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Why Generalize Contract Law? The Russian Perspective on the Benefits of the Western European Legal Style during the Long 19th Century

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Abstract
Generalized contract law is believed to be a distinctive feature of civil law elaborated by modern legal scholars on the Continent. Sharia and common law lawyers were unwilling to transit from casuistry to generalities without the influence of the Continental authors. Is this also true for Eastern Europe with its specific legal tradition? The article examines the role of legal science in modernizing Russian contract law through generalization of its casuistic provisions in a framework of a general theory of contract during the long 19th century. On the basis of a variety of academic publications of that period, revisited with the methods of comparative legal history, the author reviews the initial and the advanced phases of this transformation, reveals its sources in German and French legal scholarship, analyses multiple arguments in favor of such a generalization grouped together around the scientific, the didactic and the practical goals, and uncovers the implicit meaning of each of these goals with the help of deeper analysis against the cultural background, in contrast to German and French jurisprudence of the same period.

Keywords
Russian contract law; scientification; generalizing legal style; positive law; customary law

1. Introduction

Creating rules or patterns of behavior is believed to be essential for any society to achieve stability and increase the predictability of social interaction. It was argued that rule-making is a truly universal human phenomenon which might be "genetically hardwired into the human brain" over centuries of social life.[1] Nowhere is the significance of rule-making more obvious than in the domain of contract law, aiming to regulate the variety of possible relations and to settle unavoidable conflicts.

The styles of rules in contract law differ considerably over time and space. Through much of history, various societies used casuistic and empirically grown contract law. This is true for ancient legal orders, as well as for medieval and modern Sharia law[2] or common law before mid-19th century.[3] Even on the Continent this feature was proven to be a rather recent phenomenon. It was

1 Fukuyama, F., *Political Order and Political Decay: from the Industrial Revolution to the Globalization of Democracy*, London, 2015, pp. 462-463.

2 Experts in *faqihs* contemplated multiple specific transactions but avoided considering the concept of contract in general, as they saw (and still see) it as too abstract and too Western. See Rayner, S.E., *The Theory of Contracts in Islamic Law: a Comparative Analysis with Particular Reference to the Modern Legislation in Kuwait, Bahrain and the United Arab Emirates*, London, 1991, p. 86 in footnote 3; Milliot, L., "La pensée juridique de l'Islam", *Revue internationale de droit comparé* 6(3) (1954), pp. 441-454 at 448.

3 Most likely, under the Continental influence on English common law. See Simpson, B., "Innovation in the 19th Century Contract Law", *Law Quarterly Review* 91 (1975), pp. 247-278 at 266 f. For American common law see Gordley, J., *The Jurists: a Critical History*, Oxford, 2013, pp. 251 ff. (also with critique of Patrick S. Atiyah, Grant

unknown to Roman jurists of any period as general rules of contract did not fit into the case-based empirical mentality of the Roman jurists who considered contracts as a fixed number of typical and legally recognized transactions.[4] The general style of contract law was the result of a long development stretching from the late Scholasticism[5] to the 19th century as part of the overall transition to the mentality of thinking in principles (general rules)[6] which became the "spirit of (modern) codifications" and the backbone of the methods to interpret, understand and apply the codified legal rules to specific cases.[7]

A good deal of literature has been written on the cultural dependence of the generalizing style in Western Europe.[8] If this is true, then can this legal style really be transplanted to countries with different legal traditions and with what consequences?

In this article my aim is to answer these questions in the context of the Russian legal history of the long 19th century. The Russian case of re-thinking contract law in general rules is notable for at least two reasons. First, the (theory of) contract law was generalized in the course of a rapid and radical transformation of the centuries-old legal tradition in legislative policy and technique, in judicial decision making and in academia. These transformations meant change to millions of people of the vast Russian Empire and created perspectives for the emerging unity of the pan-European legal tradition.[9] Second, the common features of the legal mentality in conceptualizing contract law in the 19th century might be a good starting point to contribute to comparative law and history and to eliminate some stereotypes and misunderstandings in academia in Western and Eastern Europe.[10] Third, the contribution of Russian academics of the 19th century to the generalization of contract law has not been properly studied yet.

I investigate the similarities of the goals of generalizing contract law in the process of its 'scientification' in Russian and Western European legal science. I also prove that the meaning of these goals was different in the specific cultural context of 19th-century Russia. And the different meaning of the *explicit* goals generated *implicit* goals of generalization of contract law. I focus on the formation of a remarkably uniform general theory of contract (*la théorie générale du contrat*; *allgemeine Vertragslehre*, *obshee uchenie o dogovore*) in Russian dogmatics of civil law under the French and German influence.[11]

The period covered by this article matches the 'long 19th century' (termed by Eric Hobsbawm)

Gilmore, Morton J. Horwitz who advocated an autonomous invention of generalizations).

4 See Fiori, R., "*The Roman Conception of Contract*", McGinn, T.A.J., (ed.), *Obligations in Roman Law: Past, Present and Future*, Ann Arbor, 2012, pp. 40–75 (with further references).

5 See Decock, W., *Theologians and Contract Law: the Moral Transformation of the Ius Commune (ca. 1500–1650)*, Leiden and Boston, 2012, p. 105 (with further references).

6 Coing, H., *Grundzüge der Rechtsphilosophie*, 5 ed., Berlin and New York, 1993, p. 251; Schröder, J., *Recht als Wissenschaft: Geschichte der juristischen Methodenlehre in der Neuzeit (1500-1933)*, 2 ed., München, 2012, p. 276 (with reference to Peter Landau).

