NATIONAL RESEARCH UNIVERSITY
HIGHER SCHOOL OF ECONOMICS

Dmitry Poldnikov

THE RISE OF THE COMPARATIVE APPROACH IN RUSSIAN LEGAL SCHOLARSHIP AS A FACTOR IN THE MODERNIZATION OF CIVIL LEGISLATION, FROM SVOD ZAKONOV OF 1833 TO THE DRAFT CIVIL CODE OF 1905

BASIC RESEARCH PROGRAM

WORKING PAPERS

SERIES: LAW
WP BRP 85/LAW/2018

Dmitry Poldnikov[1]

THE RISE OF THE COMPARATIVE APPROACH IN RUSSIAN LEGAL SCHOLARSHIP AS A FACTOR IN THE MODERNIZATION OF CIVIL LEGISLATION, FROM *SVOD ZAKONOV* OF 1833 TO THE DRAFT CIVIL CODE OF 1905*

The place of Russian law in European legal history is debated both in the national and international literature. The advocates of the European character of Russian law have to face the particularity of its legal culture, the sources of law, and the tradition of *sui generis* national identity. Yet, national identities and legal traditions are not innate but man-made and changeable. In this paper the focus on the period of the 19th century when Russian law was essentially modernized to match the best coeval European standards. It began in the early 1860s with the judicial and university reforms of Alexander II which introduced modern principles of judicial dispute resolution and professional legal education and lasted until the October revolution of 1917.

The rapid and profound transformation of Russian law is best illustrated by the legislation in the domain of civil law, the leading branch of codified law in 19th century Europe. The pre-reformed *Svod Zakonov* (Digest of Laws) of 1833 (its 10th volume) was notably casuistic, inconsistent, and voluminous to the extent that it may not qualify as a modern code. The Draft Civil Code of 1905 could stand comparison with any European codification to date in terms of the systematic and coherent arrangement of general provisions on material civil law. Another important change was the progressive use of the best European legal experience: from the masked, fragmentary and unskilled borrowings in *Svod Zakonov* to a fully-fledged comparative legislation in the Draft Civil Code. A comprehensive comparison of all major European codes allowed the draft of a better piece of legislation but this has not been yet been researched by legal historians. The main question – how did this comparative approach came about – remains largely unanswered.

In this paper attention is drawn to the decisive role of Russian legal scholarship in developing a comparative approach using an original synthesis of several streams of European legal thought (Savigny's historical school, German Pandectistics, French *école de l'exégèse*, and Jhering's sociological approach) which it managed to develop in the second half of the 19th century. It is argued that such legal scholars as Meyer, Pobedonostsev, Pakhman, Shershenevich, Annenkov succeeded in overcoming the limits of the pre-reformed, literal knowledge of *Svod Zakonov* and began to study Russian civil law as part of a larger phenomenon (the law of the 'civilized nations') through dogmatic comparison which resembled the comparative legislation in western Europe.

The evidence for this claim is taken from the main doctrinal works between 1840 and 1910 which represent both streams of comparison and it is analysed in the framework of comparative legal history. Special attention is paid to the contribution of dogmatic comparison in developing the general part of contract law as a recognizable hallmark of civil law in continental Europe which came to be adopted in the doctrinal writings and the draft legislation of the late Russian empire.

Keywords: history of private law (19th century), comparative legislation, Russian civil law, legal modernization

JEL Classification: Z

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1 Dmitry Poldnikov is professor of legal history at the Department of general and inter-branch legal disciplines of the Law Faculty, the National Research University Higher School of Economics. E-mail: dpoldnikov@hse.ru

* The article was prepared within the framework of the Academic Fund Program at the National Research University Higher School of Economics (HSE) in 2017- 2018 (grant No.17-01-0051) and by the Russian Academic Excellence Project '5-100'.

Since the Renaissance, 'Europe' began to connote a complex of spiritual and cultural values. As law is embedded in culture, lawyers and legal historians have every right to define European law in terms of its shared values and observe the extending of its borders through time. This approach causes debates about the European character of the nations in the east of the continent and Russia in particular. Western comparatists tend to classify the Russian legal system as a transitory one or falling within a political pattern of law, while the Western European one is of a professional pattern. For Western legal historians it is quite typical to write European legal history without mentioning not only Russia but any of Eastern Europe. Few specialists are willing to support Harold J. Berman's effort to 'return' Russia to Europe, either by discovering the transferred 'European' elements in its past or by extending the borders of Europe to the east from the so-called 'core lands'.[2]

Unlike Eastern European lawyers and legal historians after the political turn of 1989, Russian scholars do not hurry to reassert the European identity of our present or past. The collapse of the Soviet Union was followed by the revival of the old debate between the Slavophiles and Westernizers. The former are ready to advocate the substantial and irreducible specificity of Russian law. The latter claim it to be a spin-off of the continental legal tradition.[3]

Both have good arguments on their side to fuel the debate, which is heavily influenced by ideological concerns. After all, national legal identities are not natural but man-made, not static but dynamic.[4] A stumbling block in the debate about Russian legal identity seems to be the 19th century. On a European scale it brought about profound changes with a polarized evaluation – as a breakup of the European unity based on *ius commune* (Coing) or as a decisive movement towards the unity of the continent through modern codification and legal scholarship (Giaro).[5] Changes in Russia were no less dramatic as its legal system passed from a medieval traditional to a modern codified state among the debates between those who welcomed and opposed this modernization (or westernisation).

This rapid transition is more visible at the level of the legislation in the domain of civil law (the hallmark of the continental European legal family). The first compilation of Russian laws during this period (*Svod Zakonov* – the Digest of Laws – of 1833) hardly matched the standards of modern codification. The final codification of the Empire (Draft Civil Code of 1905) not only matched but to some extent exceeded the coeval level of European legislative technique.

The questions are: how did this happen? and what factors played a decisive role in the quality of the new law? This can hardly be legal culture because Russian legal culture was believed to be almost the opposite from the (western) European one. In the words of Franz Wieacker, its major features include personalism, legalism, and intellectualism. '*Personalism*' refers to the 'primacy of the individual as subject, end, and intellectual point of reference in the idea of law'.[…] '*Legalism*'

2 See for example Serge Dauchy, Georges Martyn, Anthony Musson, Heikki Pihlajamḱi, Alain Wijffels (eds.), *The Formation and Transmission of Western Legal Culture: 150 Books That Made the Law in the Age of Printing* (Springer, Cham, 2017).

3 For the former see: Vladimir Sinjukov, *Rossijskaja pravovaja sistema: vvedenie v obshhuju teoriju* (Norma, Moscow, 2010). For the latter see: Andrej Medushevskij, Rossijskaja pravovaja tradicija - opora ili pregrada? (Liberal mission, Moscow, 2014).

