

The Digest of Laws of the Russian Empire: The Phenomenon of Autocratic Legality

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Researchers of the history of late imperial Russia quite often base their studies on the texts of laws as recorded in the official edition: the *Complete Collection of the Laws of the Russian Empire (Polnoe Sobranie zakonov Rossiiskoi imperii)*. The laws were published there in chronological order for purposes of conducting inquiries; it was specifically the *Complete Collection* in which the original text of a decree approved by the emperor could generally be found.

However, unlike researchers, citizens and officials of the state system of that time consistently consulted the main source of law *in force*, which was the *Digest of the Laws of the Russian Empire (Svod zakonov Rossiiskoi imperii)*. Although quite often the original law and its version in the *Digest* could differ both in form and content, which may seem disorganized, the practice of obligatory codification of laws in the *Digest* existed for a long time: from the *Digest's* first edition in 1835 until 1917. This procedure was legally stipulated in the statute establishing the Empire's highest judicial institution: the Governing Senate.¹ Supplement 2 attached to article 66 of the Statute of the Governing Senate made clear that it was the *Digest* that contained the law in force.

1. Uchrezhdenie Pravitel'stvuiushego Senata [Statute of the Governing Senate]. Art. 66, Suppl. 7, in *Svod zakonov Rossiiskoi imperii* (hereafter SZ) Vol. 2. (St. Petersburg, 1906).

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In this article I will approach the *Digest of the Laws of the Russian Empire* as a kind of material embodiment of ideas about legality in state establishment of late imperial Russia. “Legality” as a complex concept of legal culture has changed radically in different times and societies. Taking into account that nineteenth century Russia as an empire was a layered and diverse political system in which legality as a part of authority was contested and reinterpreted,² I will focus on what was the most influential for the whole legal system of Russia: the *official* interpretation of legality. The main object of my research will be the theory and practice of editing and implementation of the *Digest of the Laws of the Russian Empire* since it was drafted in the late 1820s, until the final decades of the nineteenth century.

I will demonstrate that the system of codification of laws within the *Digest* and later within its supplements was a specific derivative of the political and legal culture of tsarist Russia. Certainly, scholars of the Russian autocracy have recognized the danger of representing it as something immutable and static. Nevertheless, when looking at the official/autocratic interpretation of legality based on the unconditional legal immunity of the monarch, it is possible to speak of the stasis and inflexibility of rule in imperial Russia.

Even though the formal side of Russian state and judicial system has been much more researched than its informal side, the ambiguity and complexity of Russian legislation and its implementation have remained a very challenging field of study. Considering the lack of a close examination of everyday legal practice,³ there are several key assumptions about legal development and legality articulated in the literature. Both Western and Russian historiographies share general positive evaluation of constant legal reforms in the Russian Empire in terms of “evolution,” “modernization,” and “Europeanization.”⁴ Some post-Soviet Russian scholars tend to consider development of legislation as an important argument in their assessment of the late Russian empire as a *Rechtsstaat* (*pravovoe gosudarstvo*).⁵ This

2. Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2010).

3. Remarkable examples of such a research remain very few. See, for example, Jane Burbank, *Russian Peasants Go to Court. Legal Culture in the Countryside, 1905–1917*. (Bloomington: Indiana University Press, 2004); Gareth Popkins, “Code versus Custom? Norms and Tactics in Peasant Volost Court Appeals, 1889–1917,” *Russian Review* 59 (2000), 408–24.

4. Boris Anan'ich, Rafail Ganelin, Viktor Paneiakh, eds. *Vlast' i reformy. Ot samoderzhavnoi k sovetsskoi Rossii The Power and Reforms. From the Autocratic to the Soviet Russia* (St. Petersburg: “Dmitrii Bulanin” 1996); and George L. Yaney, *The Systematization of Russian Government: Social Evolution in the Domestic Administration of the Imperial Russia, 1711–1905* (Urbana, Chicago, London: The University of Illinois Press, 1973).

5. Boris Mironov, *Sotsial'naia istoriia Rossii (18 - nachalo 20 vv.): Genезis lichnosti, demokraticheskoi sem'i, grazhdanskogo obshchestva i pravovogo gosudarstva*, [A Social

positive assessment is challenged by another, very influential, critical evaluation of Russian passion for legal reform presented by the authority Richard Wortman, who insists that, to a large extent, law played a role of “cultural fiction,” as Viktor Zhivov once observed.⁶ Wortman’s argument is based on pathbreaking research on the social/human dimensions of legal development in imperial Russia undertaken as close analysis of the emergence of a corps of educated bureaucrats in the Ministry of Justice.

Still, it seems that all given views share the same state-centered perspective, which tends to represent the state as almost the only actor of progressive law reforms, partly unimplemented, or “fictive.” This approach, traditional to Russian legal history, was elaborated by a very influential public school (*gosudarstvennaia shkola*) of Russian legal science in the last decades of the nineteenth century. Partly, this approach originated in the imperial tradition of “centralization” represented inter alia in history writing. As observed by Jane Burbank and Mark von Hagen, for years historians have followed imperial paths defined by perspectives of central politics, concentrated in the two capitals: Moscow and St. Petersburg.⁷ Partly, this stemmed from the existent deficit of other actors. The struggles over national sovereignty and separation of powers, which stimulated codification debates in Europe, entered the Russian political agenda only in the last decade of the twentieth century. The same can be said about interested groups, especially the legal professionals, who were underdeveloped and almost unrepresented in imperial Russia.

Under these circumstances, in general, research on Russian legal history has been traditionally focused on legislative politics, in other words, on the very legislative acts, viewed as benchmarks in the evolution of the state. The *Digest of the Laws* has been also studied in this traditional paradigm of legal history as a history of legal reform. Both Russian and foreign historians wrote extensively on the stage of the *Digest’s* drafting and enactment.⁸ The further history of the *Digest’s* maintenance and editing remain unaddressed.

History of Russia (Eighteenth to the Beginning of the Twentieth Century): The Origin of Individualism, the Democratic Family, Civil Society, and Law-governed State] vol. 2 (St. Petersburg: Dmitrii Bulanin, 2003), 109–95.

6. Richard Wortman (Wortman), *Vlastiteli i sudii: razvitie pravovogo soznaniia v imperatorskoi Rossii* (Moscow: Novoe literaturnoe obozrenie, 2004), 24.

7. Jane Burbank and Mark von Hagen, “Coming into the Territory: Uncertainty and Empire,” in *Russian Empire: Space, People, Power, 1700–1930*, ed. Jane Burbank, Mark von Hagen, and Anatolyi Remnev (Bloomington: Indiana University Press, 2007), 4.

8. See relatively recent examples: Irina Ruzhitskaia, *Zakonodatel’naia deiatel’nost’ v tsarstvovanii imperatora Nikolaia I* [Lawmaking in the Reign of Emperor Nicholas I] (Moscow: IRI RAN, 2005); and William B. Whisenhunt, *In Search of Legality: Mikhail M. Speranskii and the Codification of Russian Law* (New York: East European Monographs, 2001).

In this article, I aim to demonstrate that the contest between several other interpretations of legality in Russia played an important role in the preparation of the *Digest* and its further usage. Already at the very beginning of the *Digest*, in the 1830s, one can observe a conflict between attempts to fix and order the laws in the system of the *Digest* and the exercise of the autocrat's otherwise unrestrained ability to make law. Later, during the 1870s, because of the development of the legal profession in addition to the judicial reform of 1864, the legality of the *Digest* was challenged by the activism of new courts, which became important institutes of if not law-making, then certainly of the interpretation of legislation.

Emergence of the *Digest*

The *Digest* originated in a desire shared by all of Europe's absolute monarchs: to collect all laws regulating the life of a country in a single edition.⁹ To provide a detailed regulation covering all legal relationships in such edition meant nothing less than to create a universal instruction for all and everyone. An outstanding example of such attempts was the codification of Prussian law of Friedrich the Great in 1794: the *Allgemeines Landrecht*. There, the autocrat, who did not live to see the end of codification process, attempted to regulate all spheres of life for his subjects, including intimate details of family life.¹⁰ Also, to a large extent, codification projects were considered to be of importance for the prestige of a royal authority and later national sovereignty.