7 See Cabrillac, R., *Kodifikatsii*, Moscow, 2007 (translated by Leonid Golovko from *Les codifications*, Paris, 2002), p. 361; Larenz, K., *Methodenlehre der Rechtswissenschaft*, Berlin, 1991.

8 For references see Schröder, J., *Recht als Wissenschaft*, passim.

9 Although that meant the demise of the genuine Eastern European legal tradition. See Giaro, T., "Legal Tradition of Eastern Europe. Its Rise and Demise", *Comparative Law Review* 2(1) (2011), pp. 1-23.

10 For various stereotypes regarding Eastern Europe see Giaro, T., "Some prejudices about the legal tradition of East Europe", Sitek, B., Szczerbowski, J.J., Bauknecht, A.W. (eds.), *Comparative Law in Eastern and Central Europe*, Newcastle, 2013, pp. 26-50 (with further references).

11 This theory rested on a clear principle that specific contracts share something in common with each other and, thus, should be regulated by a set of rules to conclude, interpret, execute and terminate them. It included: a) terminology and concepts, b) principles of contract law, c) general rules, groups or types of contracts, their classification, d) the place of contracts within the system of law.

but the emphasis is made on the second half of the 19th century when Russian legal scholars conceived and developed a general theory of contract in Russian civil law. This time deserves to be called the golden age of the Russian science of civil law.[12] It roughly coincides with the time from the preparation of the great modernization of Russia under Alexander II until the outbreak of World War I which severed most connections between Russian academics and Europe.

The main question and the sources of this study call for the methods of the 'deep-level comparison'.[13] I start with the standard functional presumption that scholars in all major European countries felt a common need to achieve greater certainty in the multiplying contractual relations, and that they found similar solutions to this need through generalized rules of contract law. But I also regard contract law as being imbued with a specific legal culture which determines all its elements, including the mentality of jurists. Hence, the actual meaning of the goals of the generalization of contract law can be revealed only though a multi-level comparison and their deeper analysis against the cultural background.

In the pages that follow, I, first, give an overview of the state of the generalization of contract law, second, compare the answers to the main question, third, explain the meaning of the answers in the specific cultural context.

2. The Relevance of Legal Scholars for Rethinking Positive Law

Thinking about positive law in general terms was the specialty and the privilege of university-trained jurists. The significance of academia in 19th century Western Europe rested on its connections with professional education, lawmaking and judicial decision making.[14] All that was true in the domain of contract law. In France almost two thirds of the provisions of the *Code Civil* of 1804 on the law of obligations were taken from the treatises of Jean Domat and Robert-Joseph Pothier.[15] And it was the academics who introduced the term 'general theory of contract' in the second half of that century.[16] In Germany the academic heritage of the Pandectists also permeated the drafts of the civil legislation (including the German Civil Code, or the BGB) and court practice.[17]

In Russia there was almost no space for legal science before the 1830s. Since the abolition of the representation of the estates (*Zemski Sobor*) after 1684 and the creation of the Russian Empire, legislation was monopolized by the autocratic Tsar. The domain of private law was underdeveloped. Private property was non existent not only in terms of its guarantee from arbitrary confiscation but

12 Butler, W., *Russian Law*, 3 ed., Oxford, 2009, pp. 3-88.

13 See Van Hoecke, M., "Deep Level Comparative Law", Van Hoecke, M. (ed.), *Epistemology and Methodology of Comparative Law*, Oxford, 2004, pp. 165–195. For modes of legal thinking as elements of a wide range of components of 'legal culture' see Nelken, D., "Defining and Using the Concept of Legal Culture", Örücü, E. and Nelken, D., (eds.), *Comparative Law: a Handbook*, Oxford, 2007, pp. 109-132.

14 Vogenauer, S., "An Empire of Light? II: Learning and Lawmaking in Germany Today", *Oxford Journal of Legal Studies* 26(4) (2006), pp. 627–663. For a comparable experience in France see Jestaz P. and Jamin, C., "The Entity of French Doctrine: Some Thoughts on the Community of French Legal Writers", *Oxford Journal of Legal Studies* 18(4) (1998), pp. 415–437.

15 Although the spiritual fathers of the Code Civil stood of the shoulders of the previous generation of French jurists. See Arnaud, A.-J., *Les origines doctrinales du code civil français*, Paris, 1969, p. 218; Halpérin, J.-L., *L'impossible code civil*, Paris, 1992, pp. 30-37.

16 Savaux, E., *La théorie générale du contrat, mythe ou réalité?*, Paris, 1997, pp. 48-49.

17 See Hammen, H., *Die Bedeutung Savignys für die allgemeinen dogmatischen Grundlagen des Deutschen Bürgerlichen Gesetzbuches*, Berlin, 1983, pp. 95-100.

the very word property in Russian emerged somewhat towards the end of the 18th century.[18] Neither the *Sobornoye Ulozheniye* of 1649 nor subsequent laws used contract as an umbrella-term to accumulate the casuistic provisions on specific contracts.[19] Civil justice was administered without clear procedure by the nobles and the former clerks with military or practical education and often rested upon the common sense rather on the disordered legislation. The courses taught by German professors in Latin or in German at the faculty of law of the first Russian university (founded in 1755 in Moscow) had no relevance for the positive legislation and actual legal practice.[20]

The situation began to change during the long conservative reign of Nicholas I (1825-1855). The new government needed educated jurists to interpret and to apply the laws in force collected by the official committee under Mikhail Speransky in 1832 (the *Svod Zakonov Rossijskoi Imperii,* hereinafter the *Svod Zakonov*). New universities and law faculties were created under the reform of legal education in 1835. However, the tasks of legal education (*zakonovedenie*) were limited to the literal interpretation of positive laws, and the primary method of study was to learn them by heart.

