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SUBJECTIVE PUBLIC RIGHTS IN THE LEGAL PHILOSOPHIES OF RUSSIAN LIBERALISM IN THE EARLY 20TH CENTURY

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SUBJECTIVE PUBLIC RIGHTS IN THE LEGAL PHILOSOPHIES OF RUSSIAN LIBERALISM IN THE EARLY 20TH CENTURY²

This paper examines the doctrine of subjective public rights, which was developed by the legal philosophies of Russian Liberalism in Late Imperial Russia. This doctrine caused a revolution in the consciousness of law and order of the intellectual elite of the Russian Empire and influenced the liberation movement, the content of programs and activities of liberal political parties, and the State Duma of the Russian Empire. This paper is of interest to legal historians and historians of legal teachings, law theorists, and historians of intellectual thought. It is based on a wide range of sources, including scientific and journalistic works of liberal-minded Russian legal theorists, such as Pavel Novgorodtsev, Vladimir Gessen, Bogdan Kistyakovsky, Maksim Kovalevsky, and others, many of whom are for the first time introduced into scientific use in relation to the study of subjective rights.

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Introduction

Individual liberty is a fundamental principle of liberalism, with the inalienable rights of society's members being the foundation for the legal theory of liberalism. This field studies which rights and liberties are mostly sought for by a certain society, what their correlation is in certain periods of social development, to what extent society needs their recognition, consolidation, and protection, as well as how efficiently this need is implemented in legal practice.

The Canadian political philosopher Will Kymlicka understands the liberal idea to be “a society of free and equal individuals.”¹ In the latest Russian encyclopedia on the history of social thought, Andrei Medushevsky defines liberalism as an ideology that stands for the vital minimum of human rights, which differs in different epochs depending on the level of social development.²

The notion of “citizenship”, which, according to Will Kymlicka, “has been on the lips of the thinkers of every part of the political spectrum” since the 1990s,³ is closely connected with individual rights. In the works on political theory published in Britain and the US during the post-war period, citizenship was defined through the enjoyment of rights. The most recognized conception of “citizenship as a right” was formulated by the British sociologist Thomas Humphrey Marshall in his book “Citizenship and Social Class”, which became a classical historical and sociological study of this problem. In his book, Marshall divided human rights into three categories, referring to each of them as appearing in a certain period of British history: civil rights appeared in the 18th century, political rights came in the 19th century, and social rights (such as the right to universal education, unemployment benefits, and retirement pension) became firmly established only in the 20th century. As society developed, civil and political rights became universal, spreading to new social groups, with the status of citizenship developing together with them.⁴

In modern Russia, like in the West, social scientists find human rights to be one of the most demanded academic themes. Some legal scholars consider the creation of human rights theory to be a top priority for jurisprudence, a task that is not only theoretical, but also demands applied research.⁵ In the last decade, human rights have acquired the status of an academic discipline taught at universities.⁶ It is taught at the Higher School of Economics, Russian State University for the Hu-

¹ Kukatas, 32.

² Valeri Vasilievich Zhuravlev, editor-in-chief, *Obshchestvennaia mysl' Rossii XVIII — nachala XX veka: Entsiklopediia*: (Moscow: Rossiskaia politicheskaiia entsiklopediia, 2005), 257.

³ Will Kymlicka, “Sovremennaia politicheskaiia filosofii: vvedenie”, (Moscow: Izdatelskii dom gosudarstvennogo universiteta – Vyshei shkoly ekonomiki, 2010, translated from *Contemporary Political Philosophy: An Introduction*, Oxford University Press, 1990), trans. S. Moiseev, 362. Kymlicka emphasizes that the British and Americans have different priorities in interpreting rights: the former tend to place emphasis on social rights (e.g. universal education and health service), while Americans highlight civil rights (freedom of speech, religion, etc.): Kymlicka, 367.

⁴ Thomas Humphrey Marshall, *Class, Citizenship and Social Development* (N.Y.: Anchor, 1965), 69, 78.

⁵ Valentina Viktorovna Lapaeva, “Formirovanie doktriny zashchity prav lichnosti kak aktualnaia zadacha teorii i prava”, 4 *Rossiyskoe pravosudie* (2006), 14–30; E.A. Lukasheva (ed.) *Prava cheloveka: itogi veka, tendentsii, perspektivy* (Moscow, 2002).

⁶ Ekaterina Andreevna Lukasheva (ed.), *Prava cheloveka: Textbook*, (Moscow, 2002).

manities, Moscow City Pedagogical University, Saratov State Academy of Law, as well as others. At the Smolny Institute of Free Skills and Sciences in St. Petersburg, students can take 15 different courses in human rights.

Human rights and their observance are considered importance as a major factor for generating diverse strategies for steady development in various spheres of the Russian Federation.¹ According to a number of jurists, human rights theory can be a basis for the harmonization of legal values of different juridical cultures and civilizations.² The ideological aspect of human rights theory is extremely important, since human rights serve as a ground for a legal doctrine that recognizes their natural and inalienable character as a most essential factor for forming laws. This quality of human rights gives rise to various and sometimes quite opposing assessments given by contemporary jurists. However, in recent years even critics of such an interpretation of human rights in Russian legal theory state that the ideologeme of human rights is the cornerstone of political liberalism.³

The establishment of human rights as the foundation for the political-legal doctrine of Russian liberalism is based on a strong historical tradition. This paper discusses the Russian experience in designing a logical one-piece construction of indefeasible personal and political rights for certain members of society, which was a theoretical justification for the Russian constitutionalism of the early 20th century.

At the turn of the 19th and 20th centuries, prominent liberally oriented Russian legal scholars were engaged in the development of the concept of rule of law. Within the framework of this conception, they created a detailed theory of human rights and liberties. The theory contained a catalogue of rights and liberties, their classification, and ideas about a system of guarantees and mechanisms for ensuring rights and liberties. Pre-revolutionary Russian jurists substantiated the idea that civil rights and liberties are natural and inalienable for citizens and inviolable for public authority – their recognition, observance, and protection were considered to be an integral duty of the state. These ideas were in great demand in the 20th century. They lay the foundation for the 1848 Universal Declaration of Human Rights, quite a number of international legal acts, and the 1993 Constitution of the Russian Federation.