Similar projects were initiated by the tireless reformer Peter I (1682–1725) who did much toward establishing a “Regulatory” state: *Reglementsstaat* in Russia. Since Peter the Great, legal reforms had been considered the main means of social and economic modernization of imperial Russia. As fairly observed by Marc Raeff and Evgenii Anisimov, the “regulating activity” (*regularstvo*) to which Peter was committed became a criterion of the effectiveness of state authorities, and an important element of state political and legal culture.¹¹ The “regulatory” state was governed by the sovereign and

9. Andrei Medushevskii, *Utverzhenie absolutizma v Rossii* [*Affirmation of Absolutism in Russia*] (Moscow: Tekst 1994), 87–96.

10. Gunter Birtsch, “Reform, Absolutism and the Codification of Law: The Genesis and Nature of the Prussian General Code,” in *Rethinking Leviathan: The Eighteenth-Century State in Britain and Germany*, ed. John Brewer and Eckhart Hellmuth (Oxford: Oxford University Press, 1999), 349.

11. Anan'ich et al. *Vlast' i reformy*, 146; and Marc Raeff, “Peter's Domestic Legacy: Transformation or Revolution?” in *Peter the Great Transforms Russia*, ed. James Cracraft (Toronto/Lexington, MA, 1991).

by “regulations,” or the “rules” that the sovereign established or ordered to be established. These regulations were to direct the functioning of all elements of the state system and the people as a whole. However, several codification commissions initiated by Peter I failed to work out a new code that would replace the outdated Muscovite *Sobornoe ulozhenie* of 1649. Enacted by Tsar Alexei Mikhailovich, this was the most comprehensive compilation of Russian legislation since the *Russkaia Pravda*.¹²

The history of fruitless efforts of Peter I and his successors in the eighteenth century to draft a new code—the so-called New Code Book (*Novoulozhennaia kniga*)—gives impression that the codification projects of the Russian absolutists were not fueled by the deep practical need for recodification articulated in demands of interested groups. Overshadowed by more urgent political matters, these ambitions ultimately could not be realized. Examples of codification failures of Catherine the Great (reigned 1762–1796) and Alexander I (reigned 1801–1826) clearly demonstrate that there were two main conditions needed for the success: the persistent participation of the emperor and the support of capable legal specialists. Before the second quarter of the nineteenth century, the latter was particularly problematic.

As Richard Wortman’s research demonstrated, the level of education of judicial administration as well as other civil servants was very low in the beginning of nineteenth century.¹³ During that time, as it was under Peter the Great, still, personnel often were recruited from military service and therefore, in general, military education was more preferable for noblemen than civil education at a foreign or one of a few Russian higher education institutions. Because of the lack of training, both lawmaking and judicial practice were perceived as a specific means of state administration.

Under these circumstances, codification projects in Russia naturally differed radically from the codification initiatives of other European absolutists, in which codes were drafted by law professors and eminent judges rather than by state officials. To give an example, in June 1714 Friedrich I ordered law professors of Halle University to prepare a draft for a Prussian civil code. Interestingly, this difference was admitted by leaders

12. On the history of codification of Russian law, see: Semion Pakhman, *Istoriia kodifikatsii grazhdanskogo prava* [*History of Codification of Civil law*] (St. Petersburg: Tipografiia Vtorogo otdeleniia sobstvennoi ego imperatorskogo velichestva kantseliarii, 1876), 1:203–472; Oleg Omel’chenko, *Kodifikatsiia prava v Rossii v period absolutnoi monarkhii (Vtoraia polovina XVIII v.)* [*Codification of law in Russia in the period of absolutist monarchy (second half of the 18th century)*] (Moscow: Vsesoiuznyi iuridicheskii zaonnyi institut, 1989).

13. Richard Wortman, *The Development of a Russian Legal Consciousness* (Chicago: Chicago University Press, 1976), 34–50.

of the Codification Commission (Commission for the Compilation of Laws/*Komissiiia sostavleniia zakonov*), which young Alexander I inherited from his father. In the Commission report of 1812, they mentioned that contrary to “other countries,” where codes are drafted by “academics and practicing jurisconsults,” in Russia “codification should be a business of the government, not private persons.”¹⁴ As a result, as leading statesman Mikhail Speranskii had to admit, codification was hardly possible because of the high deficit of legal specialists (*zakonoiskusniki*) in the first decades of the nineteenth century.¹⁵

In order to create a corps of educated bureaucrats, Alexander I opened new universities in Dorpat (Tartu), Kazan, Kharkov, and St. Petersburg and introduced special *lecées* for future governmental servants from noblemen. To stimulate a systematic (legal) education, the Examination Law was decreed in 1809. Under this law, to attain the eighth rank of civil service (meaning hereditary nobility and positions of important governmental level) one needed a university degree or was required to pass a special university examination, which covered various subjects including jurisprudence.

Alexander’s successor Nicholas I (reigned 1825–1855) was the leader who finally managed to accomplish the codification project, crowned by the publication of the *Digest of the Laws of the Russian Empire* in 1833, which came into force beginning January 1, 1835. It was in part a product of the rough circumstances of his enthronement, which certainly fulfilled the first condition of successful codification, which I mentioned previously: *the persistent participation of the emperor*. The Decembrists’ uprising of 1825 starkly revealed the depth of liberal-revolutionary sentiment inside the Russian elite. Simultaneously with the beginning of judicial proceedings against the hundreds of noble insurgents, who had demanded a constitution, the Second Department of His Majesty’s Own Chancellery was established to complete the task of the codification in the *Digest of the Laws of the Russian Empire*.

The idea was to obtain urgent support for the impaired throne by re-establishing its legitimacy in the eyes of the enlightened elite. The fifteen volumes of the *Digest of the Laws* bestowed by the supreme prosecutor of lawlessness and the protector of legal order—the Monarch—were to contain stable rules that would reduce cases of administrative or judicial lawlessness. Also, Nicholas emphasized that the credo of the *Digest*, was

14. *Trudy komissii sostavleniia zakonov* [*Works of the Commission for the Compilation of Laws*] (St. Petersburg: Senatskaia tipografiia, 1822), 1:141.

15. Mikhail Speranskii, “Kratkoe istoricheskoe obozrenie komissii sostavleniia zakonov,” [“Brief Historical Overview of Commission for the Compilation of Laws”] *Russkaia starina* [*Russian Antiquities*] 15 (1876): 583.

“making no new laws, but bringing order to the old.”¹⁶ Thus, contrary to borrowed constitutional ideas, the *Digest* was presented as compendium of original national laws, which had been practiced by Russian authorities and people for centuries.¹⁷ As a matter of fact, the *Digest* was designed to be a legal foundation of the legitimate people’s monarchy of Nicholas I. No need to say that there was a practical need for improvement of judicial practice, which was particularly heavily criticized by enlightened elite since the final decades of the eighteenth century.¹⁸

The second condition—the *support of capable legal specialists*—was fulfilled thanks to Alexander’s attempts to develop (legal) education and bring it into public administration. The reforms did not bring immediate results, but they appealed to foreign legal specialists to teach law as well as to consult with Russian statesmen in lawmaking. Also, a result of attempts to improve educational standards for civil service was that more trained youth slowly began to work at governmental offices. Various activities of Mikhail Balugianskii (1769–1847), a Hungarian legal scholar invited to St. Petersburg in 1803, could be viewed as an example of the “human dimension” of Alexander’s attempts to develop legal education in Russia, which finally worked for implementing Peter’s I ideas of *Reglementsstaat* under Nicholas.¹⁹ A graduate from the Law Department of Vienna University Balugianskii was recruited to teach law at St. Petersburg Pedagogical Institute and simultaneously was appointed to the Commission for the Compilation of Laws. During 1814–1817, he taught law for princes Nicholas (the future emperor) and Mikhail. In 1819, soon after St. Petersburg University was opened, Balugianskii became a dean of the Philosophy and Law Department and later the first rector of the University.

