



NATIONAL RESEARCH UNIVERSITY
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RUSSIAN EMPIRE: THE PHENOMENON
OF AUTOCRATIC LEGALITY**

BASIC RESEARCH PROGRAM

WORKING PAPERS

SERIES: LAW
WP BRP 03/LAW/2012

This Working Paper is an output of a research project implemented
at the National Research University Higher School of Economics (HSE). Any opinions or claims contained
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THE DIGEST OF LAWS OF THE RUSSIAN EMPIRE: THE PHENOMENON OF AUTOCRATIC LEGALITY²

This article is devoted to the Digest of the Laws of the Russian Empire – an embodiment of the operative legal system in late imperial Russia. Even though the Digest contained the law in force, and thus should be studied as a crucial source on Russian (legal) history, its meaning has been often overlooked. The reason for that is a remarkable difference between the original texts of laws adopted by the legislator, and their published form in the Digest. This difference came from the necessary editing procedures when every new piece of legislation was included in the existing system of the Digest.

This strange feature of legal procedure when two different versions of a particular law – the original one and the one codified in the Digest – both remained in force should be considered as a part of official autocratic legality in late imperial Russia. Even though it may seem inefficient and irrational, the practice of obligatory codification of laws in the Digest existed for a rather long time – from 1835 until 1917. My research aims to find possible explanations for the Digest’s prolonged existence in the context of political and legal culture of late imperial Russia. What did Russian ‘official legality’ actually mean on the levels of theory and action?

JEL Classification: N93

Keywords: legal history, codification, legislation, legality, Russia

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² The author is grateful to Jane Burbank, Nathaniel Knight, and William Wagner along with three anonymous readers of Law and History Review for their insightful comments on previous drafts of the paper. John King’s kind assistance with language issues was highly appreciated. Any errors or omissions are solely those of the present author.

Researchers of the Russian history of late Imperial period quite often base in 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 where 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 Digest existed for a rather 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.³ 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.

In this essay 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,⁴ I will focus on the most influential for the whole legal system of Russia *official* interpretation of legality. The main object of my research will be theory and practice of editing and implementation of the Digest of laws of the Russian Empire since it was drafted in late 1820s until ending 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 stasis and inflexibility of rule in imperial Russia.

Even though 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

³ Uchrezhdenie Pravitel'stvuiuschego Senata. Art. 66, Suppl. 7, in *Svod zakonov Rossiiskoi imperii* (hereafter SZ) Vol. 2. (SPb, 1906).

⁴ L. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge university Press, 2010).

implementation has remained a very challenging field of studies. In the situation of high deficit of a close examination of everyday legal practice,⁵ there are several key assumptions on legal development and legality articulated in the literature. Both western and Russian historiographies share general positive evaluation of constant legal reforms in Russian empire in terms of “evolution”, “modernization”, “Europeanization”, and etc.⁶ 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*).⁷ This positive assessment is challenged by another, very influential, critical evaluation of Russian passion for legal reform presented by authoritative Richard Wortman, who insists that, to a large extent, law played a role of “cultural fiction” as Viktor Zhivov once observed.⁸ Wortman’s argument is based on pathbreaking research on social/human dimensions of legal development in Russia in imperial Russia undertaken as close analysis of emergence of 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 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 two capitals Moscow and St. Petersburg.⁹ Partly, it came from the existent deficit of other actors. Indeed, the struggles on national sovereignty and separation of powers, which stimulated codification debates in Europe, entered Russian political agenda only in the last decade of the twentieth century. The same can be said about interested groups, especially the legal professionals, 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

⁵ Remarkable examples of such a research remain very few. See, for example.: J. Burbank, *Russian Peasants Go to Court. Legal Culture in the Countryside, 1905 – 1917*. (Bloomington: Indiana University Press, 2004); G. Popkins, “Code versus Custom? Norms and Tactics in Peasant Volost Court Appeals, 1889-1917”, in *Russian Review* 59, No. 3 (July, 2000), 408-424.

⁶ *Vlast’ i reformy. Ot samoderzhavnoi k sovetskoi Rossii*, ed. by B.V. Ananich, R.Sh. Ganelin, V.M. Paneiakh (SPb,1996), 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).

⁷ B. N. Mironov, *Sotsial’naia istoriia Rossii (18 - nachalo 20 vv.): Genezis lichnosti, demokraticeskoi sem’i, grazhdanskogo obshchestva i pravovogo gosudarstva*. Vol. 2 (St. Petersburg, 2003), 109-95.