4 See for example, a claim to construct a new, Central and Eastern European legal family, Rafał Mańko, Martin Škop, Markéta Štěpáníková, Central Europe Identity-A-Way-out-of-Peripherality, 6(2) *Wroclaw Review of Law, Administration and Economics* (2018), 4-28.

5 Helmut Coing, *Europäisches Privatrecht. Das 19. Jahrhundert: Überblick über die Entwicklung des Privatrechts in den ehemals gemeinrechtlichen Ländern* (C.H. Beck, München, 1989); Tomasz Giaro, «Some Prejudices about the Legal Tradition of Eastern Europe», in Bronisław Sitek, Jakub J. Szczerbowski and Aleksander W. Bauknecht (eds.), *Comparative law in Eastern and Central Europe* (Cambridge Scholars Publishing, Newcastle upon Tyne, 2013), 26-50.

indicates decision-making through general rules of law. […] It points to a positivistic separation of law and morals, and of law and politics. […] Finally, '*intellectualism*' indicates a general, intellectually orderly, systematic way of thinking about law that, for Wieacker, strains towards 'thematization, conceptualization and contraction-free consistency'.[6] Legalistic culture had required the *professionalization* of adjudication since the late middle ages and leading to the rise of a professional pattern of law (i.e. the outcome of legal disputes is determined primarily by legal professionals with specific legal reasoning).[7] This culture sank roots into Roman law, Western Christianity, Greek philosophy, Renaissance, Enlightenment, and modern rationalistic philosophy (most notably, Cartesian and Kantian).

On the contrary, Russian legal culture is believed to have rested on the *collectivistic* mentality of Russian peasants (i.e. over 90% of population until the early 20th century), with communities bound together by joint and several liability. Legalism was often confronted and overruled by the orthodox inspired ideal of inner truth in the popular consciousness.[8] Intellectualism was hardly compatible with the predominantly customary legal tradition of the lower classes, as well as the casuistry, fragmentation, and inaccessibility of the positive law (its official collection, *Sobornoye Ulozheniye* of 1649, did not include multiple later amendments). In the absence of university trained professionals the law was applied according to the common sense of those clerks (*djaki*) who were vested with both judicial and administrative powers. The influence of the Renaissance, the Enlightenment, and rationalistic philosophy was superficial and scarce. Russian legal culture was built on eastern Christianity, the autocratic rule of the tsars, and conservative traditions, as officially recognized in the state ideology under Nicolas I the year *Svod Zakonov* was promulgated.[9]

Against this backdrop one should not wonder that the voices of Russian statesmen and intellectuals of the first half of the 19th century, like Nikolai Karamzin or Mikhail Speransky, highlighted the specificity of Russian law in comparison with that of western Europe. And yet, something brought about a dramatic change in civil law in the 1860s. In this paper I demonstrate the decisive role of legal scholarship and the comparative approach as a synthesis of several streams of legal thought in Europe, which developed in the second half of the 19th century. This transition should be significant for the legal history of all nations which were part of the late Russian empire and formed its diverse legal landscape.

To analyse the nature of this synthesis, I choose the comparative approach in the domain of civil law because this branch is believed to have been the source of legal innovations on the continent (long before the codification movement) and comparison is the hallmark of the 'civil law' legal family. In Russia it became the basis of the comprehensive 12 volumes of the Motives to the Draft Civil Code by the drafting committee and even more extensive doctrinal literature. Most of the specific examples were taken from general contract law because this section seems to benefit the most from the comparative approach and foreign experience.

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6 Franz Wieacker, «Foundations of European Legal Culture», 38 (1) *The American Journal of Comparative Law* (1990), 1-29.

7 See James A Brundage, *The medieval origins of the legal profession: canonists, civilians, and courts*, (University of Chicago Press, Chicago, 2008).

8 Consequently, law was treated as secondary to a broader sphere of goodness, consciousness, and (divine) justice which could not be strictly regulated or formally applied. See Jurij Stepanov, Konstanty: slovar' russkoj kul'tury, (Akademicheskij proekt, Moscow, 2001), 598 (quoting from Gercen v rabote «O razvitii revoljucionnyh idej v Rossii», Dostoevskij v «Dnevnike pisatelja», Nekrasov v pojeme «Neschastnye», 1856).

9 For the theory of official nationality by Minister of Education Sergey Uvarov see: Nicholas V. Riasanovsky, *Russian identities: a historical survey* (Oxford University Press, Oxford, 2005).

As the study focuses primarily on comparative legislation, its main sources are the relevant sections of the Motives for the Draft Civil Code and all the major doctrinal writings which fall within the stream of comparative legislation or comparative law. Foreign legislation and doctrinal works are taken into account inasmuch they are necessary to attain the purpose of this article.

The purpose of this study belongs to comparative legal history. I believe that this young discipline can draw inspiration from the research strategies of today's comparative law and legal theory. Law is understood here as 'the institutionalised normative system of a community' the evolution of which is determined by multiple legal and extra-legal factors (legal formants).[10] Foreign law, legal transplants, and legal doctrine are understood accordingly as important legal formants which brought about major changes in the legal landscape of 19th century Europe. In assessing its controlling, direct, or indirect influence, I borrow the classification of Stefan Vogenauer.[11]

The article is divided into three parts to enable the reader to better understand the difference in the usage of foreign law in *Svod Zakonov* and in the Draft Civil Code through the evolution of appropriate methods in Russian legal scholarship.

The first section presents the state of civil legislation and legal doctrine in the Russian empire prior to the great reforms of Alexander II. The second investigates this turning point in legal scholarship. The third studies its influence on the legislative work towards the end of the 19th century. In the conclusion I assess the similarities and differences of Russian comparative legislation vis-a-vis coeval European approaches.

1) At the outset: *Svod Zakonov* and *zakonovedenije* in the 1820–40s

1.1. The compilation of laws in the absence of legal scholarship

Most legal historians today would agree that lawmaking in the domain of private law in modern Europe was the fruit of legal borrowings from a diverse legal landscape and its multiple sources (Roman law, *ius commune*, customary law, statutory provisions, and legal philosophy). Codifying diverse early modern law required comparative efforts long before the advent of comparative law proper. Yet, such a legislative pedigree was not always recognized and often eclipsed by the nationalistic legal ideology of the 19th century.