The combination of Balugianskii’s positions in education and civil service allowed him to promote talented students and educators and recruit them later for lawmaking and codification. At the same time, this combination had an impact on how Balugianskii and his colleagues and students viewed the law and its purpose. The educative mission of Russian legal

16. Quoted in: Piotr Maikov, *Vtoroe otdelenie Sobstvennoi Ego imperatorskogo velichstva kantseliarii 1826–1882* [*Second Department of His Majesty’s Own Chancellery*] (St. Petersburg: Tipografiia I.N. Skorokhodova, 1906), 191.

17. See more in Tatiana Borisova, “Russian National Legal Tradition: Svod versus Ulozhenie in Nineteenth-century Russia,” *Review of Central and East European Law* 3 (2008): 295–341.

18. Uortman (Wortman), *Vlastiteli I sudii*, 71–87.

19. See more in Evdokiia Kosachevskaia, *M. A. Balugianskii i Peterburgskii universitet v pervoi chetverti XIX v* [*Mikhail Balugianskii and St. Petersburg University in the First Quarter of the 19th Century*] (Leningrad: Izdatel’stvo leningradskogo universiteta, 1971).

professionals defined the notion of a professional ethos characterized by commitment and even service to the truth. As one of legal educators of the 1840s, Konstanin Nevolin, a former student of Balugianskii and colleague at the codification office, taught his students, “the base of legal knowledge is the notion of truth,”²⁰ Thus, moral dichotomies such as “good–bad,” or “true–false,” typical of a messianic attitude, played an important role in professional discussions among Russian legal specialists. This messianic attitude was empowered by the self-confidence of experts in the mechanism of public administration, generally shared by members of the legal profession, proven by their engagements in the highest governmental spheres. The pattern of Balugianskii’s career demonstrated an opportunity to influence the highest spheres of the authorities with the sacred legal knowledge in order to use it as an instrument of institutional change for a better, truthful life. The Soviet philosopher of law Sergey Alekseev described this specific messianic tone of the legal profession, which developed in nineteenth and twentieth century Russia, as follows. “A jurist—an expert in specificity and “secrets” of legal matter, legal tools, special juridical mechanisms—is able to use this kind of academic knowledge efficiently and productively so that the developed and knowingly constructed legal system might become an Archimedean lever, an effective power in carrying out social reforms.”²¹

In 1826, Balugianskii was appointed an official chairman of the new codification office, the Second Department of His Majesty’s Own Chancellery. However, its unofficial leader was a very experienced statesman, Mikhail Speranskii, who was not a trained jurist, but had already worked extensively in this field as a leader of Alexander’s codification commission in 1802–1811.²² Even though Balugianskii promoted students of law and young scholars from St. Petersburg University to take part in the preparations of the *Digest*, the main driving force were still chancellorists (*kantseliaristy*): petty bureaucrats of law ranks. The need for educated Russian jurists made leaders of the codification—Speranskii and Balugianskii—organize a special program for promising youngsters, usually the sons of the clergy. The program enabled them to study in Germany for 2 years and on arrival to St. Petersburg combine the continuation of their studies of law at the University and work at the Second Section on codification. Therefore, it is not an exaggeration to say that

20. Quoted in: *Razvitie russkogo prava v pervoi polovine XIX v.* [Development of Russian Law in the First Half of the 19th Century] Ed. Evgenii Skripilev (Moscow: Nauka 1994), 53.

21. Segei Alekseev, *Uroki. Tiazhkii put’ Rossii k pravu* (Moscow: Institut chastnogo prava, 1997), 29.

22. See more in Marc Raeff, *Mikhael Speransky Statesmen of Imperial Russia. 1772–1839* (The Hague: Martinus Nijhoff, 1969); and Whisenhunt, *In Search of Legality*.

the codification project certainly promoted the development of legal training in the Russian Empire.²³

On January 1, 1835, the *Digest of the Laws* came into force. A special manifesto of Nicholas I provided the *Digest* with the status of “positive law”: the primary source of legislation in force. As envisioned by the monarch, the *Digest* was a product of the complete systematization of law of that moment, and its articles would provide an organized compendium of current Russian law.²⁴ Within this compendium, an administrator or a judge would find a solution relevant to any particular situation and in case of uncertainty, he would be obliged to address himself to the higher authorities.²⁵

Nicolas I then settled the vexing question of the correlation between an original law and its version codified in the *Digest* unambiguously: the primacy was given to the *Digest*. But immediately the utopian idea of creating an exhaustive compendium of the whole country’s legislation was confronted with the problem of its own obsolescence. The Second Department of His Majesty’s Own Chancellery attempted to cope with this by publishing supplements to the *Digest* (*Prodolzheniia Svoda zakonov*). There, all accumulated legislation was arranged according to the respective parts and volumes of the *Digest*. There were annual supplements (*Ezhegodnye Prodolzseniia Svoda zakonov*) and summary supplements (*Svodnye Prodolzseniia Svoda zakonov*). The former considered legislative changes relative to all the *Digest*’s sections over the course of the year, and the latter integrated changes that had occurred from the moment of the last publication of the *Digest*. In view of the complexity of preparing a new edition of the *Digest* as a whole, the *Digest* was revised and republished in its entirety only two times: in 1842 and 1857. New editions of only certain parts of the *Digest*, subjected to the most changes, were published instead: its books and volumes.²⁶

23. See more in recent *kandidat nauk kandidat nauk Phd* dissertation in History of Anna Smirnova, *Vtoroe otdelenie sobstvennoi E.I.V. kantseliarii*. St. Petersburg State University, 2009) and Peter Mustonen, *Sobstvennaia Ego Imperatorskogo Velichestva Kantseliariia v mekhanizme vlastvovaniia instituta samoderzhtsa. 1812–1858: K tipologii osnov imperskogo upravleniia*. [Second Department of His Majesty’s Own Chancellery and the Power of Institute of Autocracy. 1812–1858: To the Typology of Basis of Imperial Rule]. (Helsinki: Aleksanteri Instituutii, 1998).

24. Some regions of the Russian empire, for example, Siberia, Finland, and Poland, had their own compendiums of codified legislation.

25. On the history of the *Digest*, see Marc Raeff, *Mikhael Speransky Statesman of Imperial Russia. 1772–1839* (The Hague: 1969); Whisenhunt, *In Search of Legality*; and Irina Ruzhitskaia, *Kodifikatsionnye proekty imperatora Nikolaiia I* [Codification projects of Nicholas I] *Rossiiskaia istoriia* [Russian History] 1 (2010): 29–44.

26. Nikolai Korevo, *Ob izdaniiaakh zakonov Rossiiskoi Imperii, 1830–1899* (St. Petersburg: Gosudarstvennaia tipografiia, 1900).

Publishing the *Digest* was an entire program for improving administration, court, and even legislative practices. A statement of the State Council approved by the tsar “On the application and use of the *Digest of the Laws of the Russian Empire*” specifically stipulated that henceforth the *Digest*’s articles were the only source of law in force replacing the formerly used “excerpts from decrees and resolutions.”²⁷ The statement explained the newly established procedure: before drafting a new piece of legislation officials first had to come up with a list of the *Digest*’s articles regarding the law’s subject. Detailed procedures were outlined for referencing the *Digest* in court proceedings and public administration. While discussing the matter, all the mentioned articles “had to be read out during the meeting from the *Digest*’s volumes.” In the statement, it was noted that the *Digest*’s articles might become out of date; therefore, they were to be examined in the supplements according to the articles’ numbers in the *Digest*. In conclusion, it was pointed out that henceforth all the state institutions and offices must use only codified legislation. This rule was included in the Statute of the Governing Senate and remained in force until the October Revolution of 1917.²⁸ The only exception was made for private persons: they were allowed to make references to articles from earlier (not the most recent) editions of the *Digest* and its supplements.

Codification procedures also implied new rules for the lawmaking process. To escape a possibility of the collapse of the “system of the *Digest*” (*sistema Svoda*)—the order in which the laws were originally grouped—every subsequent law would be properly placed in it, and the following was stipulated: “while forming every new statute the arrangement of its main parts should preserve the same plan used in the respective statute in the *Digest*.”²⁹ Thus, new laws would be easily integrated into the structure of the existed system of legislation, which would develop smoothly. At the same time, the possibility of incorrect interpretation of the legislator’s will would be reduced to a minimum.

