

# **The Emergence of the Legality Tradition in Russia, 1800-1918**

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ACADEMIC DISSERTATION

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# 1. The Emergence of the Legality Tradition in Russia, 1800-1918

## 1.1 Why history of a domestic legality conceptualization matters?

Although our general views and expectations about the world are becoming more global, legal cultures are still very contextualized. Essentially one needs to look at the legal, political and social history of any particular state in order to understand its concept of legality. In my thesis I use the example of Russia to demonstrate that the national historical heritage forms a mindset for the conceptualization of legality, that is, establishes a particular pathway of legal thinking. By the Russian conceptualization of legality I mean the set of ideas and practices which reveal the lawmakers' understanding of law and its functions. In this dissertation I study how these ideas and practices emerged and developed within the political and legal elites in late imperial to early Soviet Russia and how they were conceptualized as an official tradition of legality. This official tradition of legality is a set of expectations of the rulers and law-makers about two interrelated issues: what the law should do and by what means. I approach these questions by looking at the development of techniques of law-making and systematization of law, which were considered as the basic requirements of Russian legal order. My dissertation seeks to demonstrate that these techniques derived from the political and social conditions of the Russian autocratic regime and appeared to be very persistent despite significant changes during late imperial and early Soviet times.

Moreover, it seems that there is a remarkable continuity in the debate on the essence of Russian law which bridges past and present. One of the pillars of this historical bridging is the public discussion reflecting an ideological clash between two opposite approaches to law and legality.<sup>1</sup> The universalist/liberal approach, emphasizing the normative meaning of law, is confronted by a traditionalist/conservative approach, for which law serves as a means to protect national traditions and current political interests.<sup>2</sup> The clash of the two approaches is articulated in

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<sup>1</sup> The historical parallels in relation to contesting views on legality in the times of the late Russian empire and collapse of the USSR and emergence of the Russian Federation were problematized by both legal historians and legal scholars in the 1990s. See, for instance: William G. Wagner, "Civil Law, Individual Rights, and Judicial Activism in Late Imperial Russia", in Peter Solomon (ed.), *Reforming Justice in Russia, 1864–1996: Power, Culture, and the Limits of Legal Order* (M.E. Sharpe, New York, 1997), 36, S.S. Alekseev, *Voskhozhdenie k pravu: poiski i resheniia* (Norma, Moscow, 2002, 2<sup>nd</sup> ed.), 582-594.

<sup>2</sup> See the public debate of March 2015 on the role of law in Russia presented by a liberal newspaper *Vedomosti*: Nikolai Epple, Boris Grozovskii, "Rossiiskaia pravovaia i kommunikativnaia katastrofa" *Vedomosti* (24 March 2015), available at <http://www.vedomosti.ru/newspaper/articles/2015/03/24/ot-redaktsii-ne-dogovoritsya>

The debate covers an exchange of publications between *Novaia Gazeta* (Elena Luk'ianova, "O prave nalevo" *Novaia Gazeta* (19 March 2015) available at <http://www.novayagazeta.ru/politics/67715.html> and official *Rossiiskaia Gazeta* (Valerii Zor'kin, "Pravo i tolko pravo" *Rossiiskaia Gazeta* (23 March 2015) available at <http://www.rg.ru/2015/03/23/zorkin-site.html>

the contrast between two slogans: '*verkhovenstvo prava*' (the Russian analogue of 'rule of law') versus '*diktatura zakona*' (dictatorship of law).<sup>3</sup> Both approaches claim to speak in the name of the people, who need to be protected by law, but with a radically different focus. The first approach underlines the need to protect individual rights (*pravo*) and freedoms which are being constantly challenged by the state, while the second stresses the value of public order and the state's interests, stipulated in legislation (*zakon*).<sup>4</sup>

In a more general perspective, the first approach underlines the universal values of human rights protected by law, while the second approach stresses a positivist vision of law without the normative connotations of the human rights or natural law doctrines. Since the late eighteenth century, opposition of the two approaches has taken the form of political discussion. In recent years the traditionalist approach has dominated Russian policy, while values of the universalist approach, the rule of law and natural law, have been severely criticized by the Russian authorities and official media as instruments of the political struggle in international relations.<sup>5</sup> At the same time, since the beginning of the twenty first century, Russian policy-makers and lawyers have tended to use the 'dictatorship of law' approach as an alternative to the universalistic perspective, which was dominant in 1990s.<sup>6</sup> To support this re-evaluation, the national political, social and legal traditions have been used to question the practical relevance of 'western' natural law discourses.<sup>7</sup> This recent turn from a universalist to a traditionalist approach has been supported by appeals to Russia's great and unique history.<sup>8</sup> Thus, since the emergence, transfer and transformations of 'traditional' values and ideas are historical processes, a historical perspective of the Russian legal tradition needs to be analyzed.

In practice, this clash of two visions on the nature of law is revealed both in law-making and court practice. Practitioners, beginning with the judges of the Constitutional Court, use Russian

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<sup>3</sup> V.S. Nersesiants, *Pravo i zakon* (Moscow: Nauka, 1983), V.V. Lapaeva, "Osnovnye tipy pravoponimania", in V.M. Syrykh (ed.) *Problemy teorii gosudarstva i prava* (RAP, Moscow, 2008), 41-76.

<sup>4</sup> Like in other languages (e.i. French, German and Dutch), in Russian there are two words for the English 'law': '*zakon*' is a narrower term, meaning 'legislation', while '*pravo*' is a more general concept close to 'right.'

<sup>5</sup> Valerii Zor'kin, "Verhovenstvo prava i imperativ bezopasnosti", *Rossiiskaia gazeta* (16 May 2012).

<sup>6</sup> Pamela A. Jordan, *Defending Rights in Russia: Lawyers, the State and Legal Reform in the Post-Soviet Era* (University of British Columbia Press, Vancouver, 2005).

<sup>7</sup> See for instance the appeal of a general meeting of Novgorod region Chamber of Lawyers "Obrashchenie obshchego sobraniia advokatskoi palaty Novgorodskoi oblasti o sostoianii zakonnosti v sfere ugovonnogo sudoproizvodstva na territorii Novgorodskoi oblasti ot 27 marta 2015 g." Available at <http://www.apno.natm.ru/Lists/List/DispForm.aspx?ID=291&Source=http%3A%2F%2Fwww.apno.natm.ru%2Fdefault.aspx>

<sup>8</sup> Zor'kin op. cit. note 5.

tradition in their reasoning in cases where citizens find their constitutional rights affected.<sup>9</sup> Interestingly, in these reasonings, Russian tradition is invoked specifically to oppose the universalist claims inspired by 'western' paths of understanding of what are constitutional rights in action. In general, in current judicial practice a literal interpretation of legislation has dominated, while any systematic interpretation based on definite legal principles seems to have been avoided, especially in relation to politically sensitive issues.<sup>10</sup>

To give an example, the European Court of Human Rights' decisions on Russian election legislation challenged Russian legal doctrine, exactly in relation to the unsystematic ad hoc approach of the Russian legislator.<sup>11</sup> Contrary to this normative approach of European colleagues, Russian lawyers do not find the changes in the law problematic, because formally no violations of law-making procedures had taken place. Obviously, here we face a different conceptualization of the rule of law, namely – legality (*zakonnost'*). Thus, it is important in this context to study the Russian tradition of legality, which serves as an important prerequisite for the Russian version of rule of law performance. This dissertation therefore aims to develop a historical perspective on the emergence and development of a Russian official conceptualization of legality as a condition and basis of law's performance.

## **1.2 Historical overview of the development of the Russian legality tradition, 1200-1917**

The long lasting tradition of written law in Russia starts from Rus' Law (*Russkaia Pravda*) written under Iaroslav the Wise in the 11<sup>th</sup> century. It was devoted to establishing fixed monetary or other penalties for a wide variety of damaging acts.<sup>12</sup> The Mongol period of the thirteenth – fifteenth centuries brought in new practices of administrative control over the population and

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<sup>9</sup> See for instance the *Opredelenie Konstitutsionnogo Suda Rossiiskoi Federatsii* (19 January 2010) No 151-O-O/2010, “Ob otkaze v priniatii k rassmotreniiu zhaloby grazhdan N.A. Alekseeva, N.V. Baeva, and I.B. Fedotovoii na narushenie ikh konstitutsionnykh prav stat'ei 4 Zakona Riazanskoj oblasti “O zashchite nravstvennosti detei v Riazanskoj oblasti” stat'ei 3.10 Zakona Riazanskoj oblasti “Ob administrativnykh pravonarusheniakh” [On Refusing to Accept for Consideration a Complaint of Citizens N.A. Alekseev, N.V. Baev, and I.B. Fedotova about a Violation of their Constitutional Rights by Art.4 of the Law of Riazanskaia Oblast' 'On protection of morals of children in Riazanskaia Oblast' and by article 3.10 of the Law Riazanskaia Oblast' “On Administrative Offenses”], available at <http://www.ksrf.ru/ru/Decision/Pages/default.aspx>. In the reasoning the judges relied on 'traditional values of family and motherhood' (Para. 3). See more examples in Alexander Kondakov, “The Silenced Citizens of Russia: Exclusion of Non-heterosexual Subjects From Rights-Based Citizenship”, 23(2) *Social & Legal Studies* (2014), 151-174.

<sup>10</sup> S. Iu. Lavrus' *Realizatsiia printsipov prava v iuridicheskoi praktike*. Dissertatsiia na soiskanie uchenoi stepeni kandidata iuridicheskikh nauk (Volgograd, 2005).

<sup>11</sup> Sergei Panin, *Sootnoshenie formal'nykh protsedur i deistviia printsipov v izbiratel'nom zakonodatel'stve*. LLM dissertation (on the file with the author), St. Petersburg State University, 2011.

<sup>12</sup> Daniel H. Kaiser, *The Growth of the Law in the Medieval Russia* (Princeton University Press, 1980).

negotiations about power, which altogether strengthened Moscow's ambitions in forming a new state on the ruins of the Golden horde.<sup>13</sup> As Nancy Kollmann summarized, the further development of early modern state in Muscovy during late fifteenth – seventeenth centuries can be traced within several tracks, including a legal one: 'the state was pursuing military reform to expand empire from Eastern Europe to the Pacific and building the bureaucratic apparatus and social institutions (such as serfdom) to administer and pay for that expansion.'<sup>14</sup> At the same time, it 'was broadcasting its legitimacy through an ideological discourse of autocracy, disseminated in league with the Orthodox Church through imagery, architecture, ritual, proclamations and the formulas of official documents.'<sup>15</sup>

The legal dimension of these developments can be grasped in 1497 and 1505 codes (*Sudebniki*) of Ivan III (r. 1462–1505) and Ivan IV (r.1533–84). Unlike the 11<sup>th</sup> century Rus' Law, in these codes the interest of the state was clearly present.<sup>16</sup> There were crimes against state interests articulated, and clear procedures of court practices stipulated. The local administrators had to use these codes to supervise the work of the judges who were part of administrative apparatus. Violations of written law had been reported to higher authorities in Moscow and to the tsar directly.

The centralization tendency exposed in 1497 and 1505 codes mirrored a remarkable territorial enlargement of that time, which brought in a new track in Russian legal development – the tradition of imperial rule, which continued to format the Russian legal system. Indeed, the typically imperial, flexible approach in regulating law for different territories and social classes inhibited the development of uniform legal procedures. The existence of various legal regimes, depending on the region and social group,<sup>17</sup> cannot be ultimately viewed as the politics of central imperial power. Special regulations were frequently created within a dialogue between interested parties; local authorities in particular initiated negotiations with the central authority due to a number of reasons: their own interests, interests of the region and its elites, unprofessionalism or fear of responsibility.<sup>18</sup>

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<sup>13</sup> On the law in early Russia, see Nancy S. Kollmann *By Honor Bound: State and Society in Early Modern Russia* (1999) Kleimola, *Justice in Medieval Russia*. Kaiser, *Op. cit.*

<sup>14</sup> Nancy S. Kollmann, *Crime and Punishment in Early Modern Russia* (Cambridge University Press, Cambridge, 2012), 5.

<sup>15</sup> *Ibid.*

<sup>16</sup> Kaiser, *op. cit. note 12.*

<sup>17</sup> See further in: Jane Burbank, "Imperial rights regime: Law and Citizenship in the Russian Empire" 7(3) *Kritika: Explorations in Russian and Eurasian History*, (2006), 397-431.