The legal ideas of Russian legal scholars were not only of theoretical, but also of considerable practical importance. During the constitutional evolution of the Russian form of government, they determined the direction of legal reform and its theoretical content. Distinguished pre-revolutionary Russian legal scholars, such as M.M. Kovalevsky, S.A. Muromtsev, P.I. Novgorodtsev, and L.I.

¹ Ekaterina Andreevna Lukasheva, “Prava cheloveka i ustoichivoe razvitie”, in *Prava cheloveka: itogi veka, tendentsii, perspektivy*, 35–36.

² Akmal’ Kholmatovich Saidov, “Tsvivilizatsionnaia teoriia prav cheloveka, in A.G. Svetlanov (ed.) *Prava cheloveka i sovremennnoe gosudarstvenno-pravovoe razvitie* (Moscow, 2007), 127.

³ Boris Aleksandrovich Kurkin, “Ideologema prav chelovera i ee interpretatsiia v sovremennoi pravovoi otechestvennoi teorii, 2 *Pravo. Zhurnal Vysshei shkoly ekonomiki*, (2008), 110.

Petrazhitsky, were involved in the formation of liberal political parties and their platforms, collaborated with the liberal press, and worked actively in the State Duma, where they developed regulations for the inviolability of person and the freedoms of conscience, assembly, associations, press, and civil equality.

The wealth of legal thought in pre-revolutionary Russia, its non-positive trend and turn to philosophical idealism, the search for “an ideal meaning of the law, its moral foundation”,¹ and the prominence of its leading representatives, allow us to claim that the period between the end of the 19th century and the beginning of the 20th century was “the golden age” of Russian jurisprudence. As for the theoretical developments of jurists during that time, they have every reason to be referred to as “the golden fund” of Russian legal heritage, which is extremely instructive and in demand today. During the Soviet period, the heritage of pre-revolutionary Russian jurisprudence, which was by then filled with the ideas of German legal scholars and represented the quintessence of the ideas of the Russian law school of the imperial period, was undeservedly forgotten and distorted.

The research results obtained by the pre-revolutionary liberal legal school are of significant interest for modern Russian legal sciences. Since they are deep-rooted in the European philosophical and legal tradition and reflect the national peculiarities of Russian legal culture, they make it possible to give answers to the basic questions of political and legal life (such as the correlation of right and law, right and morality, state and person, etc.) and contribute to resolving its conflicts and sorting out differences. The study of the doctrine of the Russian natural law school is extremely instructive for modern Russian jurisprudence, which is trying to free itself from the chains of Marxist dogmatism and is now seeking for alternative concepts and legal ideas. It is significant that the practical importance of research results obtained by representatives of the pre-revolutionary school of “revived natural law” is discussed today in works by Andrei Poliakov, an authoritative Russian legal scholar and the author of legal communicative theory. Poliakov describes the heuristic potential of pre-revolutionary philosophical and legal theories for modern Russian theoretical jurisprudence, working out the conceptions of legal ideas and legal policy for modern lawmaking, which does not make any efforts to consider law in the light of morality, and also for reforming the Russian legal system as a whole.²

2. “We must find it, the lost legal idea...”

¹ Andrzej Walicki, *Filosofiya prava russkogo liberalizma*, trans. O.V. Ovchinnikov, O.R. Pazukhina (Moscow, 2012, translated from *Legal Philosophers of Russian Liberalism*, Oxford, Clarendon Press, 1987), 373.

² Andrei Vasilievich Poliakov, “Mozhet li pravo byt' nepravym? Nekotorye aspekty dorevoliutsionnogo rossiiskogo pravoponimaniia”, 4 *Izvestiia vysshikh uchebnykh zavedenii. Pravovedenie* (1997), 83, 101.

At the turn of the 19th and 20th centuries, Russian liberalism entered a new period of its development. Liberalism in its classical form, whose political and legal doctrine was represented by the ideas of B.N. Chicherin, K.D. Kavelin, and A.D. Gradovsky, was replaced by a trend called “new liberalism”. New liberalism anticipated progressive changes in political and legal life and was aimed at bringing them as close as possible through the development of philosophical and legal theory. The revival of natural law became such a theory, and the jurists P.I. Novgorodtsev, B.A. Kistyakovsky, V.M. Gessen, S.A. Kotlyarevsky, I.A. Pokrovsky, and others became its main ideologists. The legal doctrine of “new liberalism” was based on the ideas of a legal state, a representative pattern of governing, and the separation of powers. The conception of “natural”, inviolable, and inalienable human rights and freedoms served as its core.¹

The civilist Iosif Alekseevich Pokrovsky described the ideological spirit of Russian jurisprudence of the late 20th century in the words of his well-known contemporary German jurist Otto Gierke: “We must find it, the lost legal idea, or we will lose ourselves!”² “The spirit of quest”, in I.A. Pokrovsky’s opinion, reflected the state of jurisprudence in pre-revolutionary Russia, which could not be satisfied with studying current legislation and felt helpless without “great ideas” and “general truths”, and without studying legal thought. The role of “a legislation servant” did not suit it. The followers of neo-Kantianism, resting on this philosophy, were able to reconsider the existing (positive) law from a perspective of moral ideals and the category of “necessity”, to contrast the existing legal system of the Russian autocracy with the conception of liberal judicial reforms.

The revival of natural law was typical of jurisprudence in a number of European countries in the late 19th and early 20th century, such as France, Germany, Italy, and others. In Russia this trend appeared in the mid 1890s. The legal philosophers Lev Petrazhitzky (in “*Vvedenie v nauku politiki prava*”) and Pavel Novgorodtsev (in “*Istoricheskaya shkola yuristov: eyo proiskhozhdenie i sud’ba*”) were the first to claim in their works published in 1986 that it was necessary to revive natural law.