Towards the dawn of the age of codification in Europe, Russian law was only partially collected in the *Sobornoje Ulozhenije* of 1649. Many subsequent attempts failed to produce a new compilation of the multiple amendments, until this enterprise was entrusted to Mikhail Speransky, a self-made statesman without formal legal education. His first project of the civil code of 1808–10 under Alexander I provoked blistering criticism from patriots like first modern Russian historian Nikolay Karamzin[12] for being too detached from the national history, too openly and unskilfully based on the *Code Napoléon* which eventually led to its rejection and the exile of the chief drafter himself.[13]

10 For the definition of law see: Mark Van Hoecke, *Law as communication* (Hart Publishing, Oxford, Portland, 2002) 32. For legal formants see: Rodolfo Sacco, «Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)», 39 *American Journal of Comparative Law* (1991), 23.

11 Stefan Vogenauer, *An Empire of Light? : Learning and Lawmaking in the History of German Law*, 64 (2) The Cambridge Law Journal (2005), 481-500.

12 'Russian law has its own principles, just like Roman one; if you define them, you give us the system of (our) laws'. Cited after Zavitnevich Vladimir, *Speranskiĭ i Karamzin kak predstaviteli dvuh politicheskih techeniĭ v carstvovanie Imperatora Aleksandra I.* (Kiev, 1907) 34.

13 He denied these allegations as false and explained the similarity through common sense and Roman law. For references the

Karamzin's national approach, reinforced with arguments from the German historical school, won the day under Nikolas I who set the goal, first, to compile by 1830 the Complete collection of the laws of the Russian empire (chronologically arranged in 45 vols.) and, second, to prepare the abridged and systematized version of the laws in force (*Svod Zakonov* in 15 vols). Speransky was allowed to prepare the compilation after formally embracing the conservative ideology. In a memorandum of 1826 for the tsar he wrote that 'our legislation is probably alone in the whole of Europe in growing out of its own strength and knowing almost no influence of Roman law...' To romanize it is to change the whole legal culture of Russia'; which is hardly possible...[14]

In accordance with this policy, each volume of *Svod Zakonov* was presented as a restatement of still valid laws somewhere in their Complete Collection with the appropriate reference added to most articles. The same was true for the 10th volume of *Svod Zakonov* on civil laws. However, some of these references were inaccurate and the content of the articles could be explained only if one admitted borrowings from foreign codified law.

A good example of such an influence are the general provisions on contracts scattered in several sections of the first part of the 10th volume.[15] Formally, chapter 5, book 2 ('*On rights from obligations*') is based on 'general considerations' drawn from book 4 of the *Svod Zakonov*.[16] Actually, this 'general part' of contract law (25 articles) had been compiled from various foreign legislations of continental Europe, 'secretly, occasionally, unsystematically, and as a consequence, badly'.[17]

Art. 568[18] on the sources of obligations was probably inspired by textbooks on Roman law but despite that, it was marked by unclear wording, a confusion of the notions of 'obligation' and 'contract', and an unfounded differentiation between two kinds of obligations. Art. 569[19] on the binding force of correctly concluded contracts might have been built on Pothier's teaching in '*Traité des obligations*' and art. 1184 of the Civil Code but for some reason it equated the concepts of 'contract' and 'obligation'. Two important articles defining a contract (art. 1528)[20] and its validity (art. 1529)[21] did not follow from earlier Russian laws either. The sources indicated were too specific to formulate a general rule, or did not mention contracts at all. More likely, these two articles were drafted via an inaccurate translation of Ulp. D.2.14.1.3 ('*Conventionis verbum generale est*...') and under the influence of Pothier's '*Traité des obligations*' (§ 54, *l'objet d'une obligation*) and art. 1133

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assessment and references see: Mihail Speranskiĭ, «Vvedenie k Ulozheniju gosudarstvennyh zakonov» in *Plan gosudarstvennogo preobrazovanija M. M. Speranskogo* (Moscow, 1905) 338–339, Sergej Kodan, Taraborin Roman, Nesostojavshajasja kodifikacija grazhdanskih zakonov 1800–1825 gg. (Zercalo-Ural, Ekaterinburg, 2002) and Irina Ruzhickaja, «Kodifikacionnye proekty imperatora Aleksandra I kak sostavnaja chast' ego politicheskih reform», 1 Trudy Istoricheskogo fakul'teta Sankt-Peterburgskogo universiteta (2013), 130-139. On Speransky see: Roman Pochekaev, «Political And Legal Views Of Mikhail Speranskiy In "Rules On The Siberian Kirghiz"», TRG, 290–312.

14 Memorandum on Roman laws and their difference from Russian laws (read to Nicolas I on 10 March 1826).

15 Book 2, part. 2 ('On rights in rem'), chapter 5, book 2 ('On rights from obligations'); book 2, part. 3, chapter 2 ('On acquiring rights in rem'); book 4 ('On contractual obligations'), part. 1, chapters 1-2, ('On making and terminating contracts').

16 Under art. 2, chapter 5, part. 2, book 2 it reads: 'this article, as well as all articles in this chapter are based on general considerations of the provisions in the book 4 below'.

17 Maksim Vinaver, «Ob istochnikah X toma Svoda Zakonov», in id., *Iz oblasti civilistiki* (Tipografija. A.G. Rozena, St. Petersburg, 1908) 78.

18 'Obligations are contained either from those contracts which establish them, such as: hire, labour contract, delivery etc., or they are established as a separate piece according to the preceding written or oral contract, such as: mortgage deed, loan letter etc.'

19 'any contract and any obligation, if composed correctly, impose on the contracting parties a duty to perform them' (i.e. a contract or an obligation – D.P.)

20 art. 1528: '1. Contracts are concluded on the mutual agreement of the contracting parties. 2. Things or actions of persons can be the object of a contract; its goal must not be contrary to the law, good morals, and public order'.

21 'A contract is invalid and an obligation is void if they are concluded for the cause prohibited by the law.'

of the Civil Code on unlawful cause.[22] The examples of invalid contracts in part 2, art. 1529 poorly illustrated the general rule on invalidity because of their heterogenous nature. In art. 1530[23] the drafters confused a 'clause' specifying a duty to perform with a 'condition' (an uncertain future event) and a 'term' (the period of time when the claim becomes due). The reason for this confusion could be an inaccurate translation of the French word '*clause*'.

These are but a few examples but even these are enough to show that foreign legislation and legal doctrine became a 'crypto-formant' of Russian civil legislation. Its awkward results were largely due to the drafters lack of proper legal.

1.2. *Zakonovedenije* instead of legal scholarship

Had Savigny written his famous pamphlet 'On the vocation of our age for legislation and jurisprudence' in Russia under Nicolas I, he would have also declared Russia unready to codify its law because of a lack of doctrinal interpretation (and a lack of legal scholars).

Unlike medieval corporate universities in Europe, universities in Russia began to be created in 1802 by the state, for state interests, and under its administrative control. The first university statute of 1804 did not even provide for a law faculty.[24] The imperial government started to see the need for well-trained jurists only when the compilation of *Svod Zakonov* drew to its final stage and somebody had to be able to understand and apply it.