<sup>18</sup> See e.g. the case study on penal politics in Siberia: *Gentes*, Andrew: *No Kind of Liberal: Alexander II and the Sakhalin Penal Colony*, 3 *Jahrbücher für Geschichte Osteuropas*, (2006), 321–44.

At the same time the imperial rule did not acknowledge the separation of executive, legislative and court powers. In the imperial period, legislative politics was theoretically and practically based on unified governance by the supreme power of the autocrat over every sphere of imperial life; thus the separation of laws from executive acts did not appear to be realistic.<sup>19</sup>

The approach of the imperial political power to legal techniques was pragmatic: in relation to space, the law was to impose the execution of orders of sovereign power and provide territorial integrity.<sup>20</sup> Thus, for the sake of efficiency, local officials were the first and foremost recipients of the new legislation and guarantors of its enforcement. The central authorities faced uncertainty about the execution of the imperial power in the regions and thus were pre-occupied with an obsession to 'foster legality'. This fostering legality implied better legal institutions and legal techniques, which would standardize enforcement and compliance to the law, and thus would provide order and justice.<sup>21</sup> Completing the codes and their uniform implementation was used as a tool in continental Europe, including Russia.

In 1649 the Council Code (*Sobornoe Ulozhenie*) was adopted. According to its preface, the Ulozhenie was printed so 'that all cases be conducted according to the laws in that *ulozhenie*.'<sup>22</sup> Tsar Aleksei Mikhailovich (r.1533–84), who sent the book to one of the Siberian governors, Timofei Shusherin, in January 1650, instructed Shusherin to 'conduct all our business according to this book, so that in Ilimsk fortress there should be equal judgment and justice in all matters for all people of whatever rank, from the high to the low.'<sup>23</sup> The quote makes it clear that the tsar used the printed code in order to delegate to local governors his responsibility to guarantee equity before the law as a prerequisite of justice and order.<sup>24</sup> This preoccupation of the Russian tsars with legal means of

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<sup>19</sup> P.E. Kazanskii, *Vlast' Vserossiiskogo imperatora* (Odessa, 1911).

<sup>20</sup> Jane Burbank, op. cit. note 17.

<sup>21</sup> See an account of legal uniformity attempts in relation to Finland, which was a part of the Russian Empire in 1809-1917, in: Jukka Kekkonen, "The 'Golden Age of Legislation' in Finland 1863–79: Judicial Reforms in a Societal Context", 2(4) *Russian Law Journal* (2014), 63-77; Michel Tissier, "Local Laws and the Workings of Legal Knowledge in Late Imperial Russia," *Ab Imperio*, 4 (2012), 211-244. In this dissertation I do not consider imperial dimension of legality tradition.

<sup>22</sup> M.N. Tikhomirov, P.P. Epifanov, *Sobornoe ulozhenie 1649 goda*. (Moscow, Izdatel'stvo Moskovskogo universiteta, 1961). I used translation of Richard Hellie: Richard Hellie (transl.), *The Muscovite Law Code (Ulozhenie) of 1649. Part I: Text and Translation* (Charles Schlacks Jr., Irvine, CA, 1988), 2.

<sup>23</sup> *Polnoe Sobranie zakonov Rossiiskoi imperii* (hereafter PSZ) (the Complete Collection of the Laws of the Russian Empire), *Sobranie pervoe* [1649–1825], 23

<sup>24</sup> On usage of the courts by the subjects see: Jane Burbank, *Russian Peasants Go to Court: Legal Culture in the Countryside, 1905-1917* (Indiana University Press, Bloomington, 2004).

providing justice in provinces<sup>25</sup> seems to contradict a rather popular truism that law in the Russian empire was a 'cultural fiction' with an 'ideological function.'<sup>26</sup>

Peter I (Peter the Great r. 1682-1725) brought in significant changes in law-making and court-practice.<sup>27</sup> These changes were inspired by the West and were common to a large extent to all continental Europe of the seventeenth and eighteenth centuries in a form of *Pollizeistaat*.<sup>28</sup> It was based on the ideas of separation of church and secular authorities in the domain of public order, and a greater uniformity of court practices under the control of the sovereign.<sup>29</sup> Legislative politics was to bring into societal development the ideas of rationalization, efficiency and good morals and implied greater responsibilities of the nobles and educated groups in activities of the state. Eighteenth century Russian legal development was driven by Peter I and Catherine II's (Catherine the Great r. 1762-86) civic reforms, which bound ideas of productivity, orderliness, perfection of morals, and education.<sup>30</sup>

The new cameralist perspective of the state's benefit as a goal of policy-making relied on getting people more involved in statehood practices. The subjects' access to law and enthusiastic uniform compliance to it for their own purposes and for the benefit of the state was a part of the civic religion that Peter the Great tried to impose. He underlined this function of the law by the new concepts 'benefit and glory of the state,' which figure prominently in the writing of his legislation.<sup>31</sup>

Thus, improving legality via legal techniques – dissemination of new legislation in a printed form, and, in general, civic education, became an important part of Peters' reformist agenda. The 1714 decree stipulated that laws 'related to general affairs of the State (*o vsiakikh Gosudarstvennykh*

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<sup>25</sup> Marianna Muravyeva "Russian early modern criminal procedure and culture of appeal," 38 *Review of Central and East European Law* (2013), 295-316.

<sup>26</sup> I borrow this summary of skeptical evaluation of the Russian law from Simon Franklin: Simon Franklin, "Printing and Social Control in Russia 2: Decrees" 38 *Russian History* (2011), 467–492, at 468. The summary is based on a classical contribution of Viktor Zhivov: V. M. Zhivov, *Razyskaniia v oblasti istorii i predystorii russkoi kul'tury* (Moscow: Iazyki slavianskoi kul'tury, 2002), 261, 270; for a still more expansive argument on the lack of Western-style legal concepts and practices as a defining feature of Russian history and culture see Uriel Procaccia, *Russian Culture, Property Rights, and the Market Economy* (Cambridge: Cambridge University Press, 2007). On discussion on evaluation of Russian law see more in the further section of this introduction.

<sup>27</sup> The best overview is provided in: D. O. Serov, *Sudebnaia reforma Petra I. Istoriko-pravovoe issledovanie* (Zertsalo-M, Moscow, 2009).

<sup>28</sup> On the Police State and its Russian version see further in Mark Raeff's classical study: Mark Raeff, *The Well-Ordered Police State: Social and Institutional Change through Law in the Germanies and Russia, 1600-1800* (Yale University Press, New Haven, 1983)

<sup>29</sup> M. A. Kiselev, "Pravda i zakon vo vtoroi polovine XVII-pervoi chetverti XVIII veka" in *Poniatia o Rossii: k istoricheskoi semantike imperskogo perioda*, in A.I. Miller et al. (eds.) (NLO, Moscow, 2012), Vol. 1, 49-67.

<sup>30</sup> On the impact of reforms on legal thinking in Russia, see further in: S.V. Pol'skoi, "Konstitutsia i fundamental'nye zakony v russkom politicheskom diskurse v konce XIX — nachale XX veka," in A.I. Miller et al. (eds.) (NLO, Moscow, 2012), Vol. 1, 94-151.

<sup>31</sup> On Peter's legislative policy in European intellectual context see: Antony Lentin, *Peter the Great: His Law on the Imperial Succession; The Official Commentary* (Oxford, Headstart History, 1996), and Raeff, op.cit. note 28.

*general'nykh delakh*), and needing to be announced to the entire population' were to be sent, 'as before, to governors in the provinces, and to judges in the departments; and for announcement to the population they were to be printed at the printing house and put on sale to all, so that all may be informed of them.'<sup>32</sup> The novelty of an announcement to the population of published decrees was underlined in the text.

Even though Catherine the Great also issued several decrees confirming the obligatory publication of general laws, the execution of administrative power in the regions implied some remarkable discretion in relation to law implementation and enforcement. Publication of law for general awareness was one of 'technical' means of the imperial flexible approach to governance through law. The Police Statute of Catherine II of 1782 delegated to regional authorities (governors) the decision to publish legislation in their regions.<sup>33</sup> In line with the Statute, within police structures, a district attorney (*uezdnyi striapchii*) – a prosecutor assistant who supervised legality<sup>34</sup> – had to decide whether received legislation should be published. The discretion of local authorities in the issue of publication of legislation was stipulated in detail by the law.

This discretion might be considered a continuation of flexible imperial rule, when local officials were trusted to decide for their regions if the publicizing of certain legal novelties was desired or not. Simultaneously, if we consider this discretion as stipulated by law, in view of the more general civic reforms of Catherine II, we can see here the impact of the cameralist idea of public responsibilities of elites, who were involved in governance both in urban and rural Russia.

The emergence of the ambitions of enlightened elites to participate in governance on a stage of decision-making through law-making became a problematic issue in the course of the eighteenth and nineteenth centuries. The willingness to participate in civic activities in order to glorify the victorious 'fatherland' was a part of a more general romantic agenda of the late eighteenth – early nineteenth centuries.<sup>35</sup> As Marc Raeff's extensive research demonstrated, the nineteenth century's political and social developments of the Russian Empire culminated Peter's and Catherine's 'transfiguration' policy.<sup>36</sup> This policy implied greater responsibilities of nobles and the educated groups and was cultivated through civic reforms, which bound ideas of productivity, orderliness,

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<sup>32</sup> I use translation by Simon Franklin, on whose research on publication of law in the 18<sup>th</sup> century I rely in this section: Simon Franklin, "Printing and Social Control in Russia 2: Decrees" 38 *Russian History* (2011), 467–492.

<sup>33</sup> *PSZ Sobranie pervoe [1649–1825]*, no. 15379.

<sup>34</sup> *Ibid.*, no.14392.

<sup>35</sup> Alexander M. Martin, *Romantics, Reformers, Reactionaries: Russian Conservative Thought and Politics in the Reign of Alexander I*. (Northern Illinois University Press, De Kalb, 1997).

<sup>36</sup> Mark Raeff, "Transfiguration and Modernization. The Paradoxes of Social Disciplining, Pedagogical Leadership and the Enlightenment in 18<sup>th</sup> Century Russia," in Id., *Political Ideas and Institutions in Imperial Russia* (Boulder, Colorado: Westview Press, 1994), 334-347.

perfection of morals, and education. In Raeff's terms it gave a start to 'the civil society of the educated' – Russian *obshchestvo*.

A historian of Peter the Great and one of the first Russian constitutionalists, Mikhail Shcherbatov (1733-90) described civil society's emergence as a part of Peter's agenda of 'mutual responsibilities of the sovereign and subjects'.<sup>37</sup> Shcherbatov draws attention to paradoxical outcomes of Peter's policy: it was from Peter's despotism that his Russian critics 'received the very enlightenment wherewith to censure that despotism'.<sup>38</sup> The political claims about civil society (*obshchestvo*) and despotic autocracy cannot be underestimated in the analysis of legality (legal??) discourse in Russia.

Shcherbatov was one of the nobles' representatives to Catherine II's Legislative Commission, which was dissolved in 1784 without a new code completed. Catherine II continued the unsuccessful attempts of Peter I and Elizabeth to replace the Council code of 1649 with a more modern codification. Her successors, Paul (r. 1786-1801) and Alexander I (r. 1801-25), also failed to complete the codification, in spite of enormous organizational work and material resources involved. Though the mainstream historiographic interpretation of this failure is the lack of legal education,<sup>39</sup> it seems that the political ambitions of elites must be also taken into account. The context of the chain of palace coups of the eighteenth century might have made monarchs hesitate about assigning responsibility to make major political/legal reforms by means of codification. The Enlightenment, the French Revolution, the emergence of Napoleon's empire and the Russian victory over it inspired further reforms aimed at perfecting legislation in the form of codification based on the German example.

German legal scholarship was an important role-model for the development of Russian jurisprudence. The development of political concepts in German philosophy and literature prior and instead of revolutionary ruptures<sup>40</sup> was a desired model for the Russian elites.<sup>41</sup> At the same time, Russian rulers – Catherine the Great, Paul I and Alexander I – considered the further development of the machinery of the state by law as a primary goal. A transformation through reforms was

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<sup>37</sup> M.M. Shcherbatov, "Rassmotrenie o porokakh i samovlastii Petra Velikogo", in I.P. Khrushchov and A.G. Voronov (eds.), *Sochinenia Kniazia M.M. Shcherbatova* vol. II (Izd. kniazia B.S. Shcherbatova, St-Petersburg, 1898), 23-55, at 236.

