force was still too young, too modest, and also too disjointed to confront the age-long tradition of autocracy and bureaucratic tyranny in Russia. Besides this, the supporters of radical ideas were much more active and better organized. In Raeff's words, Russian liberalism of the early twentieth century proved to be weak to resist both reactionary and radical pressures.[536] Russian liberals found themselves squeezed between two conflicting vectors. On the one hand, their ideas were too radical to have appeal for the Russian autocracy. On the other hand, demands of the Russian society, especially its poorest part, were urgent and needed immediate resolution, with the agrarian problem – the still-unresolved[537] aftermath of the serfdom – being the most urgent one. Thus, the Russian liberals were at the same time to conservative to meet

[533] Ibid., 218.
[534] Howe, *A Thousand Years of Russian History*, 230-231.
[535] Lieven, ed., *The Cambridge History of Russia. Volume II*, 447.
[536] Raeff, "Some Reflections on Russian Liberalism," 218.
[537] Sack, *The Birth of the Russian Democracy*, 157-158.

the needs of current Russian society. In addition, as Berdjaev points out, the major part of intelligentsia was isolated from the society, while constantly appealing to "the people," which meaning was changing all the time depending on the context.[538] Taking the opinion of Marc Raeff, this criticism is applicable to the Russian liberals, as their relation to peasantry, even after 1905, was driven by "populist myths,"[539] while at the same time they were trying to speak for them, according to Raeff, without fully grasping their needs.[540]

In addition, the weakness of liberalism in prerevolutionary Russia has historical roots, as liberalism was never a "best-selling" ideology in Russia. For example, Nikolaj Berdjaev recognizes such lack of liberal tradition in Russia. Reflecting on the ideological disalignment of the state and the society in Russia in the nineteenth century, he writes:

> The people anarchical in its principal aspirations had a state with a hideously developed and omnipotent bureaucracy, which surrounded the autocratic tsar and separated him from the people. Such is the peculiarity of Russian fate. It is significant that in Russia there never was a liberal ideology that would inspire and have influence.[541]

For Berdjaev, Aleksandr II and other political figures involved in the 1860s reforms, even though they could be called liberals, still it was not linked to a specific ideological worldview. He believes Russian pathos of freedom is mainly connected with anarchism rather than liberalism.[542]

Leonard Schapiro believes that the influence of liberalist thought is most noticeable in the views of the *Vehi* group.[543] They believe in the primacy of the moral and religious principles. Schapiro views the volume they published as a call for the regeneration of the Russian intelligentsia. The authors of the *Vehi* volume advocate the need to

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[538] Nikolaj Aleksandrovič Berdjaev, "Filosofskaja istina i intelligentskaja pravda," in *Vehi. Sbornik statej o russkoj intelligencii*, ed. Mihail Osipovič Geršenzon (Moskva, 1909), electronic version, accessed 03 February 2013, http://www.vehi.net/vehi/berdyaev.html.
[539] Raeff, "Some Reflections on Russian Liberalism," 227.
[540] Ibid.
[541] Nikolaj Aleksandrovič Berdjaev, *Samopoznanie: Sočinenija* (Moskva: EKSMO-Press, 1998), 145.
[542] Ibid.
[543] Schapiro, "The Pre-Revolutionary Intelligentsia and the Legal Order," 469.

collaborate with social order with the aim to develop it based on the principles of morality, law and justice. For example, Schapiro especially emphasizes the essay by B.A. Kistjakovskij[544] entitled *In the Defense of Law* (*V zaščitu prava*),[545] in which the philosopher describes the attitude of the nineteenth-century intelligentsia towards law and state and their failure to recognize the importance of legal order. N.A. Berdjaev in his essay complains that the prevalence of moral utilitarianism, the populist attitude and spiritual depression due to the political despotism led intelligentsia to having weak philosophical culture.[546]

It turns out that in the beginning of the twentieth century, the sentiment of the major part intelligentsia has not changed much, and the intelligentsia was not ready to accept the idea of legal order, as the reaction to the publication of *Vehi* was very violent not only among radicals, but also among more liberally-minded intelligents.[547]

As Schapiro notes, in the second half of the 19th century, even the major part of Russian intelligentsia did not seem to support constitutionalism and any sort of legal order as such. A widespread belief existed among the intelligentsia – apparently, not without the influence of Slavophile ideas – that Russia was destined to follow its own particular way. The general tendency was to consider the advocacy of law and order to be "cold, calculating, immoral, selfish, un-Russian, or unpatriotic."[548] The opinion that, in order to escape the long tradition of despotism, Russia had to follow the way of building a legal order instead of trying to invent its own "short cuts" was quite unpopular. Raeff points out that among the intelligentsia, a "complete" Westernizer was a very rare exception, mentioning only two names – Boris Čičerin and Pëtr Struve.[549] Besides, Thomas Nemeth believes that the relative unpopularity of Kant – the unpopularity to which, as we know, Russian government has made its

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[544] Ibid.
[545] Kistjakovskij, "V zaščitu prava (Intelligencija i pravosoznanie)."
[546] Nikolaj Aleksandrovič Berdjaev, "Filosofskaja istina i intelligentskaja pravda," in *Vehi. Sbornik statej o russkoj intelligencii*, ed. Mihail Osipovič Geršenzon (Moskva, 1909), electronic version, accessed 03 February 2013, http://www.vehi.net/vehi/berdyaev.html.
[547] Schapiro, "The Pre-Revolutionary Intelligentsia and the Legal Order," 467-469.
[548] Ibid.
[549] Raeff, "Some Reflections on Russian Liberalism," 227.

contribution[550] – in nineteenth-century Russia, as opposed to that of Hegel and Marx, played its role in the unpopularity of liberal ideas as such.[551]

Marc Raeff argues that until at least 1880s, liberal thought in Russian remained rather inert to the historical circumstances.[552] Julia Berest, however, points out that direct comparison of the Western and Russian liberal tradition can cause some misconceptions. She highlights the difference of historical circumstances accompanying the development of liberalism in Russia and in the West. While in the West, liberal ideas were gradually growing out of feudal tradition, in Russia there was no feudal tradition, and liberal principles were adopted from the West. In turn, within the context of autocracy, for a long time liberalism was developing mostly on theoretical level, without political realization. Nevertheless, Berest concludes, liberal thought was still actively developing in Russia in the form of philosophical worldview, despite the autocratic pressures.[553] The thinkers analyzed in the current dissertation can be considered an evidence of such a development.

5.3. A POSTSCRIPTUM: PREREVOLUTIONARY JUSNATURALISM TODAY

To conclude, I would like to take a brief look at the ideological continuity of the Russian legal tradition, which, despite a more than 70-years gap, still can be observed. Analyzing Andrzej Walicki's *Legal Philosophies of Russian Liberalism*, James P. Scanlan concludes that in their quest of building a *pravovoe gosudarstvo*, modern Russian liberals do not need only to look to the West for insights, but can easily turn to the Russian prerevolutionary thinkers, who, opposing Marxism before it was even

[550] Berest, *The Emergence of Russian Liberalism*, 106.
[551] Thomas Nemeth, "Kant in Russia: The Initial Phase," *Studies in Soviet Thought*, 36-1/2 (1988): 82.
[552] Raeff, "Some Reflections on Russian Liberalism," 226.
[553] Berest, *The Emergence of Russian Liberalism*, 4.

implemented, were "defeated not by force of argument but by the Bolshevik seizure of power."[554]

As an illustration of this idea, Richard Sakwa in his article "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism" draws direct parallels between prerevolutionary Russian jusnaturalism and the Constitution of the Russian Federation of 1993. He points out that while the concept of *pravovoe gosudarstvo* is derived from the German *Rechtsstaat*, the Russian constitutional debate also involves a combination of Anglo-Saxon jusnaturalistic tradition and Kantian normative principles of what is "ought" to be, as opposed to what "is." Sakwa notices that the latter is also characteristic of Solov'ëv's legal philosophy.[555] He sees strong echoes of Solov'ëv's ideas in the current Constitution, recalling Solov'ëv's social liberalism based on the notion of the right to a dignified existence (*pravo na dostojnoe suščestvovanie*) within the society and state formally ruled by law. Another philosopher whose influence Sakwa finds in the 1993 Constitution is Boris Čičerin. He points out that Čičerin's formula of combining liberal measures with strong government can be found in modern Russian constitutionalism. Moreover, on the basis of Čičerin's advocacy of the ethical attributes of the legal sphere circumscribed by civil society and the notion of freedom it represents, Sakwa expressively labels Čičerin "the intellectual 'godfather' of Russia's new constitution.[556]

This example illustrates the existence of ideological heredity of prerevolutionary jusnaturalism and modern legal Russia legal system, as well as implicitly suggesting the potential applicability of other prerevolutionary jusnaturalistic ideas to the conditions of today's Russia. This topic of link between prerevolutionary and modern legal philosophy and theory in Russia seems very interesting and can become subject for future studies. As other possible topics for further elaboration, I would suggest either narrowing the scope to close analysis of individual thinkers, or, on the contrary,

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[554] James P. Scanlan, review of *Legal Philosophies of Russian Liberalism* by Andrzej Walicki, *The Review of Metaphysics*, 47-3 (1994): 642-644.
[555] Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism," 146.
[556] Ibid., 116-117.

expanding the chronological framework in order to encompass earlier legal thought of earlier historical periods. In addition, as was suggested in the chapter 2 of the dissertation, it would be interesting to closely analyze the philosophy of Lev Tolstoj in relation to jusnaturalism, with particular attention to the content rather than form of his ideas. At large, the legal dimension of Russian prerevolutionary thought, while being rich on original noteworthy theories, is still an insufficiently explored field, especially in the West, thus can be a fertile land for future study.