First, legal education 1829–34 was outsourced to Berlin University where Savigny promoted his conservative doctrine of the German historical school and Russian students could not be 'corrupted' with natural law.[25] In 1835 the updated university statute reformed legal education (*zakonovedenije*). It was limited to literal knowledge of the positive legislation (*Svod Zakonov*) excluding any hint of legal theory or history. This model resembled the French *école de l'exégèse* but could not rely on the more coherent French codified law. It looked theoretically helpless in comparison to the Pandectist legal doctrine in Germany, so that it could not provide 'professors' law' to fix the deficiencies in the legislation.[26] In accordance with the task of *zakonovedenije*, the legal literature of the 1830s and 1840s was little more than a paraphrase of the legislation.[27]

2) The turning point: critical legal scholarship and its comparative approach

2.1. The need for legal scholarship

The great reforms of Alexander II marked a turning point in Russian legal history. Of particular relevance were the abolition of serfdom, the judicial reform, and the university reform. As a consequence of the abolition of serfdom in 1861 more than 23 million serfs were recognised as natural persons capable of entering into legal relationships. The government established new courts

22 See Vinaver, op. cit, note 16, 37-38.

23 'The contracting parties are free to include in the contract all kind of clauses, if not contrary to the law, such as: the clauses on the maturity date, payment, liquidated damages, collateral etc.'

24 Law faculties existed only in Derpt (dedicated to the local Germanised law) and in Moscow (where invited German-speaking professors could not study Russian uncodified laws). Other universities in Vilno, Kazan, and Kharkov (since 1802-5), in St.Petersburg (since 1819), in Helsinki (since 1827), in Kiev (since 1834) did not embark on legal education before the reform of 1835.

25 After examination at the second division of His Imperial Majesty's Own Chancellery there were appointed professors at few law faculties. See: Martin Avenarius, *Fremde Traditionen des römischen Rechts: Einfluß, Wahrnehmung und Argument des l'imskoe pravo" im russischen Zarenreich des 19. Jahrhunderts* (Göttingen, Wallstein, 2014).

26 Hans-Peter Haferkamp, *Georg Friedrich Puchta und die "Begriffsjurisprudenz"* (V. Klostermann, Frankfurt am Main, 2004) and Savigny, System des RR.

27 Vladimir Tomsinov, *Juridicheskoe obrazovanie i jurisprudencija v Rossii v pervoj treti XIX veka: Uchebnoe posobie* (Zercalo-M, Moscow, 2011).

of the first instance (*volostnye sudy* – parish courts) competent to resolve disputes between peasants on the basis of local customs which began to be put down in writing and required interpretation.

The judicial reform of 1864 modernized the system of courts and introduced new rules of procedure for civil and criminal matters and for justices of peace, in accordance with the principles of speedy, equitable, and benevolent justice. According to these new laws the judiciary became a uniform professionalized hierarchical branch of power separated from the administration which was supposed to decide all cases through public and adversarial trials despite the unclear or deficient law. The new rules of legal procedure created demand for legal scholarship which could provide a comprehensive interpretation and critique of positive law (not yet revised in the 1860s) despite its many imperfections.[28]

The university reform of 1863 was conceived in parallel with the judicial reform. In contrast to the previous university statute, the new one expanded the object of legal studies to embrace 'law' and set the goal of training students to be capable of understanding and analysing all sources of positive law on the basis of a broader theoretical and historical background. Hence, five new chairs for legal theory and legal history (out of 13 chairs in total) were established and foreign legal experience became an important component of the standardized legal curriculum, even more so than at law faculties in Germany which provided the model for the university reform.[29]

This change was promptly noticed. In his inaugural lecture at Moscow University, Fedor Dmitriev acknowledged that 'the research of *foreign law* has never been more significant than today. Without it, one can become neither historian nor jurist' (here and hereinafter the emphasis is added – D.P.).[30] Piotr Redkin, Professor of St. Petersburg University, expressed a similar thought in his lectures on the encyclopaedia of law. When comparing the old and the new curricula, he clearly stated: 'now [...] a professor cannot limit his outlook to the national legislation; he has to present it as a modest *part of a larger phenomenon called 'law'*, according to all its sources and along all the periods of evolution'.[31]

2.2. The significance of foreign law for Russian legal scholarship

The relevance of the laws of European nations for the revival of Russian legal scholarship can be ascribed to the diversity of the positive law and foreign elements in Russian legal theory. The positive law of the late Russian empire was more fragmented than any other coeval jurisdiction in Western Europe. *Svod Zakonov* mentioned and recognized up to ten (!) local civil laws which could be schematically grouped into those of Western and Eastern origin. The latter were considered as the only appropriate law for the ‘uncivilized’ population of the Asian part of Russia (Steppe or Muslim laws). The former were kept in force as a privilege to the local population of the annexed or joined provinces (Baltic, Polish, Finnish, Little Russia and Lithuania, Bessarabia) and often due to its dogmatic superiority over the Russian legislation. The common legislation of the Empire (*Svod Zakonov*) itself contained some disguised borrowings from foreign laws (see above). Finally,

28 Art. 202 of the Statute of judiciary provided for high legal education as a prerequisite to become a judge, a state prosecutor, their deputies, an investigator.

29 They were dedicated to the encyclopedia of law, history of the most significant foreign allegations, history of Russian law, history of the legislation of the slavic peoples, and Roman law (cit. §15 of the Statute).

30 Sochinenija F.M. Dmitrieva: Stat'i i issledovanija. Vol. 2, (T-vo Tip. A.I. Mamontova, Moscow, 1900) 191; cited after: Vladimir Tomsinov, Juridicheskoe obrazovanie i jurisprudencija v Rossii v jepohu "velikih reform" (60-e - nachalo 80-h gg. XIX v.): uchebnoe posobie (Zercalo-M,Moscow, 2013) 65.

31 Iz lekcij P.G. Redkina po istorii filosofii prava v svjazi s istoriej filosofii voobshhe, vol. 1 (Tipografija M.M. Stasjulevicha, St. Petersbourg, 1889) 1.

Russian peasants lived according to customs largely unwritten before the abolition of serfdom.

Theoretical legal knowledge after the university reform became closely associated with modern Roman law taught at German universities. After the great reforms many legal scholars accepted the validity of Roman law in Russia by virtue of reason. Even non-Romanists admitted that (modern) Roman law was useful to the highlight deficiencies of *Svod Zakonov* by offering a more coherent treatment of legal institutions.[32] Romanists regarded it as a 'manifestation of universal (and apolitical) law' in the form of the dogma of civil law which could help to cope with the challenges of contemporary civil law.[33] In this respect, Roman law provided Russian civil law and its scholarship with a frame of reference common to the jurists in Continental Europe and facilitated a comparative approach.