<sup>38</sup> Ibid.

<sup>39</sup> See for example as it is summarized by V.M. Zhivov: V.M. Zhivov, "Istoriia russkogo prava kak lingvosemioticheskaia problema", in id., *Razyskaniia v oblasti istorii i predistorii russkoi kul'tury (Iazyki Slavianskoi Kul'tury, Moscow, 2002)*; Omel'chenko, O.A. *Kodifikatsiia prava v Rossii v period absolutnoi monarkhii (Vtoraia polovina XVIII v.)*. (Moscow: Vsesoiuznyi iuridicheskii zaochnyi institut, 1989); Id. "*Zakonnaia monarkhiia*" *Ekateriny II: Prosveshchennyi absolutizm v Rossii*. (Moscow: Iurist, 1993).

<sup>40</sup> Michael Stolleis, *Public Law in Germany, 1800-1914* (Berghahn books, Oxford, 2001).

<sup>41</sup> Martin, *op.cit. note 35*.

needed in view of external political and intellectual challenges: ideological threats of the French revolution and the rapid and tremendous success of French military expansion in the beginning of the nineteenth century. The professional and civic activities of German 'political professors' of the eighteenth century as an important part of the transformation of both state and society was in high demand in Russia.

In order to fulfill this deficiency new universities were established in different parts of the Empire in the beginning of the nineteenth century. German law schools' curriculum and textbooks were translated in the emerging field of Russian theoretical jurisprudence. The new generation of 'enlightened' civil servants was expected to replace existing patterns of legal professionalism in Russia: (a) the Muscovy type of legal professionals – trained as the bench scribes of the courts,<sup>42</sup> and (b) ex-military personnel in charge of both courts and local administration of Peter the Great's *Pollizeistaat*.<sup>43</sup>

The accomplishments and performance of the 'administrative state' in Prussia, based on Allgemeines Landrecht of 1794, were inspiring for the Russian Empire. In both Holy Roman and Russian empires the law-making process and judicial reforms were to encourage economic performance, to guarantee civil rights of marriage, inheritance and property and to promote the development of infrastructures of transport and economic exchange.<sup>44</sup> The first fruit of this promotion of jurisprudence in Russia was the completion of a long-lasting codificational project, which is considered in great detail in this dissertation.

The establishment of chairs in law in Russian universities and other institutions of higher education set up a potential conflict of understanding of the concept of 'law' – the domestic versus the 'Western', which was taken mostly from Prussia. Following some similarity in practices of the instrumentalist approach to law, it was not surprising that the discussion of German publicists on the 'constitution' and 'constitutional state' as opposed to the 'administrative state' was enthusiastically received by Russian students and then first professors of law.<sup>45</sup> Theoretical

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<sup>42</sup> See more on them in Kollman, op. cit. note 14, 47-68.

<sup>43</sup> Serov, op. cit. note 27.

<sup>44</sup> Jörg Baberowski, *Autokratie und Justiz: zum Verhältnis von Rechtsstaatlichkeit und Rückständigkeit im ausgehenden Zarenreich 1864–1914* (Klostermann, Frankfurt am Main, 1996).

<sup>45</sup> For the first half of the 19<sup>th</sup> century this process is studied on example of biography of Professor of Law Alexander Kunitsyn by Julia Berest: Julia Berest, *The Emergence of Russian Liberalism: Alexander Kunitsyn in Context, 1783-1840* (Palgrave Macmillan, New York, 2011). The second half of the century is covered in G.M. Hamburg, Boris Chicherin and Early Russian Liberalism, 1828-1866. (Stanford University Press, 1992). For the pre-revolutionary years see: (Mishel Tis'e (Michel Tissier) "Vysokostatusnaia distsiplina, neiasnaia nauka: teoriia i praktika rossiskogo pravovedeniia v kontse XIX – nachale XX veka", in A.N. Dmitriev, I.M. Savel'eva (eds.) *Nauki o cheloveke: istoriia distsiplin* (Izdatel'skii dom Vysshaia shkola ekonomiki, Moscow, 2015), 207-240.

discussion on an ideal 'system of law' based on natural law principles in the long run provided the basis for critical evaluation of existing Russian legislation.

However, the Decembrists rebel of 1825 approved suspicions about natural law discourse voiced by a conservative element of the Russian elites. The conservatives insisted on predominance of the political will of the monarch, which cannot be limited by any law. For them the law was an instrument of fair rule, in other words, a means of governance by enlightened and loyal administrators.<sup>46</sup> During Nicholas I's reign (1825-55) legislative measures were undertaken to impose restrictions on liberal developments in the public sphere and to prevent a flow of liberal European ideas. Simultaneously, the decision- and law-making on the most needed economic and social developments (like gradual abolition of serfdom) developed more in the form of rather sporadic, ad hoc measures in reaction to the urgent needs of a rapidly developing Empire, than a program of long-lasting reforms.

The situation changed radically with the defeat in the Crimean War. Alexander II (r. 1855-81) initiated liberal reforms, the most famous of which were the abolition of serfdom in 1861<sup>47</sup> and the judicial reform (1864).<sup>48</sup> The adversarial procedures of the reformed courts enabled some legal professionals to push forward ideas of natural law by contrasting them to the repressive legislation of tsarist Russia. Also, jury trials were introduced in 1864 as a form of societal participation in judicial practices. As a result, courts became a tribune of a much needed political discussion, which resulted in a remarkable politicization of defendants in urban Russia. After the first astonishing acquittals of revolutionary terrorists by jurors, the reforms were revised. Following Alexander's II assassination by terrorists in 1881, the administrative measures were used in order to prevent revolutionary activities. The intelligentsia voiced concerns about the 'illegality' of these measures, which were followed with repressions. The lack of parliamentary institutions, nontransparent autocratic law-making, and administrative repressive measures changing existing rules pushed the intelligentsia further to support revolutionary movement.

Under the pressure of the Revolution of 1905, the Manifesto of October 17 was published with a long-expected statement of 'an immutable principle that no law could be implemented

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<sup>46</sup> Bruce W. Lincoln, *In the Vanguard of Reform: Russia's Enlightened Bureaucrats, 1825-1861* (Northern Illinois University Press, De Kalb, 1997).

<sup>47</sup> I. A. Khristoforov, *Sud'ba reformy: russkoe krest'janstvo v pravitel'stvennoj politike do i posle otmeny krepostnogo prava, 1830-1890-e gg.* (Sobranie, Moscow, 2011).

<sup>48</sup> The detailed account of the reform see in: M.V. Nemytina, *Sud v Rossii: vtoraiia polovina XIX – nachalo XX v.* (Saratovskii iuridicheskii institut MVD Rossii, Saratov, 1999), Baberovski, op. cit. note 44.

without its approval by the State Duma'.<sup>49</sup> Liberals saluted the start of the Russian parliament, which they viewed as the absolute rule of rightful law, i.e. law approved by the people's representatives: 'The tremendous significance of parliamentary order lies in the fact that it creates the unity of lawmaking process which is the most necessary condition of strength and stability of legal order'.<sup>50</sup>

Simultaneously, the supreme state authority did its best to maintain its power within former limits while 'from the outside point of view' complying with the demands of establishing parliamentary legal order.<sup>51</sup> Legislative activity of the people's representatives was designed in a way, as a secretary of Council of Ministers' sessions put it: 'to provide the monarch with the ability to rule if necessary without their participation' yet by means of legitimate instruments.<sup>52</sup> This tendency was embedded in the main documents of the 'renewed regime', as it was called then: Statutes of The State Duma (February 20, 1906) and State Council (April 20, 1906), new Fundamental Laws (April 23, 1906), and State Budget Laws (March 8, 1906). The mentioned laws could not have been changed by the State Council or the Duma. Thus, on the one hand, from the very beginning, crucial matters of the political system were withdrawn from the competence of people's representatives. On the other hand, the supreme monarchical rule inseparable from executive authorities retained the legislative mandate for operating, irrespective of parliamentary structure.

Preparing to use the law mostly as an instrument, both sides paid special attention to formal procedures (legal techniques). Publication and codification of laws started to be perceived as political actions legitimizing various orders of power. The pitch was certainly set by jurist-politicians, outstanding figures of the Constitutional Democrats' party (*kadety*) who were the most influential in the first State Duma. Their attention to formal matters should be observed from the perspective of the sociological studies of Bourdieu, who attributed 'juridical formalism' to the basic element of the symbolic power of lawyers.<sup>53</sup> He observed that 'strong juridical competence

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<sup>49</sup> *Gosudarstvennaia дума v Rossii v dokumentakh i materialakh* (Gosudarstvennoe izdatel'stvo politicheskoi literatury, Moscow, 1957), 90-91.

<sup>50</sup> V. M. Gessen, "Gosudarstvennaia дума" in *id.*, *Na rubezhe* (St-Petersburg, 1906), 166.

<sup>51</sup> S. E. Kryzhanovskiy, *Vospominania* (Berlin, S.A., 1929), 16.

<sup>52</sup> Quoted in: B.V. Anan'ich, R.Sh. Ganelin, V.M. Paneiakh (ed.) *Vlast' i reformy. Ot samoderzhavnoi k sovetskoi Rossii* (Dmitrii Bulanin, St. Petersburg, 1996), 525.

<sup>53</sup> Burdie [Bourdieu] "Vlast' prava: osnovy sotsiologii yuridicheskogo polia, in *id.*, *Sotsial'noe prostranstvo: polia i praktiki*. Edit. by N.A. Shmatko (Aleteia, St-Petersburg, 2007), 75-129 (Bourdieu P. La force du droit: elements pour une sociologie du champ juridique, 64 *Actes de la recherche en sciences sociales*. (1986), 3-19).

especially that of lawyers is closely connected with the competence of experts in juridical struggle trained to use forms and formulations instead of weapon'.<sup>54</sup>

The lawyers who became politicians used their professional expertise based on the knowledge of jurisprudence to oppose the legal regime of the Russian empire. Having enlisted the support of the constituency, liberal leaders were pressing for changing the rules of the game not on the pages of special professional writings but from the rostrum of the State Duma, in which many of them saw a parliament, despite the reality. Opposing personal competence to the actual meaning of current state laws, they nullified the opportunity for their own legislative activity. This is demonstrated in a fragment of speech of the jurist professor Moisey Ostrogorskiy (1854-21) on the plenary powers of the Duma committees:

It is not only important but undoubtedly necessary for the parliament, that members of the budget committee had the right to demand information and explanations from the state offices. Although it was not mentioned in the Statute of the State Duma, this right of elective representation is readily apparent from the very essence of any legislative institution, which reviews the state budget... Basing upon the parliamentary practice, I do state that we do not need any legal definitions in relation to the right to demand any kind of information and explanations from any government bodies. We do possess this right.<sup>55</sup>

The further radicalization of elites, escalation of political crises, and severe infrastructural problems caused by participation in World War I resulted in the collapse of the Russian Empire in 1917. This collapse was caused by numerous tensions of the rapid social, economic, and cultural development of the Russian empire. The legal system had to accommodate all of these developments and simultaneously preserve existing the political regime, an administrative autocratic state. The difficult task provided an important context of the development of the Russian legal tradition.

### **1.3 Research Purposes/Object and Methodology**

The overall goal of my research is to use evidence of legal history to demonstrate that since the late imperial time there has been a noteworthy tradition of official legality in Russia. This tradition was articulated as 'fostering legality', and implied the formalization of law via a set of techniques designed to promote access to law and its more coherent and efficient implementation. In other words, this dissertation studies how the perception of law and legality in Russia developed in the eyes of those who created the law and made it function. I examine how law was facilitated

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<sup>54</sup> Ibid, 116-117.

<sup>55</sup> *Deiatel'nost' M. Ya. Ostrogorskogo v pervoi gosudarstvennoi dume* (St. Petersburg, 1906).

via legal techniques by those who promoted the professionalization of law and legality in Russia. These techniques were: (a) the systematization of newly published law in the *Digest of laws of the Russian empire* and its continuation (*Svod zakonov Rossisskoi imperii*)<sup>56</sup>; and (b) obligatory publication of legislation. I considered these legal techniques as *practices for making and reproducing a Russian legal tradition forming the basis of a specific identity of the Russian legal community which is being reproduced*. In my view this tradition predetermines, to a certain extent, the understanding of law and legality in Russia today.