As we can see, the codification of Nicholas was to realize the absolutist dream of Peter I in which, as Marc Raeff has observed, an enlightened monarch leading a well-educated administration elite was mobilizing the

27. *Polnoe Sobranie zakonov Rossiiskoi imperii* (hereafter *PSZ*) (1834) no. 7654.

28. *Svod zakonov Rossiiskoi Imperii. Uchrezhdenie Pravitel’stvuiushego Senata* [*Statute of the Governing Senate*] (St. Petersburg, 1892); *Uchrezhdenie Pravitel’stvuiushego Senata, izdaniia 1915 goda, i ego izmenenie zakonom 16 dekabria 1916* [*Statute of the Governing Senate 1915 edition changed 16th December 1916*] *Sobranie zakonov i raspriadazhenii pravitel’sva* [*Collection of Legislation and Regulations of the Government*] (1917), no.11, art. 68.

29. *PSZ* (1834) no. 7654.

population for productive work through the *regularstvo* (regulating activity) and planned operation of the central authorities. However, the practical implementation of this program of absolutist legality encountered several severe obstacles.

The first of them was the constantly growing flow of legislative acts subjected to codification in the *Digest*. The second edition of *Digest* published in 1842 already contained one and a half times more articles than the first one had; namely 59,396.³⁰ The third edition of the *Digest* appeared 15 years later: in 1857. Its sheer volume doubled that of the first *Digest*; it contained approximately 90,000 articles. Naturally, the codification process slowed down, making it less efficient.

The second obstacle was loss of interest in the *Digest* on the part of Nicholas's I heirs, which could not but have affected the importance of codification. The *Digest*, which was completed by the official body most closely connected with the "source of laws": His Majesty's Own Chancellery, which was regarded as *an extension of the regal hand*. Alexander II (1855–1881) was less involved than his father had been in the codification process, but at least Alexander II continued to meet the chief of the Second Department in person for a report every week.³¹ After the abolition of His Majesty's Own Chancellery in 1882, Alexander's successors contented themselves with a formal procedure of official approval of further codification editions. The task of editing the *Digest* was passed on to the Codification Department of the State Council;³² in 1893, in view of the growing bureaucratization of the codification process, it was transferred to the Department of the Digest of the Laws at the State Chancellery serving the State Council.³³ By the beginning of the twentieth century, the participation of the emperor—the supreme source of law—in preparing new editions and supplements of

30. *The Digest of the Laws of the Russian Empire*, published in 1833, contained 36,000 articles; with appendices this rose to 42,198. See: Mikhail Speranskii, "Obozrenie istoricheskikh svedenii o Svode zakonov. Ob'iasnitel'naia zapiska soderzhania i raspolozhenia Svoda zakonov grazhdanskikh," [*Overview of Historical Sources on the Digest of Laws*] in Speranskii, *Rukovodstvo k poznaniu zakonov (Manual to Legal Studies)* (St. Petersburg: Nauka, 2002), 155.

31. Maikov, *Vtoroe otdelenie*, 138. On Nicholas I's close involvement in the preparation of the *Digest*, see: Georgii Telberg, "Uchastie imperatora Nikolaia I v kodifikatsionnoi rabote ego tsarstvovaniia (po povodu 80-letia deistvia SZRI)", ["Participation of the Emperor Nicholas I in the Codification of Laws in His Reign (on 80 Years Anniversary of the Digest of laws)"] *Zhurnal Ministerstva iustitsii [Journal of Ministry of Justice]* 1 (1916): 233–44, and Irina Ruzhitskaia, *Kodifikatsionnye proekty imperatora Nikolaia I [Codification projects of Nicholas I]* Rossiiskaia istoriia [*Russian history*] 1 (2010): 29–44.

32. *PSZ* (1882) no. 621.

33. *PSZ* (1893) no. 10212.

the *Digest* was purely nominal. Codification became an entirely bureaucratic practice that certainly made its legitimacy more questionable.

However, the main problem of the *Digest* remained the failure to execute “Speransky’s rule.” The first *Digest*’s editor, and its architect, had insisted on an obligatory statement by future legislators outlining the specific changes that a newly codified resolution introduced to the *Digest*.³⁴ By providing a clear indication of what articles were rescinded or changed by a new law, the possibility of distorting its meaning in the process of its codification in the *Digest* was reduced to zero. However, if we look at any volume of *Complete Collection of Laws*, we see that legislators demonstrated a consistent reluctance to define clearly the changes to previous legal regulations resulting from new laws. Instead, legislators limited themselves to a diffuse phrase put at the end of almost every legislative act: “all that differs from the aforementioned in the former legislation is repealed, while all the content remains in force.” Over the course of time, the phrase was replaced with a not much more concrete statement at the start of new laws: “in order to repeal, change, and add to the appropriate laws” (*v otmenu, izmenenie i dopolnenie podlezhashchikh uzakoneni*). Thus, the legislator left the task of interpreting new legislation and the changes that it made in the existing legal system to the codifiers.

Legal professionals tried to justify the reasons for this reluctance on the part of legislators. For example, a participant in the codification process in the 1880s, professor of civil law Kronid Malyshev, alluded to their general conservative approach. In his opinion, “legislators perceive a new law as an improved form of the old one, without intending any changes in essence.” In addition, an accurate indication of changes within laws in force implied confidence in the “completeness and clarity”³⁵ of the newly introduced regulations, thus likely increasing ministers’ responsibility for consequences of introducing new legislative regulations.

The validity of Malyshev’s explanation is demonstrated by a law that instructed ministers not to rush in the case of repeal or radical change of existed legislation. The very first edition of the Statute of Ministries of 1801 contained an article that was not changed until the October Revolution in 1917: “In a wide range of matters and cases in diverse connections of different needs and benefits one cannot but face in practice various needs and inconveniences; but not all the inconveniences are to be perceived as a reason for new legislation. The Minister must first of all attempt to find all the means for improvement without exceeding the

34. Speranskii, *Obozrenie*, 145–46.

35. Kronid Malyshev, *Kurs obshchego grazhdanskogo prava Rossii* [*Lectures on Russian General Civil Law*] vol.1. (St. Petersburg: Tipografiia Stasiulevicha, 1878), 188–90.

bounds of the existed order, and only after that, having estimated and compared all the inconveniences that would have resulted from the new law in view of its innovativeness, should he start making the proposal.”³⁶ Thus, a minister whose position was dependent exclusively on the emperor could,³⁷ while drafting legislation, try to evade and make someone else responsible for the law’s possible negative effects. The codification office that “incorrectly” included a law into the *Digest* could have always become a scapegoat in such a situation.

The chance of errors occurring in the process of codification was high.³⁸ Every act, which in effect changed existing law, was first inserted into a chronological catalogue, and then divided into articles from the point of view of subject content as stipulated by the *Digest*’s structure. If a law’s provisions referred to various subjects, they would all have to be inserted into the respective parts of the *Digest*. Only in this way could the *Digest* fulfill the task of being an exhaustive source of current law. This mode of codification, which had been started under Speranskii’s supervision, lasted until October 1917.

The practices of codification described previously “automatically” empowered the Second Department and all the subsequent codification offices to impose their interpretation of new laws on the *Digest* and its supplements. As a result, a law that had been codified within the *Digest* might well differ from its original version. One can hardly underestimate the significance of codifiers’ functions; the codification process can be viewed as the first stage of “implanting” a new law into the “tissue” of the existed legal system.

How could a monarch, the supreme custodian of the law in the Russian Empire, tolerate a competition between laws that he had approved and laws produced by the codification process? As mentioned previously, Nicholas

36. *Uchrezhdenie Ministerstv [Statute of Ministries]* Article 166, *PSZ* (1811) no. 24686.