In the 1860s and 1870s the imperial government under tsar Alexander II (1855-1881) undertook a series of reforms, including the abolition of serfdom and the creation of the modern judiciary.[21] These institutional changes were supported by transformations in Russian legal academia which secured its prominent place in relation to a) education, b) judicial decision-making and c) lawmaking in the Russian Empire.[22]

a) Under the new university statute of 1863 the tasks of legal education were changed in line with the idea of introducing law students to the basics of legal science in the Pandectist sense[23] Legal theory and dogma of Roman private law became the linchpin of an emerging Russian theory of private law.

b) A link with judicial decision-making was established and strengthened because the new Regulation of the Judiciary of 1864 (Art.202) required a law degree for legal careers of judges, court session secretaries, attorneys, advocates, and academic doctrines were increasingly used to clear obscure or deficient provisions of the positive laws.

c) The deficiencies in the positive law and the complexity of legal relations in the

18 Novitskaya, T., *Pravovoe regulirovanie imuschestvennykh ontoshenij v Rossii vo vtoroj polovine XVIII veka*, Moscow, 2005, p. 316.

19 Although the provisions on specific contracts were numerous in the *Sobornoye Ulozheniye*, the very word ‘contract’ as 'consensus' was used only twice, referring to marriage arrangement of the peasants (in chapter 11, Art.19) and to agreed allowance for jailers (in chapter 21, Art.97).

20 This stage of legal development in Russia has been recently summarized for the European reader in M. Avenarius' *Fremde Traditionen des römischen Rechts: Einfluß, Wahrnehmung und Argument des "rimskoe pravo" im russischen Zarenreich des 19. Jahrhunderts*, Göttingen, 2014, pp. 129-173.

21 The four Regulations of 1864 introduced such principles of modern European judicature as judicial monopoly on law enforcement, the principle of equality of the parties involved, public hearings, jury trial, and the institution of a professional advocate. In cases of silence, obscurity or inadequacy of the legislation, the judges were allowed to interpret it beyond its literal meaning.

22 On the rise of Russian jurisprudence generally see Rudokvas, A. and Kartsov, A., "Der Rechtsunterricht und die juristische Ausbildung im kaiserlichen Russland", Pokrovac Z., (ed.), *Die Juristenausbildung in Osteuropa bis zum Ersten Weltkrieg*, Frankfurt am Main, 2007, pp. 173-316. On the study of civil law see Tomsinov, V., "Nauka grazhdanskogo prava v Rossii v 60-h - nachale 80-h godov XIX veka. Stat'ja vtoraja", *Zakonodatelstvo* 1 (2013), 81-87; Avenarius, M., *Fremde Traditionen des römischen Rechts*, pp. 35-47.

23 The updated curriculum incorporated courses on legal theory (a. basic concepts of legal and political science; b. history of jurisprudence), legal history (a. foreign; b. domestic), Roman law (a. history; b. dogma of private law; c. Byzantine law). See *Polnoe sobranie zakonov Rossijskoj Imperii. Sobranie vtoroe*, v *55 tomakh,* St. Petersburg, 1830-1884, vol. 38, sec. I. No 39752, 623, § 15. The text of the University statute of 1863 is available at <http://letopis.msu.ru/documents/2760>.

industrializing society paved the way for academic involvement in lawmaking, including the drafting of the modern Civil Code of the Russian Empire since 1882.

Academic contributions helped to promote more systematic and generalized legislative provisions, especially in the domain of contract law. The *Sobornoye Ulozheniye* contained only casuistic provisions on specific contracts and did not know the general concept of contract nor the general part of contract law. The *Svod Zakonov* of 1835 was drafted by the commission headed by Mikhail Speransky, who could not ignore the model of the French *Code Civil*. Thus, the *Svod Zakonov* contained ca. 25 articles with general provisions out of ca. 500 articles on contract law (part 1, volume X, book 4). In contrast, the Draft Civil Code of the Russian Empire (law of obligations of 1905) contained provisions on contracts in the general part of civil law and treated contracts as a species of legal transaction (*sdelka*), similar to the general part and provisions on *Rechtsgeschäft* in the German BGB.[24] The tendency to generalize contract law in theory and in practice was more than obvious. It went on uninterrupted until the end of the long 19th century.

3. Similar Goals of Generalizing Contract Law

The role and meaning of legal science in Russia from the 1860s to 1917 make it possible to group the variety of *answers* to the question "Why generalize contract law?" around scientific, didactic and practical goal.

3.1. Scientific Goal

1) There is a growing social need for certainty in contractual relations, as the growing complexity of modern social life makes these relations less certain.

In the Russian legal literature of the second half of the 19th century most authors mentioned the growing multiplicity of contracts in the age of modernization. And they understood quite well that such multiplicity might cause confusion among the contracting parties and the judges, if the clear guidelines were missing. This is true for the followers of the historical school[25], of the Pandectism[26] and of the sociological jurisprudence. These convictions seem to fit into the concept of the progressive liberation of human beings in the course of world history "from status to contract" (as it was noted by Sir Henry Maine) and the expansion of its field of application from obligations to the whole domain of private (and public) law.[27]

2) General rules constitute the 'nature' of contract law and do not change.