The study has three main purposes. *First*, to understand the Russian concept of legality (*zakonnost*) in political, cultural, and social contexts by reconstructing its historical development in Russia between 1800-1918. I will consider how the legal techniques of codification and publication of law were introduced by the state to foster 'autocratic' legality (*samoderzhavnaia zakonnost*). I analyze how the autocratic legality concept originated under certain social and political circumstances and how it responded to them. Because this is a study of legal history and not legal theory, I concentrate on the historical development of the concept of Russian legality and do not examine its theoretical merits. In addition, because this is a study of legal techniques, the changes of law in general have not been the focus, though I consider closely legislation on the research object, that is, legal techniques.

*Second*, to understand the alternatives to official legality in Russia as they were offered by some representatives of the Russian legal profession in the last decades of the nineteenth, beginning of the twentieth century, and by some revolutionaries in 1917 – 1918. These alternatives help us to understand the dimensions of autocratic legality in Russia, as conceptualized by critical contemporaries. Importantly, these alternatives were articulated in relation to official legal techniques, either in the form of their critique by legal professionals or in the form of some revolutionary initiatives in legal techniques.

*Third*, to understand the main traits of Russian official legality and the reasons for its continuity. I am interested in the interplay of factors of a political and social nature which played an important role in developing the tradition of Russian legality. In order to do this, I use as my theoretical basis key theories on the development of state and law by Max Weber, Carl Schmitt and

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<sup>56</sup> The process of the Digest's drafting and its further continuation was called 'codification', and was planned to be general codification of all existing Russian law in a structured, logical form. Throughout my dissertation I use the term 'codification', however, as early as the late nineteenth century some Russian legal scholars claimed that 'systematization' was a better term for the Digest and its various editions and continuations. I consider this in detail in chapters one and two. In both Soviet and current legal scholarship the term 'systematization' seems to prevail. See further in: V. N. Galuzo, *Sistematizatsiia zakonodatel'stva v Rossii (1649 - 1913)* (IuNITI - DANA, Zakon i pravo, Moscow, 2007).

Berger and Luckmann.<sup>57</sup> These theoretical frameworks are useful for a substantial analysis of the pathway of Russian legality in a global context. Also, these theoretical models might be used as a good basis for overcoming the idea that Russian conceptualization of the rule of law is very different from Western ones and almost pathological, deriving from Russian 'legal nihilism'.<sup>58</sup> On the contrary, they enable us to think of the Russian past and present legal tradition in terms of general and global long-term trends in the development of state and law.

Thus, the object of my research is the Russian tradition of legality. I have studied it through the lens of the Russian government's efforts to foster legality by means of legal techniques. It is important to take into account that these techniques were introduced first and foremost in order to achieve legal certainty, but with a window to allow arbitrary decision-making by state power. This focus on legal certainty may be considered as an important bridge between the Russian concept of legality and the modern universalist concept of rule of law, since legal certainty has been an internationally recognized criterion of rule of law and one of its basic components. I thus study the Russian pathway to rule of law via the practicalities of legal techniques designed for achieving legal certainty.

#### **1.4 What do we already know about the tradition of Russian legality and why bother?<sup>59</sup>**

The conceptualization of legality in Russia has been partly addressed in the field of Russian legal theory as a history of the conceptualization of law (*pravoponimanie*) in Russia. The most important contribution was made by Soviet/Russian legal thinker Vladik Nersesiants (1938-2005) who wrote on the development of a positivist legal agenda in pre-revolutionary Russian legal thought, paying special attention to the importance of natural law ideas shared by a number of Russian legal thinkers.<sup>60</sup>

Nersesiants and his school made an important contribution to the popularization of natural law ideas in Russia. Their approach to legal history was a rather practical effort to prove that natural

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<sup>57</sup> I used the theoretical framework of Berger and Luckmann in the Conclusion, not in the main body of the text. I thank Dr. Rafal Manko who drew my attention to its relevance for conceptualization of my empirical findings in a more general context.

<sup>58</sup> Kathryn Hendley, "Who Are the Legal Nihilists in Russia?", 28(2) *Post-Soviet Affairs* (2012), 149-86.

<sup>59</sup> In this section I overview the literature in the field of Russian legal history of the late imperial period which directly or indirectly deals with the legality issue. A brief overview of the main approaches and findings allows me to acknowledge the work of my predecessors and colleagues in the field of history of Russian law. At the same time, the overview problematizes the gap in the research on the historical background of the conceptualization of legality.

<sup>60</sup> V.S. Nersesiants, *op. cit.* note 3; *id.* *Pravo – matematika svobody: Opyt proshlogo i perspektivy* (Iurist, Moscow, 1996).

law concepts were not entirely irrelevant to legal thinking in late imperial Russia. However, examining the historical context of the emergence of these ideas, which implies a close analysis of the political and social conditions, has been beyond the scope of Nersesiants' school.<sup>61</sup> My dissertation addresses this gap. I focus on the political and social dimensions of the emergence of a doctrine of Russian legality among the elites of late imperial Russia, who were closely involved in law-making and law-enforcement. Thus the literature on Russian legal history has to be closely examined.

Though there is a mass of literature on various aspects of Russian legal history, there is still a lack of any systematic investigation of the legality issue.<sup>62</sup> Available research which may shed light on this issue provides important facts and some stimulating generalizations. However, as I will demonstrate below, the research agenda (key questions, methods, and conclusions) has been shaped by certain normative assumptions about Russian law. These assumptions form three key approaches within Russian legal history scholarship: the *positivist*, *critical positivist*, and *functionalist*.

*Firstly*, the most influential account of Russian legal history is provided by the *positivist approach*. Its main focus has been to trace a coherent and progressive development of Russian law from the emergence of the Russian state until the present day. Since the 1840s to 1850s, positivist legal scholars have described how branches of Russian law developed, providing detailed research on the black-letter law of regulations of particular spheres and institutions. Of course, an overwhelming concentration on codified law cannot be considered as something exclusively Russian; this tradition should be attributed to legal scholarship of the continental legal family in general, distinctively characterized by the prevalence of codified law.<sup>63</sup>

On a more theoretical level this approach was elaborated by the very influential State School (*gosudarstvennaia shkola*) of Russian legal science in the last decades of the nineteenth century. Its distinguished representatives Boris Chicherin (1828-1904), Konstantin Kavelin (1818-85), Vasilii Sergeevich (1832-1910) and others underlined the leading role of the Russian state and its legal

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<sup>61</sup> V.A. Chetvernin, "Kontseptsiiia sovetskogo pravovogo gosudarstva" in M.P. Vyshinskii (ed.), *Pravo i vlast'* (Progress, Moscow, 1990), 113–144. See further in: N.E. Gridchina, *Razvitie teorii pravovogo gosudarstva v otechestvennoj juridicheskoi nauke 60-kh g. XX v. – nachala XXI v.*, Dissertatsiia na soiskanie uchenoi stepeni kandidata iuridicheskikh nauk (Moscow, 2005).

<sup>62</sup> There is some growing scholarly interest in the Soviet legality. See, e.g. Dina Moyal, *Did law matter? Law, state and individual in the USSR, 1953-1982*, PhD Dissertation in History (Stanford University, 2011), D.M. Feldman, *Terminologiiia vlasti: Sovetskie politicheskie terminy v istoriko-kul'turnom kontekste* (Rossiiskii gosudarstvennyi gumanitarnyi universitet, Moscow, 2006). Also, the elitist legality sometimes is considered in scholarship on the intellectual history of Russian liberalism. See for instance: Julia Berest, op. cit. note 45.

<sup>63</sup> Lawrence Friedman, "Introduction to the Theme Issue: Writing Legal History", 4(2) *Theoretical Inquiries in Law* (2003), 437-449, at 438.

command in the course of Russian history.<sup>64</sup> This state-centered approach seems similarly to prevail in contemporary Russian jurisprudence<sup>65</sup> and is also widely shared by foreign and Russian historians who tend to see in written law a progressive modernization of the Russian state.<sup>66</sup> In general, accounts of both legal scholars and historians tend to share the same positivist and progress-oriented research paradigm.

To sum up, the positivist narrative of Russian legal history elaborates the ideology of progress being achieved by legal means.<sup>67</sup> The people and their various associations (groups, cliques, estates or classes) are not present in the Russian legal positivist narrative. In contrast to European legal history, the Russian positivist account remains ignorant of diversity of conflicting public interests and values which were being contested in political struggles affecting law. This idealistic celebration of the coherent and progressive state's legal policy<sup>68</sup> at the expense of the people's exclusion seems to provide a very influential background to the understanding of the Russian legal tradition.

*The second, critical approach*, on the contrary, provides a more realistic evaluation of the functionality of Russian law. According to it, law has been easily displaced by informal practices or administrative discretion, thus its practical meaning should not be overestimated. This view has been put forward by cultural historian Viktor Zhivov who once observed that, to a large extent, law played a role of 'cultural fiction'<sup>69</sup> in imperial Russia.<sup>70</sup> Since informal practices were still present in every sphere of social, economic and political life, the 'legal track' could be neglected by actors and Russian law itself could be considered fictitious, or in other words, 'abnormal' or 'atypical' law. This in particular was stressed in relation to rural Russia, where, as Vladimir Bezgin, Stephen Frank,

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<sup>64</sup> See more on them in V.A. Tomsinov, *Iuridicheskoe obrazovanie i iurisprudentsiia v Rossii v epokhu 'velikikh reform' (60-e — nachalo 80-kh gg.nineteenth v.)* (Zertsalo-M, Moscow, 2013).

<sup>65</sup> See for instance: S.S. Alekseev, *Uroki. Tiazhkii put' Rossii k pravu* (Institut chastnogo prava, Moscow, 1997), 29.

<sup>66</sup> See for instance: Anan'ich, Ganelin, Paneiakh (ed.) *Vlast' i reformy*. op. cit. note 52; George L. Yaney, *The Systematization of Russian Government: Social Evolution in the Domestic Administration of the Imperial Russia, 1711–1905* (The University of Illinois Press, Urbana, Chicago, London, 1973).

<sup>67</sup> Naturally, this view is a part of general positivist legal thinking, not attributed exclusively to Russia. See the stimulating debate on the instrumentalist usage of law in light of current legal developments: Leslie Green, "Law as a Means" in Peter Cane (ed.), *The Hart-Fuller Debate in the Twenty First Century* (Hart Publishing, Oxford, 2010), 169–189, Anthony J. Sebok, "Comment on 'Law as a Means'", *Ibid*, 189–197.

<sup>68</sup> This celebration is not something exclusively Russian and as Jukka Kekkonen demonstrates should be deconstructed as a separate aspect of national legal histories: Jukka Kekkonen, "The political role of courts in Finland 1809–2015: Some methodological and historiographical observations," 38(2) *Retfærd: nordisk juridisk tidsskrift* (2015), 32–47.

<sup>69</sup> Richard Uortman (Wortman), *Vlastiteli i sudii: razvitie pravovogo soznaniia v imperatorskoi Rossii* (Novoe literaturnoe obozrenie, Moscow, 2004), 24, translated from *The Development of a Russian Legal Consciousness* (University of Chicago Press, Chicago, 1976).

<sup>70</sup> V.M. Zhivov, "Istoriia russkogo prava kak lingvosemioticheskaia problema", in *id.*, *Razyskaniia v oblasti istorii i predystorii russkoi kul'tury* (Iazyki Slavianskoi Kul'tury, Moscow, 2002), 187–305.

Corinne Gaudin, and Christine Worobec showed, peasants used extralegal procedures (*samosud* – self-trial) to punish crime outside the legal system.<sup>71</sup>

A more balanced critical perspective (from Jörg Baberowski and Peter Solomon)<sup>72</sup> underlines the inconsistency of Russian legislation, its lack of coherence and the radicalism of legal changes. Established by empirical evidence, these observations of 'critical' scholarship are very important as they shed light on the conditions of Russian law: namely, its lack of predictability and an instability of the legal structure as such. However, the critical approach sometimes seems to be too straightforward, claiming very generally that legal reforms in Russia have been jeopardized by the underdeveloped social conditions of Russia's predominantly traditional society.<sup>73</sup> Within this perspective, again we can see that modernization through legal reforms is still embedded at the center of discussion. The difference with the positivists is in the critical assessment of this modernization.