⁸ R. Wortman (Wortman), *Vlastiteli i sudii: razvitie pravovogo soznaniia v imperatorskoi Rossii* (Moscow, 2004), 24.

⁹ J. Burbank and M. 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.

benchmarks in the evolution of the state. The Digest of 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.¹⁰ The further history of the Digest's maintenance and editing remain unaddressed.

In this essay 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, at 1830s, one can observe a conflict between attempts to fix and order the laws in the *system of Digest* and the exercise of the autocrat's otherwise unrestrained ability to make law. Later, during 1870s, due to the development of legal profession along with the Judicial reform of 1864, the legality of Digest was challenged by the activism of new courts, which became an important institutes of if not law-making but certainly 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.¹¹ 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.¹² 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" (*reguliarstvo*) to which Peter was committed became a criterion of the effectiveness of state

¹⁰ See relatively recent examples: I. V. Ruzhitskaia, *Zakonodatel'naia deiatel'nost' v tsarstvovanii imperatora Nikolaia I* (Moscow, 2005), W. B. Whisenhunt, *In Search of Legality: Mikhail M. Speranskii and the Codification of Russian Law* (East European Monographs, New York, NY, 2001).

¹¹ A.N. Medushevskii, *Utverzhenie absolutizma v Rossii* (Moscow, 1994), 87-96.

¹² G. 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. J. Brewer, E. Hellmuth (Oxford, 1999), 349.

authorities, and an important element of state political and legal culture.¹³ The “Regulatory” state was governed by the sovereign and 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 Moscovite Sobornoe ulozhenie of 1649. Enacted by Tsar Alexei Mikhailovich, this was the most comprehensive compilation of Russian legislation since the Russkaia Pravda.¹⁴

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.¹⁵ In that time, as it was under Peter the Great, still, the personnel often was recruited from military service and thus, in general, military education was more preferable for noblemen than civil education at a foreign or one of a few Russian higher education institutions. Due to the lack of training, the both lawmaking and judicial practice was perceived rather, in framework of general state administration, than professional legal field.

Under these circumstances codification projects in Russia naturally differed radically from codification initiatives of other European absolutists, where codes were drafted by law professors and eminent judges rather than state officials. To give an example, in June 1714 Friedrich I ordered law professors of Halle university to prepare a draft Prussian Civil code. Interestingly, this difference was admitted by leaders of Codification Commission (Commission for the Compilation of Laws / Komissiia sostavleniia zakonov), which young Alexander I inherited from his father. In

¹³ Vlast’ i reformy, 146; M. Raeff, “Peter’s Domestic Legacy: Transformation or Revolution?”, in Peter the Great Transforms Russia, ed. by J. Cracraft, D. C. Heath. (Lexington; Massachusetts; Toronto, 1991).

¹⁴ On the history of codification of Russian law, see: S. Pakhman, Istoriiia kodifikatsii grazhdanskogo prava, (St. Petersburg, 1876), Vol.1, 203-472; O. Omel’chenko, Kodifikatsiia prava v Rossii v period absoliutnoi monarkhii (Vtoraia polovina XVIII v.) (Moscow, 1989).

¹⁵ R. Wortman, The Development of a Russian Legal Consciousness (Chicago, 1976), 34-50.

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”.¹⁶ In result, as leading statesman Mikhail Speranskii had to admit, codification was hardly possible because of high deficit of legal specialists (*zakonoiskusniki*) in the first decades of the nineteenth century.¹⁷

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 lectures 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 the passing of 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 from 1 January 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 above, -- *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 reestablishing 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 “making no new laws, but bringing order to the old.”¹⁸ 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.¹⁹

¹⁶ Trudy komissii sostavleniia zakonov (St. Petersburg, 1822), Vol.1, 141.

¹⁷ M. Speranskii, “Kratkoe istoricheskoe obozrenie komissii sostavleniia zakonov”, *Russkaia starina*.15 (1876), 583.

¹⁸ Quoted in: P.M. Maikov, *Vtoroe otdelenie Sobstvennoi Ego imperatorskogo velichestva kantseliarii 1826-1882* (SPb, 1906), 191.

¹⁹ See more in T. Borisova, “Russian National Legal Tradition: Svod versus Ulozhenie in Nineteenth-century Russia”, *Review of Central and East European Law* (2008) no. 3 (33), 295-341.