Even the conservative authors repeatedly wrote about the specific 'nature' of legal institutes,

24 See Tjutrjumov, I. (ed.), *Grazhdanskoe ulozhenie, Proekt Vysochajshe utverzhdennoj Redakcionnoj Komissii po sostavleniju Grazhdanskogo Ulozhenija*, St. Petersburg, 1910, vol. 2.

25 Pobedonostsev, K., *Kurs grazhdanskogo prava*, Moscow, 2003 (first published in St. Petersburg in 1880, reprinted after the edition of 1896), vol. 3, p. 5: "In our times there are more new types of contracts than ever befor." Contract law is especially flexible in adapting to changing social needs. (All translations from Russian into English are mine unless otherwise noted. — D.P.)

26 Pakhman and Shershenevich explained it by the rapid development of the market economy and the freedom of individuals to be protected by the civil laws. See Pakhman, S., *Obychnoe grazhdanskoe pravo v Rossii*, Moscow, 2003 (first published in St. Petersburg in 1877), vol. 1, p. 50. Shershenevich, G., *Uchebnik russkogo grazhdanskogo prava*, Moscow, 2005 (reprinted after the edition of 1912), §40. sec. III.

27 Savigny, F., *System des heutigen Römischen Recht*, Berlin, 1840, vol. 3, § 140, pp. 309-314; Windscheid, B., *Lehrbuch des Pandektenrechts*, 6 ed., Frankfurt am Main, 1887, vol. 1, § 69, p. 190.

comprising mostly general rules.[28] However, none of the mainstream jurists considered investigating the legal meaning of 'nature' or 'essence'.[29] For them the meaning of 'nature' was certainly closer to the one it acquired in German or French legal science of the 19th century. This concept might refer to the upper level of legal reality, the institutes, which should be primarily studied by the scholars. In Germany, many jurists acknowledged the existence of the scientific, or learned law drawn from the 'nature of things'. Yet, neither the Pandectists nor their critics, including Rudolf Jhering, envisaged any special method of understanding 'nature' other than that of positive law.[30] The same was true for France where the school of exegesis refused to investigate the 'nature' of the institutes in the *Code Civil* although its drafters alluded to principles of natural equity and natural law as the only solid foundation of all durable legal institutes and a link between the present and the past.[31]

3) General rules are not obvious to laymen or practitioners since they are overshadowed by the multiplicity of species of contracts.

Casuistic provisions on contracts in positive law of the Russian Empire and in Russian customary law proved that general rules were not obvious to anyone lacking special legal training and, hence, can be formulated only by jurists with a law degree and dogmatic skills.[32] In this regard, Russian academics followed Friedrich Savigny and other German scholars did not believe in the ability of the 'people's spirit' (*Volksgeist*) to refine legal institutions into a coherent system of legal concepts.[33]

4) It is for legal science to study generalities in contract law.

The majority of Russian academics accepted the duty to transform all the content of the sources of law into a form which would be suitable for the civil code enthusiastically as "the most important and hardest task of legal science".[34] Since the early 1870s the first Russian scholars familiarized themselves with this customary law attested in the decisions of the newly created *volost* courts for peasants, and they "could not help noticing some more or less general rules for different transactions and obligations" and "to group together those rules" according the blue print of the learned law, although the scholar voiced the danger of distorting authentic customary law by imposing scholarly concepts on it.[35] All that fits into the agenda of German and French academics. The mainstream of German civilian scholars assumed Friedrich Savigny's premise and set out to conceptualize the sources of civil law and to arrange the rules coherently themselves. Academic

28 Pobedonostsev, K., *Kurs grazhdanskogo prava*, p. 5.

29 For more details see Poldnikov, D., "The Legacy of Classical Natural Law in Russian Dogmatic Jurisprudence in the Late 19th Century," *Journal on European History of Law* 4(1) (2013), pp. 72-80.

30 See Schröder, J., *Recht als Wissenschaft*, p. 265; Haferkamp, H.-P., "Natur der Sache", *Handwörterbuch zur deutschen Rechtsgeschichte*, 2 ed., Berlin, 2016, vol. 3, pp. 1844-1847 (with further references).

31 See Portalis, J.-E.-M., *Discours préliminaire du premier projet de Code civil, prononcé le 21 janvier 1801 et le Code civil promulgué le 21 mars 1804*, Bordeaux, 2004 (first published in Paris in 1801), p. 13, 22, 29 etc., available at <http://classiques.uqac.ca/collection_documents/portalis/discours_1er_code_ civil/discours_1er_code_civil.pdf>.

32 For the positive law see Pobedonostsev, K., *Kurs grazhdanskogo prava*, p. 6: the lack of general provisions was "unsatisfactory" and "due to the lack of classical education of its drafters." For customary law see Pakhman, S., *Obychnoe grazhdanskoe pravo*, p. 6 ("the people do not seem to be aware of these commonalities" and believed that "each village has customs of its own").

33 Savigny, F., *System des heutigen Römischen Recht*, vol. 1, § 14, pp. 45-49.

34 Pobedonostsev, K., *Kurs grazhdanskogo prava*, pp. 4-5. See also Pakhman, S., "K voprosu o predmete i sisteme russkogo Grazhdanskogo ulozhenija", *Zhurnal grazhdanskogo i ugolovnogo prava* 8 (1882), pp. 193-222.