It seems that this focus on the failure of modernization reveals an important ideological restraint of the critical approach: the open or silent contradistinctions between Russian law and legislative politics and normal (that is, standard western) patterns. In practice, it turns out that both methodology and analysis imply there to be 'ideal typical' constructs, based on western analytical language, in the analysis of the Russian past and present.<sup>74</sup>

In addition to these conceptual doubts, legal historians doing important field work, have also highlighted the practical necessity of more context-oriented research, both in concepts<sup>75</sup> (which

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<sup>71</sup> V.B. Bezgin, *Sel'skoe pravosudie i pravovye obychai russkikh krest'an vtoroi poloviny nadvinsyatsy – nachala XX veka*. (I.P. Chesnokov, Tambov, 2014) Stephen P. Frank, *Crime, Cultural Conflict, and Justice in Rural Russia, 1856-1914* (University of California Press, Berkeley, 1999), Corinne Gaudin, *Ruling Peasants: Village and State in Late Imperial Russia* (Northern Illinois University Press, De Kalb, 2007), Christine D. Worobec, *Peasant Russia: Family and Community in the Post-Emancipation Period* (Northern Illinois University Press, DeKalb, 1995).

<sup>72</sup> Jörg Baberowski, op.cit. note 44, Peter Solomon, "Courts and Their Reform in Russian History," in Solomon, op.cit. note 1, 3-20.

<sup>73</sup> Baberowski, op.cit. note 44; Linda Edmondson, "Was there a Movement for Civil Rights in 1905?" in Olga Crisp and Linda Edmondson (eds.), *Civil Rights in Imperial Russia* (Oxford University Press, Oxford, 1989), 282.

<sup>74</sup> Cultural anthropologist Alexey Yurchack points it out as an important problem in his groundbreaking book on the end of the USSR: Alexey Yurchack, *Everything Was Forever, Until It Was No More: The Last Soviet Generation* (Princeton University Press, Princeton, 2007), 6. See, for example a stimulating study on 'normalizing' usage of Rechtsstaat concept in relation to Russian legality: Girish Bhat, "Recovering the Historical Rechtsstaat", 32(1) *Review of Central and East European Law* (2007), 65-97.

<sup>75</sup> Here I mean first and foremost the contribution by historians Jane Burbank, Marianna Muravyeva, Cathy Frierson, Sandra Dalke, Michel Tissier, Gareth Popkins and William Wagner, whose work I consider below. Russian legal scholars also find this trend productive: see, Anastasia Tumanova, "The Liberal Doctrine of Human Rights in the Late 19th – Early 20th Century: History of the Struggle for a Law-Based State in Late Imperial Russia". (*Manuscript*). See the pre-print of this article: A.S. Tumanova, "Subjective Public Rights in the Legal Philosophies of Russian Liberalism in the Early 20th Century", Working papers by NRU Higher School of Economics. Series LAW "Law". 2013. No. WP BRP 25/LAW/2013. Available at <http://www.hse.ru/data/2013/09/20/1278731636/25LAW2013.pdf>

should be studied as Russian terms including their meanings) and in everyday practice.<sup>76</sup> William Wagner in particular pointed out the limitations of socio-legal research where the 'normal pattern of European development' structures the research findings. As a result, socio-legal research is used to make a claim of normality for Russia; its conformity to European development is viewed in positive light while deviations from it are given a negative cast.<sup>77</sup>

In general, it seems that this normalization trend builds up an influential discourse of similarity and normativity along the European progressive pathway. To some extent this may be viewed positively, since it opposes the discourse of 'difference' or 'alienness' of some states and nations.<sup>78</sup> Also this vision may be of some analytical usage in comparative studies. However, despite this, this universalist perspective undermines the meaning of variations and the possibilities of drawbacks in a particular state. Also, its rather open normativity and modernism, when all European, Western and the most recent developments are viewed positively, might narrow the scope of a research agenda, leaving aside any 'abnormal' facts, tendencies, and tracks which do not fit the normal developmental track pathway.

*The third, 'functionalist', approach*, specifically challenges this normalization trend and fills lacunae in studies of legal practice; it aims to explore what were the functions of law in a given society.<sup>79</sup> To provide a better contextualization of law, this approach pays attention to a variety of social, political, and economic conditions and pre-conditions for the development of the Russian legal system and its implementation. It is the most interdisciplinary approach within legal studies, involving perspectives of legal history, legal anthropology, sociology, and comparative law along with other disciplines within law and society research.

In relation to Russia, the functionalist approach has seen increasingly rapid advances in the past thirty years. In 1976, Richard Wortman's path-breaking research on legal awareness introduced

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<sup>76</sup> Jane Burbank, "Legal Culture, Citizenship, and Peasant Jurisprudence: Perspectives from the Early Twentieth Century", in *Reforming Justice in Russia*, op. cit. note 1, 84. William G. Wagner, "Law and the State in Boris Mironov's *Sotsial'naiia istoriia Rossii*" 60 (3) *Slavic Review* (2001), 558-565, at 560-61. Sandra Dahlke, Michel Tissier, "The practice of law and justice in Russia, 18-20 centuries", 53 *Cahiers du monde russe* (2012), 7-13. Popkins, Gareth, "Code versus Custom? Norms and Tactics in Peasant Volost Court Appeals, 1889-1917" 59(3) *Russian Review* (2000), 408-24.

<sup>77</sup> Wagner, *Ibid*, 560-561.

<sup>78</sup> See for example stimulating attempts to consider Russian constitutionalism in a comparative perspective within more general European constitutional law development, e.g. in on-going ambitious project on constitutional history, lead by Peter Brandt, Martin Kirsch, Arthur Schlegelmilch: Dietmar Wulff, M. D. Karpačev, 'Russland', in: Peter Brandt, Martin Kirsch, Arthur Schlegelmilch (Hg.): *Handbuch zur europäischen Verfassungsgeschichte im 19. Jahrhundert. Institutionen und Rechtspraxis im gesellschaftlichen Wandel. Bd. 2: 1815-1847* (Dietz, Bonn, 2011), 1221-1262. Marc Szeftel, *The Russian Constitution of April 23, 1906: Political Institutions of the Duma Monarchy* (Librairie Encyclopédique, Bruxelles, 1976), Andrey Medushevskii, *Russian Constitutionalism. Historical and Contemporary Development* (Routledge, London, 2006).

<sup>79</sup> The approach is discussed in more detail in Dahlke, Tissier, op. cit. note 31, 7-13.

an inspiring theme, the emergence of the authority of law among the bureaucratic elites (their 'legal consciousness') in nineteenth century Russia.<sup>80</sup> Since then, many enlightening socio-legal studies have further developed Wortman's perspective on the legal consciousness of the people and the legal pathways of everyday life.

To mention the most inspiring directions, I will start with Girish Bhat who investigated legality as 'a judicial cast of mind' of legal practitioners. Focusing on Reform-era court practice, from jury trials to the Criminal Cassation Department of the Governing Senate, he demonstrated that the legality concept ought to be analyzed as 'a kind of self-contained rule of law within the broader cluster of coexisting legalities competing for expression'.<sup>81</sup> Bhat's perspective on legality in court practice provides important accounts on adherence to written law in the Russian legal system as part of a political agenda of affirming the politically challenged autocratic rule.

The crucial role of written law and legal institutions (and indirectly legality) for different stratum of society in late imperial Russia has been demonstrated in a number of important studies in the field. Jane Burbank<sup>82</sup> and Garrett Popkins<sup>83</sup> studied the bottom level of legal consciousness in their publications on the practical relevance of codified law in everyday peasant courts in Russia at the beginning of the twentieth century. William Wagner<sup>84</sup> and Marianna Muravyeva<sup>85</sup> challenged the influential discourse of 'backward' Russian patriarchal family relations and poor usage of formal institutions of civil law (Wagner) or criminal procedure (Muravyeva). Studies by William Pomeranz,<sup>86</sup> Michel Tissier,<sup>87</sup> Jane Burbank,<sup>88</sup> David Wartenweiler,<sup>89</sup> and Cathy Frierson<sup>90</sup> provide important accounts of the day-to-day reality of Tsarist Russian legal institutions. There has been an

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<sup>80</sup> Richard Wortman, *The Development of a Russian Legal Consciousness* (University of Chicago Press, Chicago, 1976). See also: Id., "Russian Monarchy and the Rule of Law: New Considerations of the Court Reform of 1864" 6 (1) *Kritika: Explorations in Russian and Eurasian History* (2005), 145–170.

<sup>81</sup> Girish Bhat "The Rule of Zakon: The Criminal Cassation Department and Legality in Late Imperial Russia, 1866 - 94" *The Russian Review* 72 (2013): 622–46, at 646.

<sup>82</sup> Burbank, op. cit. note 24.

<sup>83</sup> Gareth Popkins, "Code versus Custom? Norms and Tactics in Peasant Volost Court Appeals, 1889–1917", 59 *Russian Review* (2000), 408–24.

<sup>84</sup> William G. Wagner, *Marriage, Property, and Law in Late Imperial Russia* (Clarendon Press, Oxford, 1994).

<sup>85</sup> Marianna Muravyeva, "Between Law and Morality: Violence Against Women in Nineteenth-Century Russia", in Wendy Rosslyn, Alessandra Tosi (eds.), *Women in Nineteenth-Century Russia: Lives and Culture* (Open Book Publishers, Cambridge, 2011), 209-238.

<sup>86</sup> William Pomeranz, "'Profession or Estate'? The Case of the Russian Pre-Revolutionary 'Advokatura'", 77 (2) *The Slavonic and East European Review* (1999), 240-68.

<sup>87</sup> Michel Tissier, "Les sociétés juridiques dans l'Empire russe au tournant du XXe siècle", 51 *Cahiers du monde russe*, (2010), 5-34.

<sup>88</sup> Jane Burbank, "Discipline and Punishment in the Moscow Bar Association", 54 *Russian Review* (1995), 44-64.

<sup>89</sup> David Wartenweiler, *Civil Society and Academic Debate in Russia 1905-1914* (Clarendon Press, New York, 1999).

<sup>90</sup> Cathy Frierson, "I must always answer to the law..." Rules and Responses in the Reformed Volost' Court", 75(2) *Slavonic and East European Review* (1997), 308–334.

increasing interest in studies of the public and private dimension of legal interactions. Ekaterina Pravilova in her recent book addressed the legal mode of public property in the late Russian Empire.<sup>91</sup> Anastasia Tumanova wrote about the legal framework of Russian NGOs and their successful activities of the late nineteenth to early twentieth century.<sup>92</sup>

Altogether, these accounts provide strong evidence of the practical relevance of a modernized legal framework for different social groups in both the private and public spheres. They also demonstrate that in the last decades of the nineteenth century, the legal infrastructure was developing quite efficiently after the Judicial Reform of 1864, especially in the sphere of private law. In general, the evidence of socio-legal research within the functionalist approach highlights the fact that, thanks to the rapid and remarkable development of a legal profession and infrastructure, Russian codified law did function. This contribution presents a certain challenge to the idea that legal modernization was premature in the context of Russian traditional society, along with claims of a Russian tradition of legal nihilism.

My research shares the ambitions of the functionalist approach. I find very stimulating Laura Engelstein's observation of two states legal rules functioning in late imperial Russia – 'the rule of law' and 'the rule of administration'.<sup>93</sup> The 'rule of administration' undermined 'the rule of law' via corrupting law enforcement by administrative interventions.<sup>94</sup> Indeed, accounts about lawless administration have been very popular from the late eighteenth century until the present day. In the course of the last three centuries numerous attempts have been undertaken by legislators to overcome an arbitrary/informal/corrupted administration. However, the coexistence of both rules, in Engelstein's terms, the 'rule of law' and illegal 'rule of administration', have remained ineradicable. Is it possible that both 'rules' might embed each other at a certain conceptual and/or functional level?<sup>95</sup> In this dissertation I closely consider their interrelatedness as a part of the tradition of Russian legality. In the following section I will consider the theoretical concept of legal tradition.