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ANNEXES

ANNEX 1. THE MANIFESTO ON THE IMPROVEMENT OF THE STATE ORDER (MANIFEST OB USOVERŠENSTVOVANII GOSUDARSTVENNOGO PORJADKA) OF 17 OCTOBER 1905[557]

17 октября 1905 г.

Манифест об усовершенствовании государственного порядка

Смуты и волнения в столицах и во многих местностях империи нашей великой и тяжкой скорбью преисполняют сердце наше. Благо российского государя неразрывно с благом народным и печаль народная — его печаль. От волнений, ныне возникших, может явиться глубокое нестроение народное и угроза целости и единству державы нашей.

Великий обет царского служения повелевает нам всеми силами разума и власти нашей стремиться к скорейшему прекращению столь опасной для государства смуты. Повелев подлежащим властям принять меры к устранению прямых проявлений беспорядка, бесчинств и насилий, в охрану людей мирных, стремящихся к спокойному выполнению лежащего на каждом долга, мы, для успешного выполнения общих преднамечаемых нами к умиротворению государственной жизни мер, признали необходимым объединить деятельность высшего правительства.

На обязанность правительства возлагаем мы выполнение непреклонной нашей воли:

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[557] *PSZRI, sobranie 3-e (1881-1913)*, tom 25, čast' 1, № 26803.

1. Даровать населению незыблемые основы гражданской свободы на началах действительной неприкосновенности личности, свободы совести, слова, собраний и союзов.

2. Не останавливая предназначенных выборов в Государственную думу, привлечь теперь же к участию в Думе, в мере возможности, соответствующей кратности остающегося до созыва Думы срока, те классы населения, которые ныне совсем лишены избирательных прав, предоставив за сим дальнейшее развитие начала общего избирательною права вновь установленному законодательному порядку, и

3. Установить как незыблемое правило, чтобы никакой закон не мог восприять силу без одобрения Государственной думы и чтобы выборным от народа обеспечена была возможность действительного участия в надзоре за закономерностью действий поставленных от нас властей.

Призываем всех верных сынов России вспомнить долг свой перед Родиною, помочь прекращению сей неслыханной смуты и вместе с нами напрячь все силы к восстановлению тишины и мира на родной земле.

ANNEX 2. THE MANIFESTO ON THE IMPROVEMENT OF THE STATE ORDER OF 17 OCTOBER 1907 (ENGLISH TRANSLATION)[558]

Manifesto of 17 October 1905

On the improvement of order in the state

The disturbances and unrest in St Petersburg, Moscow and in many other parts of our Empire have filled Our heart with great and profound sorrow. The welfare of the Russian Sovereign and His people is inseparable and national sorrow is His too. The present disturbances could give rise to national instability and present a threat to the unity of Our State. The oath which We took as Tsar compels Us to use all Our strength, intelligence and power to put a speedy end to this unrest which is so dangerous for the State. The relevant authorities have been ordered to take measures to deal with direct outbreaks of disorder and violence and to protect people who only want to go about their daily business in peace. However, in view of the need to speedily implement earlier measures to pacify the country, we have decided that the work of the government must be unified. We have therefore ordered the government to take the following measures in fulfilment of our unbending will:

1. Fundamental civil freedoms will be granted to the population, including real personal inviolability, freedom of conscience, speech, assembly and association.

2. Participation in the Duma will be granted to those classes of the population which are at present deprived of voting powers, insofar as is possible in the short period before the convocation of the Duma, and this will lead to the development of a universal franchise. There will be no delay to the Duma elect already been organized.

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[558] "The October Manifesto of 1907," Durham University, accessed 25 March 2013, http://www.dur.ac.uk/a.k.harrington/octmanif.html.

3. It is established as an unshakeable rule that no law can come into force without its approval by the State Duma and representatives of the people will be given the opportunity to take real part in the supervision of the legality of government bodies.

We call on all true sons of Russia to remember the homeland, to help put a stop to this unprecedented unrest and, together with this, to devote all their strength to the restoration of peace to their native land.

ANNEX 3. THE FUNDAMENTAL LAWS OF THE RUSSIAN EMPIRE (*OSNOVNYE GOSUDARSTVENNYE ZAKONY ROSSIJSKOJ IMPERII*) OF 23 APRIL 1906[559]

Свод основных государственных законов (1906г.)

РАЗДЕЛ ПЕРВЫЙ

Основные Государственные Законы

Ст. 1. Государство Российское едино и нераздельно.

2. Великое Княжество Финляндское, составляя нераздельную часть Государства Российского, во внутренних своих делах управляется особыми установлениями на основании особого законодательства.

3. Русский язык есть язык общегосударственный и обязателен в армии, во флоте и во всех государственных и общественных установлениях. Употребление местных языков и наречий в государственных и общественных установлениях определяется особыми законами.

ГЛАВА ПЕРВАЯ

О существе Верховной Самодержавной Власти

4. Императору Всероссийскому принадлежит Верховная Самодержавная власть. Повиноваться власти Его, не только за страх, но и за совесть, Сам Бог повелевает.

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[559] *SZ (izd. 1906 g.)*, tom 1, čast' 1.

5. Особа Государя Императора священна и неприкосновенна.

6. Та же Верховная Самодержавная власть принадлежит Государыне Императрице, когда наследство Престола, в порядке, для сего установленном, дойдет до лица женского; но супруг Ее не почитается Государем; он пользуется почестями и преимуществами, наравне с супругами Государей, кроме титула.

7. Государь Император осуществляет законодательную власть в единении с Государственным Советом и Государственною Думою.

8. Государю Императору принадлежит почин по всем предметам законодательства. Единственно по Его почину Основные Государственные Законы могут подлежать пересмотру в Государственном Совете и Государственной Думе.

9. Государь Император утверждает законы и без Его утверждения никакой закон не может иметь своего совершения.

10. Власть управления во всем ее объеме принадлежит Государю Императору в пределах всего Государства Российского. В управлении Верховном власть Его действует непосредственно; в делах же управления подчиненного определенная степень власти вверяется от Него, согласно закону, подлежащим местам и лицам, действующим Его Именем и по Его повелениям.

11. Государь Император, в порядке верховного управления, издает, в соответствии с законами, указы для устройства и приведения в действие различных частей государственного управления, а равно повеления, необходимые для исполнения законов.

12. Государь Император есть верховный руководитель всех внешних сношений Российского Государства с иностранными державами. Им же определяется направление международной политики Российского Государства.

13. Государь Император объявляет войну и заключает мир, а равно договоры с иностранными государствами.

14. Государь Император есть Державный Вождь российской армии и флота. Ему принадлежит верховное начальствование над всеми сухопутными и морскими вооруженными силами Российского Государства. Он определяет устройство армии и флота и издает указы и повеления относительно: дислокации войск, приведения их на военное положение, обучения их, прохождения службы чинами армии и флота и всего вообще относящегося до устройства вооруженных сил и обороны Российского Государства. Государем Императором, в порядке верховного управления, устанавливаются также ограничения в отношении права жительства и приобретения недвижимого имущества в местностях, которые составляют крепостные районы и опорные пункты для армии и флота.

15. Государь Император объявляет местности на военном или исключительном положении.

16. Государю Императору принадлежит право чеканки монеты и определение внешнего ее вида.

17. Государь Император назначает и увольняет Председателя Совета Министров, Министров и Главноуправляющих отдельными частями, а также прочих должностных лиц, если для последних не установлено законом иного порядка назначения и увольнения.

18. Государь Император, в порядке верховного управления, устанавливает в отношении служащих ограничения, вызываемые требованиями государственной службы.

19. Государь Император жалует титулы, ордена и другие государственные отличия, а также права состояния. Им же непосредственно определяются условия и порядок пожалования титулов, орденов и отличий.