2.3. A comparative approach to study foreign laws

Against the backdrop of the judicial and university reforms, legal scholarship experienced a true renaissance. It was noticeable in the domain of civil law. Before 1863 legal literature was little more than a compilation of the legislation, with the notable exception of the course of lectures by Dmitry Meyer (1819–56). This former pupil of Georg Puchta at Berlin University was the first to present Russian civil law in the Pandectist system in his lectures at Kazan University in the late 1840s and early 1850s (edited by his students and published posthumously in 1858).[34] Comparison did not play a prominent role in his treatment of civil law although he mentioned Roman, Austrian, and French civil law to find the 'scientific point of view' and to highlight the deficiencies of *Svod Zakonov*.[35]

Yet, between 1863 and 1917, several prominent scholars enriched their studies of civil law and its history in Russia with comparison. The earliest scholar was Konstantin Pobedonostsev (1827–1907).[36] A significant statesman and conservative politician of the late Russian empire, he is said to have laid the solid foundation for the scholarship of Russian civil law by publishing between 1868 and 1880 a comprehensive three-volume textbook which built on a method similar to comparative legislation. Reflecting upon a better method to study various parts of Russian law, he differentiated between the conservative and the new, dynamic branches of law. For the former (especially real rights) he recommended a historical path of investigating the complete collection of the laws of the Russian empire, and a variety of archival documents (various enactments and case law).[37] For the latter, where positive legislation had little to offer (e.g. law of obligations, intellectual property, copyright law), he proposed a 'comparative method of exposition': 'first of all, in the beginning of each article, I tried to give the main idea of an institution; after that I moved to the explanation of its features according to Roman, French, and German law.

32 Konstantin Pobedonostsev, *Course of Civil Law Vol.3* (Zercalo, Moscow, 2003, originally published in 1896) 6.

33 Such was the opinion of professor of Roman law in Yaroslavl, Nikolai Duvernua, former pupil of Karl Vangerow, Joseph Unger, and Rudolph Jhering. In 1872 he expressed it in a brilliant essay 'The importance of Roman law for Russian jurists'. He also cites the same argument of Karl Vangerow. See: Duvernua, Op. cit. p. 12.

34 See Dmitry Poldnikov, «Dmitry Ivanovich Meyer 'Russian Civil Law' (1858)» in *Formation and Transfer of Western Legal Culture*, op. cit., note 1, 374-376.

35 His lectures were later criticized (in comparison with Pobedonostsev and Annenkov's works) for being a rough adaptation of foreign legal dogmatics and legislation. See Preobrazhenskij I.V., *K.P. Pobedonoscev, ego lichnost' i dejatel'nost' v predstavlenii sovremennikov ego konchiny* (St. Petersburg, 1912) 101.

36 A graduate of the Imperial institute of legal scholarship (’*la grande école*’ for the imperial bureaucracy), professor of civil law at Moscow university, personal instructor of the sons of Alexander II, senator and member of the State Council, chief procurator of the Holy Synod of the Russian Orthodox church. For his bigraphical data see: Aleksandr Polunov, "Konstantin Petrovich Pobedonostsev – Man and Politician", 39 (4) *Russian Studies in History* (2001), 8-32.

37 Konstantin Pobedonostsev, Izuchenie literatury votchinnogo prava in id., *Kurs grazhdanskogo prava Vol.1*. (St. Petersburg, 1868) 220.

Later, when the overall image of this institution was complete in the minds of the listener or the reader, I moved on to present it according to the Russian legislation, with the preliminary overview of its origins and historical development on our soil. In so doing, I hoped to enable the reader to see the difference between the Russian version of the institution and its general type, as it embodied itself in history, in economics, and in law of Western Europe'.[38]

Despite its name, this methodology combined dogmatic, historical, and comparative elements borrowed from several European legal schools. That is why the conservative scholar and patriot recommended Savigny's 'The system of modern Roman law' as 'a masterpiece of legal analysis, well-founded conclusions, simplicity of legal mentality, and elegance of legal language'. He called French dogmatical treatises examples of 'linguistic clarity and practical narration'.[39] The historical element was very well known to him from the earlier writings of Savigny which he certainly read as a student at the Imperial institute of jurisprudence (1841–46). The comparative element seems to be an original invention of Pobedonostsev as he did not quote any European specialists on comparative legislation. This early version of legal comparison was hardly described in the textbook, written in a practical manner, but it seems to rest on the pragmatic presumption of learning and borrowing better legal solutions which did not contradict the Russian way of life. It resonated with the popular saying of Rudolph Jhering about the reception of law as 'a simple issue of expediency' and 'not an issue of nationality'.[40]

Pobedonostsev succeeded in rendering the doctrine of Russian civil law more systematic, coherent, and clear. He followed the institutional system of civil law, distilled general provisions and definitions from the casuistry of the laws. This achievement is more visible in the law of obligations and contracts where he succeeded in arranging the much needed general provisions. In Pobedonostsev's words, all major codified legislations introduced multiple articles to regulate common issues for all contracts while in *Svod Zakonov* one could find only about 25 articles, awkwardly borrowed from various undisclosed sources and badly formulated due to the 'lack of classical education' of the drafters.[41]

He filled in this gap by examining Roman law, Prussian, French, Austrian civil legislation, followed by a study of Russian civil law. As a result, his textbook featured 'The general part of a doctrine on contracts and obligations' covering all the major topics of this sub-branch of codified civil law[42], where general provisions usually stemmed not from *Svod Zakonov* but from German dogmatics of civil law.[43]

Pobedonostsev limited the scope of comparison to analyse Russian civil law. But dogmatic

38 Ibid, ii.

39 Ibid, vol. 2, 221.

40 Cited in my translation after the first edition which could be known to Pobedonostsev before he published the first volume of his textbook: Rudolf. von Jhering, *Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung Vol. 1* (Breitkopf und Hartel, Leipzig, 1866) 8-9.

41 Pobedonostsev, op. cit., note 36, 5-6.

42 Including the content and types of (contractual) obligations; general conditions of validity of obligations; establishing obligations; interpretation of obligations (i.e. contracts); modification and termination of obligations; relaxation of obligations; substitution of parties in an obligation; effects of contracts upon a third party; collateral for obligations. See Pobedonostsev, op. cit., note 36, vol. 3.