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<sup>91</sup> Ekaterina Pravilova, *A Public Empire. Property and the Quest for the Common Good in Imperial Russia* (Princeton University Press, Princeton, Oxford, 2014).

<sup>92</sup> A. S. Tumanova, *Obshchestvennyie organizatsii i russkaia publika v nachale XX veka* (Novyi khronograf, Moscow, 2008).

<sup>93</sup> Laura Engelstein, *The Keys to Happiness: Sex and the Search for Modernity in Fin-de-siècle Russia* (Cornell University Press, Ithaca, NY, 1992). See also: Natasha Assa, "How Arbitrary was Tsarist Administrative Justice? The Case of the Zemstvos' Petitions to the Imperial Ruling Senate, 1866–1916," 24(1) *Law and History Review* (2006), 1-43.

<sup>94</sup> On the practical difficulties of the principles of rule of law such as guarantees of civil rights in late imperial Russia, see: William E. Butler, "Civil Rights in Russia: Legal Standards in Gestation," in Crisp and Edmondson, op. cit. note 28, 3-12.

<sup>95</sup> In relation to contemporary Russia, Kathryn Hendley discusses this phenomenon in terms of Ernst Fraenkel's 'dual state' (*The Dual State: A Contribution to the Theory of Dictatorship* (Oxford University Press, New York, London,

## 1.5 Theoretical Framework

Taking a more general perspective, my research contributes to the discussion about otherness as an essential part of constituting legal traditions/legal cultures.<sup>96</sup> The issue of difference/otherness has been a key one in the field of comparative legal studies, especially in relation to legal traditions of the world conceptualized by such authorities as Konrad Zweigert and Hein Kötz, Patrick Glenn, and John Merryman.<sup>97</sup> However, the problematization of the criteria of significant differences between legal traditions/cultures has not been sufficiently studied.<sup>98</sup> Indeed, what features of both form and substance have been observed as 'different'? Why does it matter?

A good example here is the discussion on classification of legal systems. As Rene David put it in 1964 there are two major criteria to establish difference: (a) 'legal technique' (terms, concepts, sources of law and their hierarchy, juridical methods); and (b) 'philosophical, political or economic principles desired to be implemented'.<sup>99</sup> If 'legal technique' deals with the formal criteria of difference, the 'principles' provide substantial features. By the end of the twentieth century comparativists anticipated the idea of dynamic motion, which would affect both the formal and substantial features of legal systems.<sup>100</sup> In addition to anticipating motion and change in legal systems' development, the very objectiveness of taxonomical thinking was challenged. As it has been pointed out by both legal theorists and legal comparativists like Csaba Varga, Jaakko Husa,

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Toronto, 1941): Kathryn Hendley, "Varieties of Legal Dualism: Making Sense of the Role of Law in Contemporary Russia", 29(2) *Wisconsin International Law Journal* (2011), 233-62.

<sup>96</sup> Though, there have been attempts to radically separate concepts of 'legal tradition' from 'legal culture' (Patrick Glenn), it seems that both concepts share the same contextualized understanding of law in a certain society. As it was pointed out by Efstathios Banakas, the co-existence of both terms in the literature comes from different research contexts/discipline vocabularies: 'legal historians with comparative interest and comparative jurists seem to use 'legal tradition' pretty much similarly to the way sociologists of law use 'legal culture'. Efstathios K. Banakas. "The Method of Comparative Law and the Question of Legal Culture Today" *Tillburg Foreign Law Review* 3 (1994), 113-153, at. 121. See further in: Jaakko Husa, "Legal Culture vs Legal Tradition: Different Epistemologies?" Maastricht Private Law Institute Working Paper 2012/18, Alan Watson, "Legal Culture vs Legal Tradition" in Mark Van Hoecke, *Methodology and Epistemology of Comparative Law* (Hart Publishing, Oxford, Portland Oregon, 2004), 1-6.

<sup>97</sup> Konrad Zweigert, Hein Kötz, *An Introduction to Comparative Law* (Clarendon Press, Oxford, 1998, 3rd ed.), 63, H. Patric Glenn, *Legal Traditions of the World* (Oxford University Press, Oxford, 2007, 3rd ed.), John H. Merryman, Rogelio Perez-Perdomo, *The Civil Law Tradition* (Stanford University Press, Stanford, 2007, 3rd ed.).

<sup>98</sup> See, for instance, the discussion on classification of legal systems: Csaba Varga, "Taxonomy of Law and Legal Mapping" 51(4) *Acta Juridica Hungarica* (2010), 253-272.

<sup>99</sup> David René, Camille Jauffret-Spinozi, *Osnovnye pravovye sistemy sovremennosti*. (Les grands systèmes de droit contemporains, Translated by V.A. Tumanov, Mezhdunarodnye otnoshenia, Moscow, 1998).

<sup>100</sup> Ugo Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems" *The American Journal of Comparative Law* 45 (1997), 1-24.

and Jonh C. Reitz<sup>101</sup> difference is constructed within some 'us'/'they'-consciousness. 'Critical' legal scholars have taken this argument further and problematized the very field of legal studies as being biased by outdated language (Vivian Curran) and structures, which critical legal scholars have conceptualized as 'legocentrism' (Günter Frankenberg), 'legal orientalism' (Teemu Ruskola) and other kinds of economic (David Kennedy), political and social oppression of the 'other' (Andrew Harding, Duncan Kennedy).<sup>102</sup>

Comparative law could rely on scholarship from legal history, which explores otherness, in both the forms and principles of law, as a historically contextualized phenomenon. Here the work of legal historian and theorist Alan Watson takes the path of a challenging contribution on reception and change in legal history.<sup>103</sup> Watson underlined the significant role of interaction between legal systems and put forward a complex understanding of 'otherness' in law. As he put it, “a great deal if not most of law operates in a territory for which it was not originally designed or in a society which is radically different from that which created the law.”<sup>104</sup> Numerous facts of legal history have been used by Watson to support this observation, especially its first part and in general legal historians have accepted his theory.<sup>105</sup>

I would like to emphasize two different aspects of 'otherness', which Watson problematized. The most visible dimension of 'otherness' implies the reception of legal institutions, both material (norms) and procedural (norms and practices), from one jurisdiction to another. This was elaborated in his theory of legal transplants, which stresses the factor of reception as a moving force of legal change.<sup>106</sup> The other dimension, though explored by Watson to a lesser degree, implies a possibility of otherness/difference of legal institutions, especially those of codified law, to the social settings of

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<sup>101</sup> Ibid, Jaakko Husa, “Interdisciplinary Comparative Law – Between Scylla and Charybdis?” 9(2) *Journal of Comparative Law* (2014), 28-42; John C. Reitz “How to Do Comparative Law” *The American Journal of Comparative Law* 46 (1998), 617-636.

<sup>102</sup> Vivian Grosswald Curran, “Comparative Law and Language”, in Reinhard Zimmermann and Mathias Reimann (eds.), *Oxford Handbook on Comparative Law* (Oxford University Press, Oxford, New York, 2006), 675-709, Günter Frankenberg, “Critical Comparisons: Re-thinking Comparative Law”, 26(2) *Harvard International Law Journal* (1985), 411-456; Teemu Ruskola “Legal Orientalism” *Michigan Law Review* 101 (2002), 179-234, Andrew Harding “Comparative Public Law: Some Lessons From South East Asia”, in Andrew Harding, Esin Örüçü (eds.) *Comparative Law in the 21st Century* (Kluwer Law International, London, the Hague, New York, 2002), 249-266; Duncan Kennedy, “The Critique of Rights in Critical Legal Studies”, in Janet Halley, Wendy Brown (eds.) *Left Legalism/Left Critique* (Duke University Press, Durham NC, 2002), 179-228; David Kennedy, “Law and the Political Economy of the World” *Leiden Journal of International Law* 26 (2013), 7–48.

<sup>103</sup> See in particular: Alan Watson, *Legal Origins and Legal Change* (Hambledon Press, London, 1991).

<sup>104</sup> Ibid., 73.

<sup>105</sup> John W. Cairns, “Watson, Walton, and the History of Legal Transplants”, 41 *Georgia Journal of International and Comparative Law* (2013), 637-696.

<sup>106</sup> To give an important example of development/revision of 'transplants' ideas we might think of Esin Örüçü's “Law as Transposition” *International and Comparative Law Quarterly* 51 (2002), 205-223. See the detailed overview of the critique of Watson's work along with analysis of its impact on legal studies: Cairns, op.cit. note 58.

a given society. On one hand, this can simply be an aspect of a legal reform, when more modern institutions are introduced via reception of foreign law/procedures, in order to change social reality according to a new legal structure. On the other hand, this understanding of 'alien law', operating in 'a society which is radically different from that which created the law' does not necessary imply a law of another jurisdiction. It might also be seen as an issue of the accommodation of rapid change in turbulent times of rapid legal reforms and revolutions.

In all of the above-mentioned perspectives one may observe a cultural function of law, namely its usage as a marker of a certain identity. The aspect of 'otherness' is inevitable here, since, resulting from more general political, social, and economic processes, 'law becomes an object to fit identity needs'.<sup>107</sup> In the case of Russia the issue of otherness/difference was a key one for the emergence and reproduction of a Russian tradition of legality. It was a part of discussion about the cultural identity of Russians and should be studied as an identity benchmark for making modern Russian law.

In this dissertation I utilise the conceptual framework of 'tradition' to study issues of continuity and identity of the official Russian view of legality revealed in my sources. As I aimed to demonstrate in my review of approaches to Russian legal history, Russian exceptionalism was an important trope of the historical and legal scholarship on Russian legal history. Thus, a framework of 'traditionality' as a central feature of any legal system, as Martin Krygier put it, would stimulate a less biased perspective on Russian law in general.<sup>108</sup>

In the field of legal history the concept of 'legal tradition', namely 'Western legal tradition' was developed by Harold Berman.<sup>109</sup> In volume one of *Law and Revolution: The Formation of the Western Legal Tradition*, he stressed the idea of continuity conceptualized in the term 'legal tradition'. His scholarship provided an important mapping of the dissemination of 'Western law' through time and space and presented a clear challenge to the field of “victims, in the last two centuries, of an increasingly nationalistic legal historiography”. Since in my thesis I rely on Berman's ideas of 'Western law' institutionalization as an essential part of 'Western legal tradition', I should mention that his approach must be treated critically.

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<sup>107</sup> Assaf Likhovski, *Law and Identity in Mandate Palestine* (University of North Carolina Press, Chapel Hill, 2006), 213.

<sup>108</sup> Martin Krygier, “Law as Tradition”, 5(2) *Law and Philosophy* (1986), 237-262.

<sup>109</sup> Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, Cambridge, MA, 1983).

Firstly, the very concept of 'Western law' is naturally embedded in the Cold war context of two competing superpowers/camps/ideologies/laws separated by the Iron Curtain.<sup>110</sup> Indeed, Berman's 'West', separated from the East mostly by the division of Christianity, has to be critically challenged; also the role of Roman law as an important commonality cannot be underestimated.<sup>111</sup> Secondly, as was highlighted by Jean-Louis Halpérin, Berman's focus on continuity did not properly acknowledge the significant role of change as a driving force of (legal) history.<sup>112</sup> However, in spite of these two major limitations, Berman's focus on continuity as developed further by Glenn<sup>113</sup> provides an important contribution to the conceptualization of legal tradition as cultural information brought from the past into the present.<sup>114</sup>

In my dissertation I rely on this understanding of Berman and Glenn, which has been further developed by Edgar Schein and Jan Smits, who explore the analytical tools of legal tradition studies within the socio-legal dimension of 'the transfer of information'.<sup>115</sup> The socio-legal component is focused on understanding of the role of tradition for a certain community, while history is embedded in the continuity of traditions. All the aspects mentioned are summarized in Schein's definition of tradition as 'the transfer of information within a community over a substantive period of time'.<sup>116</sup> In my analysis of the emergence and continuation of official legality in Russia, I consider making legal sources in Russia a part of the process for making a tradition of legality. This set up in Russia a certain conceptual meaning of law-making and law-enforcement shared by the legal community and which continued from imperial to Soviet times.