37. On the dependence of ministers from the monarch’s personal will see the published diaries of ministers: *Dnevnik P. A. Valueva, ministra vnutrennikh del.*, [*Diary of P.A. Valuev, Minister of Interior*] 2 vols., ed. Piotr Zaionchkovskii, (Moscow: Izdatel’stvo Akademii nauk SSSR 1961), 420, 586; and *Dnevnik D. A. Miliutina*, 4 vols. ed. Piotr. Zaionchkovskii, (Moscow: Gosudarstvennaia biblioteka SSSR 1950), 253, 290, 323, and discussion on relationships of tsar with his ministries: Anatolii Remnev, *Komitet ministrov v sisteme vysshego upravleniia Rossiiskoi imperii (vtoraia polovina XIX– nachalo XX veka)*. (Moscow: Rossiiskaia politicheskaia entsiklopediia, 2010).

38. Until 1885, the instruction on codification procedure was for inside use of the Second Department. The “Highly approved Statement of the Department of Laws of the State Council on the procedure of the *Digest*’s reissue” appeared on November 5, 1885, *PSZ* (1885) no. 3261. Speranskii’s instructions for compilation of the *Digest* are provided in Gugo Blöfel’dt, “*Zakonnaia*” *sila Svoda zakonov v svete arkhivnykh danykh* (Petrograd: Senatskaia tipografiia 1917), 10–15.

I, who most likely believed he was an actual author of the *Digest*, resolved this confrontation in favor of the latter; he empowered the *Digest*'s first edition of 1833 as the sole law that reversed all previous law that might be incompatible. In the future in case of discrepancy in laws, priority was to be given to the original version, signed by the legislator.³⁹

The paradox of “the legitimate monarchy” was that the imperial administration took no measures to define more precisely the status of the *Digest*'s articles in relation to the original laws. Despite debates on this problem in juridical press, the *Digest*'s legal basis remained immutable: it was defined in the aforementioned article of the Statute of Governing Senate that directed state authorities and citizens to refer only to the codified law in the *Digest* or its supplements.

How could this phenomenon be explained? Based on what we know about autocratic power in the Russian Empire, it seems that this way of codifying laws mirrored the very ethos of Russian autocracy, in which contradictions in laws to some extent supported the supreme power of the monarch.⁴⁰ Uncertainty about the law in force always left a gap for arbitrariness that preserved an advantageous position for the monarch “above the law”; it was only he who could restrain the vices of state agents. The danger in repudiating the given supreme power of the monarch, by limiting it to the letter of the coherent law, was best described by Nikolai Karamzin in his famous Memoir of 1811, which was intended to put an end to the liberal projects of Nicholas I's predecessor Alexander I (1801–1826): “Sirens may sing around the throne: ‘Alexander! Let the law reign over Russia... and etc. (sic)’ I will be an interpreter of this chorus: ‘Alexander! Give us in the name of law the right to rule Russia while you just rest on throne and only pour out your favors, give us higher ranks, new decorations and money!’”⁴¹

39. Nikolai Lazarevskii, *Lektsii po russkomu gosudarstvennomu pravu*. [Lectures on Russian Public Law] Vol.1. *Konstitutsionnoe pravo* [Constitutional Law] (St. Petersburg: Pravo, 1908); Mikhail Lozina-Lozinskii, “Kodifikatsia zakonov po russkomu gosudarstvennomu pravu,” [“Codification of Legislation under Russian Public Law”] *Zhurnal ministerstva iustitsii* [Journal of Ministry of Justice] 4–5 (1897): 142–86, E. M. Pobedina, “K voprosu o iuridicheskoi sile Svoda,” [“To the question of legal power of the Digest”] *Zhurnal ministerstva iustitsii* [Journal of Ministry of Justice] 4 (1909): 138–50.

40. This observation, pointed out by Richard Wortman in his *The Development of a Russian Legal Consciousness* (Chicago: University of Chicago Press 1976), has been further elaborated by other scholars. See the survey by Wortman in his “Russian Monarchy and the Rule of Law: New Considerations on the Court Reform of 1864,” *Kritika: Explorations in Russian and Eurasian History* 6 (2005):150–51.

41. Nikolai Karamzin, *Zapiska o drevnei i novoi Rossii v ee politicheskom i grazhdanskom otosheniakh* [Memoir on Ancient and Modern Russia in its Political and Civil Respects] (Moscow: Nauka, 1991), 102.

Karamzin formulated the basic idea of the autocratic legal doctrine: “the monarch is the living law—merciful for the kind and castigating evildoers, the love of the former is obtained by the fear of the latter. If people aren’t afraid of the tsar they aren’t afraid of the law!”⁴² The historian stated that the traditional and only possible limiting factor of the monarchical power in Russia was the criterion of morality. He compared the monarch to the head of a family, where no legal framework is needed: “The Russian monarch is the source of all state powers: our rule is fatherly, patriarchal. As a head of a family judges and punishes without any regulations, so the monarch should act only according to his total honesty.” Therefore, the task of monarchs was to protect in every possible way their supreme legitimacy: “to preserve at any price the right to grant general benevolence from above.” One such benevolence was the relative legality established with introducing the *Digest*. However, if the law had been exhaustive within the *Digest*, then its clarity and stability could have threatened the primacy of monarch’s will and the power of his servants: the bureaucracy.⁴³ The *Digest*’s creator Speranskii shared Karamzin’s views and put them into the mind of his pupil, the future tsar Alexander II: “the legislator combines within himself two honorary titles: establishing the rules he becomes a supreme interpreter of the truth; imposing the penalties he becomes its supreme protector.”⁴⁴

Legalistic Challenge to the *Digest*

It is fair to say that the conception of autocratic legality was clearly formulated and expressed as a result of the challenge raised during the Enlightenment with the opposite positing the conflict as between law and arbitrariness. By the beginning of the nineteenth century, in contrast to the official Russian interpretation of law as a privilege granted by the monarch, discussions about formal constitution became all the rage. A constitution was perceived as a foundation for the state structure, a foundation that monarchs committed themselves not to break. As an obligatory item of constitutional government, enlightened contemporaries of Alexander included elective representation: the participation of the Russian society’s

42. *Ibid*,

43. Walter M. Pinter has fairly pointed out that even transparency of lawmaking process was considered a threat to the autocracy. W. Pinter, “Reformability in the Age of Reform and Countereform, 1855–1894,” in *Reform in Russia and the USSR: Past and Prospects*, ed. Robert O. Crumney (Urbana: University of Illinois Press 1989), 90.

44. Mikhail Speranskii, “*Besedy*” *M.M. Speranskogo o zakonakh*, M. Speranskii’s ‘talks’ on law/ed. Dzhenevra Lukovskaia, Sergei Grechishkin, *Pravovedenie* 4. (1997).

representatives in legislative politics. This provision jeopardized the supreme right of the monarchy to grant laws. In response to the challenge of constitutional discourse, the publication of the *Digest* was considered by state authorities to be a means of popularizing the idea of a transparent legal monarchy, which rested upon an accurate legal foundation, as stated in all the editions of the *Fundamental Laws of the Russian Empire*. By presenting fifteen volumes of the *Digest* for general use, the tangible reality of autocratic legality was set against the liberal ideas of constitution.

It should be noted that at the beginning of 1830s there were those who saw in relatively complete codification of Russian legislation within the *Digest* a danger to the autocratic sacrament of granting legislation and jurisprudence.⁴⁵ Take, for example, the apocryphal story of Senator Aleksandr Chelischev.⁴⁶ In 1833, just after the *Digest* was prepared, he was appointed a member of the secret committee established for the *Digest's* revision. Examining the *Digest* completed by Speranskii's team, the Senator shuddered with horror. He rushed to report confidentially to the committee's chairman on his discovery: there was nothing said about the autocratic rule of the monarch in the draft *Digest*. In the evening, Speranskii himself came to thank Chelischev, explaining the omission as an oversight by a copyist.

Analyzing this story a historian of Russian law, Aleksandr Nolde came to the conclusion that it was completely groundless. He referred to the *Digest's* draft, which had remained among the documents of the Second Department; in the draft instead of the term "autocracy" (*samoderzhavie*) often appeared the term "absolute rule" (*samovlastie*), which was obviously a synonym.⁴⁷ Chelischev's story nonetheless demonstrates the suspicions in the top echelons of power that the *Digest* could affect the system of supreme autocratic rule.