35 See Pakhman, S., *Obychnoe grazhdanskoe pravo*, p. 50. As a result, he composed a 30-page chapter on 'Transactions and obligations in general'. It included provisions regarding the terms of legal transactions, the sources of obligations, and the collateral.

approach proved to be helpful to organize customs as well as the codified civil law.[36]

3.2. Didactic Goal

Generalized contract should provide guidance for legal education.

A systematized exposition of contract law found its way into the curriculum of law faculties long before it influenced lawmaking and judicial decision-making. It was Dmitry Meyer who realized as early as the 1840s the benefits of bringing clarity to the study of casuistic positive law and forming the basis of a new coherent legal thinking.[37] Konstantin Pobedonostsev underlined the need to start education with general rules in contract law which were indispensable to guide students in the details of specific contracts. Muromtsev, Gambarov, Grimm, Pokrovsky, and Petrazycki and other authors of the late 19th and early 20th century went a step further and aimed at developing a general theory of civil law, and contract law in particular, relevant for all 'civilized nations'. Surely, it were German universities which provided a model for Russian professors to teach civil law in a generalized way. This academic style should have become quite pronounced here due to the leading role of German universities in the intellectual life and the successful reform of universities as autonomous bodies in Prussia in the early 19th century.[38] Friedrich Savigny did a lot to prepare jurists for the noble task of 'scientifying' positive law. He inspired the majority of German professors, as well as his Russian students (including Dmitry Meyer) to stick to the academic system of civil law and not to the 'scribbles' of the positive legislation.[39] Thus, a generalized theory of contract (as a species of legal transaction, *Rechtsgeschäft*) became the essential part of every notable Pandectist course of lectures and ultimately found its way into the modern civil codes of Saxony and of unified Germany, resonating at the law faculties of the Russian Empire.[40]

3.3. Practical Goal

Despite the supreme academic vocation of the legal science, Russian scholars never forgot its practical task and significance. In the combination of theory and practice was "all task, all power and all beauty of jurisprudence."[41]

1) Guidance for the legislator.

36 The best example of such an approach is, probably, a textbook of 1808 on French civil law by the German jurist, Karl Zachariae, who followed the order and method of German legal science and influenced a textbook of the Strasbourg professors Charles Aubry and Charles Frédéric Rau *Cours de droit civil français, traduit de l'allemand de M. C. S. Zachariae revu et augmenté*, Strasbourg, 1838.

37 His lectures on civil law perfectly served both purposes, according to G. Shershenevich's *Nauka grazhdanskogo prava v Rossii*, Moscow, 2003 (first published in Kazan' in 1893), p. 143.

38 For details with regard to public law see Stolleis, M., *Öffentliches Recht in Deutschland: eine Einführung in seine Geschichte (16.-21. Jahrhundert)*, München, 2014.

39 This pejorative characteristic was found in one of Savigny's letters. Cited after Wieacker, F., *A History of Private Law in Europe: with Particular Reference to Germany*, translated by T. Weir, Oxford, 2003 (first published in 1967), p. 266.

40 Hammen, H., *Die Bedeutung Savignys*, pp. 100, 103-106.

41 Dynovsky, K., *Zadachi civilisticheskogo obrazovanija i znachenie ego dlja grazhdanskogo pravosudija,* Odessa, 1896, p. 26. Sergey Muromtsev's comments on the division of theory and applied dogma in law see in his article "Chto takoe dogma prava?", *Juridicheskij Vestnik* 4 (1884), pp. 759-765 at 759.

The principal channel of influence of the generalized theory of contract law was the participation of academics in identifying the pitfalls of the positive provisions on contracts in the *Svod Zakonov* and in proposing better rules for the modern Civil Code of the Russian Empire. This activity was endorsed by the government. For example, in 1882 the minister of justice Dmitry Nabokov asked the legal community to give feedback on the shortcomings in civil law.[42] Because of the academic involvement the resulting draft of the Code contained a highly abstract general part, and the law of obligation included general provisions for all contracts. Thus, legal scholars assisted the government in the task of raising the positive civil law above the casuistry of multiple contracts in the same way as did their German counterparts during the long 19th century.

2) Guidance for the judges.

After the judicial reform of 1864 judges of the Russian Empire were supposed to interpret laws and to resolve disputes on the basis of positive laws despite lacunas and contradictions. Soon it became obvious that "without clear general rules judges would have to use analogy which did not contribute to coherent dispute resolution," especially with regard to dynamic contract law.[43] The consistency and impartiality of adjudicating was to be secured by the strict application of the general rules of the positive law to a specific case by the model of syllogism.[44] Legal scholars, from their part, started to analyze, arrange and publish the collections of juridical decisions of the higher courts with the obvious intention to fit them into the doctrine of contract law.[45] Indeed, the judges began to benefit from the legal doctrines in 'hard cases' and the civil department of the Ruling Senate gradually assumed the role of introducing innovations from doctrine in order to correct the defective positive law.[46] Here again, the Russian pattern of interaction of academia and the judiciary was close to the German one.[47]

3) Standard for assessment and critique.

As soon as legal scholars opted for an academic standard, they began to criticize both the legislation and the judgements for failing to comply with the academically developed standard of contract law. With all the lacunas and deficiencies, Russian civil law and court practice were a breeding ground for such critiques. Without general provisions Russian legislation on contractual matters was especially inconsistent, fragmented in an age of socio-economic modernization. The examples of academic critique are many and can be found in the works of the pioneers of civilian legal doctrine (Meyer), the conservative supporters of the regime (Pobedonostsev), and especially liberally thinking scholars (Muromtsev and others).[48] Towards the end of the 19th century, Russian

42 In response to this proposal see Pakhman, S., *K voprosu o predmete i sisteme russkogo Grazhdanskogo ulozhenija*, St. Petersburg, 1882 and *Juridicheskij vestnik* 11(3-4) (1892), pp. 519–520.