The interrelatedness of tradition and community and the social role of traditions for creating identity for a group was highlighted by sociologist Eric Hobsbawm. He defined tradition as “a set of practices, which seek to inculcate certain values and norms of behavior by repetition, which

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<sup>110</sup> Westad, Odd Arne, *The Global Cold War* (Cambridge: Cambridge University Press, 2005); Tatiana Borisova, William Simons, “Introduction: Legal Front of the Cold War: Why?”, in *id.* (eds.), *The Legal Dimension in Cold War Interactions: Some Notes from the Field* (Martinus Nijhoff Publishers, Leiden, Boston, 2012), xi-xxiv.

<sup>111</sup> Unfortunately, the path set by Berman to exclude uncritically Eastern Europe, Greece, and Russia from the Western legal tradition seems to be very influential. See, e.g.: David B. Goldman, *Globalization and the Western Legal Tradition: Recurring Patterns of Law and Authority* (Cambridge, UK: Cambridge University Press, 2007), especially at 4-5. There is an inspiring initiative to recast the role of religion in legal history through the prism of empires within an ambitious research project “International law, Religion and Empire” initiated by Professor Dr. Martti Koskenniemi: <http://www.helsinki.fi/intlawhistory/project.html>

<sup>112</sup> Jean-Louis Halpérin, *Five Legal Revolutions Since the 17th Century. An Analysis of a Global Legal History* (Springer, Heidelberg, Berlin, 2014), especially at viii-xii.

<sup>113</sup> William Twining, “Glenn on Tradition: An Overview” 1 *Journal of Comparative Law* (2005), 107–15.

<sup>114</sup> Other accents in conceptualizations of legal traditions in the field of comparative law – e.g. by Merryman – are described and analyzed by Husa, *op. cit. note 55*.

<sup>115</sup> 'Tradition as the transfer of information within a community over a substantive period of time'; Edgar H. Schein, *The Corporate Survival Guide* (Jossey-Bass, San Francisco, 2009). Jan Smits, “Is Law a Parasite? An Evolutionary Explanation of Differences among Legal Traditions” 7(3) *Review of Law and Economics* (2011), 792-804.

<sup>116</sup> Schein, cited in Smits, *op. cit. note 62*, at 797.

automatically implies continuity with the past.”<sup>117</sup> Within this theoretical framework, a central focus of legal traditions' studies is actually a *legal community* being constructed through the reproduction of a certain legal identity. Hobsbawm's focus on *practices* of making tradition, which embed the transfer of values, seems to provide new methodological insights: in relation to my theme, I focused on practices of fostering legality by lawmakers as a part of the formation of the authority of law by the elites in Russia in the late imperial and early Soviet period.

## 1.6 Methodology

As mentioned, this dissertation is based on case studies of legal techniques which were introduced to promote legality in the late Russian empire – the official codification of legislation (1835 – 1918) and its obligatory publication (1863 –). These techniques were introduced in line with a more general policy of Russian modernization and implied some Western legal patterns of economic and technological development. Partly for this reason it was inevitable that the new legal techniques were benchmarks for an emergence of rule of law ideas and practices in Russia, articulated in terms of 'legality'. Following the important distinction articulated by Roscoe Pound between 'law in books' and 'law in action', I must emphasize that my research actually questions the sharp distinction between these two approaches.<sup>118</sup> I study how pieces of legislation become 'law in books'; primary official sources of legislation. I am interested in why making these law-books accessible to the general public became essential for the Russian political leadership in the late imperial period.

In the official books of law, I aim to discover the origins of the Russian elitist top-down perspective of legality. Imbedded within the *Digest* and the *Collection of Legislation*, this perspective, I argue, was crucial for both law-making and the general understanding of how the administration and courts should enforce law. The research is based on an analysis of three main groups of sources: *legislation*; *archival documents*; and *professional literature of the time period under research*, including legal periodicals and horn-books.<sup>119</sup>

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<sup>117</sup> Eric Hobsbawm, “Introduction: Inventing Tradition”, in Eric Hobsbawm and Terence Ranger, (eds.), *The Invention of Tradition* (Cambridge University Press, Cambridge, 1983), 1-14, at 1.

<sup>118</sup> I agree with Assaf Likhovski's important observation on political nature of this distinction in works of both Ehrlich and Pound, since they “both wanted to expose the gap between formal and real life 'living' law, and both saw law as the product of the people rather than the state”. See further in: Assaf Likhovski, “Chernowitz, Lincoln, Jerusalem, and the Comparative History of American Jurisprudence”, 4(1) *Theoretical Inquiries in Law* (2003), 621-659, at 628.

<sup>119</sup> I have also considered sources which enable a better understanding of the personal justifications of historical actors such as memoirs and diaries. In order to carry out a contextualized analysis, other sources of legal, political, and intellectual history had to be taken into account.

My focus is on official conceptualization of legality in Russia, which does not involve court judgments. This is because court-practice did not play an important role in formulation of legality tasks in Russia in 1800 – 1917: the priority has been always given to the codified law. As my dissertation demonstrates, the Russian legislator was obsessed with an idea that the system of written law should be as comprehensive as possible. Legal techniques were designed in order to enable a judge to find a solution relevant to any particular situation and, in case of uncertainty, he would be obliged to address himself to the higher authorities. Thus, judgments as such were not considered a challenge in any sense to the legislator.

In view of the growing criticism of the relevance of 'law in books' studies, I would insist that in my case 'law in books' research is still absolutely necessary because there is a lack of substantial knowledge both in Russia and abroad of three important questions:

1. *how* legislation was published, systematized and codified and distributed around the country;
2. *why* particular legal procedures for publication, systematization and codification were chosen;
3. and finally and most importantly, *what* these procedures tell us about Russian legality in terms of its basic aims and values.

I have approached these questions through the prism of the emergence of new procedures in the making of the Russian legal structure in chronological order: firstly, the codification project of the first decades of the nineteenth century, and, secondly; the obligatory publication of legislation in the 1860s. The last chapter is devoted to the revolutionary changes in the publication of law in 1917-18. By taking into account revolutionary practices, my idea was to study what ideas of legality and legality techniques the Bolsheviks found efficient to borrow from the tsarist regime. The revolutionary period is essential in the sense that it enables us to think of continuities in Russian legal tradition.<sup>120</sup>

Methodologically, I was in general inspired by the approach of *Begriffsgeschichte* promoted by the German historian Reinhart Koselleck. Koselleck's pioneering research on the social history of Prussia demonstrated that the very language of society, and especially its most important concepts (as for example 'constitution', 'property', 'citizen' etc.) should be perceived as an object of a continuous struggle of interests.<sup>121</sup>

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<sup>120</sup> Although in the Soviet times both Russian and foreign scholars developed a tradition of focusing on the discontinuity of imperial and Soviet law, with the important exception of the detailed monograph by Harold J. Berman: Harold J. Berman, *Justice in the U.S.S.R.: an Interpretation of Soviet Law* (Harvard University Press, Cambridge, MA, 1963).

<sup>121</sup> On the methodology itself and its distinctive features see Hans Erich Bödeker, "Reflexionen über Begriffsgeschichte als Methode", in Mark Bevir et al. (eds.) *Begriffsgeschichte, Diskursgeschichte, Metapherngeschichte* (Wallstein Verlag, Göttingen, 2002), 73-121.

I found this method very useful in order to analyze the conceptualization of the Russian legal tradition especially during the most turbulent periods of reforms and revolutions when new political ideas and legal techniques emerged. I was interested in two issues: *firstly*, how law, as a material object would be changed according to a new political agenda; and *secondly*, what continuities of Russian law, both in techniques and concepts/ideas, were preserved notwithstanding radical political changes, and thus may be considered to be key features of the Russian legal tradition.

In particular, I applied it in my study of the political struggles for the meaning of key components of the Russian legal tradition, such as a 'Russian national law' (*russkoe natsional'noe pravo*), 'autocratic legality' (*samoderzhavnaia zakonnost'*), 'legitimate monarchy' (*zakonnaia monarkhiia*), 'digest of laws' (*svod zakonov*), and 'code' (*ulozhenie*). While studying them in context, my aim was to give attention to changes in their definitions caused by clashes of political interests. I used the methodological insights of *Begriffsgeschichte*, which assures us that our sources enable us to hear and analyze the voices of actors contending for their definitions of law in Russia – what it was, what it should have been and why it mattered.

## 1.7 Possible methodological limitations

As I already mentioned, my general research paradigm is a functional approach to legal history, which tends to study written law and practices as a formalized structure within which particular choices by historical actors have been made. However, some doubts on the practical relevance of this research perspective can be always raised; to what extent were the actors informed about the legal structure within which they lived and acted.<sup>122</sup> Indeed, while presenting my research on the publication and codification of Russian law in the nineteenth century to interdisciplinary colleagues I have repeatedly had to deal with questions about the relevance of formal rules “to the majority of illiterate people inhabiting imperial Russia”.<sup>123</sup>

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<sup>122</sup> This view is actually presented in the studies by Bezgin, Frank and others of rural Russia legal practices, which tend to underline the role of customs not the codified law for peasants. See: op. cit. *note* 25. However, as Burbank and Frierson demonstrate on the basis of empirical research of volost' courts, the legal procedures were getting more employed in late 19<sup>th</sup> – early 20<sup>th</sup> centuries. See: op. cit. *note* 45, 36.

<sup>123</sup> Here we need to take into account that there is an important difference between general literacy and functional literacy, that is, an ability to perceive the functional meaning of a regulation. The statistics worldwide of functional literacy nowadays assures us that an ability to read does not necessarily imply an ability to comply with the law: Thomas M. Duffy, Robert Waller (eds.), *Designing Usable Texts* (Academic Press, Orlando, 1985), Robert Waller, 'What Makes a Good Document: the Criteria We Use' Technical paper 2, The Simplification Centre, University of Reading (2011). Available at: <http://www.simplificationcentre.org.uk/resources/technical-papers/> (I am thankful to Dr. Helena Happio for getting me in touch with Rob Waller).

In general, since my research is focused on rather an elitist top-down perspective on legality, produced by the ruling leadership, the bottom-up view of legality has not been at the focus of my research. I am interested in why at particular historical moments, the law and decision-makers in Russia, were interested in making law visible, clear, and comprehensive evidence of a legality tradition in Russia.

However, it would not be correct to assume that the elitist conceptualization of legality was at all irrelevant to lay people.<sup>124</sup> On the contrary, my research demonstrates that according to the exact official understanding of legality lay people might have more or less access to law. The primary dimension of this usability of legality may be studied via techniques of legality which enable legal professionals to assist people in their legal needs.<sup>125</sup> If legality techniques are stable and easy to use they certainly make law more accessible.<sup>126</sup> In this sense Lon Fuller underlined that visibility of law is of both political and legal value.<sup>127</sup> As a result, research on concepts and practices of official legalities actually provides an important basis for a profound understanding of any legal system's performance.

## 1.8 Research outline

The research is presented in four chapters, which were published in peer-reviewed legal journals over the course of 2008-2013.<sup>128</sup> The central idea of all four chapters is to elaborate a contextualized perspective on the peculiarities of the Russian institutionalization of law. I do it through an analysis of legal techniques designed to strengthen law as an institution in order to enable a more efficient modernization of the Russian state. I explore how the historical circumstances of law institutionalization via legal techniques defined the limitations of Russian law and legality, namely its predominantly formalist and instrumentalist character. To sum up, the case

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<sup>124</sup> Burbank convincingly challenged this view articulated by pre-revolutionary elite contemporaries (op. cit. *note 37*, 14-16.

<sup>125</sup> In this sense people in urban area had a better access to sources of law and professional legal services than rural population. However, I would not go into comparison of urban and rural legality practices in this PhD. I am doing it in my current project on social history of private firearms in Russia, 1800-1937, where indeed difference of legal regimes of private possession of firearms was significant, due to the lack of police institutions in rural area.

<sup>126</sup> The other possible dimensions, which lay beyond the scope of this study, are law-making and court-practice, which are also highly influenced by any official understanding of what legality is and should be.

<sup>127</sup> Lon Fuller, *The Morality of Law* (Yale University Press, New Haven, 1964), 42.

<sup>128</sup> The only exception is an article published in the collective monograph, which comprises Chapter 3: Tatiana Borisova, "Legislation as a Source of Law in Late Imperial Russia", in George Martyn, Anthony Musson, and Heikki Pihlajamäki (eds.), *From the Judge's Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trial*, Comparative Studies in Continental and Anglo-American Legal History. Vol. 31. (Duncker & Humblot, Berlin, 2013), 295-315.

studies of legal techniques presented in the following chapters serve to describe and analyze the process of 'making law' instead of purely the administrative procedures of state governance.