However, the fears of the *Digest's* opponents were not entirely groundless; the *Digest* immediately revealed all the defects of legislation. Speranskii and Nicholas I justified this outcome from a practical point of view: publishing the *Digest* would later assist "in the process of defining governmental politics in the sphere of legislation."⁴⁸ As an encyclopedia

45. Arkadii Fateev, "K istorii yuridicheskoi obrazovannosti v Rossii," ["On the History of Legal Education in Russia"] *Uchenye zapiski, osnovannye russkoi uchebnoi kollegiei v Prage* [*Academic Memoirs of the Russian College in Prague*] 1 (1924):170.

46. Mikhail Pogodin, "K biografii Speranskogo," ["To the Biography of Speranskii"] *Russkii arkhiv* [*Russian archive*] (1871), stolbets 1947.

47. Aleksandr Nolde, "Retsenzia na knigu P. M. Maikova 'Vtoroe otdelenie sobstvennoi ego imperatorskogo velichestva kantseliarii,'" ["Review of the book: P.M. Maikov *The Second Department of His Majesty's Own Chancellery*"] *Zhurnal ministerstva iustitsii* [*Journal of Ministry of Justice*] 5 (1908):181.

48. Quoted in: Maikov, *Vtoroe otdelenie*, 191.

of Russian acting laws, the *Digest* became, according to a contemporary, the first and best university handbook in Russian law.⁴⁹ The aspirations of graduates trained during the reign of Nicholas I to make constructive use of their legal education proved a significant factor in the promulgation of the great reforms of 1860s and 1870s.

The court reform of 1864 was probably the most radical and influential for the development of the Russian society. It brought much more openness to the legal field, especially in court proceedings. Naturally, the reform introduced new challenges to the existed official understanding of legality, embodied in the *Digest*. One of the great innovations was the newly inaugurated official edition—the legislation bulletin of the governing Senate—*Collection of Edicts and Regulations of the Government (Sobranie zakononii i raspriazsenii pravitelstva)*, where current legislation started to be published systematically after 1863. Afterward, practical validity of the *Digest* diminished; legal professionals started to regard codification editions as useless and unnecessary compared with the original legislation, which became easily accessible in the Senate's bulletin.

Very influential arguments against the *Digest* usually were based on the statement that the Court Statutes of 1864 allowed the interpretation of laws while adopting court decisions, which they had never done before.⁵⁰ Two identical articles, one in the Statute of Civil Proceedings and the other in the Statute of Criminal Proceedings, instructed jurists to act always “on the basis of existing legislation” and not to defer to court decisions in light of their “incompleteness, vagueness, shortness or contradictions.”⁵¹ Therefore, in view of the right to interpret laws, the doubts cast upon the *Digest* expedience sounded quite natural. The *Digest's* purpose and function precluded interpretation of the law.

However, according to the dominant point of view in the professional literature stated by recognized expert in criminal law and criminal proceedings Nikolai Tagantsev, “the responsibility to reveal and to define the extent and the essence of changes introduced by a new law in the former legislation,” in a case in which the legislator did not indicate these changes

49. Iakov Barshev, *Istoricheskaia zapiska o sodeistvii Vtorogo otdeleniia sobstvennoi ego imperatorskogo velichestva kantselarii razvitiu iuridicheskogo obrazovaniia v Rossii* [*Historical memoir on promotion of legal education in Russia by the Second Department of His Majesty's Own Chancellery*] (St. Petersburg: Tipografiia Vtorogo otdeleniia sobstvennoi ego imperatorskogo velichestva kantselarii, 1876), 9–11.

50. Nikolai Korkunov, *Russkoe gosudarstvennoe pravo* [*Russian Public Law*] (St. Petersburg: Knizhnii magazin Tsinzerlinga, 1893) Vol. 2:46–47.

51. Ustav Grazhdanskogo sudoproizvodstva [Statute of Civil Procedure]. Art.10, Ustav Ugolovnogo sudoproizvodstva [Statute of Criminal Procedure]. Art. 13, *SZ* (St. Petersburg, 1914). vol. XIV, part. 1.

himself “is entrusted to the department that is in charge of codification of laws.”⁵² This conclusion came from the exact meaning of unaltered Article 65 of the Fundamental Laws. Contrary to the Court Statutes of 1864, this article secured the former mechanistic principle of law implementing “according to the exact and literal meaning of laws” and avoiding the “deceptive inconstancy of arbitrary interpretations.”⁵³ That is why it is difficult to agree with the view that the *Digest* “stood as an active digest of laws until the era of the Great reforms in the 1860s,”⁵⁴ based on uncritical consideration of critique of the *Digest* in later decades of the nineteenth century. However, the consequence of the reforms certainly provided more freedom in interpretation of law and in general liberalized the judicial practices.

This layering over of regulations on interpretation of laws is just one example of the frequently mentioned phenomenon of the inept and contradictory character of Russian administrative policy.⁵⁵ Moreover, detailed analysis of contradictory policy of the authorities in the course of court reform in 1860s and 1870s undertaken by Nadezhda Korneva enabled her to conclude that counter-reform was undertaken simultaneously with the court reform itself because of its incompatibility with an autocratic system of power.⁵⁶ Nevertheless, the judges used their right of interpretation, and often tended to rely on the principles of jurisprudence that they were taught at universities and *lecées*, rather than a letter of a particular article from the *Digest*.⁵⁷

One of the great accomplishments of the court reform was making legal defense a regular part of a criminal trial. Notwithstanding the government’s efforts to exert more control over the liberalization process, the court reform brought its fruit: among which the most remarkable was the

52. Nikolai Tagantsev, *Leksii po ugovnomu pravu. Chast’ Obschaia* [Lectures on Criminal Law. General Part]. (St. Petersburg: Gosudarstvennaia tipografiia, 1887), vypusk 1, 128.

53. Osnovnye zakony Rossiiskoi imperii [Fundamental Laws of the Russian Empire], SZ (St. Petersburg, 1892) vol. 1, part. 1.

54. Whisenhunt, *In Search of Legality*, 122.

55. William Wagner, “Tsarist Legal Policies at the end of the Nineteenth Century: a Study of Inconsistencies,” *Slavonic and East European Review* 54 (1976): 394.

56. Nadezhda Korneva, *Politika samodersaviia v oblasti sudoustroistva i sudoproizvodstva* [Autocratic Policy in the Realms of Courts’ Organization and Functioning], PhD Dissertation in History (Institute of History, Leningrad, Russian Academy of Sciences, 1990) Unpublished Manuscript, 193. Many findings of this dissertation were developed by Marina Nemytina, *Sud v Rossii: vtoraiia polovina XIX – nachalo XX v.* (Saratov, 1999).

57. Wortman, *Development*, 269.

emergence of Russian lawyers (*advokaty* or *prisiazhnye poverennye*).⁵⁸ Even though the reformers coined a new term in the Russian language (*prisiazhnye poverennye*) to avoid the revolutionary connotations surrounding the French word “*avocat*,” the Russian lawyers often followed the example of their predecessors of 1789. According to the memoirs of an outstanding leader of the lawyers’ group, Maksim Vinaver, they placed in the forefront of their activities the “struggle for the rights of the individual and their protection from the immense dictatorship of state authorities.”⁵⁹ The starting point here was open for public trial of Nechaev’s terrorist revolutionary group (1871), when lawyers had achieved acquittals for forty-two of seventy-eight revolutionaries. The political trials became a vivid example of the professional power of the Russian legal profession.⁶⁰ Applying the laws of the autocratic regime, they secured acquittals for those who had attempted to overturn the regime by means of terror. The power of a new, politically active group of legal professionals, primarily lawyers, was romanticized in society and, as is shown in the recent study by Irina Kovaleva, even determined the popularity of juridical education at the end of the nineteenth century.⁶¹

Lawyers appeared to be both capable and willing to enter into the political arena during the closing decades of imperial Russia. Their political ambitions, as Weber made clear from the example of Germany, can be explained in terms of the general context of the legal profession: while struggling for people’s rights, well-organized law firms became almost prototypes for political parties.⁶² In Russia, lawyers were the most visible, although not the only, group of legal professionals whose actions challenged the legitimacy of the autocratic political and legal regime.