20. Государь Император издает непосредственно указы и повеления как в отношении имуществ, личную Его собственность составляющих, так равно в отношении имуществ, именуемых Государевыми, кои, всегда принадлежа Царствующему Императору, не могут быть завещаемы, поступать в раздел и

подлежать иным видам отчуждения. Как те, так и другие имущества не подчиняются платежу налогов и сборов.

21. Государю Императору, как Главе Императорского Дома принадлежат, согласно Учреждению о Императорской Фамилии, распоряжения по имуществам удельным. Им же определяются также устройство состоящих в ведении Министра Императорского Двора учреждений и установлений, равно как порядок управления оными.

22. Судебная власть осуществляется от имени Государя Императора установленными законом судами, решения коих приводятся в исполнение именем Императорского Величества.

23. Государю Императору принадлежит помилование осужденных, смягчение наказаний и общее прощение совершивших преступные деяния с прекращением судебного против них преследования и освобождением их от суда и наказания, а также сложение, в путях Монаршего милосердия, казенных взысканий и вообще дарование милостей в случаях особых, не подходящих под действие общих законов, когда сим не нарушаются ничьи огражденные законом интересы и гражданские права.

24. Указы и повеления Государя Императора, в порядке верховного управления или непосредственно Им издаваемые, скрепляются Председателем Совета Министров или подлежащим Министром либо Главноуправляющим отдельною частью и обнародываются Правительствующим Сенатом.

ГЛАВА ВТОРАЯ

О порядке наследия Престола

25. Императорский Всероссийский Престол есть наследственный в ныне благополучно царствующем Императорском Доме.

26. С Императорским Всероссийским Престолом нераздельны суть Престолы: Царства Польского и Великого Княжества Финляндского.

27. Оба пола имеют право к наследию Престола; но преимущественно принадлежит сие право полу мужескому по порядку первородства; за пресечением же последнего мужеского поколения, наследие Престола поступает к поколению женскому по праву заступления.

28. Посему, наследие Престола принадлежит прежде всех старшему сыну царствующего Императора, а по нем всему его мужескому поколению.

29. По пресечении сего мужеского поколения, наследство переходит в род второго сына Императора и в его мужеское поколение; по пресечении же второго мужеского поколения, наследство переходит в род третьего сына, и так далее.

30. Когда пресечется последнее мужеское поколение сыновей Императора, наследство остается в сем же роде, но в женском поколении последне-царствовавшего, как в ближайшем к Престолу, и в оном следует тому же порядку, предпочитая лицо мужеское женскому; но при сем не теряет никогда права то женское лицо, от которого право беспосредственно пришло.

31. По пресечении сего рода, наследство переходит в род старшего сына Императора-Родоначальника, в женское поколение, в котором наследует ближняя родственница последне-царствовавшего рода сего сына, по нисходящей от него или сына его старшей, или же, за неимением нисходящих, по боковой линии, а в недостатке сей родственницы, то лицо мужеское или женское, которое заступает ее место, с предпочтением, как и выше, мужеского пола женскому.

32. По пресечении и сих родов, наследство переходит в женский род прочих сыновей Императора-Родоначальника, следуя тому же порядку, а потом в род старшей дочери Императора-Родоначальника, в мужеское ее поколение; по пресечении же оного, в женское ее поколение, следуя порядку, установленному в женских поколениях сыновей Императора.

33. По пресечении поколений мужеского и женского старшей дочери Императора-Родоначальника, наследство переходит к поколению мужескому, а потом к женскому второй дочери Императора-Родоначальника, и так далее.

34. Младшая сестра, хотя бы и сыновей имела, не отъемлет права у старшей, хотя бы и не замужней; брат же младший наследует прежде старших своих сестер.

35. Когда наследство дойдет до такого поколения женского, которое царствует уже на другом Престоле, тогда наследующему лицу предоставляется избрать веру и Престол, и отрещись вместе с Наследником от другой веры и Престола, если таковой Престол связан с законом; когда же отрицания от веры не будет, то наследует то лицо, которое за сим ближе по порядку.

36. Дети, происшедшие от брачного союза лица Императорской Фамилии с лицом, не имеющим соответственного достоинства, то есть не принадлежащим ни к какому царствующему или владетельному дому, на наследование Престола права не имеют.

37. При действии правил, выше изображенных о порядке наследия Престола, лицу, имеющему на оный право, предоставляется свобода отрещись от сего права в таких обстоятельствах, когда за сим не предстоит никакого затруднения в дальнейшем наследовании Престола.

38. Отречение таковое, когда оно будет обнародовано и обращено в закон, признается потом уже невозвратным.

39. Император или Императрица, Престол наследующие, при вступлении на оный и миропомазании, обязуются свято наблюдать вышепоставленные законы о наследии Престола.

ГЛАВА ТРЕТИЯ

О совершеннолетии Государя Императора, о правительстве и опеке

40. Совершеннолетие Государям обоего пола и Наследнику Императорского Престола полагается в шестнадцать лет.

41. При вступлении на Престол Императора прежде сего возраста, до совершеннолетия Его, учреждается правительство и опека.

42. Правительство и опека учреждаются или в одном лице совокупно, или же раздельно, так, что одному поручается правительство, а другому опека.

43. Назначение Правителя и Опекуна, как в одном лице совокупно, так и в двух лицах раздельно, зависит от воли и усмотрения царствующего Императора, которому, для лучшей безопасности, следует учинить выбор сей на случай Его кончины.

44. Когда при жизни Императора такового назначения не последовало, то, по кончине Его, правительство государства и опека над лицом Императора в малолетстве принадлежит отцу и матери; вотчим же и мачиха исключаются.

45. Когда нет отца и матери, то правительство и опека принадлежат ближнему к наследию престола из совершеннолетних обоего пола родственников малолетнего Императора.

46. Законные причины неспособности к правительству и опеке суть: 1) безумие, хотя бы оно было временное; 2) вступление вдовых, во время правительства и опеки, во второй брак.

47. Правителю государства полагается Совет Правительства; и как Правитель без Совета, так и Совет без Правителя существовать не могут.

48. Совет составляет шесть особ первых двух классов, по выбору Правителя, который назначает и других, при случающихся переменах.

49. Мужеского пола особы Императорской Фамилии могут заседать в сем Совете по выбору Правителя, но не прежде своего совершеннолетия и не в числе шести особ, оный составляющих.

50. В Совет Правительства входят все без изъятия дела, подлежащие решению Самого Императора, и все те, которые, как к Нему, так и в Совет Его вступают; но опеки Совет не касается.

51. Правитель имеет голос решительный.

52. Назначение Совета и выбор членов оного полагается в недостатке другого распоряжения скончавшегося Государя, ибо оному должны быть известны обстоятельства и люди.

ГЛАВА ЧЕТВЕРТАЯ

О вступлении на Престол и присяге подданства

53. По кончине Императора, Наследник Его вступает на Престол силою самого закона о наследии, присвояющего Ему сие право. Вступление на Престол Императора считается со дня кончины Его предшественника.

54. В манифесте о восшествии на Престол возвещается и законный Наследник Престола, если лицо, коему по закону принадлежит наследие, существует.

55. Верность подданства воцарившемуся Императору и законному Его Наследнику, хотя бы он и не был наименован в манифесте, утверждается всенародною присягою.

56. Каждый присягает по своей вере и закону.

Примечание 1. Правительствующий Сенат, напечатав клятвенное обещание по установленной форме (прил. V), рассылает оное в потребном числе экземпляров ко всем вообще, как военным, так и гражданским начальствам, сообщая о том и Святейшему Синоду для сообразного с его стороны распоряжения (а).- Каждый

приводится к присяге своим начальством в соборах, монастырях или приходских церквах, по удобности; находящиеся же под стражею/но еще не осужденные к лишению прав, приводятся к присяге начальством тех мест, где они содержатся (б).- Иноверцы, где нет церкви их исповедания, приводятся к присяге в присутственном месте, при членах оного (в).- Каждый присягнувший на верность подданства, если он писать умеет, подписывает печатный лист, по коему он присягал. Листы сии в последствии доставляются от всех начальств и ведомств в Правительствующий Сенат .

Примечание 2. К присяге приводятся все вообще подданные мужеского пола, достигшие двенадцатилетнего возраста, всякого чина и звания.

ГЛАВА ПЯТАЯ

О Священном короновании и миропомазании

57. По вступлении на Престол, совершается священное коронование и миропомазание по чину Православной Греко-Российской Церкви. Время для торжественного сего обряда назначается по Высочайшему благоусмотрению и возвещается предварительно во всенародное известие.

58. Совокупно с Императором, по изволению Его, приобщается сему священнодействию и Августейшая Его Супруга (а). Но если бы коронование Императора последовало прежде вступления Его в брак, то коронование Супруги Его совершается в последствии не иначе, как по особенному Его соизволению (б).