The ideology of this trend in legal thought was formulated in the policy article “*Navstvenny idealism filosofii prava*” (“The Moral Idealism of Legal Philosophy”), published by Novgorodtsev in 1902. In this article Novgorodtsev, Doctor of Law at Moscow University, admitted that the current legal science was in crisis and that in the legal sciences “critical spirit and deep philosophical yearning were suppressed..., practical interests prevailed, and its work became minor, corporate, and confined.” In his opinion, the situation could be saved only by “the revival of natural law with its a priori method, ideal aspirations, recognition of independent significance as a moral principle

¹ Valentin Valentinovich Shelokhaev (ed.), *Modeli obshchestvennogo pereustroistva Rossii. XX vek* (Moscow, 2004), 228–230; Lyudmila Vasilevna Selezneva, *Rossiiskii liberalism na rubezhe XIX-XX vekov i evropeiskaia politicheskaiia traditsiia* (Ph.D. diss., Rossiiskii gosudarstvennyi gumanitarnyi universitet, 1996), 9; Lyudmila Novikova, Irina Sizemskaya, “Novyi liberalism”, 5 *Obshchestvennye nauki i sovremennost’*, (1993), 132–140.

² Iosif Alekseevich Pokrovsky, *Osnovnye problemy grazhdanskogo prava* (Moscow, 1998), 75–76.

and regulatory consideration.”¹ In his speech made at St. Petersburg University in 1902, the scholar proclaimed war against historicism, positivism, and naturalist evolutionism, while defending idealism, moral private autonomy, and regulatory principle. He declared the revival and maintenance of “the ideal significance of law, its moral principle” as the main task of modern legal philosophy. Novgorodtsev called to change the methodology of jurisprudence, to reject technical and dogmatic interpretation of law in favor of the “outside” perspective, and the elaboration of the laws of its development from moral consciousness, to start studying law as a part of social reality, appealing to history, sociology, psychology, and other sciences.²

Neo-Kantianism, which is based on the idea of dialectics of *das Sollen* and *das Sein*, and on the necessity to learn social phenomena in two aspects: The way they are and the way they should be was the methodological foundation for the doctrine of revived natural law in Russia. It was the revival of philosophical individualism that was visible in the early 1860s and consisted in the call to return to Kant, and then in the Neo-Kantian movement, which finally led to the revival of the idea of natural right. As the legal scholar Bogdan Aleksandrovich Kistyakovskiy, an eminent representative of scientific idealism, wrote in his main work “*Sotsialnye nauki i pravo*” (“Social Sciences and Law”), published in 1916: “The idea of natural law has been revived in a new formula, because it is mainly characterized as a regulative idea. It is this idea, critically checked and purified by Neo-Kantianism that serves as one of the ideological foundations for guaranteeing human rights.”³ On the basis of this philosophy, the representatives of revived natural law tried to draw a distinction between *das Sein* and *das Sollen*, assess the matter (notably the legal system and political regime of autocratic Russia) from a perspective of the due, which is a moral ideal whose concrete implementations were the building of legal statehood and guaranteeing human rights and liberties by basic law.

The representatives of revived natural law assumed the idea of personality as a basis of their legal theory. Natural law was assigned the status of a science that expressed the “independent absolute significance of an individual, which should belong to the individual at any form of the political system.”⁴ For example, Novgorodtsev, who was aware of the crisis of individualism, certainly held the view that the idea of an individual, which implied that all people were individuals vested with certain inalienable rights, was the only possible basis for a morally acceptable social and legal or-

¹ Pavel Ivanovich Novgorodtsev, “Nравственный идеализм в философии права (К вопросу о возрождении естественного права)”, in *O svobode. Antologiya mirovoi liberal'noi mysli (I polovina XX veka)* (Moscow, 2000), 598, 600–601.

² Valitskiy, *Filosofiya prava russkogo liberalizma*, 373, 382–383.

³ Bogdan Aleksandrovich Kistyakovskiy, “Sotsial'nye nauki i pravo. Ocherki po metodologii sotsial'nykh nauk i obshchei teorii prava” in Kistyakovskiy B.A., *Selected works: in 2 parts*, part 1 (Moscow, ROSSPEN, 2010), author: A.N. Medushevskiy, 479.

⁴ Novgorodtsev, *Nравственный идеализм в философии права*, 636.

der. This is why the scholar stood up for replacing the idea of state sovereignty with one that conforms the state to higher laws arising from the depths of human nature.¹

Kistyakovsky also enunciated the principle of absolute value of an individual in public and social life, stating, “State interests in no way should take up the interests of certain individuals. An individual is not a means for the state, they cannot be considered as an appendage to the state... Where an individual is just a means for the state, the state becomes a despot, whose power grows into pure lawlessness. Such despotism is typical of a state of absolute monarchy. The interests of state and authority are everything here, while the individual is nothing. A state becomes constitutional only if the following principle is established: The individual exists independently of the state and has priority over it.”²

Supporters of the new legal ideology claimed that moral ideals should direct the development of law. They saw the purpose of revived natural law in controlling positive law. The theory of revived natural law had a solid reformatory potential. As Novgorodtsev pointed out, the idea of natural law had found its place among political ideas of Russian progressive parties before contemporary jurists started speaking about it.³ Assessing the existing political and legal life from the viewpoint of their legal ideal, representatives of this trend supported its modernization on the basis of liberal and democratic principles.

However, natural law theory required further development and improvement to become a generator of social reforms. A theory of natural law with changing content was put forward. Suggested by Rudolf Stammler and Boris Chicherin, and also found partly in Kant’s works, this theory was brought into being by an urge to overcome the dualism of views of the old school of natural law, which contrasted natural law with positive law and eventually led to the exclusion of natural law theory by historical legal school and positivism. Chicherin predicted the gradual harmonization of positive law and natural law in the course of society’s historical development and the creation of a social order under which individual political freedom would reach its completion.⁴

Natural law theory with changing content was also supported by the eminent historian and legal scholar Pavel Gavrilovich Vinogradov, who taught at both Moscow and Oxford universities. As an evolutionist, the scholar denied the existence of natural law as a complex of eternal norms: He believed that each epoch, alongside with positive law, developed its own “right law”, yet he noted that “its objective remains constant, and this objective is justice.”⁵

¹ Valitsky, *Filosofiya prava russkogo liberalizma*, 384, 398.

² Bogdan Aleksandrovich Kistyakovsky, “Gosudarstvennoe pravo (obshchee i russkoe). Lektsii B.A. Kistyakovskogo, chitannye v Moskovskom kommercheskom institute v 1908/1909 akademicheskom godu” in Kistyakovsky B.A., *Selected works: in 2 parts*, part 2 (Moscow, ROSSPEN, 2010), author: A.N. Medushevsky, 191.