58. Nadezhda Cherkasova, *Formirovanie i razvitie advokatury v Rossii, 60–80-e gg. XIX v.* [*Emergence and Development of Advocacy in Russia, 1860s–70s*]. (Moscow: Nauka, 1987).

59. Maksim Vinaver, *Nedavnee. Vospominania i kharakteristiki* From the Recent: Memories and Characteristics (Petrograd: Izdatel’stvo M. Vol’f, 1917), 66.

60. Nikolai Troitskii, *Bezumstvo khrabrykh: Russkie revoliutsionery i karatel’naia politika tsarizma 1866–1882 gg* [*Daring of the Brave: Russian Revolutionaries and Penal Policy of the Autocracy, 1866–1882*] (Moscow: Mysl’ 1978).

61. Inna Kovaleva, *Tsennosti pravovoi kultury v predstavleniakh rossiiskogo obschestva kontsa XIX – nachala XX vv.* [*Values of legal Culture in Russian Society in the end of of the 19th century – beginning of the 20th century*] (Velikii Novgorod: Novgorodskii gosudarstvennyi universitet 2002).

62. Max Weber, “K politicheskoi kritike chinovnichestva i partiinoi zhizni,” [Parlament und Regierung im neugeordneten Deutschland: Zur politischen Kritik des Beamtentums und Parteiwesens] in *Politicheskie raboty 1895–1917* [Schriften zur Politik, 1895–1917] (Moscow: Praksis, 2003), 188.

The attacks on the *Digest* and therefore on the whole system of applied law may be viewed as another dimension of their struggle. In an era defined by the ethos of modernizing reform, the *Digest* came to be seen as the embodiment of archaic bureaucratic practice, a dead weight on society and an impediment to the progress of reform. That these attitudes were consequences of the great reforms was pointed out by the critics themselves. For example, Professor of Law Solomon F. Berezkin stated that the volumes of the *Digest* “poorly influenced” by Alexander’s II reforms “had recently become an object of fierce attacks.”⁶³ In an atmosphere of social discontent with state politics, critical essays and even feuilletons regarding the *Digest of the Laws of the Russian Empire*, became commonplace.⁶⁴

In view of this, the *Digest* started to be viewed as an out-of-date and harmful obstacle, restraining legislators and impeding them in the promulgation of “progressive” measures. The applied codification procedure itself came to be perceived as a practice that demanded urgent reform in the immediate future when: “Over the last fifty years our public life has made a big step forward, a whole range of interrelations has emerged that defy old legislative definitions and thus require new actions by the legislative branch. Due to these developments, the need for a better form of codification has emerged.”⁶⁵

The critique of the *Digest* was concentrated on three statements: the *Digest* was pronounced inefficient, bureaucratic, and illegitimate. Along with general critical statements regarding the *Digest*, at the end of the nineteenth century, a series of special studies revealing the *Digest*’s defects had been completed. Among these were Mikhail Lozina-Lozinskii’s articles on the juridical basis of Russian codification and mistakes in codification, and historical studies on the origins of civil law by German Baratts and Maksim Vinaver.⁶⁶ All of them had the tendency to underline the defects caused by the bureaucratic character of the codification of law in the *Digest*

63. Solomon Berezkin, *Speranskii kak kodifikator [Speranskii as a Codifier]* (Odessa: Ekonomicheskaiia tipografiia 1889), 2.

64. Nikolai Korkunov, “Znachenie Svoda zakonov” [“Meaning of the Digest of Laws”], in *Sbornik statei N. M. Korkunova, 1877–1897 [Collection of articles of Nikolai Korkunov]* (St. Petersburg: Izdatel’stvo N. K. Martynova, 1898), 77–96; “Kur’ezneishii kodeks (fel’eton),” The most curious code (feuilleton) *Sudebnaia gazeta Court Gazette* 38 (1903); “Prodolzhenie kur’ezneishego kodeksa,” [“Supplement of the most curious code”] *Sudebnaia gazeta [Court Gazette]* 39 (1903).

65. Berezkin, *Speranskii kak kodifikator*, 3–4.

66. Mikhail Lozina-Lozinskii, 1). “Kodifikatsia zakonov po russkomu gosudarstvennomu pravu,” [“Codification under Russian Public Law”] *Zhurnal ministerstva iustitsii [Journal of Ministry of Justice]* 4–5 (1897); and “Kodifikatsionnye oshibki,” [“Codification Mistakes”] *Zhurnal ministerstva iustitsii [Journal of Ministry of Justice]* 5 (1896): 133–59.

effected by state offices of the “bureaucrat nature”—codification bodies of State Council and, since 1894, of State Chancellery.

Mikhail Lozina-Lozinskii, a jurist and civil servant, who finished his career as a governor of Perm Region in 1914–1917, wrote about the inefficiency of bureaucratic codification, which resulted in incorrect interpretation of new legislation by codifiers or merely its wrong placement in the system of the *Digest*. According to Lozina-Lozinskii, codification errors were a natural consequence of the codification process itself when a new law referring to various chapters of the *Digest* had to be divided into separate statements and then put in the *Digest*'s different volumes and parts. As a result, the initial idea of legislator and the sense of a new law could be distorted and the new regulation was almost lost in the new editions of the *Digest*'s parts or its supplements.

The drawbacks of codification described at the end of the nineteenth century originated in the remarkably irresponsible attitude of the legislator to lawmaking, especially in the area of clearly indicating the changes that were made by the new law in the existed legislation, which was discussed earlier. As one of codifiers in 1895–1902 wrote in his memoirs, there were very few laws that totally repealed previous legislation; consequently, the codifiers had to interpret the new law in order to change the acting legislation.⁶⁷ The huge impact of codification on the lawmaking process was positively acknowledged in the official memo “On codification body of state apparatus,” which stated that one of the most important missions of codifiers had always been to make a new legislation comply with existing law.⁶⁸

The historical articles of practicing lawyers German Baratts and Maksim Vinaver⁶⁹ bore an unmistakable political message; they cast doubt on one of the main principles of the *Digest*'s legitimacy. As was stated earlier,

67. Vladimir Gurko, *Cherty i siluety proshlogo. Pravitel'stvo i obshchestvo v tsarstvovanie Nikolaia II v izobrazhenii sovremennika* [Features and Silhouettes of the Past. Government and Society in the Reign of Nicholas II, an overview of a Contemporary] (Moscow: Novoe literaturnoe obozrenie, 2000), 122.

68. *Spravka ob ustroistve kodifikatsionnoi chasti*. [Memo on Arrangement of Codification Department] (1917). Rossiiskii Gosudarstvennyi Istoricheskii Arkhiv. [Russian National Historical Archive]. Fund 1162. Inventory 5. (1917) File 66. List 23–25.

69. German Baratts, “O chuzhezemnom proiskhozhdenii bol'shinstva russkikh grazhdanskikh zakonov,” [“On Foreign Origins of Russian Civil Legislation”] *Zhurnal grazhdanskogo i ugovnogo prava* [Journal of Civil and Criminal Law] 9 (1882): 45–80; Maksim Vinaver, “Ob istochnikakh grazhdanskikh zakonov,” [“On Origins of Civil Legislation”] *Zhurnal ministerstva iustitsii* [Journal of Ministry of Justice] 10 (1894): 87–102; Maksim Vinaver: “K voprosu ob istochnikakh X toma Svoda zakonov,” [“To the question of origins of the Xth volume of the Digest of Laws”] *Zhurnal ministerstva iustitsii* [Journal of Ministry of Justice] 10 (1895): 1–68.

according to the general autocratic conception of legality, the legitimacy of codification work was secured by the lawfulness of acts that the codifiers had been systematizing *without any changes* within the *Digest*. Vinaver brought out clearly that Speranskii had not fulfilled the monarch's wish: "making no new laws, but bringing order to the old." He demonstrated that, already in the *Digest's* first edition of 1835, officials of the Second Department had used references to Russian legislative acts of the seventeenth and eighteenth centuries as a screen, disguising foreign innovations that had in fact been based on articles of the revolutionary French Civil Code, more commonly known as the Napoleonic Code.⁷⁰ Thus both the national and autocratic legitimacy of Nicholas' project of legal monarchy were seriously questioned.