Примечание 1. Священный обряд коронования и миропомазания совершается в Московском Успенском Соборе, в присутствии высших государственных правительств и сословий, по Высочайшему назначению к сему призываемых (а).- Коронование Императоров Всероссийских, как Царей Польских, заключается в одном и том же священном обряде; депутаты Царства Польского призываются к участвованию в сем торжестве вместе с депутатами прочих частей Империи (б) .

Примечание 2. Император, пред совершением сего священного обряда, по обычаю древних Христианских Государей и Боговенчанных Его предков, произносит в слух верных Его подданных Символ Православно-Кафолической веры и потом, по облечении в порфиру, по возложении на Себя короны и по восприятии скипетра и державы, призывает Царя Царствующих в установленной для сего молитве, с коленопреклонением: да наставит Его, вразумит и управит, в великом служении, яко Царя и Судию Царству Всероссийскому, да будет с Ним приседящая Божественному престолу премудрость, и да будет сердце Его в руку Божию, во еже вся устроити к пользе врученных Ему людей и к славе Божией, яко да и в день суда Его непостыдно воздаст Ему слово.

ГЛАВА ШЕСТАЯ

О титуле Его Императорского Величества и о Государственном гербе

59. Полный титул Императорского Величества есть следующий:

"Божиею поспешествующею милостью, Мы, NN, Император и Самодержец Всероссийский, Московский, Киевский, Владимирский, Новгородский; Царь Казанский, Царь Астраханский, Царь Польский, Царь Сибирский, Царь Херсониса Таврического, Царь Грузинский; Государь Псковский и Великий Князь Смоленский, Литовский, Волынский, Подольский и Финляндский; Князь Эстляндский, Лифляндский, Курляндский и Семигальский, Самогитский, Белостокский, Корельский, Тверский, Югорский, Пермский, Вятский, Болгарский и иных; Государь и Великий Князь Новогорода низовския земли, Черниговский; Рязанский, Полотский, Ростовский, Ярославский, Белозерский, Удорский, Обдорский, Кондийский, Витебский, Мстиславский, и всея северные страны Повелитель; и Государь Иверския, Карталинския и Кабардинския земли и области Арменския; Черкасских и Горских Князей и иных Наследный Государь и Обладатель; Государь Туркестанский; Наследник Норвежский, Герцог Шлезвиг-Голстинский, Стор-марнский, Дитмарсенский и Ольденбургский, и прочая, и прочая, и прочая".

60. В некоторых, законом определенных, случаях сей титул Императорского Величества изображается сокращенно:

"Божиею поспешествующею милостию, Мы, NN, Император и Самодержец Всероссийский, Московский, Киевский, Владимирский, Новгородский; Царь Казанский, Царь Астраханский, Царь Польский, Царь Сибирский, Царь Херсониса Таврического, Царь Грузинский, Великий Князь Финляндский и прочая, и прочая, и прочая".

В других, также законом определенных, случаях употребляется титул Императорского Величества краткий, в следующем виде:

"Божиею милостию, Мы, NN, Император и Самодержец Всероссийский, Царь Польский, Великий Князь Финляндский и прочая, и прочая, и прочая".

61. Российский Государственный герб есть в золотом щите черный, двоеглавый орел, коронованный двумя Императорскими коронами, над которыми третия, такая же, в большем виде, корона с двумя развевающимися концами ленты ордена Святого Апостола Андрея Первозванного. Государственный орел держит золотые скипетр и державу. На груди орла герб Московский: в червленом щите Святой Великомученик и Победоносец Георгий, на коне, поражающий дракона золотым копьем.

В большой Государственной печати, щит, с вышеописанным двоеглавым орлом, увенчан шлемом Святого Великого Князя Александра Невского и окружен цепью ордена Святого Апостола Андрея Первозванного; по сторонам его изображения Святых Архистратига Михаила и Архангела Гавриила; над всем золотая усеянная двоегла-выми орлами и подложенная горностаем сень с надписью: "С нами Бог"; над сению Императорская корона и государственная хоругвь. Вокруг щита изображаются Родовой Его Императорского Величества герб, и гербы Царств Казанского, Астраханского, Польского, Сибирского, Херсониса Таврического и Грузинского, и Великих Княжеств Киевского, Владимирского, Новогородского и Финляндского; над сению соединенные, на шести щитах, гербы всех прочих Княжеств и Областей, упоминаемых в полном

Императорском титуле (ст. 59). Сей полный Императорского Величества титул помещается на краях печати.

В средней Государственной печати помещаются те же, как и на большой, изображения, кроме лишь государственной хоругви и шести верхних над сению щитов с соединенными гербами Княжеств и Областей. На краях Императорский титул в сокращенном виде (ст. 60, п. 1).

Малая Государственная печать вообще сходствует со среднею, но в ней нет изображений Святых Архангелов и Родового герба Его Императорского Величества, а окружающие главный щит гербы Царств и Великих Княжеств помещаются на крыльях орла. На краях печати Императорский титул в кратком виде (ст. 60, п. 2).

Примечание. Подробное описание Государственного герба и Государственной печати во всех видах и правила о употреблении их помещены в особом приложении (прил. 1) .

ГЛАВА СЕДЬМАЯ

О вере

62. Первенствующая и господствующая в Российской Империи вера есть Христианская Православная Кафолическая Восточного Исповедания.

63. Император, Престолом Всероссийским обладающий, не может исповедывать никакой иной веры, кроме Православной (ст. 62).

64. Император, яко Христианский Государь, есть верховный защитник и хранитель догматов господствующей веры, и блюститель правоверия и всякого в Церкви святой благочиния.

В сем смысле Император, в акте о наследии Престола 1797 Апр. 5 (17910) именуется Главою Церкви.

65. В Управлении Церковном Самодержавная Власть действует посредстом Святейшего Правительствующего Синода, Ею учрежденного.

66. Все не принадлежащие к господствующей Церкви подданные Российского Государства, природные (а) и в подданство принятые (б), также иностранцы, состоящие в Российской службе, или временно в России пребывающие (в), пользуются каждый повсеместно свободным отправлением их веры и богослужения по обрядам оной.

67. Свобода веры присвояется не токмо Христианам иностранных исповеданий, но и Евреям, Магометанам и язычникам (а): да все народы, в России пребывающие, славят Бога всемогущаго разными языками по закону и исповеданию праотцев своих, благословляя царствование Российских Монархов, и моля Творца вселенной об умножении благоденствия и укреплении силы Империи (б).

68. Дела церковные Христиан иностранных исповеданий и иноверцев в Империи Российской ведаются их духовными властями и особенными правительствами, Верховною Властию к сему предназначенными.

Примечание . Правила охранения веротерпимости и пределы ее подробно означены в Уставах по принадлежности.

ГЛАВА ВОСЬМАЯ

О правах и обязанностях российских подданных

69. Условия приобретения прав российского подданства, равно как и их утраты, определяются законом.

70. Защита Престола и Отечества есть священная обязанность каждого русского подданного. Мужское население, без различия состояний, подлежит воинской повинности согласно постановлениям закона.

71. Российские подданные обязаны платить установленные законом налоги и пошлины, а также отбывать повинности согласно постановлениям закона.

72. Никто не может подлежать преследованию за преступное деяние иначе, как в порядке, законом определенном.

73. Никто не может быть задержан под стражею иначе, как в случаях, законом определенных.

74. Никто не может быть судим и наказан иначе, как за преступные деяния, предусмотренные действовавшими во время совершения сих деяний уголовными законами, если притом вновь изданные законы не исключают совершенных виновными деяний из числа преступных.

75. Жилище каждого неприкосновенно. Производство в жилище, без согласия его хозяина, обыска или выемки допускается не иначе, как в случаях и в порядке, законом определенных.

76. Каждый российский подданный имеет право свободно избирать место жительства и занятие, приобретать и отчуждать имущество и беспрепятственно выезжать за пределы государства. Ограничения в сих правах установлены особыми законами.

77. Собственность неприкосновенна. Принудительное отчуждение недвижимых имуществ, когда сие необходимо для какой-либо государственной или общественной пользы, допускается не иначе, как за справедливое и приличное вознаграждение.

78. Российские подданные имеют право устраивать собрания в целях, не противных законам, мирно и без оружия. Законом определяются условия, при которых могут происходить собрания, порядок их закрытия, а равно ограничение мест для собраний.

79. Каждый может в пределах, установленных законом, высказывать изустно и письменно свои мысли, а равно распространять их путем печати или иными способами.

80. Российские подданные имеют право образовывать общества и союзы в целях, не противных законам. Условия образования обществ и союзов, порядок их действий, условия и порядок сообщения им прав юридического лица, равно как порядок закрытия обществ и союзов, определяются законом.

81. Российские подданные пользуются свободою веры. Условия пользования этой свободою определяются законом.

82. Правами российских подданных иностранцы, в России пребывающие, пользуются с соблюдением ограничений, установленных законом.