³ Novgorodtsev, *Nravstvennyi idealizm v filosofii prava*, 595.

⁴ Chicherin B.N., *Sobstvennost’ i gosudarstvo*, Part 1 (Moscow, 1881), 87.

⁵ Pavel Gavrilovich Vinogradov, *Ocherki po teorii prava*. (Petrograd, 1915), 151–152.

The substantial renewal of the concept of natural law at the turn of the 19th and 20th centuries made it less vulnerable to criticism by its opponents – positivistic theories – and made it possible for the natural law theory to rank high among juridical teachings of that time.

3. “It is necessary to come to the conclusion that an individual has inalienable rights”

January 1905 saw the first issue of the literary-social journal “*Voprosy zhizni*”. Its editor was Nikolai Onufrievich Lossky, a well-known philosopher. The journal published Bogdan Kistyakovsky’s article “*Prava cheloveka i grazhdanina*” (“The Rights of a Man and a Citizen”), which was a policy statement in that it set a task to form a constitutional (legal) system in Russia. The author of the article called for recognition of the independent significance of individuals, to be imbued with the awareness of their rights and to induce them to struggle for their rights. The legal scholar offered every single citizen, including those who were not supporters of natural law theory, to come to the conclusion that “an individual has inalienable rights, which cannot be violated by the state.”¹

The main message of Kistyakovsky’s teachings consisted in substantiating the further development of individual freedom in an unfree society, and in upholding the legal ethics of “subjective public rights.”² Recognition of human rights theory was a significant part of the conception of a law-based state and was an important contribution to the development of national law.³ Kistyakovsky insisted that legality supposed not only the replacement of personal power by the power of impersonal regulations, but also certain limitations of state-prescribed decrees that are ensured by the inviolability of human rights, which are to be recognized *de jure*, not just *de facto*. He considered the declaration of human rights of the 18th century to be significant acts, which marked a real turning point in the development of modern legal consciousness.⁴

The views of revived natural law scholars on human rights were connected directly with their views on law. Their idea about the priority of natural law over positive law was a substantiation for the view on human rights as “natural” rights, which are not created by the state, are given to man by nature, and are obligatory for everybody, first and foremost for public authorities, who are to guarantee their unimpeded implementation. The realization of human rights and freedoms was the ultimate purpose of the development of both natural and positive law. Through the category “human rights”, jurists determined the content of such notions as “legal law” (equitable law, contributing to

¹ Bogdan Aleksandrovich Kistyakovsky, “Prava cheloveka i grazhdanina”, 1 *Voprosy zhizni* (1905), 123, 142.

² Andrei Nikolaevich Medushevski, *Dialog so vremenem. Rossiiskie konstitutsionalisty kontsa XIX – nachala XX veka* (Moscow: Novyi khronograf, 2010), 383.

³ Susan Heuman, Kistiakovsky. *The Struggle for National and Constitutional Rights in the Last Years of Tsarism* (Cambridge: Harvard University Press, 1998), 65; Valitsky, *Filosofia prava russkogo liberalizma*, 444.

⁴ Valitsky, *Filosofia prava russkogo liberalizma*, 444.

the implementation of human rights and dignity) and the “law-based state” (a state that places a priority on human rights over public authority).

While substantiating the principle of the absoluteness and inalienability of human rights, representatives of the school of revived natural law developed a model of the relationship between an individual and public authorities that was very different from the one proposed by positivists. According to this model, an individual was vested with autonomy, the right of privacy, and the guarantees of state protection in case of a violation of their rights and liberties. The public authority’s obligation of non-interference in individual freedoms meant that the individual had the right to such non-interference that could be defended in court. According to V.M. Gessen, an eminent supporter of the natural law revival, theorist of a law-based state, and founder and editor of *Pravo*, the judicial press organ of liberals, the following principle was in force for an individual: “Everything that is not forbidden by law is allowed.” This dovetails with the principle for authorities: “Everything that is not allowed by law is forbidden.”¹

The conception of subjective public rights served the purpose of consolidating human rights theory in state (constitutional) law – a conception created by the German legal scholars Rudolf von Jhering and Georg Jellinek. Russian jurists were influenced by this conception, which they developed further. Let us describe the typology of subjective public rights, or Jellinek’s theory of the three statuses of an individual. The theory carried out a three-fold task: It determined a person’s position against the state and within the state, it was the basis for their public and legal claims, and it was a mechanism to protect an individual from arbitrary state rule. According to Jellinek, subjective public rights was something that citizens could demand for themselves from the state, guaranteeing them full execution of their rights and a legal basis for the implementation of their rights. Jellinek postulated the priority of public rights of an individual, and claimed that the state should refrain from any actions that might prevent a person from exercising their freedoms.²

In the revival of natural law theory, the notion of “subjective public rights” was widely used. One of the most capacious definitions of subjective public rights was given in 1905 by Aleksei Karpovich Dzhivelegov, who was Pavel Vinogradov’s apprentice. He defined these as a collection of rights, inviolable by the state, and that guaranteeing these rights, the state recognized certain limits in its relations with citizens that it had no right to exceed.³ Sergei Kotlyarevsky, who was an expert in state law, interpreted them in the same way. For Kotlyarevsky, this notion meant that each member of the state had a certain sphere of life and activity that was protected from the encroachment of

¹ Vladimir Matveevich Gessen, *Administrativnoe pravo* (St. Petersburg, 1903), 27; Gessen, *O pravovom gosudarstve* (St. Petersburg, 1906), 24–26.

² Georg Jellinek, *Obshchee uchenie o gosudarstve* (St. Petersburg, 2004), 406, Valitsky, *Filosofia prava russkogo liberalizma*, 445.