43 Such was the definition of contract as 'a conscious agreement of several persons whereby they express their will to define a legal relationship among them, in their personal interest and with regard to some property' which was not followed by any reference to Russian laws and paraphrased the Pandectist teaching. Cf. Savigny: 'contract is an agreement of several persons in a coinciding expression of their wills which defines a legal relationship among them.' (§. 140. p. 309).

comparison proved to be applicable to other areas, such as legislative technique and customary law. These were the topics researched by another important Russian scholar, professor at Kharkov and St. Petersburg, Semyon Pakhman (1825–1910). As a member of the second division of His Imperial Majesty's Own Chancellery (responsible for lawmaking) he published '*The History of Codification of Civil Law*' (2 vols., 1876). This was a new, encyclopaedic survey of the subject in Rome, western Europe, Slavic lands and Russia until the 1870s, which accumulated, described, and compared the milestones of an important legislative enterprise on the eve of a new codification of civil law in the Russian empire. The comparison of various codes rested on the *functional* similarity of the legislator's task to assemble and to arrange the positive civil law.

A more difficult matter was to apply dogmatic comparison to the study of common Russian customary civil law (1877–79). Customs were presumed to vary from village to village but were almost unknown to Russian academics before they started to be applied by the special local courts created in the course of the judicial reform of Alexander II. When attested by witnesses in front of the courts and applied, they were put down in writing and soon collected by the ethnologists of the Imperial geographic society for the usage of the committee to reform these local courts.[44]

Pakhman came up with the idea of revealing the 'common core' (principles and basic rules) of customs in the European part of Russia and Ukraine. He relied on the 'comparative method', the meaning of which was not disclosed in the introductory part but it was evidently taken from dogmatic legal scholarship. Even though he acknowledged substantial differences between customs and codified civil laws and promised not to impose abstract concepts upon customs, Pakhman used the same dogmatic toolbox to arrange customary casuistry to principles and branches of civil law as they were presented in the textbooks on state-made civil law. As a result, Russian legal customs were, in a two-volume treatise, arranged into such sections as: property law and possession, transactions and obligations in general, various kinds of contracts and civil wrongs, types of law suits, family law, succession law, guardianship.

Dogmatic comparison became firmly established in the writings of the second generation of lawyers after the great reforms. The most notable scholar with regard to dogmatic comparison was Gabriel Shershenevich (1863–1912), professor of civil law and civil procedure at Kazan, later at Moscow University, a politician and a deputy from the liberal party in the first Russian parliament. Unlike Pobedonostsev, he was a convinced Westernizer who made a lot of effort to bring Russian civil law closer to the western European legal tradition.[45]

In Shershenevich's view, the aim of legal scholarship was threefold: first, to understand the law through legal dogmatics; second, to explain its causes through sociological and historical approach; third, to evaluate its goal via legal politics (*de lege ferenda*). While discussing these aims, he made the next step in advancing a comparative approach by differentiating between dogmatic comparison (comparative legislation) and academic comparative law (as scholarship, *pravovedenije*). The former is intertwined with the first and the third tasks because it can help to explain the meaning of a legal institution in Russian law by referring to its more developed model in a foreign (western European) legislation. It also orients lawyers to the best foreign models as

44 *The proceedings of the commission for the reform of local courts* (St. Petersburg, 1873-1874), in 7 vols.

45 He authored several textbooks and other doctrinal writings on a wide range of legal issues (civil and trade law, its history, jurisprudence, legal methodology) which are said 'to represent a whole era within the Russian civil law literature. See: Heike Litzinger, «Shershenevich 'Textbook of Russian Private Law' (1894)» in op.cit., note 1, *Formation and transmission of Western legal tradition*, 421.

'examples to be followed'. 'Such a comparative study of contemporary (foreign) legislations with the aim of juxtaposing it with (our) national law to make it better, should not be confused with comparative law which aims at singling out general laws (i.e. regularities) of legal evolution via comparing laws of various peoples at various levels of culture'.[46]

To draw a clear border between these two kinds of comparison, the scholar emphasised their indented benefits. Comparative legislation should be useful for legal scholars to criticize the deficiencies and to propose necessary amendments, and for the lawmaker to draft better legislation, but not to the judicial decision-makers for the strict application of the positive law. Comparative law is to be applied 'to sort out legal phenomena of foreign laws in the past and present and to explain these data'.[47]

Shershenevich clearly opted for dogmatic comparison leaving comparative law to others (see below). In his most popular textbook on Russian civil law (1st ed. 1894), the author uses comparison with moderation, limited to the 'most important western (European) legislations'. He recommended the reading of several dogmatic writings on French (Planiol, Baudry-Lacantinerie, Aubry and Rau), German (Endemann, Cosack, Dernburg, Crome) and English law (Stephen, Lehr, Schirmeister).[48]

In the main content of the textbook he judged it more appropriate to refer to particular foreign laws in the analysis of specific institutions of civil law, not in the treatment of general provisions. For example, the exposition of the general part of contract law was based on the articles of the 10th volume of *Svod Zakonov*, case law, and occasionally on the 'primary' French and German legislation. However, there were more comparative data in the paragraphs dedicated to particular legal institutions, such as kinds of contracts. For example, the issue of the termination of a loan was illustrated with references to the French, Italian, Spanish, Prussian, Austrian, German, and Swiss civil codes. The treatment of particular issues resembled the plan proposed by Pobedonostsev: the social issue and its preliminary solution, an overview of major foreign legislations (no case law taken into account), then ‘our legislation’ and case law of the Senate.

Comparative legislation remained secondary to general theory of civil law which Shershenevich treated as the main object of legal study. Thus, discussing the system of civil law from an academic perspective, he criticised the German Pandectist system for ignoring the legal relationships generated by the industrial capitalism (e.g. exclusive rights) and for the lack of a general criterion for subdividing civil law into sub-branches (i.e. the law of inheritance combines features of real rights and obligations).[49]

Towards the end of the 19th century dogmatic comparison sank such deep roots among the civilists that even good doctrinal writing could have been criticised for its flaws. Such was a treatise by Konstantin Annenkov (1843–1910). He stood out from other authors as a practitioner, a justice of peace, chairman of the conference of the justices of peace of his province (Kursk), and a member of the committee for a new edition of the judicial statutes of 1864. His *magnum opus* was a six volume set of practical commentaries on Russian positive civil law ('The system of Russian civil law' 1899–1902) where almost every possible legal issue was treated meticulously, covering all

46 Gabrijel' Shershenevich, *Uchebnik russkogo grazhdanskogo prava* (Izdanie br. Bashmakovyh, Moscow, 1911) 15.
47 Ibid, 13-15.
48 Op. cit., §3, p. 20-21. Italian law was mentioned in the historical overview of western civil law in § 4.
49 Op. cit. p. 67. Yet, the author built on this system in the absence of a better one for pedagogical purposes, structuring the particular part of his textbook into real rights, exclusive rights, obligations, family, and inheritance.