83. Изъятия из действия изложенных в сей главе постановлений в отношении местностей, объявленных на военном положении или в положении исключительном, определены особыми законами.

ГЛАВА ДЕВЯТАЯ

О законах

84. Империя Российская управляется на твердых основаниях законов, изданных в установленном порядке.

85. Сила законов равно обязательна для всех без изъятия российских подданных и для иностранцев, в Российском Государстве пребывающих.

86. Никакой новый закон не может последовать без одобрения Государственного Совета и Государственной Думы и восприять силу без утверждения Государя Императора.

87. Во время прекращения занятий Государственной Думы, если чрезвычайные обстоятельства вызовут необходимость в такой мере, которая требует обсуждения в порядке законодательном, Совет Министров представляет о ней Государю Императору непосредственно. Мера эта не может, однако, вносить изменений ни в Основные Государственные Законы, ни в учреждения Государственного Совета или Государственной Думы, ни в постановления о

выборах в Совет или в Думу. Действие такой меры прекращается, если подлежащим Министром или Главноуправляющим отдельною частью не будет внесен в Государственную Думу в течение первых двух месяцев после возобновления занятий Думы соответствующий принятой мере законопроект, или его не примут Государственная Дума или Государственный Совет.

88. Законы, особенно изданные для какой либо местности или части населения, новым общим законом не отменяются, если в нем именно такой отмены не постановлено.

89. Каждый закон имеет силу только на будущее время, кроме тех случаев, когда в самом законе постановлено, что сила его распространяется и на время предшествующее, или что он есть только подтверждение и изъяснение смысла закона прежнего.

90. Общее хранение законов полагается в Правительствующем Сенате. Посему все законы должны быть вносимы в подлиннике или в заверенных списках в Правительствующий Сенат.

91. Законы обнародываются во всеобщее сведение Правительствующим Сенатом в установленном порядке и прежде обнародования в действие не приводятся.

92. Законодательные постановления не подлежат обнародованию, если порядок их издания не соответствует положениям сих Основных Законов.

93. По обнародовании, закон получает обязательную силу со времени назначенного для того в самом законе срока, при неустановлении же такового срока - со дня получения на месте листа Сенатского издания, в коем закон напечатан. В самом издаваемом законе может быть указано на обращение его, до обнародования, к исполнению по телеграфу или посредством нарочных.

94. Закон не может быть отменен иначе, как только силою закона. Посему, доколе новым законом положительно не отменен закон существующий, он сохраняет полную свою силу.

95. Никто не может отговариваться неведением закона, когда он был обнародован установленным порядком.

96. Постановления по строевой, технической и хозяйственной частям, а равно положения и наказы учреждениям и должностным лицам военного и военно-морского ведомств, по рассмотрении Военным и Адмиралтейств Советами, по принадлежности, непосредственно представляются Государю Императору, если только сии постановления, положения и наказы относятся собственно к одним упомянутым ведомствам, не касаются предметов общих законов и не вызывают нового расхода из казны или же вызываемый ими новый расход покрывается ожидаемыми сбережениями по финансовой смете Военного или Морского Министерства, по принадлежности. В том же случае, когда новый расход не может быть покрыт указанными сбережениями, представление означенных постановлений, положений и наказов на Высочайшее утверждение допускается лишь по испрошении в установленном порядке ассигнования соответственного кредита.

97. Постановления по военно-судебной и военно-морской судебной частям издаются в порядке, установленном в сводах военных и военно-морских постановлений.

ГЛАВА ДЕСЯТАЯ

О Государственном Совете и Государственной Думе и образе их действий

98. Государственный Совет и Государственная Дума ежегодно созываются указами Государя Императора.

99. Продолжительность ежегодных занятий Государственного Совета и Государственной Думы и сроки перерыва их занятий в течение года определяются указами Государя Императора.

100. Государственный Совет образуется из Членов по Высочайшему назначению и Членов по выборам. Общее число Членов Совета, призываемых

Высочайшею Властью к присутствованию в Совете из среды его Членов по Высочайшему назначению, не должно превышать общего числа Членов Совета по выборам.

101. Государственная Дума образуется из Членов, избираемых населением Российской Империи на пять лет на основаниях, указанных в законоположениях о выборах в Думу.

102. Государственный Совет проверяет полномочия своих Членов по выборам. Равным образом Государственная Дума проверяет полномочия своих Членов.

103. Членом Государственного Совета и Членом Государственной Думы одно и то же лицо одновременно быть не может.

104. Состав Членов Государственного Совета по выборам может быть заменен новым составом до истечения срока полномочий сих Членов по указу Государя Императора, коим назначаются и новые выборы Членов Совета.

105. Государственная Дума может быть до истечения пятилетнего срока полномочий ее Членов распущена указом Государя Императора. Тем же указом назначаются новые выборы в Думу и время ее созыва.

106. Государственный Совет и Государственная Дума пользуются равными в делах законодательства правами.

107. Государственному Совету и Государственной Думе в порядке, их учреждениями определенном, предоставляется возбуждать предположения об отмене или изменении действующих и издании новых законов, за исключением Основных Государственных Законов, почин пересмотра которых принадлежит единственно Государю Императору.

108. Государственному Совету и Государственной Думе в порядке, их учреждениями определенном, предоставляется обращаться к Министрам и Главноуправляющим отдельными частями, подчиненным по закону Правительствующему Сенату, с запросами по поводу таких, последовавших с

их стороны или подведомственных им лиц и установлений, действий, кои представляются незакономерными.

109. Ведению Государственного Совета и Государственной Думы и обсуждению их в порядке, учреждениями их определенном, подлежат те дела, кои указаны в учреждениях Совета и Думы.

110. Законодательные предположения рассматриваются в Государственной Думе и, по одобрении ею, поступают в Государственный Совет. Законодательные предположения, предначертанные по почину Государственного Совета, рассматриваются в Совете, и, по одобрении им, поступают в Думу.

111. Законопроекты, не принятые Государственным Советом или Государственною Думою, признаются отклоненными.

112. Законопроекты, предначертанные по почину Государственного Совета или Государственной Думы и не удостоившиеся Высочайшего утверждения, не могут быть внесены на законодательное рассмотрение в течение той же сессии. Законопроекты, предначертанные по почину Государственного Совета или Государственной Думы и отклоненные одним из сих установлений, могут быть вносимы на законодательное рассмотрение в течение той же сессии, если последует Высочайшее на то повеление.

113. Законопроекты, поступившие в Государственную Думу и одобренные как ею, так и Государственным Советом, равно как законопроекты, предначертанные по почину Государственного Совета и одобренные как им, так и Государственною Думою, представляются Государю Императору Председателем Государственного Совета.

114. При обсуждении государственной росписи не подлежат исключению или сокращению назначения на платежи по государственным долгам и по другим, принятым на себя Российским Государством, обязательствам.

115. Кредиты на расходы Министерства Императорского Двора вместе с состоящими в его ведении учреждениями, в суммах, не превышающих

ассигнований по государственной росписи на 1906 год, обсуждению Государственного Совета и Государственной Думы не подлежат. Равным образом не подлежат их обсуждению такие изменения означенных кредитов, которые обусловливаются постановлениями Учреждения о Императорской Фамилии, соответственно происшедшим в ней переменам.

116. Если государственная роспись не будет утверждена к началу сметного периода, то остается в силе последняя, установленным порядком утвержденная, роспись, с теми лишь изменениями, какие обусловливаются исполнением последовавших после ее утверждения узаконений. Впредь до обнародования новой росписи, по постановлениям Совета Министров, в распоряжение Министерств и Главных Управлений открываются постепенно кредиты в размерах действительной потребности, не превышающие, однако, в месяц, во всей их совокупности, одной двенадцатой части общего по росписи итога расходов.

117. Чрезвычайные сверхсметные кредиты на потребности военного времени и на особые приготовления, предшествуюшие войне, открываются по всем ведомствам, в порядке верховного управления на основаниях, в законе определенных.

118. Государственные займы для покрытия как сметных, так и сверхсметных расходов, разрешаются порядком, установленным для утверждения государственной росписи доходов и расходов. Государственные займы для покрытия расходов в случаях и в пределах, предусмотренных в статье 116, а также займы для покрытия расходов, назначаемых на основании статьи 117, разрешаются Государем Императором в порядке верховного управления. Время и условия совершения государственных займов определяются в порядке верховного управления.

119. Если по заблаговременном внесении в Государственную Думу предположений о числе людей, потребном для пополнения армии и флота, закон по сему предмету не будет в установленном порядке издан к 1 мая, то указом Государя Императора призывается на военную службу необходимое число людей, не свыше, однако, назначенного в предшествующем году.

ГЛАВА ОДИННАДЦАТАЯ

О Совете Министров, Министрах и Главноуправляющих отдельными частями

120. Направление и объединение действий Министров и Главноуправляющих отдельными частями по предметам как законодательства, так и высшего государственного управления, возлагается на Совет Министров на основаниях, в законе определенных.