³ Aleksei Karpovich Dzhivelegov, “Konstitutsiia i grazhdanskaia svoboda” in *Konstitutsionnoe gosudarstvo* (St. Petersburg, 1905), 57–58.

authorities.¹ However, for Russian jurists who worked during the period of great constitutional reform, not only a theoretical sense was important, but also a practical support for the understanding of subjective public rights, which support motivated people to act. Therefore, speaking about the subjective public rights of an individual, they meant a law-based (constitutional) state as a condition for their implementation. Kistyakovsky pointed out the inviolability of subjective public rights in a law-based state, which was deprived of the opportunity to put a restraint on these rights or violate them.²

Vladimir Gessen also connected the category of subjective public rights with a constitutional state, in which an individual becomes a subject of public rights and duties, i.e. a citizen (*grazhdanin*), while in a police state an individual is only an object of authority, i.e. a subject (*poddanny*).³ The creation of theories of subjecthood (*poddanstvo*) and citizenship (*grazhdanstvo*) and the determination of the essential differences between a subject and a citizen was the great achievement of this scholar. The term subjecthood was used by Gessen to denote that a person belonged to the state, while the term citizenship was used to denote an ideal state, in which people were equal members of civil society, where everyone “was a subject of a certain category of rights, notably political rights.”⁴ Following the Kantian *das Sein* and *das Sollen* theory, he found citizenship to be an ideal that had to be (*das Sollen*), while subjecthood was the existing reality (*das Sein*). Based on Kant’s universal theory, Gessen made his contemporaries believe that Russian legislation, institutions, and traditions could serve as the basis for the evolutionary transition from a subject deprived of rights to a citizen vested with rights. Gessen’s attempt to assume rights as the basis for the concept of citizenship, in which, thanks to the political and legal reality existing in Russia, duties prevailed, became the main intellectual result of his scientific work, as emphasized by the American historian Eric Lohr. This author also noted that Gessen’s theory of vesting citizens with natural rights opposed those theories that emphasized the integration of individuals into a state and their duties towards the state union (the latter were based on Hegel’s philosophy). Gessen, on the contrary, claimed that an individual could not be secondary in relation to the state and its laws, and that human rights had a universal nature.⁵

Let us come back to the theory of three statuses of rights proposed by Jellinek and used by Russian legal scholars. It was based on Jellinek’s idea about the continuous progressive growth of individualism in the course of the transformation of relations between an individual and a state in history. The German scholar interpreted the negative status of rights as an individual’s free self-

¹Sergei Andreevich Kotlyarevsky, *Konstitutsionnoe gosudarstvo. Opyt politiko-morfologicheskogo obzora* (St. Petersburg, 1907), 80.

²Kistyakovsky, *Prava cheloveka i grazhdanina*, 117.

³Gessen, *O pravovom gosudarstve*, 23–24.

⁴Vladimir Matveevich Gessen, *Poddanstvo: Ego ustanovlenie i prekrashchenie*, vol. 1 (St. Petersburg: Pravda, 1909), 116.

⁵Eric Lohr, “The Ideal Citizen and The Real Subject in Late Imperial Russia”, 7, 2 *Kritika: Explorations in Russian and Eurasian History* (2006), 182.

determination and expression of will (free from state interference). He reckoned the freedoms born in the course of the struggle with official enforcement among negative status rights. According to Jellinek, they included freedom of consciousness and press, security of private residence, and the freedom of assembly and meeting. The positive status of rights was interpreted by the scholar as one that provided its bearer with claims for positive acts of the state in their interests. In Jellinek's classification, an active status was closely connected with a positive status, compelling an active civil position and an individual's realization of his or her public rights as guaranteed by law. In other words, a positive status outlined an area of potential activity, while an active status was a sphere for exercising civic capacity. The active status of rights included, for example, the right to participate through election in the work of state organs.¹

Following Jellinek, the theorists of revived natural law determined a universal set of human rights and freedoms, and worked out their classification. One of the most complete and logically integral Russian versions of the catalogue of rights was by Vladimir Gessen. He singled out three categories of subjective public rights. The first one was freedom rights. By guaranteeing these rights, the state recognized that a citizen had a certain sphere of freedom, in which it was not to interfere ("negative status rights"). Under authoritarian regimes, these rights were most severely trampled by the state, while constitutional states protected them and proclaimed them to be the integral rights of a person and a citizen. This category included basic civil freedoms guaranteed by the declarations of rights and constitutions, such as the freedoms of belief, speech, press, unions, assembly, travel, trade, occupation, and others. The second category of rights, i.e. positive public rights of an individual or the rights to services by the state, included the rights to judicial protection (right to suit), social protection (social care), and education (positive status rights). By active status rights, the scholar understood the rights to exercise state power (political rights): Active and passive elective rights, the inheritance rights for membership in the upper chamber of parliament, the right of the elected to be a member of the Chamber of Deputies, the right to be a juror, and so forth.²

Unlike Gessen, who considered the rights and liberties of every category to be equally important, Kistyakovsky ranked them by the degree of their significance. The scholar claimed that the most essential right of a person was the right of personal inviolability, as well as the right of inviolability of home and correspondence – another right that complemented it. Without these, all other civil rights seemed illusive to him. In a law-based state, the bodies of state power, which acted within strict legal boundaries, protected personal inviolability. Analyzing the process of expanding the catalog of rights in the legislations of European countries (England, France, Germany) and the USA, Kistyakovsky found an important trend in the development of subjective rights: their trans-

¹ Jellinek, *Obshchee uchenie o gosudarstve*, 406–408; E.B. Levental', "Vklad Georga Jellineka v razvitie instituta osnovnykh prav i svobod", 2 *Pravo i politika* (2007), 74–84.

² Gessen, *Osnovy konstitutsionnogo prava*, 87–89.

formation from national rights into the universal rights of a person and citizen.¹ Kistyakovsky was not a pioneer in transferring the problem of national civil rights to the level of universal human rights, and in attaching to them the importance of a category of international law. Gessen, who supported the creation and expansion of international law at the turn of the 19th and 20th centuries, also paid attention to this problem.