43 Pobedonostsev, K., *Kurs grazhdanskogo prava*, p. 5.

44 This model was carefully described in the textbook of E. Waskowski, *Rukovodstvo k tolkovaniju i primeneniju zakonov: Dlja nachinajushikh juristov*, Moscow, 1913.

45 See, for example, *Dogovornoe pravo po reshenijam kassacionnogo Senata*, 2 ed., Vladimir, 1880, pp. 168–205, available online at <http://civil.consultant.ru/reprint/books/54/4.html#img5>.

46 See Rudokvas, A. and Kartsov, A., "The Development of Civil Law Doctrine in Imperial Russia under the Aspect of Legal Transplants (1800–1917)", Pokrovac, Z. (ed.), *Rechtswissenschaft in Osteuropa. Studien zum 19. und frühen 20. Jahrhundert, Sonderdruck*, Frankfurt am Main, 2010, vol. 5, pp. 291–333 at 329.

47 Vogenauer, S., "An Empire of Light? Learning and Lawmaking in the History of German Law", *The Cambridge Law Journal* 64(2) (2005), pp. 481-500; Hammen, H., *Die Bedeutung Savignys*, pp. 100-103 (quoting decisions of the high courts in Berlin, Dresden, Bavaria, Kassel).

48 For example, Dmitry Meyer pointed out that it was inconsistent and misleading to treat sale and purchase in different subsections of the *Svod Zakonov*. Pobedonostsev noted that the legislator (falsely) substituted the division into mutual and unilateral obligations for the division of the modes of acquiring property in book 3, vol. X, sec. 1 and 3 of the *Svod Zakonov* (see Pobedonostsev, K., *Kurs grazhdanskogo prava*, p. 23). Also he noted that the legislation ignored

legal scholars were close to provide the legislator and the courts with possible solutions of 'hard cases'. It meant a proactive spirit which is believed to be another hallmark of German and French legal scholarship.[49]

3.4. Understanding Similarities

The similarities in the attitude of Russian, German and French academics towards the issue of generalizing contract law should be attributed to the common paradigm of legal science in the long 19th century. In Russia this paradigm became known primarily in the form of a typically German positivist legal science (*Rechtswissenschaft*).[50] The implementation of this program led to the emergence of "a special style of legal thinking based on the principles"[51] where generalization was not only possible but *preferred*, even *inevitable*[52].

Despite its German origins, Russian civilian scholars embraced the tenants of the Pandectist program quite enthusiastically. Contemplating the essence of legal science, Semjon Pakhman made it clear that "the foundations of legal science are not rules of behavior, but rules of legal thinking (not *leges*, but *regulae juris*)…" He also stated that the task of legal science "is not to interpret legal rules but to create the general system of legal concepts"[53] to transform the legal 'matter' into the form suitable for codification, mainly through the formal and dogmatic methods, as noticed Sergey Muromtsev.[54]

Additionally, the generalizing trend was stimulated by the comparative character of Russian legal science in the 19th century. A broad comparison seemed to be the most appropriate method reveal the "principle idea of each legal institution" often blurred in the national variations of Roman, French and German law and obscured by the deficiencies of Russian law. Its clear image was to be compared with the relevant provisions in national civil law in their historical development.[55] By the early 20th century, Yury Gambarov attributed the scientific character of jurisprudence directly to the comparative approach: "Only in this kind of research… jurisprudence elevates itself to the level of a proper science which aims at discovering the repeated patterns in legal phenomena and the causal link between them and the (social) environment".[56]

4. Difference of Implied Goals of Generalizing Contract Law

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altogether natural (incomplete) obligation (*ibid.*, p. 27) and the implications of the missing goal or cause of contracts (*ibid.*, p. 46).

49 Vogenauer, S., "An Empire of Light? II", pp. 658-659; Jestaz P. and Jamin, C., "The Entity of French Doctrine", pp. 415-437.

50 Schröder, J., *Recht als Wissenschaft*, pp. 251 ss.; Wieacker, F., *A History of Private Law in Europe*; Gale, S.G., "A Very German Legal Science: Savigny and the Historical School", *Stanford Journal of International Law* 18 (1982), pp. 123-146.

51 Coing, *Grundzüge der Rechtsphilosophie*, p. 251.

52 Friedrich Julius Stahl wrote about the "necessity to generalize". According to Friedrich Savigny, the most noble task of legal scholars is to reveal the generalities in the particular. Likewise Jhering claimed that legal science could not perform its functions without generalizing. For references see Schröder, J., *Recht als Wissenschaft*, pp. 251 ss.

53 Pakhman, S., "O sovremennom dvizhenii v nauke prava", *Zhurnal grazhdanskogo i ugolovnogo prava* 3 (1882), pp. 1-68 (a speech delivered on 14.02.1882). It was a difficult task, he acknowledged, given the uncertainty of Russian legal terminology, the lack of general rules and the basis in positive legislation for legal analysis.