possible Russian legislation, case law of the higher courts, and doctrinal literature. These merits could eclipse such flaws as 'Annenkov's dislike of legal theory, not very convincing system and his method of treatment of the law, ignoring western European literature, fragmentary and arbitrary selection of data for comparative study, finally, the absence of indices...'[50]

The dogmatic method of comparative legislation was rooted in the dogmatic toolbox of the continental legal scholarship of the age of codifications and shared with it its strengths and weaknesses. It helped to fit the casuistic and fragmentary legislation into a more systematic, coherent legal doctrine and allowed the identification of similarities and differences in the black letter law of the major continental jurisdictions. But it was not good for explaining those similarities or differences, as the advocates of sociological jurisprudence argued. The alternative was to go beyond dogmatics into academic comparative law. One can observe this transition in the publications of Sergey Muromtsev, Maksim Kovalevsky, Yury Gambarov, and Iosif Pokrovsky. It was largely due to the influence of Rodolf Jhering's writings (most of them had been translated into Russian), but also to the critique of the narrow dogmatic interpretation of law by François Gény. It expanded the scope of comparison into legal history and beyond positive legislation. It offered an alternative to dogmatic comparison, but proved to be too ambitious and missing a detailed methodology to be realized before the end of the long 19th century. Moreover, this approach to comparison remained unclaimed in the drafting of a new civil code.

3) The influence of legal doctrine on lawmaking

Russian legal scholarship realized and accepted the challenge of the great reforms. Its leading representatives took a pro-active position to criticize the law *de lege lata* and *de lege ferenda*, not least through the comparative approach. Their efforts were successful in terms of having a direct and indirect influence on the drafting of the civil code between 1882 and 1905. The content of this draft owed a great deal to comparative legislation and less to comparative law.

3.1. The Draft Civil Code

The multiple deficiencies of the 10th volume of *Svod Zakonov* became a common place in legal debates after 1863, as legal procedures gained more weight in social relationships. The need felt even more urgent in the face of the codification of law in the recently unified German empire, a powerful rival at the western borders. The drafting history of the civil code is well-known and has recently become subject of new studies.[51] My point here, however, is to highlight how the comparative approach helped to shape its content from the outset because of its promises and the attitude of the members of the drafting committee.

a) Direct influence

The drafting committee was established in May 1882. Although conservative statesmen chaired it and exercised a controlling influence, many of its members were notable scholars eager to enrich the draft with necessary doctrinal models. Among them were Kronid Malyshev (a student of common civil law and civil procedure in Russia via the historical and comparative method), Semyon Pakhman (customary law and the history of codification), Andrey Povorinsky (an expert on

50 Kravtsov's words in the obituary for Annenkov in newspaper Pravo. Ezhenedel'naja juridicheskaja gazeta (2 March 1910), 12,. Similarly, Shershenevich reproached Annenkov for looking at 'secondary' foreign legislation, that is Italian and Saxon civil law, instead of the French and German civil codes.(p. 18)

51 Vladimir Tomsinov, Razrabotka proekta Grazhdanskogo ulozhenija i razvitie nauki grazhdanskogo prava v Rossii v konce XIX - nachale XX veka. Stat'ja pervaja, 2, *Zakonodatel'stvo* (2015).

the bibliography of Russian civil law), Władysław Holewiński (an expert on Polish civil law and the French civilian tradition). Other members of the committee were practitioners but well-versed in the doctrine which became widely used by the Senate to cope with difficult issues of civil law in the absence of a modern civil code in Russia.[52]

The committee seemed to endorse comparative legislation unanimously as one of its basic methods. With its approval, the ministerial officials translated almost all notable codifications in Europe and North America (the civil code of California, the draft civil code of New York) to enable the committee to analyse foreign experience. The results of this comparative effort are visible in the structure and content of the articles and the article-for-article motives of the drafting committee published in 12 volumes between 1895 and 1902 (see below).

b) Indirect influence

This influence was based on the mutual recognition of the link between lawmakers and legal scholars to cope with the challenges of drafting a modern civil code. The guiding principles of the drafting committee were dispatched to all major universities and published in 1883. The same year the minister publicly called for assistance from the academic community and legal societies in Russia.[53] An enthusiastic response gave the committee rich feedback which it collected, examined, and published in 1891.[54]

The drafting committee took many of these suggestions into account, not only by formally indicating legal scholarship as one of the sources of the Draft, but also by citing the doctrinal opinions as arguments in the explanations of particular articles.[55] Among the most frequently cited scholars were the leading positivists of the second half of the 19th century: Pobedonostsev, Shershenevich, Annenkov, Kavelin, Meyer, Pakhman, Holewiński, Vaskovski, Nechaev and others. The same principle dictated the choice of foreign legal scholars.[56] Liberal scholars and supporters of 'comparative law' were not cited (Muromtsev, Gambarov, Pokrovsky etc.).

3.2. Comparative legislation in the Draft Civil Code

Given the substantial degree of doctrinal influence on the drafting committee, one can surely prove their usage of comparative legislation. In methodological terms it resembles Pobedonostsev's take on comparing foreign laws but with less accent on past Russian law and more pragmatic arguments. The main features of comparative legislation practised by the drafting committee can be summarized as follows:

– drafting modern legislation must heavily rely on a preliminary study of foreign law;

– the goal of such study is to find a *better legislative solution* to practical problems (social needs) in the law of the most developed nations, the criteria for this assessment being the principles of material and accessible justice backed up by an independent judiciary;

– for legislative purposes it is enough to limit the object of comparison to the codified

52 See: Avenarius, op. cit., note 24; Redakcionnaja komissija po sostavleniju proekta Grazhdanskogo ulozhenija ,8 *Zhurnal grazhdanskogo i ugolovnogo prava* (1885).

53 See the circular note of the minister of justice to the academic and judicial institutions regarding their suggestions to the Drafting Committee for the Civil Code in: 4 *Zhurnal grazhdanskogo i ugolovnogo prava* (1883). Prilozhenie.

54 *Zamechanija o nedostatkah dejstvujushhih grazhdanskih zakonov. Izdanie redakcionnoj komissii po sostavleniju Grazhdanskogo Ulozhenija* (Gosudarstvennaja tipografija, St. Petersburg, 1891).