121. Министры и Главноуправляющие отдельными частями имеют право участия в голосовании в Государственном Совете и Государственной Думе только в том случае, если они состоят Членами сих установлений.

122. Обязательные постановления, инструкции и распоряжения, издаваемые Советом Министров, Министрами и Главноуправляющими отдельными частями, а также другими, на то законом уполномоченными, установлениями, не должны противоречить законам.

123. Председатель Совета Министров, Министры и Главноуправляющие отдельными частями ответствуют пред Государем Императором за общий ход государственного управления. Каждый из них в отдельности ответствует за свои действия и распоряжения.

124. За преступные по должности деяния Председатель Совета Министров, Министры и Главноуправляющие отдельными частями подлежат гражданской и уголовной ответственности на основаниях, в законе определенных.

ANNEX 4. THE FUNDAMENTAL LAWS OF THE RUSSIAN EMPIRE OF 23 APRIL 1906 (ENGLISH TRANSLATION)[560]

THE RUSSIAN FUNDAMENTAL LAWS OF 1906

INTRODUCTION

1. 1. The Russian State is one and indivisible.

2. The Grand Duchy of Finland, while comprising as inseparable part of the Russian State, is governed in its internal affairs by special decrees based on special legislation.

3. The Russian language is the common language of the state, and its use is compulsory in the army, in the navy and in all state and public institutions. The use of local (regional) languages and dialects in state and public institutions are determined by special legislation.

CHAPTER I

The Essence of the Supreme Autocratic Power

4. 4. The Emperor of All the Russias possesses Supreme Sovereign Power. Obedience to His authority, not only out of fear, but in good conscience, is ordained by God Himself.

5. The person of the Lord Emperor is sacrosanct and inviolable.

6. The same Supreme Sovereign Power belongs to the Sovereign Empress when succession to the Throne, in the order thereunto established, reaches a female person;

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[560] "Russian Fundametal Laws of 1906," Royal Russia, accessed 25 March 2013, http://www.angelfire.com/pa/imperialrussian/royalty/russia/rfl.html.

but her consort is not regarded as Sovereign; he enjoys the same honors and privileges as the spouses of emperors, except for the title.

7. The Sovereign Emperor exercises legislative power in conjunction with the State Council and State Duma.

8. The initiative in all legislative matters belongs to the Sovereign Emperor. Only upon His initiative may the Fundamental Laws be subject to revision by (in) the State Council and the State Duma.

9. The Sovereign Emperor ratifies laws and without His ratification (approval) no laws can go into effect.

10. Total administrative power belongs to the Sovereign Emperor throughout the entire Russian State. At the highest level of administration His authority is direct; at subordinate levels of administration He entrusts a certain degree of power, in conformity with the law, to the proper agencies or officials, who act in His name and in accordance with His orders.

11. As supreme administrator, the Sovereign Emperor, in conformity with the laws, issues decrees for the organization and functioning of various departments of state administration as well as directives essential for the execution of the laws.

12. The Sovereign Emperor is in charge of all external relations of the Russian Government with foreign powers. He determines the direction of the Russian Government's foreign policy.

13. The Sovereign Emperor declares war, concludes peace, and negotiates treaties with foreign states.

14. The Sovereign Emperor is the Supreme Commander of the Russian army and navy. He is Commander-in-Chief of all the land and sea armed forces of the Russian Government. He determines the organization of the army and navy and issues decrees and orders concerning: the displacement of troops, the mobilization of troops, their training, the performance of duties of the various ranks of army and navy personnel and, in general, everything connected to the organization of the armed forces and

defense of the Russian Government. As the Supreme Commander the Sovereign Emperor sets forth limitations on the rights to reside and acquire property (real estate) in zones that comprise military installations and maintenance areas for the army and navy.

15. The Sovereign Emperor declares areas to be under martial law or in a state of emergency.

16. The Sovereign Emperor has the right to coin money and to determine its physical appearance.

17. The Sovereign Emperor appoints and dismisses the Chairman of the Council of Ministers, Ministers, and Chief Administrators of various departments, as well as other officials, unless the procedure of appointing and dismissing the latter, has been determined by law.

18. As supreme administrator the Sovereign Emperor determines the scope of activities for all state officials in accordance with the needs of the State.

19. The Sovereign Emperor grants titles, medals and other state distinctions, as well as property rights. He also determines the conditions and procedures for granting titles, medals and distinctions.

20. The Sovereign Emperor directly issues decrees and instructions on matters of property that belong to Him personally, as well as on so-called State properties that always belong to the ruling Emperor. The latter cannot be bequeathed or divided and are subject to a different form of alienation. Those, as well as the other properties are not subject to taxation or levy.

21. As Head of the Imperial House, the Sovereign Emperor, in accordance with the Statute on the Imperial Family, has the right to administer princely properties. He also determines the organization and the administrative procedures of institutions and establishments managed by the Minister of the Imperial Court.

22. Judicial power is implemented through legally constituted courts in the name of the Sovereign Emperor. Their decisions are carried out in the name of His Imperial Majesty.

23. The Sovereign Emperor has the right to pardon the accused, to mitigate sentences and to generally forgive transgressors; to terminate court actions and to release from trial and punishment. Exercising royal mercy, He has the right to commute official penalties and to grant clemency in exceptional cases that are not subject to general laws, provided such actions do not infringe upon civil rights or the legally protected interests of others.

24. Decrees and commands that are issued directly or indirectly by the Sovereign Emperor, as supreme administrator, are sealed by the Chairman of the Council of Ministers or by an appropriate minister or by a department head, and are promulgated by the Governing Senate.

CHAPTER II

On the order of succession to the Throne

25. The Imperial Throne of All the Russias is hereditary within the Imperial House presently reigning.

26. Inseparable from the Imperial Throne of All the Russias are the Thrones of the Kingdom of Poland and of the Grand Duchy of Finland.

27. Both sexes have the right of succession to the Throne; but this right belongs by preference to the male sex according to the principle of primogeniture; with the extinction of the last male issue, succession to the Throne passes to the female issue by right of substitution.

28. Accordingly, succession to the Throne belongs in the first place to the eldest son of the reigning Emperor, and after him to all his male issue.

29. With the extinction of this male issue, succession passes to the branch of the second son of the Emperor and his male issue; with the extinction of the second male issue, succession passes to the branch of the third son, and so forth.

30. When the last male issue of the Emperor's sons is extinct, succession remains in the same branch, but in the female issue of the last reigning Emperor, as being nearest to the Throne, and therein it follows the same order, with preference to a male over the female person; but the female person from whom this right directly proceeds never loses this right.

31. With the extinction of this branch the succession passes to the female issue of the branch of the eldest son of the Emperor-Progenitor, wherein the nearest relative of the last reigning Emperor in the branch of this son succeeds, the eldest in this descending line, or if unavailable, in a collateral line, and if this relative is lacking, then the male or female person who takes her place by substitution, with preference, as above, for a male over a female person.

32. When these branches too are extinct, succession passes to the female issue of the other sons of the Emperor-Progenitor, following the same order, and after that to the male issue of the eldest daughter of the Emperor-Progenitor; and when that too is extinct, to her female issue, following the order established for the female issue of the Emperor's sons.

33. With the extinction of the male and female issue of the eldest daughter of the Emperor-Progenitor, succession passes first to the male and then to the female issue of the second daughter of the Emperor-Progenitor, and so forth.

34. A younger sister, even if she has sons, does not deprive her elder sister of her right, even if the latter is unmarried; but a younger brother succeeds before his elder sisters.

35. When the succession reaches a female branch which is already reigning on another throne, it is left to the person who succeeds to make a choice of faith and throne and, together with that person's heir, to renounce the other faith and throne, if

such a throne is tied by Law (with a religious denomination); if there is no renunciation of faith, the succession passes to the person next in order.

36. Children born of a marriage between a person of the Imperial Family and a person not of corresponding dignity, that is not belonging to any royal or sovereign house, have no right of succession to the Throne.

37. As the rules on the order of succession, enunciated above, take effect, a person who has a right to succeed is free to abdicate this right in those circumstances in which an abdication does not create any difficulty in the following succession to the Throne.

38. Such an abdication, when it has been made public and becomes law, is henceforth considered irrevocable.

39. An Emperor or Empress succeeding to the Throne undertakes, at accession and anointment, to solemnly observe the aforesaid laws on succession to the Throne.

CHAPTER III

On the attainment of Majority of the Sovereign Emperor, on Regency and Guardianship.

40. Sovereigns of both sexes and the Heir to the Imperial Throne reach their majority at the age of sixteen.

41. When an Emperor younger than this age ascends to the Throne, a Regency and a Guardianship are instituted to function until this majority is attained.