In trying to explain the phenomenon of the *Digest's* low valuation in last decades of the nineteenth century, one should take into account a revealing observation by Petr Maikov, a former official of the Second Department and its first historian. He noticed that while writing on the obsolescence of the *Digest*, its eminent critics, such as Professor of Law Nikolai Korkunov, made mistakes themselves by not taking into account the newest editions of the *Digest's* books and volumes.⁷¹ It seems that criticism concerning the codification of laws in the *Digest* was such a commonplace in the community that providing formal evidence of the *Digests'* inadequacy by checking of its new editions was considered unnecessary. Therefore, it is possible to search for its reasons in broader context: the unfulfilled desire for representative legislators and irritation against the regime's paternalistic attitude to society.

The great reforms did not give the most desired "constitution"; autocracy was still unwilling to allow representatives of society to perform mutual legislative work. Jurists, whose education and training had been favored during Nicholas's I autocratic reign, and whose prestige grew rapidly after the 1864 judicial reform, were the first to express growing dissatisfaction.

For example, Aleksandr Gradovskii, a well-known publicist and professor of law at St. Petersburg University, while giving credit to Nicholas I's attempts to infuse education and legality into the administrative practices of the empire, critically assessed the unfavorable results of these good intentions. Drawing on his research on the development of legal institutions in imperial Russia, he insisted that the state finally must

70. Tatiana Borisova, "Russian National Legal Tradition," 321–23.

71. For examples of such oversights made by competent jurists, see Piotr Maikov, *O Svode zakonov Rossiiskoi Imperii* [On the Digest of Laws of the Russian Empire] (St. Petersburg: Tipografiia tovarishchestva "Obshchestvennaia pol'za," 1906), 9.

put more trust in Russian society and its ability to participate in the political life of the country. Freely quoting from Bentham, Gradovskii wrote: “There are only two ways to be effective in interactions with the people (. . .). Either to keep people in complete ignorance regarding current affairs or to provide the population with clear information; either to impede people’s making of their own opinions or to give the population a chance to elaborate its most profound judgment; either to treat people as if it were a child or to perceive it as a grown-up—these are two modes of action and one has to choose between them.”⁷²

Gradovskii expressed general dissatisfaction with authority’s paternalistic attitude toward society, which intruded with Alexander’s III (1881–1896) counter-reforms into the sphere of his professional expertise: law. Here his major target was Nicholas’s *Digest*. In Gradovskii’s view, “the pile” of its volumes had become suffocating “shackles of bureaucratization” tightened on developing Russia.⁷³

In general, pointing out the drawbacks of codification of laws in the *Digest*, its critics maintained implicitly the professional right of the community to define independently legal effects of new legislation without taking into account the interpretations of codifiers in the State Chancellery. In the continuing process of codification, they perceived a certain distrust toward the professional abilities of legal specialists, as if the codifiers were “dictating” to them the meaning of new laws. Criticizing the *Digest*, they vindicated their professional mastery of legislation and, therefore, their right to interpretation. On the other hand, whether intentional or not, the criticism of the *Digest*’s new editions was also directed toward the autocratic regime in general.

One of main static features of autocratic understanding of legality was distrust of formal institutions and popularizing the “above the law” power of the monarch, which could be used as a means of “strengthening legality.” At the beginning of the twentieth century, Karamzin’s doctrine of autocratic legality was still relevant.⁷⁴ This is shown not only by the crown’s adherence to the old system of obligatory codification and therefore to incomplete transparency in the matter of current law. To give an example, we can take a project designed in 1898 by Dmitrii Sipyagin, who soon afterward was appointed to the position of minister of the

72. Aleksandr Gradovskii, “Biurokratizm i pravovoi poriadok”, [“Bureaucracy and Rule of Law”] *Nabliudatel* [Observer] 7 (1882): 47.

73. *Ibid.*, 45.

74. See more in Aleksei Kartsov, *Pravovaia ideologiia russkogo konservatizma (vtoraia polovina XIX – nachalo XX v.)* [Legal Ideology of the Russian Conservatism, Second Half of the 19th century – Beginning of the 20th Century], Juridical Doctor Dissertation Moscow State Law Academy 2008, Unpublished manuscript.

interior. With the purpose of strengthening legality, he suggested reforming the Chancellery of Petitions for His Majesty into an official body standing above all the central and higher authorities. For that purpose, the Chancellery was to be entitled to review these institutions' resolutions "on the basis of anyone's petition."⁷⁵ Thus, almost a century after Karamzin's Memoir, in the top echelons of power, an autocratic legal order was still based not upon law and legal procedures but upon the favorable will of the monarch.

The experience of assembling and maintaining the *Digest* clearly demonstrates the practical weakness of formal institutions—the legislation itself—perceived as something less important than actual performance, to borrow Karamzin's phrase "the most important are people, not laws" (*ne zakony, a liudi vazhny*).⁷⁶ The *Digest* as a special system of legislation confirms the accuracy of the Richard Wortman's observation that legality existed in tsarist Russia as an unattainable ideal, a "legal fiction."⁷⁷ The legislator failed to fulfill the autocratic project of legal traditionalism: to create no new laws, but to put in order old ones. The codifiers had to create new laws in the new editions of the *Digest* and its supplements, because, as we observed earlier, the legislator very seldom provided a clear indication of which articles of the *Digest* were rescinded or changed by a new law. There could be several interrelated motivations found for this peculiarity of Russian legislative politics.

First, it can be partly explained by attempts to evade the issue of the responsibility of a legislator in autocracy. *Second*, from a practical point of view, the imperial government was not confident enough that new legislation could be applied coherently in different parts of the empire, and left to the codifiers to do the kind of "tuning" of a new norm for different regions. This further "tuning" of new norms by local authorities in practice was considered as an efficient means of administration, namely, "*usmotrenie*" (discretion) and was protected by the system of administrative justice.⁷⁸ *Third*, it realized the theory of legal traditionalism, when a new legislation was perceived as an improved version of a previous order in

75. Quoted in Anatolii Remnev, "Problema ob'edinennogo pravitelstva nakanune pervoi rossiiskoi revoliutsii" ["Problem of united government on the edge of the first Russian revolution"] *Novoe o revoliutsii 1905–1907 gg. v Rossii* [New findings on the revolution of 1905–1907] (Leningrad: Izdatel'stvo Leningradskogo universiteta 1989), 97.

76. Karamzin, *Zapiska*, 102–3.

77. Wortman (Wortman), *Vlastiteli i sudii*, 24.

78. Ekaterina Pravilova, *Zakonnost' i prava lichnosti: administrativnaia iustitsia v Rossii (vtoraia polovina XIX v – Oktiaбрь 1917)* [Legality and Individual Rights: Administrative Justice in Imperial Russia (Second Half of the 19th Century — October 1917)] (St. Petersburg, "Obrazovanie-Kultura," 2000).

a legitimate monarchy. Critics of the *Digest* demonstrated a conflict of ideas between legal traditionalism and the newly embarked upon attitudes of emerging legal professionals in the last decades of the nineteenth century.

Under threat of revolution on the eve of the twentieth century, supporters of the Russian autocracy insisted that the latter was “a state of legality, truth and justice.”⁷⁹ In their opinion, the Russian monarchy as embodiment of a “people’s monarchy” was by definition “true” and “legal.” They envisioned overcoming the growing political crisis by preserving the autocracy’s “firm principles” based on a stable foundation of written law. Precisely by “strengthening legality” the authorities strove to dispel the threat of impending revolution on the eve of 1905. The text of a decree dated December 12, 1904 stated as its goal: “to take effective measures in order to preserve the absolute strength of law—the most important support of throne in an autocratic state—such that its inviolable and universal execution would be considered a primary duty of local authorities subjected to our power while willful non-observance would inevitably entail legal liability.”⁸⁰ However, in practice, the neglect of formal institutions, embodied in the very legislative practices, left very little chance for a peaceful path of reform of autocracy in imperial Russia.

79. Piotr Semenov, *Samoderzhavie kak gosudarstvennyi stroi* [*Autocracy as State Structure*] (St. Petersburg: Senatskaia tipografiia, 1905), 6, 9–11.

80. *PSZ* (1904) no. 25495.