54 Muromtsev, S., "Chto takoe dogma prava?", pp. 759-765.

55 Pobedonostsev, K., *Kurs grazhdanskogo prava*, p. 2.

56 Gambarov, Y., *Grazhdanskoe pravo: obshhaja chast'* Moscow, 2003 (first published in St. Petersburg in 1911), p. 35.

Most Russian scholars of the 19th century readily stressed common goals of legal science with regard to generalizing contract law. Yet, a closer look on the same matter reveals at least three implied reasons to generalize contract law in Russian academia.

4.1. Highlighting the Differences

1. Raising the prestige of legal scholars

French and German scholars in the 19th century did not face the issue of establishing their prestige because they could build on a century long university tradition. By contrast, Russian academics had to show the value of dogmatic skills, including the ability to see the general in the particular, to command respect in late 19th century Russia from law students, professional jurists and the government. In the 1870s over half of all students at the universities of the Russian Empire studied law.[57] Since the 1860s newspapers published information of the major trials on a regular basis. The meetings of legal societies in St. Petersburg and Moscow attracted a considerable number of the general public. The drafting of the Civil Code of the Russian Empire showed that the government also held legal scholars in prestige for their capacity to see the general in the particular.

2. Accelerating the modernization of law and society

In many publications one can find at least a brief reference to the ever more rapid exchange of goods and services after the Great reforms of the 1860s. This belief rested in the state of European political economy and ideology that established a firm link between the economic progress and the legal guarantees of proprietary and contractual rights. In Russia this ideology was warmly supported by the so-called Westernizers as opposed to the Slavophils, or protagonists of the national (Slavic) identity.[58] Many civilian scholars in Russia were indisputable Westerizers, including the drafter of the *Svod Zakonov* count Mikhail Speransky, then Dmitry Meyer, Nikolai Duvernua, Sergey Muromtsev, Leon Petrazycki, Iosif Porkovsky. Although, one could appreciate efficiency of generalized contract law without sharing Western values. Pobedonostsev made it clear, "we need to update (Russian civil law) on the basis of Western legal science because it is essential for functioning of modern society".[59]

3. Civilizing the backward-thinking peasantry

General rules of contract law believed to be able to civilize the vast majority of the Russian peasantry. Until the late 19th century the Russian Empire was a rural nation. The rate of urbanization was below 10% and most of town-dwellers lived in St. Petersburg and Moscow. Before the period of the Great Reforms most peasants were poor illiterate serfs excluded from the official legal order. The lack of information about their customs led many scholars to diminish popular perception of law and justice. In the late 19th century the researcher of customary law, Evgeny Yakushkin (1826-1905), summarized the situation as follows: "Most of the opinions presuming immorality of the (Russian) peasantry, its disrespect towards the law, result from (an academic attempt) to apply the rules of strict (written) law to such cases where ordinary people consider it inappropriate".[60] Yet, after 1861 professional judges of *volost* courts began to projected

57 Davydov, N. and Polyansky, N., (eds.), *Sudebnaja reforma*, Moscow, 1915, p. 363.

58 See articles "Slavophile" and "Westernizer" in Encyclopædia Britannica at <https://www.britannica.com≥ and article "Slavjanofily i Zapadniki" in Stepanov, Y., *Konstanty: Slovar russkoj kultury*, Moscow, 2004, pp. 670-674 (with further references).

59 Pobedonostsev, K., *Kurs grazhdanskogo prava*, p. 6.

60 Evgeny Yakushkin's opinion is cited after Tomsinov, V., "Pravovaja kultura", *Ocherki russkoj kultury XIX veka*,

some concepts of the learned law on customs. And they were followed by academics who investigated the patchwork of decisions of these courts.

4.2. Understanding the Differences

The implied meaning of generalizing contract law in Russia should be understood in the context of two cultural splits: first, between Russia and West Europe, second, between official and popular culture within Russia.

1) Discrepancy between European and Russian legal cultures.

In Western Europe the foundations of a general theory of contract could be traced back to such elements of European legal culture as personalism, legalism, intellectualism.[61] This theory originated in an intellectually sophisticated academic tradition which poses individuals at the center of private law and provides them with a universal instrument to dispose of their rights and to engage into obligations at their free will, irrespective of moral, social, or political purposes or values.

Russian legal culture before the Great reforms of 1860s cannot be described in either of these elements. First, it tends to be collectivistic. Historically individuals were perceived and legitimated as part of a community (estate, village, class etc.).[62] A centralized state dominated over people ideologically (with the values of the Orthodox Church, autocratic rule of Tsar and national specificity of Russia), economically (the patrimonial Russian state was the main proprietor and entrepreneur in the land) and legally (personal rights were acknowledged and partially guaranteed only for the nobility after the Charter of Catherine II in 1785). Second, the Byzantine influence on Russia secured strong ties between law and morality, formal justice and truth, state and church coexisting in symphony. The resulting pattern of morally and politically-driven law was not challenged before the Judicial Reform of 1864. Third, before the mid-19th century intellectual energy of talented Russian thinkers was channelled to religious and moral studies.

The theory of contract law was known in Russia as part of 'modern Roman law'. Many conservatives perceived it as suspiciously individualistic and liberal. The Westernizers had to veil its individualism or to prove its universality though comparison in contemporary civil law and legal history.[63]

2) Dualism of official and customary law in Russia.

The 'dualism' of official and customary law in Russia is believed to be the consequence of very limited access individuals had to the legislation.[64] Even in the end of the 19th century laws and orders were scattered in separate publications, often communicated exclusively to the competent authorities for implementation and were kept secret from the general public which did not know and

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Moscow, 2000, vol. 2, pp. 102-165 at 159-160.