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 ending decades of the eighteenth century.²⁰

The second condition -- *the support of capable legal specialists* -- was fulfilled thanks to Alexander's attempts to develop (legal) education and bring it in the public administration. The reforms did not bring immediate results, but they indeed appealed foreign legal specialists to teach law as well as consult Russian statesmen in law making. Also in result of attempts to improve educational standards at civil service more trained youth slowly began to work at the governmental offices. Various activities of Mikhail Balugianskii (1769-1847), a Hungarian legal scholar invited in St. Petersburg in 1803, could be viewed as an example of '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 .²¹ Graduate from law department of Vienna University Balugianskii was recruited to teach law at St. Petersburg Pedagogical Institute and simultaneously was appointed at 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 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 law making and codification. At the same time this combination certainly had an impact on how Balugianskii, his colleagues and students viewed the law and its purpose. The educative mission of Russian legal 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, former Balugianskii's student and colleague at the codification office, taught his students, "the base of legal knowledge is the notion of truth".²² Thus, moral dichotomies such as "good - bad", "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, proved by their engagements in the highest governmental spheres. The pattern of Balugianskii's carrier demonstrated an opportunity

²⁰ Uortman (Wortman), *Vlastiteli I sudii*, 71-87.

²¹ See more in E. M. Kosachevskaia, M. A. Balugianskii i Peterburgskii universitet v pervoi chetverti XIX v. (Leningrad, 1971).

²² Quoted in: *Razvitie russkogo prava v pervoi polovine XIX v.* / Red. Skripilev E. A. (Moscow, 1994), 53.

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 legal profession, which developed in the nineteenth-twentieth century Russia, as following:

“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”.²³

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 1802-1811.²⁴ 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 chancelleryists (kantseliaristy) -- petty bureaucrats of law ranks. The need for educated Russian jurists made leaders of the codification -- Speranskii and Balugianskii -- to organize a special program for promising youngsters, usually, the sons of the clergy. The program enabled them to study in Germany for two 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. Thus, it will not be an exaggeration to say that the codification project certainly promoted development of legal training in the Russian Empire.²⁵

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.²⁶ 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.²⁷

²³ S. S. Alekseev, *Uroki. Tiazhkii put' Rossii k pravu* (M., 1997), 29.

²⁴ See more in M. Raeff, *Mikhael Speransky Statesmen of Imperial Russia. 1772-1839* (The Hague, 1969), W.B. Whisenhunt, In *Search of Legality. Mikhail M. Speranskii and the Codification of Russian Law* (NY, 2001).

²⁵ See more in recent *kandidat nauk* dissertation of A. A. Smirnova, *Vtoroe otdelenie sobstvennoi E.I.V. kantseliarii*. dissertation (St-Petersburg, 2009).

²⁶ Some regions of the Russian empire, e.g., Siberia, Finland, Poland had their own compendiums of codified legislation.

²⁷ On the history of the Digest see M. Raeff, *Mikhael Speransky Statesman of Imperial Russia. 1772-1839* (The Hague, 1969), W.B. Whisenhunt, In *Search of Legality. Mikhail M. Speranskii and the Codification of Russian Law* (NY, 2001).

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. 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.²⁸

Publishing the Digest was, in fact, 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 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."²⁹ 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 October Revolution of 1917.³⁰ 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.

²⁸ N. N. Korevo, *Ob izdanii Svoda zakonov Rossiiskoi Imperii 1830-1899* (SPb, 1900).

²⁹ PSZ (1834) № 7654.

³⁰ *Svod zakonov Rossiiskoi Imperii. Uchrezhdenie Pravitelstvuiushego Senata* (SPb, 1892), *Uchrezhdenie Pravitelstvuiushego Senata, izdaniia 1915 goda, i ego izmenenie zakonom 16 dekabria 1916, Sobranie uzakoneni i raspriazsenii pravitelstva* (1917), no.11, art. 68.

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, 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.”³¹ 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 well-educated administration elite was mobilizing the population for productive work through the *reguliarstvo* (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; namely 59396.³² The third edition of the Digest appeared fifteen years later -- in 1857. Its sheer volume doubled that of the first Digest; it contained about 90000 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 may be 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 by institutional inertia Alexander II met the chief of the Second Department in person for a report every week.³³ After the abolition of His Own Majesty’s 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 Council³⁴; in 1893, in view of the growing bureaucratization of the codification process, it was transferred to the Department of the Digest of

³¹ PSZ (1834) № 7654.