42. The Regency and the Guardianship are instituted jointly in one person or separately, in which case one person is entrusted with the Regency and the other with the Guardianship.

43. The appointment of Regent and Guardian, either jointly in one person or separately in two persons, depends on the will and discretion of the reigning Emperor who should make this choice, for greater security, in the event of His demise.

44. If no such appointment was made during the lifetime of the Emperor, upon His demise, the Regency of the State and the Guardianship of the Emperor who is under age, belong to the father and mother; but the step-father and step-mother are excluded.

45. When there is no father or mother, then the Regency and Guardianship belong to the nearest in succession to the Throne among the underage Emperor's relatives, of both sexes who have reached majority.

46. Lawful reasons barring tenure of the Regency and Guardianship are the following: 1) insanity, even if temporary; 2) the remarriage of widowed persons during tenure of the Regency and Guardianship.

47. A Regent of the State must have a Regency Council; there can be neither a Regent without a Council nor a Council without a Regent.

48. The Council consists of six persons of the first two classes selected by the Regent, who will also appoint others as changes arise.

49. Male dynasts of the Imperial Family selected by the Regent, may attend sessions of this Council but not before reaching their majority and are not included in the number of the six persons constituting the Council.

50. The Regency Council deals with all matters without exception, which are subject to the decisions of the Emperor Himself and with all matters that are submitted to Him and to His Council; but the Council is not concerned with the Guardianship.

51. The Regent has the decisive vote.

52. The appointment of the Council and the selection of the members thereof are provided for in case of the absence of other directives from the deceased Sovereign, to whom the circumstances and the persons should have been known.

CHAPTER IV

On Accession to the Throne and Oath of Allegiance

53. Upon the demise of an Emperor, His Heir accedes to the Throne by virtue of the law of succession itself, which confers this right upon Him. The accession of the Emperor to the Throne is reckoned from the day of the demise of His Predecessor.

54. In the Decree on the accession to the Throne, the Rightful Heir to the Throne is also announced, if the person to whom lawful succession belongs, exists.

55. Allegiance to the newly acceded Emperor and to His Rightful Heir, even if the Heir is not named in the Decree, is confirmed by a nationwide oath.

56. Everyone pledges an oath according to his faith and law.

CHAPTER V

On the Sacred Coronation and Anointment

57. Upon accession to the Throne, the sacred coronation and anointment are performed according to the rite of the Greco-Russian Orthodox Church. The date for this solemn ritual is set at the discretion of the Emperor and is given nationwide publicity in advance.

58. If the Emperor so deigns, His August Spouse joins Him in partaking of these sacred rites. But if the coronation of the Emperor precedes His entry into matrimony, the coronation of His Spouse occurs afterwards, solely with His specific assent.

CHAPTER VI

On the Title of His Imperial Majesty and the State Coat of Arms

59. The full title of His Imperial Majesty is the following: “By the Grace (and aid) of God, We NN, Emperor and Sovereign of All the Russias, of Moscow, Kiev, Vladimir, Novgorod; Tsar of Kazan, Tsar of Astrakhan, Tsar of Poland, Tsar of Siberia, Tsar of Taurian Khersones, Tsar of Georgia; Sovereign of Pskov and Grand Duke of Smolensk, Lithuania, Volhynia, Podolia, and Finland; Duke of Estland, Lifland, Courland and Semigalia, Samogitia, Bielostok, Korelia, Tver, Yugria, Permia, Vyatka, Bolgary and others; Sovereign and Grand Duke of Nizhni Novgorod, Chernigov, Ryazan, Polotsk, Rostov, Jaroslavl, Bielo-ozero, Udoria, Obdoria, Kondia,

Vitebsk, Mstislav, and Ruler of all Northern territories; Sovereign of Iberia, Kartalinia, the Kabardinian lands and Armenian province: hereditary Sovereign and Ruler of the Circassian and Mountain Princes and of others; Sovereign of Turkestan, Heir of Norway, Duke of Schleswig-Holstein, Stormarn, Dietmarsen, Oldenburg, and so forth, and so forth, and so forth."

60. In certain cases, determined by law, the title of His Imperial Majesty appears in an abridged form: "By the Grace (and aid) of God, We NN, Emperor and Sovereign of All the Russias, of Moscow, Kiev, Vladimir, Novgorod, Tsar of Kazan, Tsar of Astrakhan, Tsar of Poland, Tsar of Siberia, Tsar of Taurian Khersones, Tsar of Georgia, Grand Duke of Finland, and so forth, and so forth, and so forth." In other cases, also determined by law, the following brief version of the title of His Imperial Majesty is used: "By the Grace of God, We NN, Emperor and Sovereign of All the Russias, King of Poland, Grand Duke of Finland and so forth, and so forth, and so forth."

61. The Russian State Coat of Arms is a black double-headed eagle on a gold shield, crowned by two imperial crowns, above which there is a third, bigger crown, of similar appearance, with two undulating ends of ribbon of the Order of St. Andrew, the First-Called. The State eagle is holding a gold scepter and a gold orb. On the breast of the eagle is the Moscow Coat of Arms: a scarlet escutcheon with an image of St. George the Great Martyr and Victory-bearer on horseback, smiting a dragon with a golden spear.

The great State seal contains the escutcheon with the double-headed eagle described above, crowned by the helmet of Grand Duke Saint Alexander Nevsky and encircled by the chain of the Order of St. Andrew, the First-Called; on either side -- depictions of Archangel Michael and Archangel Gabriel; above all -- a gold pavilion studded with two-headed eagles and lined with ermine bearing the inscription: "God is with us"; above the pavilion -- the Imperial crown and State gonfalon. Around the escutcheon are depicted the ancestral coat of arms of His Imperial Majesty and the coat of arms belonging to the Realms of Kazan, Astrakhan, Poland, Siberia, Taurian Khersones and Georgia, the Grand Duchies of Kiev, Vladimir, Novgorod and Finland; above the pavilion -- combined on six shields the coat of arms of the other

Principalities and Provinces, named in the full Imperial title (article 59). This full title of His Imperial Majesty is placed along the rim of the seal.

The medium State seal contains the same depictions as on the great seal except for the State gonfalon and the six shields with the combined coat of arms of Principalities and Provinces located above the pavilion. Along the rim -- the abridged version of the Imperial title (article 60, paragraph 1).

The small State seal is in general similar to the medium seal but lacks the images of the Holy Archangels and the ancestral Coat of Arms of His Imperial Majesty, and the coat of arms of the Kingdoms and Principalities encircling the main escutcheon are situated on the wings of the eagle. Along the rim of the seal -- the brief version of the Imperial title (article 60, paragraph 2).

CHAPTER VII

On the Faith

62. The primary and predominant Faith in the Russian Empire is the Christian Orthodox Catholic Faith of the Eastern Confession.

63. The Emperor who occupies the Throne of All the Russias cannot profess any Faith other than the Orthodox.

64. The Emperor, as a Christian Sovereign, is the Supreme Defender and Guardian of the dogmas of the predominant Faith and is the Keeper of the purity of the Faith and all good order within the Holy Church.

65. In the administration of the Church, Sovereign Power acts through the Most Holy Governing Synod, which It has instituted.

66. All native and naturalized subjects of the Russian Empire who do not belong to the predominant Church, as well as foreigners working or temporarily residing in Russia, are everywhere free to observe their own faith and worship in accordance with its rites.

67. Freedom of religion is granted not only to Christians of foreign denominations, but also to Jews, Muslims and heathens; so that all peoples residing in Russia may glorify Almighty God in various tongues according to the laws and confessions of their ancestors, blessing the reign of Russian Monarchs and beseeching the Creator of the universe to increase the (nation's) well-being and to strengthen the might of the Empire.

68. Church matters of foreign Christian denominations and of other confessions in the Russian Empire are managed by their spiritual leaders and by administrators specifically designated by the Supreme Power.

CHAPTER VIII

On the Rights and Obligations of Russian Subjects

69. Conditions for acquiring the rights of Russian citizenship, as well as the loss thereof, are determined by law.

70. The defense of the Throne and of the Fatherland is a sacred obligation of every Russian subject. The male population, irrespective of social status, is subject to military service in accordance with lawful decrees.

71. Russian subjects are obliged to pay legally instituted taxes and dues, and also to perform other duties in accordance with lawful decrees.

72. No one can be subject to prosecution for a criminal act, except by procedures determined by law.

73. No one can be arrested, except in circumstances determined by law.

74. No one can be tried and punished except for criminal acts, governed by criminal laws in force during the perpetration of these acts, provided newly enacted laws do not exclude the perpetrated acts from the list of crimes.

75. The dwelling of every individual is inviolable. Conducting searches and seizures without the consent of the owner is permissible only in circumstances and by procedures defined by law.

76. Every Russian subject has the right freely to select his place of dwelling and profession, to acquire and dispose of property, and to travel abroad without any hindrance. Specific laws place limitations on these rights.