Russian theoreticians of the revival of natural law actualized the problem of positive rights. A package of new social rights was included in the right to a dignified life as conceptualized by Vladimir Soloviev. A considerable contribution to the development of this concept was made by Novgorodtsev, who interpreted the right to a dignified life extremely broadly, as the possibility of a dignified life, guaranteed by the state to people suffering from economic dependence, lack of money, and unfavorable life circumstances. Inclusion of the right to a dignified life in the declaration of rights, in Novgorodtsev's opinion, led to such juridical consequences as the recognition of the right to social security in cases of illness, disability, and old age for every worker, recognition of the right to work, recognition of the right to a certain standard of living, recognition of the rights of individuals, consolidated by common interests and mutual support, and the right to establish trade unions. Novgorodtsev considered factory legislation to be a mechanism for implementing the right to a dignified life.² Novgorodtsev did not see any principle contradiction between classical human rights and new social rights. However, he warned against dangerous destructive illusions, such as the idea of establishing paradise on earth, which, in his opinion, could be caused by the struggle for social rights.³

The theoreticians of the revival of natural law were given credit for the catalogue of human rights and freedoms and the elaboration of a system of subjective public rights. However, the theory of subjective public rights was not an end in itself for them. Developing this theory in Russia during the early 20th century under the conditions of an expanding movement for a legislative guarantee of human rights, Neo-Kantianists were in a hurry to transform natural rights from the *das Sollen* category to the *das Sein* category. In Kistyakovsky's words, they tried "to pass from theory to practice, from examining the theoretical meaning of subjective public rights and their system to their recognition in the legislation and implementation in reality."⁴

4. "In Russia, freedoms will be exercised invariably only when they are guaranteed"

¹ Bogdan Aleksandrovich Kistyakovsky, *Filosofii i sotsiologii prava* (St. Petersburg, 1999), 545.

² Pavel Novgorodtsev, "Pravo na dostoinoe chelovecheskoe sushchestvovanie", 5 *Obshchestvennye nauki i sovremennost'* (1993), 129–131.

³ Valitsky, *Filosofii prava russkogo liberalizma*, 399.

⁴ Kistyakovsky, *Gosudarstvennoe pravo (obshchee i russkoe)*, 204.

This thesis finishes the section on public rights and duties of Russian citizens in Kistyakovsky's course of lectures on state law. The author of the course claims that, to make human freedoms formal and juridical, "it is not enough to have only laws on freedoms; we also need good laws on the responsibility of officials," which will give any citizen whose subjective public right is violated an opportunity to initiate a criminal or civil suit against the official who violated it by advancing a claim for damages. Kistyakovsky considered the formation of a constitutional system in Russia to be the most important legal rationale for human rights as truly indefensible.¹

The theorists of revived natural law believed that the protection of subjective rights and the creation of conditions for their implementation were a basic function of a law-based state. They worked out a teaching on a law-based state and formulated a system for guaranteeing rights relating to the given form of state. The ability of the state to secure the rights of its citizens was interpreted by them as a sign that the state was restricted by law – that it was governed by law. On the contrary, they did not consider the state in which public authority could abolish basic rights and freedoms at its sole discretion to be governed by law. As Kistyakovsky wrote, "These freedoms are the inalienable right of every person to the extent that a state system in which they are violated cannot be considered normal... State authority is considered violent and unlawful by nature where these freedoms do not exist or where they... can be abolished even temporarily"²

Legal scholars pointed out the absence of subjective public rights in a police state. Describing the nature of the absolute monarchy, Kistyakovsky used the formula of the anarchist Mikhail Bakunin, for whom the state was "a total number of negations of freedoms for all its citizens." Only when the people enjoying their rights and are capable of making claims against the state will state authority have observe the law, as Kistyakovsky supposed.³ The absolutist state, in his opinion, was not aware of the principle of subjective public rights and the idea of legality.

Since the theorists of the revived natural law connected the establishment of subjective public rights with the introduction of the constitutional system in Russia, they joined a discussion on the significance of the 1905–1906 state reforms, whose main landmarks were the adoption of the Manifesto of October 17, 1905, and publishing a new edition of the Fundamental Laws of the Russian Empire on April 23, 1906, which contained a chapter on civil and political rights.

Jurists divided into two camps in their assessment of the legal significance of the above acts. The first camp comprised skeptics who did not recognize the Manifesto or The Fundamental Laws of April 23 to be acts that introduced a new legal system. They interpreted them simply as a decla-

¹ Kistyakovsky, *Gosudarstvennoe pravo*, 247.

² Bogdan Aleksandrovich Kistyakovsky, *Sushchnost' gosudarstvennoi vlasti* (Yaroslavl', 1913), 474, 479; *id.*, *Filosofiiia i sotsiologiia prava*, 328.

³ Kistyakovsky, *Filosofiiia i sotsiologiia prava*, 329–330.

ration of the supreme authority's intentions to transform the Russian state system on the basis of a law-governed state. Thus, Fedor Kokoshkin, a professor of state law at Moscow University, described the Manifesto of October 17 as an act that introduced no significant changes to Russian state law or to the legal relations between the state and its citizens. It "just showed the way for the reform to go."¹ The other part of the legal community had the opposite viewpoint, identifying the Manifesto and the Fundamental Laws with the Constitution. Gessen called the Manifesto a law and an oc-troyed constitution.² Lev Shalland, a professor of state law, called it a normative legal act that created a limited (constitutional) monarchy.³

Human rights theory, developed by the theorists of revived natural law, became complete thanks to the system of guarantees for rights elaborated by its representatives. There was a firm belief in legal theory that subjective rights would become a dead letter if they were not duly protected and guaranteed.

In formulating guarantees of subjective public rights, Russian scholars were under the influence of Georg Jellinek's conception of a law-based state. Within the context of this conception, Jellinek distinguished three types of guarantees for subjective rights: social, which included religion, morals, and social customs; political, relating to the separation of powers, local government, and so forth; and legal, meaning the responsibility of ministers, the impeachment process, and administrative justice. According to Jellinek, legal guarantees were, first of all realized, through the supervising function of the state, which exercised administrative, financial and parliamentary types of control.⁴

Russian legal scholars divided the guarantees of human rights into political, social, material, and legal. According to them, political guarantees included the separation of powers and the by-law nature of the judicial and administrative branches of power; social guarantees included the state of social mores, morals, and the sense of justice; material guarantees included the economic independence of a person; and legal guarantees included administrative justice, constitutional oversight, and the responsibility of ministers and other officials before legislative and judicial powers.⁵

For Vladimir Gessen, guaranteeing individual rights was the foundation of a law-based state. His idea about guaranteeing rights resulted from his teachings of a law-based state, whose key principles were the supremacy of the law and adherence to the law by any authority, the representative nature of government, which was based on the principle of separation of powers, and the legal con-

¹ Fedor Fedorovich Kokoshkin, "Iuridicheskaia priroda Manifesta 17 oktiabria", *Iuridicheskii vestnik* (1913), 41, 43.