³² The Digest of the Laws of the Russian Empire of published in 1833 contained 36000 articles; with appendices – 42198. See: M.M. Speranskii, “Obozrenie istoricheskikh svedenii o Svode zakonov. Ob’iasnitelnaia zapiska soderzhania i raspolozhenia Svoda zakonov grazhdanskikh,” in M.M. Speranskii, *Rukovodstvo k poznaniu zakonov* (SPb, 2002), 155.

³³ P.M. Maikov, *Vtoroe otdelenie*, 138. On Nicholas’s I close involvement in the preparation of the Digest see: G. G. Telberg, “Uchastie imperatora Nikolaia I v kodifikatsionnoi rabote ego tsarstvovaniia (po povodu 80-letia deistvia SZRI),” *Zhurnal Ministerstva iustitsii* (1916), no.1, 233-244.

³⁴ PSZ (1882) № 621.

the Laws at the State Chancellery serving the State Council.³⁵ By the beginning of the twentieth century, the participation of the emperor -- the supreme source of law -- in preparing new editions and Supplements of 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 carry out ‘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.³⁶ 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.” In a course of time, the phrase was replaced with not a much more concrete statement in the start of new laws: “in order to repeal, change, and add to the appropriate laws” (*v otmenu, izmenenie i dopolnenie podlezhashchikh uzakonenii*). 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 instance, a participant in the codification process in the 1880’s, 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.” Besides, an accurate indication of changes within laws in force implied confidence in the “completeness and clarity”³⁷ 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 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

³⁵ PSZ (1893) № 10212.

³⁶ M.M. Speranskii, *Obozrenie*, 145-146.

³⁷ K.I. Malyshev, *Kurs obshchego grazhdanskogo prava Rossii*, vol.1. (SPb, 1878), 188-190.

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 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.”³⁸ Thus, a minister whose position was dependent exclusively on the emperor³⁹ while drafting legislation could 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.

Indeed, the chance of errors occurring in the process of codification was high.⁴⁰ 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 above “automatically” empowered the Second Department and all the subsequent codification offices to impose its interpretation of new laws in 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; in fact, 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 which he had approved and laws produced by the codification process? As mentioned above, Nicholas 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

³⁸ Uchrezhdenie Ministerstv Article 166, PSZ (1811) № 24686.

³⁹ On the dependence of ministers from the monarch’s personal will see the published diaries of ministers: *Dnevnik P. A. Valueva, ministra vnutrennikh del.*, ed. P. A. Zaionchkovskii, 2 vol. (Moscow, 1961), 420, 586; *Dnevnik D. A. Miliutina*, ed. P. A. Zaionchkovskii, 4 vol. (Moscow, 50), 253, 290, 323.

⁴⁰ 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) №3261. Speranskii’s instructions for compilation of the Digest are provided in G.E. Blosfeldt, “Zakonnaia” sila Svoda zakonov v svete arkhivnykh dannikh (Petrograd, 1917), 10-15.

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.⁴¹

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? Up to what we know about autocratic power in 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.⁴² 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 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!”⁴³

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!”⁴⁴ 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 with a head of 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

⁴¹ N.I. Lazarevskii, *Svod i zakon* (St-Petersburg., 1899); N.I. Lazarevskii, *Lektsii po russkomu gosudarstvennomu pravu*. Vol.1. *Konstitutsionnoe pravo* (St-Petersburg., 1908); M.A. Lozina-Lozinskii, “Kodifikatsia zakonov po russkomu gosudarstvennomu pravu”, *Zhurnal ministerstva iustitsii* (1897), no.4-5.; E.K. Pobedina, “K voprosu o iuridicheskoi sile Svoda”, *Ibid.* (1909), no. 4.

⁴² This observation pointed out by Richard Wortman in his *The Development of a Russian Legal Consciousness* (Chicago, 1976) has been further elaborated by other scholars, see the survey by R. 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, 1(2005), 150-151.

⁴³ N. M. Karamzin, *Zapiska o drevnei i novoi Rossii v ee politicheskom i grazhdanskom otnosheniiakh* (Moscow, 1991), 102.

⁴⁴ N. M. Karamzin, *Zapiska*, 102.