55 See the list of sources indicated in the introduction to each volume of the Draft Civil Code (for the law of obligations see: vol. 5, p. xli-xlvi)

56 For Austrian law – Kirchstetter, Unger, Schiefner, Hasenöhrl, Stubenrauch, Krainz; for French law – Aubry and Rau, Dalloz, Demolombe, Marcadé, Mourlon, Pothier, Zachariae, Laurent; for German Pandectistic and the German civil code – Savigny, Dernburg, Windscheid, Arndts, Regelsberger; Barre, Cosack, Kontze, the motives to the civil code; for Italian law – Mattei, Pacifici-Mazzoni; for Swiss law – Schneider, Fick; for common law – Bekker, Smith, Story.

legislation and the doctrinal works of the authority (and excluding case law) of 'civilized' nations mostly based on Roman canon *ius commune*;[57]

– the selected black letter law of the countries with a shared legal tradition can be studied dogmatically with the help of grammatical analysis of the literal meaning and its systematic interpretation (historical or teleological interpretations were rare);

– the focus of the comparative analysis was on the clarity and coherence of a legal rule within the piece of legislation, while references to the practical usability of legal rules, the stability of legal transactions, and the value of certainty do not seem to be supported by the dogmatic comparative method;

– the place of comparative analysis in a typical plan of the motives is immediately after the practical problem addressed by an article and before the solution under Russian civil law, as well as in the concluding part to back up the preferred solution of the drafters.

In practical terms such comparisons ended up borrowing legal solutions from the most recent legislations (the German civil code, Swiss legislation) as far as they had been endorsed by the majority of Russian scholars.

Falling back to the examples from contract law are:

– the same critical arguments of the deficiencies of *Svod Zakonov*;

– the introduction of a comprehensive general part (with content closely resembling Pobedonostsev's account).

The same is true for particular articles, e.g. on the sources of obligations, the definition of a contract.

Conclusion

During the modernization of the Russian legal system and civil law after the great reforms of Alexander II, legal scholarship proved to be the decisive legal formant which helped to narrow the wide gulf between Russian and western European black letter law by transforming Russian legislation from casuistic and parochial into something generalized, coherent, and essentially European.

The difference is staggering when comparing the 10th volume of *Svod Zakonov* of 1833 and the Draft Civil Code of 1905 in the domain of general contract law, one of the most important achievements of early modern European legal scholarship. In *Svod Zakonov* one could find only about 25 articles in various sections, awkwardly borrowed from various undisclosed foreign sources (Roman law, French doctrine, French and Austrian civil codes) and badly formulated due to the lack of knowledge of the drafters under Speransky and the official ideology to build only on pre-existing Russian legislation. From the dogmatic point of view of coeval European legal scholarship, the general part of contract law in *Svod Zakonov* contained unclear casuistic determining of the sources of obligations, an erroneous identification of fundamental concepts (e.g. obligation and contract, contractual clause and condition) in addition to combining the norms of material and procedural law in one legislative act. These and other deficiencies could not be noticed and amended by Russian *zakonovedenije*, or literal knowledge of the laws taught at the few public law faculties in accordance with the university statute of 1835. Unlike the French *école de l'exégèse*, *zakonovedenije* could not

57 References to American common law and Slavic legisltions are limited to occasional remarks regarding particular legal rules, e.g. on mistake in transactions.

rely on a coherent codified law which integrated the scholarly achievements of jusnaturalists and *arretists*. It was theoretically helpless in comparison to the Pandectist legal doctrine in German academia.

On the contrary, the Draft Civil Code of 1905 matched the best European standards of late 19th century codification, as it became a one-branch legislative act with an emphasis on material justice above formal justice, the systematic coherence of the Pandectist subdivision instead of the traditional sections of *Svod Zakonov*, and extensive general provisions (definitions and rules) in place of the casuistry of pre-1860s civil laws. Its general part on contract law contained over 180 articles in a dedicated section of book 5 ('on obligations') determining the sources of obligations (contract, delict, and other legal grounds; art. 2), defining obligation as a legal duty to deliver or to do something (art. 1) and a contract as an agreement to establish, modify or terminate a legal right (art. 4), as well as establishing rules on performance, cession and delegation, termination of contractual obligation, and joint and several obligations (chapters 2–5).

The difference in quality between the two pieces of Russian legislation was largely due to an extensive comparison of all significant European civil codes. The drafters clearly borrowed this comparative approach from coeval Russian legal scholarship. Unlike *zakonovedenije*, it addressed the need to explore Russian law 'as a modest part of a large phenomenon called law, according to all its sources and along all the periods of evolution' in order to form a corps of critically thinking jurists capable of applying the deficient *Svod Zakonov* in the reformed Russian courts after 1864.

At the core of this revival was the comparative approach. It marked the official and academic recognition of the significance of the western European legal tradition for modernizing Russian governance and unifying its diverse legal landscape (including the western provinces with French and German-inspired legislations). Thus, comparison became even more significant for Russian scholars than for their western European counterparts most of whom limited their studies to their national legislation. Towards the end of the 19th century this approach matured into dogmatic comparison.

Dogmatic comparison resembled the French discipline of comparative legislation but was developed independently by such scholars as Pobedonostsev, Pakhman, Shershenevich, Annenkov. Some of them were Slavophiles, others were convinced Westernizers, but all of them seemed to share some basic assumptions: (1) legal phenomena developed through some basic regularities were valid for all (most?) peoples, (2) peoples at a similar level of cultural development should have similar laws, (3) modern law manifested itself mainly through legislation. The first two assumptions were shared with such legal historians as Maine, Darret, and Kovalevsky. The third one reflected the attitude of the French *école de l'exégèse* and German Pandectistic. The purpose of dogmatic comparison would be to see a better model of the legal institution in order to criticize the positive law *de lege lata* and *de lege ferenda*. To reach this end, it seemed enough to limit comparison to major jurisdictions of continental Europe with codified legislation and a considerable degree of Roman (canon) law (meaning almost no common law and no Scandinavian law). Taking into account the laws of the same legal family (as comparatists would call it in the 20th century), Russian scholars relied on the dogmatic toolbox with its interpretative canon. The sources of black letter law were interpreted in light of foreign legal doctrine but few references to case law.

It was dogmatic comparison that yielded the fruits that attracted the Russian legislators and assured legal scholarship had a direct and indirect influence on lawmaking. The drafting committee

for the civil code included several prominent scholars and its voluminous article-for-article commentary featured multiple references to legal doctrine (both Russian and foreign). Thus, within half a century from promulgating *Svod Zakonov*, a joint comparative enterprise of legal scholars and the legislator narrowed the gulf in black letter law. The problem was not the quality of legal scholarship and draft legislation but the persistent dualism of the official and popular legal culture. The 'golden age' of Russian jurisprudence was not long enough for personalism, legalism, and intellectualism to sink deep roots into the minds of the majority of Russians who eventually supported another model of social development after the October revolution of 1917.

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Dmitry Y. Poldnikov
National Research University Higher School of Economics (Moscow, Russia). Department of general and inter-branch legal disciplines of the Law Faculty, Faculty of Law. Professor.
E-mail: dpoldnikov@hse.ru