² Vladimir Matveevich Gessen, "Samoderzhavie i Manifest 17 oktiabria" in *Na rubezhe: Sbornik statei* (St. Petersburg, 1906), 205.

³ Lev Adamirovich Shalland, *Russkoe gosudarstvennoe pravo* (Iuriev, 1908), 19.

⁴ Jellinek, *Obshchee uchenie o gosudarstve*, 745–750.

⁵ Vladimir Matveevich Gessen, "Teoriia pravovogo gosudarstva" in *Politicheskii stroi sovremennykh gosudarstv* (St. Petersburg, 1905), 140–143; Sergey Andreevich Kotlyarevsky, *Vlast' i pravo. Problema pravovogo gosudarstva* (Moscow, 1915), 287–288.

solidation of these principles in constitutional law.¹ It is obvious that Gessen found a law-based state synonymous with a constitutional state.

In Gessen's political conception, the term *obosoblenie vlastei* ("separation of powers") is widely used, which means the precedence of the legislative branch over the executive branch, and adherence to the law by governmental and judicial powers. It is the principle of the separation of powers and their adherence to the law that were fundamental guarantees of subjective human rights, and also key indicators of a constitutional state for Gessen. Gessen pointed out that in a constitutional state only the legislative power, which expressed the will of the people, was not restricted by the current law in carrying out their prerogatives. The governmental and judicial powers, on the contrary, were restricted by the current law.²

Following the lead of German jurisprudence, which assigned key positions in the system of legal guarantees of subjective rights to the judicial power, representatives of the revived natural law school developed a concept of administrative justice. This was understood as judicial control over the legality of acts issued by administrative bodies, and the right to complain to judicial authorities about the actions of the administration.³

In the developing theories of pre-revolutionary legal scholars, the idea of administrative justice was a derivative of the principle of the separation of powers exercised in a constitutional state. Thus, by "administrative justice", Gessen meant "a specific and separate organization of the judicial power designed to protect subjective public rights by cancelling unlawful orders of the administrative power."⁴ The scholar attributed the appearance of this institution to the formation of a law-based state. He argued that in absolute monarchies citizens were completely deprived of their rights in their relation with the governmental – for example, a complaint to the court about its decision and actions was not permitted – and because of this administrative justice was impossible. The only form of protection from the government's unlawful resolutions and decisions was for citizens "to complain to the authorities", which was not, in Gessen's view, a very efficient way to protect individual rights, since public authorities "acted as judges in their own case."⁵

Gessen took a definite stand in theoretical disputes about the essence of administrative justice, the necessity of a special administrative court, and the transfer of supervision over the legality of administrative acts and decisions to general jurisdiction courts. He supported the establishment of an independent judicial body for cancelling any unlawful decrees of an authority. In the scholar's opinion, investigating a conflict between an individual and an authority, arising from administrative

¹ Medushevsky, *Dialog so vremenem*, 267–268.

² Gessen, *O pravovom gosudarstve*, 12.

³ Viktor Nikolaevich Kornev, *Problemy teorii gosudarstva v liberal'noi pravovoi mysli Rossii kontsa XIX – nachala XX veka* (Moscow, Iurlitinform, 2005), 250.

⁴ Gessen, *Osnovy konstitutsionnogo prava*, 90–91.

⁵ Gessen, *O pravovom gosudarstve*, 45.

law, demanded from the judge special knowledge in administrative law – not private-law – meaning that an ordinary civil court could not be charged with such a case. Besides, the methods that were efficient for a civil procedure did not “work” for an administrative procedure. In proof of his statement, Gessen appealed to the French experience: France had two different judicial bodies for resolving private and administrative disputes.¹

Describing the status of administrative courts, Gessen claimed that they should be organized on the basis of the following important principles: administrative judges that are independent from the administration (as was the case with civil judges), judges that are irremovable, collective nature of the court, and competitiveness and publicity of legal proceedings. Gessen called administrative justice of this kind “the Archimedean lever of a law-based state.”²

It is with the institution of administrative justice that juridical sciences of the early 20th century connected the prospects of modernizing the mechanism of autocratic administration. The first department of the Directing Senate in St. Petersburg, as well as the administrative and court offices in provinces and towns, were a prototype of administrative justice establishments – an institution designed to guarantee the lawfulness of the administration and to act as an intermediary in disputes between the administration and social institutions, resolving them by special administrative courts that did not belong to a judicial corporation, but were organized after the model of general courts. Appeals against the actions of the administration, consideration of the conflicts between the administration and regional self-government (*Zemstvo*), and the jurisdiction of *Zemstvo* institutions and provincial authorities were the sphere of activity for administrative courts.³

In the juridical literature of that time, as well as in today’s works on Russian administrative law, the concept of administrative justice as a special form of judicial power was not generally recognized. The German jurist Rudolf Gneist, for instance, believed that administrative justice was a continuation of administrative power and was intended for its self-control.⁴ British jurists rejected the notion of administrative justice. Albert Dicey, for example, was of the opinion that if a certain range of problems had a special jurisdiction then it would take them out of the general court system and give an advantage to the administration.⁵ Meanwhile, Russian legal theory considerably outstripped the institutionalization of administrative justice. The projects for establishing this institu-

¹ Gessen, *O pravovom gosudarstve*, 46.

² Gessen, *Teoriia pravovogo gosudarstva*, 141.

³ Sergey Konstantinovich Gogel’, “Gubernskie prisutstviia smeshannogo sostava kak organy administrativnoi iustitsii na mestakh”, Book IV *Vestnik prava. Zhurnal Iuridicheskogo obshchestva pri Imperatorskom S-Peterburgskom universitete* (1906), 411–413; German Anshiuts, *Iustitsiia i administratsiia* (St. Petersburg, 1907), 22; Sergey Aleksandrovich Korf, *Administrativnaia iustitsiia v Rossii* (St. Petersburg, 1910).