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.⁴⁵ 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.”⁴⁶

Legalistic challenge to the Digest

It is fair to say that the conception of autocratic legality was clearly formulated and expressed owing to the challenge raised during the Enlightenment with the opposite positing the conflict between law versus 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 representatives in the 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 as 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 1830’s 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.⁴⁷ Take, for example, the apocryphal story of Senator Aleksandr Chelischev.⁴⁸ In 1833, just after the Digest was prepared, he was appointed a member of the secrete 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

⁴⁵ W. Pinter has fairly pointed out that even transparency of lawmaking process was considered as 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. by R. O. Crumney (Urbana, 1989), 90.

⁴⁶ M.M. Speranskii, “Poniatie o zakone voobsche”, in “Besedy” M.M. Speranskogo o zakonakh, ed. D. I. Lukovskaia, S. S. Grechishkin, *Pravovedenie* (1997) no. 4.

⁴⁷ A.N. Fateev, “K istorii yuridicheskoi obrazovannosti v Rossii”, *Uchenye zapiski, osnovannye russkoi uchebnoi kollegiei v Prage* (1924), vol.1, 170.

⁴⁸ M.P. Pogodin, “K biografii Speranskogo”, *Russkii arkhiv* (1871), stlb.1947.

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.⁴⁹ 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."⁵⁰ As an encyclopedia of Russian acting laws the Digest became, according to a contemporary, the first and best university handbook in Russian law.⁵¹ 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-1870s.

The Court reform of 1864 was probably the most radical and influential for development of the Russian society. It brought in much more openness in 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. Afterwards practical validity of the Digest reduced -- legal professionals started to regard codification editions as useless and unnecessary compared to 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 had before.⁵² Indeed, two identical articles -- one in the Statute of Civil Proceedings and

⁴⁹ A.E. Nolde, "Review of the book: P.M. Maikov, Vtoroe otdelenie sobstvennoi ego imperatorskogo velichestva kantselarii," *Zhurnal ministerstva iustitsii* (1908), no.5, 181.

⁵⁰ Quoted in: P.M. Maikov, *Vtoroe otdelenie*, 191.

⁵¹ Ia. Barshev, *Istoricheskaia zapiska o sodeistvii Vtorogo otdeleniia sobstvennoi ego imperatorskogo velichestva kantselarii razvitiu iuridicheskogo obrazovaniia v Rossii* (SPb, 1876), 9-11.

⁵² N. M. Korkunov, *Russkoe gosudarstvennoe pravo* (SPb, 1893), Vol.2, 46-47.

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.”⁵³ Thus, 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 where the legislator did not indicate these changes himself “is entrusted to the department that is in charge of codification of laws.”⁵⁴ 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.”⁵⁵ 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”,⁵⁶ 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.⁵⁷ Moreover, detailed analysis of contradictory policy of the authorities in the course of Court reform in 1860s-1870s undertaken by Nadezhda Korneva enabled her to conclude that counter-reform was undertaken simultaneously with the court reform itself due to its’ incompatibility with autocratic system of power.⁵⁸ Nethertheless, the judges used their right of interpretation, and often tended to rely on the principles of jurisprudence, they were taught at universities and lycées, rather than a letter of a particular article from the Digest.⁵⁹

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 overt more control over the

⁵³ Ustav Grazhdanskogo sudoproizvodstva. Art.10, Ustav Ugolovnogogo sudoproizvodstva. Art. 13, SZ (SPb, 1914). vol. XIV, part. 1.

⁵⁴ N. S. Tagantsev, *Lektsii po ugolovnomu pravu. Chast’ Obschaia* (SPb, 1887), vyp.1, 128.

⁵⁵ *Osnovnye zakony Rossiiskoi imperii*, SZ (SPb, 1892) vol. 1, part. 1.

⁵⁶ Whisenhunt, *In Search of Legality*, 122.

⁵⁷ W. Wagner, “Tsarist Legal Policies at the end of the Nineteenth Century: a Study of Inconsistencies”, *Slavonic and East European Review*, (1976), vol. 54, no. 3, 394.

⁵⁸ N. Korneva, *Politika samodержavii v oblasti sudoustroistva i sudoproizvodstva*, kandidat nauk dissertation (Institute of History, Leningrad, Russian Academy of Sciences, 1990), 193. Many findings of this dissertation were developed by M. V. Nemytina, *Sud v Rossii: vtoraiia polovina XIX – nachalo XX v.* (Saratov, 1999).