77. Private property is inviolable. Forcible expropriation of immovable property, when it is required for State or public use is permissible only upon just and proper compensation.

78. Russian subjects have the right to organize meetings for purposes that are not contrary to law, that are peaceful and unarmed. The law defines the conditions under which meetings take place, the procedures for concluding them, as well as the limitations on venues.

79. Within the limits established by law everyone can express his thoughts verbally or in writing, and can also promulgate them through publications or other means.

80. Russian subjects have the right to organize associations and unions for purposes not contrary to laws. The conditions for organizing associations and unions, the manner of their activities, the terms and rules for acquiring legal status, as well as the procedure for terminating associations and unions, are defined by law.

81. Russian subjects enjoy religious freedom. The conditions for making use of this freedom are defined by law.

82. Foreigners residing in Russia enjoy the rights of Russian subjects within limitations established by law.

83. Specific laws define exceptions to the rules expounded in this chapter regarding localities under martial law or under exceptional circumstances.

CHAPTER IX

On Laws

84. The government of the Russian Empire is established upon a firm foundation of laws that have been properly enacted.

85. Laws are equally applicable, without exception, to all Russian subjects and foreigners residing within the Russian State.

86. No new law can be enacted without the ratification of the State Council and the State Duma, and cannot go into effect without being approved by the Sovereign Emperor.

87. If extraordinary circumstances necessitate the introduction of a measure which requires legislative action when the State Duma is in recess, the Council of Ministers submits the measure directly to the Sovereign Emperor. Such a measure, however, cannot introduce changes into the Fundamental State Laws, or the Institutions of the State Council and State Duma, or in the Regulations on elections to the Council or the Duma. The force of such a measure will cease if the responsible minister or department head fails to introduce appropriate legislation in the State Duma during the first two months of its session upon reconvening, or if the State Duma or State Council refuse to enact it into law.

88. Laws specifically enacted for certain localities or segments of the population are not repealed by a new, general law unless precisely such a repeal is specified.

89. Every law becomes effective only in the future, except in those cases when the law itself specifies that it is in force retroactively or when it exists only to confirm and clarify the meaning of a previous law.

90. The Governing Senate is the general depository of laws. Therefore, all laws must be submitted in the original or in duly certified copies to the Governing Senate.

91. To inform the general public, laws are promulgated by the Governing Senate according to established procedures and do not take effect before their promulgation.

92. Legislative decrees are not subject to promulgation if they were not enacted according to the procedures set in these Fundamental Laws.

93. Upon promulgation, the law becomes effective from the time specified by the law itself, if such a period of time is not specified -- from the day on which the Senate publication containing the printed law is received locally. The law being published

may itself indicate that by means of telegraph or courier it be transmitted for execution before its publication.

94. A law cannot be repealed otherwise than by the force of another law. Therefore, until an active law is effectively repealed by a new law, it retains its full force.

95. No one can plead ignorance of a law once it has been duly promulgated.

96. Regulations concerning regimental, engineering and quartermaster corps, as well as provisions and orders to institutions and authorized personnel in the departments of the Army and Navy are submitted directly to the Sovereign Emperor upon review by the Military and Admiralty Councils, as long as these regulations, provisions and orders, in fact pertain only to the above-mentioned establishments, and do not concern matters of general laws and do not call for new expenditures from the treasury or if they do call for new expenditures, these are covered by expected surpluses in the financial budgets of the War or Naval Ministries. In case a new expenditure cannot be covered by the expected surplus, the submission of such regulations, provisions and orders for the Emperor's approval are permitted only after petitioning, in the prescribed manner, for the necessary allocation.

97. Regulations concerning military and naval courts are issued according to procedures established in the Codes of Military and Naval Regulations.

CHAPTER X

On the State Council and State Duma and their modus operandi

98. The State Council and the State Duma are convened annually by decree of the Sovereign Emperor.

99. Duration of the annual session of the State Council and State Duma and the lengths of recess during the year are determined by decrees of the Sovereign Emperor.

100. The State Council consists of members appointed by the Sovereign Emperor and of elected members. The total number of appointed members of the Council

summoned by the Sovereign Emperor to deliberate in the Council must not exceed the total number of the elected members of the Council.

101. The State Duma consists of members, elected by the population of the Russian Empire for a five-year term according to the statutes on election to the Duma.

102. The State Council verifies the credentials of its elected members. Likewise, the State Duma verifies the credentials of its members.

103. The same person cannot serve simultaneously as a member of the State Council and as a member of the State Duma.

104. Before its term of office expires, the elected membership of the State Council may be replaced by a new membership by a decree of the Sovereign Emperor in which new elections of Council members are scheduled.

105. Before the five-year term of office expires, the State Duma can be dissolved by decree of the Sovereign Emperor. The same decree sets new elections to the Duma and the time for it to convene.

106. The State Council and the State Duma possess equal rights in legislative matters.

107. The State Council and the State Duma are authorized to initiate legislative proposals according to the procedures they have established in order to enact new laws and to repeal and modify existing laws, with the exception of the Fundamental State Laws that are subject to revision solely upon the initiative of the Sovereign Emperor.

108. The State Council and the State Duma are authorized to interpellate, according to procedures they have established, ministers and chief administrators of various departments under the legal jurisdiction of the Governing Senate, concerning actions taken by them or subordinate persons and agencies, which seem to be unlawful.

109. The Statutes of the State Council and the State Duma indicate which matters are under the auspices of the Council and Duma and may be open for discussion according to procedures that they have established.

110. Legislative proposals that are considered and approved in the State Duma, are submitted to the State Council. Legislative proposals that are initiated in the State Council are considered by the Council, and upon approval, are submitted to the Duma.

111. Legislative proposals that have not been adopted in either the State Council or in the State Duma are considered rejected.

112. Legislative proposals initiated in the State Council or the State Duma, but not approved by the Sovereign Emperor, cannot be resubmitted for legislative consideration during the same session. Legislative proposals initiated in the State Council or the State Duma and rejected by one of these institutions, can be resubmitted for legislative consideration during the same session, provided the Sovereign Emperor so decrees.

113. Legislative proposals brought before, and approved by the State Duma and then by the State Council, and likewise, legislative proposals initiated in, and approved by the State Council, as well as by the State Duma, are then submitted to the Sovereign Emperor by the Chairman of the State Council.

114. When the State Budget is under consideration, appropriations for the payment of government debts or other obligations taken up by the Russian Government, are not subject to exclusion or reduction.

115. Allocation of funds covering the expenses of the Imperial Court Ministry and of those institutions under its jurisdiction, are not subject to consideration by the State Council or the State Duma if the sums do not exceed the amounts allotted in the State Budget of 1906. Modifications to the allocated funds, which are dependent on regulations found in the Statutes of the Imperial Family and which correspond to the changes within the Statutes, are equally not subject to consideration.

116. If the State Budget is not approved before the accounting period, the budget that had been duly approved the previous year will remain in force, with only such changes that meet the requirements of legislation enacted after the budget's approval. Before the promulgation of a new State Budget, on the decision of the Council of

Ministers, necessary funds are gradually made available to Ministries and Departments, not exceeding however, in their totality during any month, one-twelfth of all budgetary expenditures.

117. Additional over-budget funds for war-time needs and for special preparations preceding a war become available to all departments by supreme command in circumstances defined by law.

118. Government loans to cover budget and over-budget expenditures are permitted through the same procedures as established for approval of the State Budget's revenues and expenses. Government loans for covering expenses in cases and according to limits described in Article 116, as well as those loans for covering expenses that are required on the basis of Article 117, are permitted by the Sovereign Emperor, as the supreme administrator. The time and conditions for acquiring government loans are determined at the supreme level of administration.

119. If a legislative proposal, submitted in good time to the State Duma, concerning the number of people necessary to reinforce the Army and Navy, is not enacted into law in due process by May 1, then a requisite number of people, but not exceeding the number assigned the previous year, will be conscripted into military service by a decree of the Sovereign Emperor.

CHAPTER XI

On the Council of Ministers, Ministers and Chief Administrators of Various Departments

120. The Council of Ministers is charged with directing and unifying the actions of ministers and chief administrators of various departments on matters of legislation and of management on the highest level of government administration, in conformity with the law.

121. Ministers and chief administrators of various departments have voting rights in the State Council and the State Duma only if they are members of these institutions.

122. Regulations, instructions and orders issued by the Council of Ministers, ministers and chief administrators of various departments, as well as other ordinances lawfully authorized, must not contradict laws.

123. The Chairman of the Council of Ministers, ministers and chief administrators of various departments are accountable to the Sovereign Emperor for the general course of State administration. Each one of them is individually responsible for his actions and orders.

124. For official misconduct in office, the Chairman of the Council of Ministers, ministers and chief administrators of various departments shall be held liable under the civil and criminal laws.