61 Under personalism Franz Wieacker understood "the primacy of the individual as subject, end, and intellectual point of reference in the idea of law". Legalism signified "the need to base decisions about social relationships and conflicts on a general (and intrinsically valuable) rule of law". Finally, intellectualism referred to the "basic tendency to comprehend legal phenomena in the framework of scientific thought". See Wieacker, F., "Foundations of European Legal Culture", *The American Journal of Comparative Law* 39(1) (1990), pp. 20-25.

62 See article "Chelovek, Lichnost" in Stepanov, Y., *Konstanty*, p. 725.

63 This thesis was maintained by Nikolai Duvenrua, Yury Gambarov, Iosif Pokrovsky and others. See, for example, Duvernua, N., "Znachenie rimskogo prava dlja russkikh juristov", *Vremennik Demidovskogo juridicheskogo litseja* 1 (1872), pp. 33-57.

64 See Medushevskij, A., *Rossijskaja pravovaja tradicija — opora ili pregrada?*, Moscow, 2014, pp. 36-40.

did not accept them.[65] Towards the end of the 19th century legal anthropologists discovered that people's legal consciousness was anti-formalistic, casuistic and very context-dependent.[66] Russian peasants perceived the good, the just and the conscious as a much broader area than that of official law. They regarded formalities as unjust and ignored abstract legal concepts.[67] The customary regime of contracts (including their binding force) changed with various circumstances, in contrast with the 'sanctity of contract' under positive law and academic doctrine.[68] Even the professional judges of *volost* courts for peasants rested their judgements on their 'consciousness' and 'good will', and by "taking into account the personality of the accused". This knowledge was publicized and found its way into the press and literature.[69]

Still, academics could not help seeing general provisions in the patchwork of customs. In the words of Semjon Pakhman, "the idea of the 'essence' of obligation is not completely alien to people's consciousness… Some principles are actually hidden in customs which relate them to a developed legal system…"[70] That gave jurists hope to close the gap between 'scientified' contract law and popular customs through a steady 'civilizing' influence of the former upon the latter. However, this development belongs to the realm of hypothesis because revolutionary events of 1917 led to the abolition of all imperial legislation and 'learned' law in early Soviet Russia.

5. Concluding Remarks

After the Great reforms of the 1860s legal science assumed the substantial role in transforming and shaping the ways of thinking and presenting civil law in Russia. Contract law theory was at the center of this rapid transition from the literal knowledge of casuistic laws (*zakonovedenie*) to legal scholarship.

The efforts to generalize it could be divided into two phases. *The first phase* is best described with the term 'scientification' (1850s to 1880s). The pioneers of Russian civil law put forward explicit arguments in favor of generalizing contract law which I grouped around the scientific, the didactic and the practical goals. These goals were rooted in the paradigm of positivist legal science shared by German and French scholars of the 19th century.

The second phase of generalization (1880s to 1917) marked the ambitions of Russian legal scholars to build a general theory of civil law and to reveal the universal rules of (contract) law through the comparative study of Russian law, modern European legislations and Roman law. The goals of generalization were adjusted accordingly. Scientifically, the focus shifted to the construction of a universal theory of contract through the comparative study of national and foreign laws. Didactically, contract law should be taught not solely on the dogma of (modern) Roman law

65 Vladimir Nechaev cited after Stepanov, Y., *Konstanty*, p. 597.

66 For example, Russian peasants in the Volga region generally misunderstood or ignored the law of the *Svod Zakonov* and lived by their own ideas. In legal cases they could see only the facts while all other issues (that is legal rules and qualification of the facts) were of no interest for them. See Solovjev, E., "Prestuplenie i nakazanie po ponjatijam krest'jan Povolzhja", *Sbornik narodnyh juridicheskih obychaev*, St. Petersburg, 1900, vol. 2, p. 279. Cited after Tomsinov, V., "Pravovaja kultura", p. 157.

67 Stepanov, Y., *Konstanty*, p. 598.

68 Tomsinov, V., "Pravovaja kultura", p. 157.

69 See Anton Chekhov's short story "A Malefactor" (1885) keenly describing ignorance and distrust in official law of a peasant arrested for unscrewing bolts on a railroad. The text in Constance Garnett's translation is available at <http://www.eldritchpress.org/ac/jr/031.htm>. In a comedy "An Ardent Heart" (1869) by Alexander Ostrovsky there is a scene of a trial organized by a chief official in a small Russian town who judges not by laws but "according to my heart", "as God tell me", with the consent of all the accused who ignored and feared the laws.

70 Pakhman, S., *Obychnoe grazhdanskoe pravo*, p. 59.

but on a comparative and sociological basis. Practically, general contract theory aimed at providing comprehensive guidance in matters of legal policy, public and private interests.

In the second phase Russian legal science managed to keep up with the pace of the theoretical discussions in the German and French academia. However, analysis of the goals of generalization against the Russian cultural background revealed several implied goals of generalizing contract law by Russian legal scholars. First, it could secure the influence of legal science on legal education, the legislative policy and judicial decision making. Second, it was supposed to accelerate the modernization of law and society in accordance with the German and French models. Third, it should help to civilize the illiterate and backward-thinking Russian peasantry whose customs and legal concepts were poorly understood by the educated elite.

Indeed, the emphasis of generalization of contract in Russia were different from that in Western Europe. But the examined period of Russian legal history proves that a mode of legal thinking in general terms could be quite rapidly transplanted from one culture to another. As a result, it could harmonize the ways academics perceived their national contract law and, thus, facilitate dialogue and comparison.*

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