⁵⁹ R. Wortman, *The Development*, 269.

liberalization process, the Court reform brought its fruit -- among which the most remarkable was emergence of Russian lawyers (*advokaty* or *prisiazhnye poverennye*).⁶⁰ 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.”⁶¹ Starting point here was the case of open for public process of Nechaev group (1871), when lawyers had achieved acquittals for 42 from 78 revolutionaries. The political trials became a vivid example of the professional power of the Russian legal profession.⁶² 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 very active group of legal professionals, first of all, lawyers, was romanticized in society and, as it is shown in the recent study by Irina Kovaleva, even determined the popularity of juridical education at the end of the nineteenth century.⁶³

Indeed, 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 parties⁶⁴. 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.

The attacks on the Digest and thus 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 instance, Professor of law S. F. Berezkin stated that the volumes of the Digest “poorly influenced” by Alexander’s II reforms “had recently become an object of fierce attacks.”⁶⁵ In an atmosphere of social discontent with state politics, critical essays

⁶⁰ N. V. Cherkasova, *Formirovanie i razvitie advokatury v Rossii, 60-80-e gg. XIX v.* (Moscow, 1987).

⁶¹ M.M. Vinaver, *Nedavnee. Vospominania i kharakteristiki* (Petrograd, 1917), 66.

⁶² N.A. Troitskii, *Bezumstvo khrabrykh: Russkie revoliutsionery i karatel’naia politika tsarizma 1866–1882 gg.* (Moscow, 1978).

⁶³ I.V. Kovaleva, *Tsennosti pravovoi kultury v predstavleniakh rossiiskogo obschestva kontsa XIX – nachala XX vv.* (Velikii Novgorod, 2002).

⁶⁴ M. Veber (Max Weber), “K politicheskoi kritike chinovnichestva i partiinoi zhizni”, M. Veber, *Politicheskie raboty 1895 – 1917* (Moscow, 2003), 188.

⁶⁵ S.F. Berezkin, *Speranskii kak kodifikator* (Odessa, 1889), 2.

and even feuilletons regarding the Digest of the Laws of the Russian Empire, became commonplace.⁶⁶

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.”⁶⁷

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.⁶⁸ All of them had the tendency to underline the defects caused by the bureaucratic character of the codification of law in the Digest carried out 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 carrier 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 in the end of the nineteenth century originated in remarkably irresponsible attitude of the legislator to lawmaking, especially in the part of clear indicating the changes which were made by new law in the existed legislation, which was discussed

⁶⁶ N. M. Korkunov, “Znachenie Svoda zakonov”, in Sbornik statei N. M. Korkunova, 1877-1897 (SPb, 1898), 77-96, “Kur’ezneishii kodeks (fel’eton)”, Sudebnaia gazeta (1903), no.38; “Prodolzhenie kur’ezneishego kodeksa”, Ibid, no. 39.

⁶⁷ S.F. Berezkin, Speranskii kak kodifikator, 3-4.

⁶⁸ M.A. Lozina-Lozinskii, 1). “Kodifikatsia zakonov po russkomu gosudarstvennomu pravu”, Zhurnal ministerstva iustitsii (1897), no.4-5, 2). “Kodifikatsionnye oshibki”, Ibid. (1896), no.5, 133-159.

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.⁶⁹ Huge impact of codification on lawmaking process was positively acknowledged in the official memo “On codification body of state apparatus” stated one of the most important missions of codifiers had always been to comply a new legislation with existing law.⁷⁰

The historical articles of practicing lawyers German Baratts and Maksim Vinaver⁷¹ bore an unmistakable political message; they cast doubt on one of the main principles of the Digest’s legitimacy. As was stated earlier, 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 17th-18th centuries as a screen, disguising foreign innovations that had in fact been based on articles of revolutionary French Civil Code, more commonly known as the Napoleonic Code.⁷² Thus both the national and autocratic legitimacy of Nicholas’ project of legal monarchy was seriously questioned.

In trying to explain the phenomenon of the Digest’s low evaluation 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.⁷³ 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. Thus, it is possible to search for its reasons in broader context -- the unfulfilled desire for representative legislator and irritation against the regime’s paternalistic attitude to the society.

⁶⁹ V. I. Gurko, Cherty i siluety proshlogo. Pravitel’stvo i obshchestvo v tsarstvovanie Nikolaia II v izobrazhenii sovremennika (M,2000), 122.