⁴ Rudolf Gneist, *Istoriia gosudarstvennih uchrejenii Anglii* (Moscow, 1885)

⁵ Albert Dicey, “The Development of Administrative Law in England”, *Law Quarterly Review* 31 (1915), 151–153.

tion of the Provisional Government were based the concept of administrative justice developed by Russian theorists of revived natural law – most thoroughly by Vladimir Gessen.¹

One of questions that legal scholars in the early 20th century discussed the most was the expedience of introducing an institution of constitutional supervision and carrying out within its boundaries a judicial review over the conformity of laws to be adopted to the fundamental laws. Sergey Kotlyarevsky took an active part in this discussion. The activity of the US Supreme Court, which controlled the constitutional nature of laws and had a great impact on constitutional development in the USA, was a positive example for him. According to Kotlyarevsky, the very possibility of verifying laws with the Fundamental Law provided a guarantee against violations of the constitution by the legislative power.²

Sergey Kotlyarevsky, like Vladimir Gessen, ranked the protection of personal rights in court as first among the guarantees for the insurance of subjective rights in a constitutional state. Second place was assigned to the political responsibility of ministers to the people for their violations of law. Kotlyarevsky considered a society's state of juridical consciousness to be no less significant a guarantee for exercising personal rights and freedoms. In his opinion, the system of guaranteeing subjective rights was effective only “if the whole nation was aware of the importance of these individual rights, of the great danger coming from the violation of these rights by the state, and was ready to protect them.”³ In his statement on the question about the legal consciousness of society as a condition for the insurance of subjective rights, Kotlyarevsky was a true exponent of the position of the revived natural law school, which considered legal consciousness to be the source of the development of law and statehood. Pavel Novgorodtsev considered legal consciousness to be both the source and the roots of the life of the state. He regarded social legal consciousness, which included the moral consciousness of people and their moral ideas about the state and state order, as a key factor for exercising subjective rights and for their consolidation and recognition by the legislator.⁴

Thus, subjective rights were of practical significance for pre-revolutionary Russian jurisprudence. They contributed to developing the concepts of a law-based state, to practical steps in its construction, and in the creation of constitutional and administrative justice.

Conclusion

In pre-revolutionary Russia, on the basis of the ideas of philosophical idealism, a systematic theory of personal rights and freedoms was developed by representatives of the school of revived

¹ Ekaterina Anatolievna Pravilova, *Zakonnost' i prava lichnosti: administrativnaya iustitsiia v Rossii (vtoraia polovina XIX v. – oktiabr' 1917 g.)* (St. Petersburg, 2000), 251.

² Kotlyarevsky, *Vlast' i pravo*, 287–288.

³ Kotlyarevsky, *Konstitutsionnoe gosudarstvo. Opyt politico-morfologicheskogo obzora*, 99–100.

⁴ Pavel Ivanovich Novgorodtsev, “Pravo i gosudarstvo”, book IV (74) *Voprosy filosofii i psikhologii* (1904), 535.

natural law. The theorists of revived natural law formulated a concept of subjective rights, which interpreted human rights as natural and inalienable and as belonging to a person by right of birth. Within the framework of this theory, they developed an idea stating that individuals were autonomous in their relation to the state and that the state was forbidden to interfere with their individual liberty outlined both by natural law and positive law. On the basis of European legal theory, classifications of individual rights and freedoms were made. Taking into account the specific features of the Russian political system, they determined a hierarchy of personal rights and freedoms and developed a theory of guarantees for human rights and functions of judicial authority. The theory of subjective public rights laid the groundwork for the theory of citizenship, which Russian legal scholars also actively developed. The key ideas created in the bosom of Russian philosophy at the turn of the 20th century (about inalienable human rights and their protection from the state, the restriction of the state by law, and about rights and legal dichotomy) truly had a revolutionary impact on the development of Russian legal sciences. At the beginning of the last century, legal science developed on a wide ethical and pluralistic basis, which was distinguished by a variety of ideas and conceptions. Thanks to this, Russian legal thought managed to overcome the narrowness and simplicity of the positivist-sociologist interpretation of reality.

Liberal human rights theory had a great impact on the political situation in the country, as well. It substantiated the necessity of liberal transformations in the political sphere and set a task before the judicial branch of the contemporary state to enroot the ideas of a law-based state, the supremacy of law, and formal equality on a legal basis. The liberal theory gave an impulse to the development of the liberation movement in Russia and to the formation in the 20th century of liberal parties, which included in their platforms the ideas of human rights, civil equality, and the supremacy of law. Pavel Novgorodtsev, Vladimir Gessen, Bogdan Kistyakovsky and other representatives of the school of revived natural law became the theorists of the liberal parties. The theory of revived natural law determined the vector of development for Russian statehood in the early 20th century. It contributed to its transformation from a police state, which is characterized by a paternalistic and subjective attitude to the individual by the state, to a state governed by law, which is based on the supremacy of law, formal equality, and the inherent worth of the humans, their freedom, and dignity. The liberal theory of human rights stimulated changes in the social system of imperial Russia, as well. It became the platform for the progressive transformation of a class society into a civil one.

The ideas of natural legal theory, which marked a revolution in legal thought and in the legal consciousness of people in late imperial Russia, became unacceptable for Soviet Russia and were severely criticized by its theorists. The “new liberalism” of human rights theory became topical in Russian theoretical jurisprudence only in the late 1980s and early 1990s. Securing natural principles of human rights and their direct action in the 1993 Constitution of the Russian Federation meant a

shift at the state level from a positivistic interpretation of personal rights and freedoms to the concept of natural law. The ideas of positivist jurists about subjective rights as the establishment of public authority became the heritage of the past, and views on human rights were supplemented by the categories of freedom, justice, and the inherent worth of the human being.

It is quite clear that in the legal theory of modern Russia, “ideological monism”, in the interpretation of the Human Rights Institute, which was typical of the Soviet period, has been replaced by a variety of approaches and conceptions worked out by libertarian juristic, sociological, integrative, communicative, and other legal concepts. This inspires hope that, within the framework of ideological and legal diversity, it will be possible to interpret the institution of personal freedom more broadly, and to conceptually comprehend the prospects for its development in the Russian Federation. Modern jurisprudence must explore possibilities for exercising and protecting human rights within the bounds of the national legal system. As we know, this task was set by the pre-revolutionary school of revived natural law, whose scholars tried to complete it by thoroughly studying the positive experience of political and legal development in other European countries and with a deep knowledge of the national legal culture and philosophy.

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