⁷⁰ Spravka ob ustroistve kodifikatsionnoi chasti. (1917). Rossiiskii Gosudarstvennyi Istoricheskii Arkhiv. F.1162. Op.5. (1917) D.66. L.23-25.

⁷¹ G. Baratts, “O chuzhezemnom proiskhozhdenii bol’shinstva russkikh grazhdanskikh zakonov”, Zhurnal grazhdanskogo i ugolovnogo prava (1882) no.9, 45-80, M.Vinaver: 1) “Ob istochnikakh grazhdanskikh zakonov”, Zhurnal ministerstva iustitsii (1894), no.10, 87-102; 2) “K voprosu ob istochnikakh X toma Svoda zakonov”, Ibid. (1895) no.10, 1-68.

⁷² T. Borisova, “Russian National Legal Tradition”, 321-323.

⁷³ Examples of such oversights made by competent jurists see in: P.M. Maikov, O Svode zakonov Rossiiskoi Imperii (SPb, 1906), 9.

The Great reforms did not give the most desired ‘constitution’ -- autocracy was still unwilling to admit representatives of society to 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 instance, Aleksandr Gradovskii, a well-known publicist and professor of law at St. Petersburg University, while giving credit to Nicholas’s I 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 development of legal institutions in imperial Russia, he insisted that state finally must put more trust in Russian society and its ability to participate in 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.”⁷⁴

Gradovskii expressed general dissatisfaction with authority’s paternalistic attitude towards 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’ Digest. In Gradovskii’s view “the pile” of its volumes had become suffocating “shackles of bureaucratization” tightened on developing Russia.⁷⁵

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 towards 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, thus, their right to interpretation. On the other hand, whether intentional or not, the criticism of the Digest’ new editions was also directed towards the autocratic regime in general.

One of main static features of autocratic understanding of legality was distrust in formal institutions and popularizing the “above the law” power of monarch, which could be used as a means of “strengthening legality”. At the beginning of the twentieth century, Karamzin’s doctrine of

⁷⁴ A.D. Gradovskii, “Biurokratizm i pravovoi poriadok”, *Nabliudatel* (1882), no.7, 47.

⁷⁵ *Ibidem*, 45.

autocratic legality was still relevant.⁷⁶ This is shown not only by the crown's adherence to the old system of obligatory codification and thus 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 afterwards was appointed to the position of Minister of 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."⁷⁷ 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 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*).⁷⁸ The Digest as a special system of legislation confirms the accuracy of the Richard Wortman's observation that the legality existed in tsarist Russia as unattainable ideal, a "legal fiction."⁷⁹ 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, since, as we observed earlier, the legislator very seldom provided a clear indication of what 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.

Firstly, it can be partly explained by attempts to evade the issue of responsibility of a legislator in autocracy. *Secondly*, from 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.⁸⁰ *Thirdly*, it realized the theory of legal traditionalism, when a new legislation was perceived as an improved version of previous order in a legitimate monarchy. Critics of the

⁷⁶ See more in A. S. Kartsov, *Pravovaia ideologiya russkogo konservatizma (vtoraia polovina XIX – nachalo XX v.)* (Moscow, 2008).

⁷⁷ Quoted in: A.V. Remnev, "Problema ob'edinennogo pravitelstva nakanune pervoi rossiiskoi revoliutsii", *Novoe o revoliutsii 1905-1907 gg. v Rossii* (Leningrad, 1989), 97.

⁷⁸ Karamzin, *Zapiska*, 102-103.

⁷⁹ R. Uortman (Wortman), *Vlastiteli i sudii*, 24.

⁸⁰ E.A. Pravilova, *Zakonnost' i prava lichnosti: administrativnaia yustitsia v Rossii (vtoraia polovina XIX v – Oktiabr' 1917)* (SPb, 2000).

Digest demonstrated conflict of ideas of legal traditionalism and newly embarked 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.”⁸¹ 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.”⁸² However, in practice the neglect of formal institutions, embodied in the very legislative practices, left very little chances for a peaceful path of reform of autocracy in imperial Russia.

⁸¹ P. N. Semenov, *Samoderzhavie kak gosudarstvennyi stroi* (SPb, 1905), 6, 9-11.

⁸² *Polnoe Sobranie zakonov Rossiiskoi imperii* (hereafter PSZ) (1904) № 25495.

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