The chapters are structured according to a chronological principle. Within a chronological perspective the first two chapters are devoted to the Russian codification project, 1800-1835, and, as its outcome, the emergence of Russian national law and autocratic legality. Chapter III describes and analyzes the issue of obligatory publication since 1863 in a special bulletin of legislation in the Russian Empire. Chapter IV examines the revolutionary experience in the field of techniques of legality during 1917-18.

In Chapter I, I study the Russian codification project (1800-1835) and show how legal techniques were designed to overcome the practical difficulties of modernization without any proper institutionalization of law. Since Russian codification was undertaken at the same time as other European codification attempts, western models, – both theoretical (Bentham) and practical (Napoleonic codes), were studied. In spite of a public display of rejection of Western borrowings (for ideological reasons), nevertheless, they were partially included in the *Digest of Laws of the Russian Empire*.

The whole project was possible thanks to the pursuit of legal education in Prussia of an outstanding group of young Russian codifiers, who afterwards actually became the first professors of Russian law in the newly opened Russian law schools. It is important to note that this education abroad served not only to allow 'cutting and pasting' of some legal institutions and ideas, but also, simultaneously the utilization of others' ideas. For example, those of European romanticism and cultural nationalism, in the making of the Russian national legal tradition, as something very original and completely unprecedented. Thus, the codification project should be considered as a starting point for the institutionalization of Russian law, propagated as being based on Russian national values and tradition, though inspired by western (continental) legal systems.

My analysis highlights the fact that the codification project resulted in the emergence of a tradition of Russian legality, with its material embodiment, the *Digest of Laws of the Russian Empire*. It is important to note that it emerged in the context of a competition between two approaches to codification: a universalistic codification pattern strongly influenced by Napoleon's codes; and its alternative, the invention of a Russian national legal tradition. In order to explain why the latter prevailed I delineate several political and social factors: the war with Napoleon and victory over his invading forces; cultural transfers from the West leading to the emergence of a cultural nationalism; and the strong need for institutional modernization in Russia.

The chapter underlines the outstanding role of Western models in attempts to discover and facilitate a Russian national legal tradition via its formalization in the *Digest*. This fact is still

somewhat overlooked since borrowing from the West was officially rejected by the political leadership and the original Russian legal tradition has been propagated as a concept which is separate from the Western path. That has been the main trend from the 1820s until the present day, with some short periods of 'thaws', characterized by more open attitudes towards the West, seeing the possibility of it being a partner, not only a competitor and enemy.

However, despite the nationalistic ideological rhetoric, legal language, that is, legal terminology, basic legal concepts and institutions, as well as the more general concepts of law, were to a large extent borrowed. My research demonstrates that already in 1800-1830s we can see a tension between the more developed Western institution of law and the Russian ideological, political and social difficulties, which prevented an open and efficient borrowing into the Russian legal system. This tension makes the core of the conceptualization of the Russian legal tradition to be quite close to the Western in specific legal techniques (such as legal terminology and basic notions) but different in its essence, forming an important pathway towards Russian legality.

Chapter II focuses on this tension taking a long-term perspective, through the course of the nineteenth century until the Russian revolutions in the first decades of the twentieth century. I describe and analyze difficulties in the institutionalization of Russian law in terms of its problematic separation from the institutions of both politics and administration. The central argument is that in Russia the role of the state and politics in the institutionalization of law was crucial yet ambivalent.

Indeed, the political needs of institutional modernization stimulated the development of Russian law as a separate institution from politics and administration in the late imperial period. Legal certainty and predictability were absolutely necessary for substantial development in the economy. However, certainty and predictability of law were barely achievable, since the leading role of short-term political tasks, serving an unstable political course, undermined the effective separation of law as an institution. Thus, paradoxically, the development of a legal infrastructure was jeopardized by political factors, mainly, by the predominance of administrative power, based on legality provided by the *Digest*.

The chapter explains why political circumstances predetermined a rather narrow technical understanding by the Russian leadership of the role of law. In order to do this, the political structure and process of decision-making under autocracy are considered. The chapter argues that the limitations of the official technical understanding of legality can be considered as another important feature of the Russian legal tradition, along with its nationalistic, anti-western position. The chapter demonstrates that these two features were closely interrelated.

This conclusion is derived from an analysis of a discussion of the relevance of the Digest, initiated by some liberal legal professionals in last decades of the nineteenth century. They severely criticized the Digest and the practice of its continuation by state officials. The discussion itself is considered as a good example of the struggle for proper institutionalization of law by legal professionals, who used universalistic claims to prove that law cannot be dominated by administration and politics. As a result, on the eve of the 1905 Russian revolution the most radical legal professionals tended to see Russian law and the legal system as almost illegal. At the same time, the ideologists of legitimate monarchy found universalistic claims to be irrelevant in relation to Russia and insisted on the uniqueness (*osobennost'*) of the Russian legal tradition which makes it incomparable to the West. This conflict, which demonstrates that the legal structure was seen both as an ideological and practical skeleton of the state, made the Russian revolutions inevitable. This fact once again proves the necessity of deepening research into the Russian legal tradition.

Chapter III analyzes another legal technique, the compulsory publication of legislation, introduced in 1863, in order to overcome the practical difficulties of modernization within the more general 'Great reforms' program of the 1860s-1870s. The reforms targeted the slow modernization of Russia. Indeed, instrumentalist borrowings from the West within a technical understanding of the role of law could not provide effective modernization. In many respects it remained blocked by the irresponsible bureaucratic rule of administrators.

In order to overcome the practical difficulties of modernization, the policy of 'fostering legality' now implied that equal access to law and court justice were targeted as important conditions of the legality principle. However, my research demonstrates that the concrete practices of decision-making and power distribution tended to undermine legal techniques and procedures initially designed to guarantee access to law as well as legality and the rule of law. A good example of this is to be found in my research on the compulsory publication of Russian legislation, which was reintroduced in 1863, a century and half later after it had been originally introduced by Peter the Great in 1711 as an important measure for his reforms.

In 1863, however, obligatory publication was introduced in a form of a special Bulletin (the Collection of Legislation). This chapter demonstrates that the Bulletin was designed to solve 'technically' a crucial political problem of the impossibility of separating legislative and administrative powers under autocracy. Indeed, there were no clear conventions in theory, doctrine or legislation about which subjects were to be regulated only by law, compulsory for everyone. Thus administrative and legal acts were enacted simultaneously, sometimes in a contradictory

manner. To overcome this, it was declared that those acts published in the Bulletin <sup>129</sup>, were laws promulgated for general awareness.

A case study of compulsory publication technique demonstrates that, without a proper substantial legal conceptualization of law separated from both politics and administration, the concept of legality in late imperial Russia was narrowed to a positivist 'technical legality'. Everything published in the Bulletin was to be implemented as law, just by the very fact of its proper publication. At the same time, even these partial 'technical' measures provided a problematization of law as an institution. Indeed, it highlighted the need to clarify what is law, namely, what are the criteria for treating a particular command by the authorities as a general law. This 'technical' approach to the question gave legal professionals some instruments to struggle for their autonomy and promote a substantial, not merely 'technical', institutionalization of law. The weakness of the institutional infrastructure partly explains why autocratic modernization did not survive up to World War I and was swept away by the 1917 revolutions.

Chapter IV is devoted to the publication of legislation during 1917-1918. My analysis of the Bolsheviks' attempts to use law in order to make their authority 'legal' and 'legitimate' bridges a gap between 'autocratic' and 'revolutionary' legalities and underlines continuity. In line with a recent trend in historical studies of the early Soviet state,<sup>130</sup> I see continuity in policy practices, characterized by the prevalence of short-term perspectives, achieved through administrative and other extralegal means, including terror.

I demonstrate that due to political instability and ultimately by a deficit of resources, the Bolsheviks relied heavily on the 'technical' practices of the tsarist administration. In particular, the Bolsheviks inherited and deepened an instrumentalist conceptualization of law and legality while building their new state. Moreover, in the course of the civil war, political necessity was declared to prevail, while autonomy of law as an institution became impossible. Law's subverted role was

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<sup>129</sup> All of them were published full-text.

<sup>130</sup> Alessandro Stanziani, *L'économie en révolution. Le cas russe, 1870-1930* (Albin Michel, Paris, 1998); Heinzen, 'Alien' Personnel in the Soviet Revolutionary State: The People's Commissariat of Agriculture under Proletarian Dictatorship, 1918-1929', 56(1) *Slavic Review* (Spring 1997), 73-100; Peter Holquist, *Making War, Forging Revolution: Russia's Continuum of Crisis 1914-1921* (Harvard University Press, Cambridge, MA, 2002); *id.*, 'Information is the Alpha and Omega of our Work': Bolshevik Surveillance in its Pan-European Context', 69(3) *Journal of Modern History* (1997), 415-450; *id.*, 'In accord with State Interests and the People's Wishes': The Technocratic Ideology of Imperial Russia's Resettlement Administration', 69(1) *Slavic Review* (2010), 151-179; Don K. Rowney, 'Narrating the Russian Revolution: Institutionalism and Continuity across Regime Change' 47(1) *Comparative Studies in Society and History* (2005), 79-105.

underlined in Soviet political theory, starting with Lenin's major work 'State and Revolution' (*Gosudarstvo i revoliutsiia*).<sup>131</sup>

Simultaneously, as I show by focusing on publication of law during 1917 – 1918, tsarist techniques and forms of legality were exploited in order to promote more legal certainty for a more efficient administration. Alternative attempts to promote any new revolutionary technique of law-writing and distribution for general public awareness and control over administration were found to be irrelevant. These attempts are still very important, since they demonstrate that notwithstanding the general trend, there were possibilities for alternatives, which could not be supported in the circumstances of a fierce civil war and severe socio-economic crisis.

Whereas the autocratic regime was interested in supporting enlightened elites and thus did not object to the institutionalization of law as a part of a 'civilized' development and modernization of Russia, the Soviet leadership did not share this view. In contrast to late imperial times, when legal institutions were seen as a tool for modernization, and thus law was given a kind of autonomy, the one-party state increased the outstanding domination of political over all other institutions. Even the technical dimension of legality was neglected, including the compulsory publication of law. This was typified by the fact that only in 1990, after five years of *Perestroika*, was enforcement of unpublished law found to be anti-constitutional.

## 1.9 Overview of the Thesis' Statement

The *longue durée* historical perspective exemplifies how certain political and also social and cultural circumstances created important restrictions on the reception of a western (continental) legal tradition in Russia. Moreover, the Russian legal tradition was consistently articulated as 'the other', something separate and incomparable to the Western one based on the specific values and customs of the Russian people, 'autocratic legality', 'revolutionary legality', and 'Soviet/socialist legality'.<sup>132</sup>

All the chapters elaborate my central thesis statement which I will develop in more detail in the Conclusion: two factors were of crucial significance for the promotion of legality in Russia: (a) the *practical factor*; that is, the deficit of legal certainty; and (b) the *ideological factor*; that is, the

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<sup>131</sup> V.I. Lenin, *Gosudarstvo i revoliutsiia: uchenie marksizma o gosudarstve i zadachi proletariata v revoliutsii*, in V.I. Lenin, *Polnoe sobranie sochinenii* (Moscow, Izdatel'stvo politicheskoi literatury, 1974, 5th ed.), Vol. 33, 1-120.

<sup>132</sup> While leading political doctrine of today, 'Sovereign democracy' is beyond the scope of my study, its focus on the Russian uniqueness is obvious for both domestic and Western observers: Richard Sakva, 'Surkov: dark prince of the Kremlin', 7 April 2011, available at <http://www.opendemocracy.net/od-russia/richard-sakva/surkov-dark-prince-of-kremlin>; Andrey Makarychev and Viacheslav Morozov, 'Multilateralism, Multipolarity, and Beyond: A Menu of Russia's Policy Strategies' 17(3) *Global Governance* (2011), 353–373. See also Mikhail Antonov, 'Conservatism in Russia and Sovereignty in Human Rights' 39(1) *Review of Central and East European Law* (2014), 1-40.

challenges to the legitimacy of political power. Both factors derive from the realities of the Russian political structure, with a tradition of an autocratic legislator, whose power is unrestricted and undermines any attempts to distinguish it from administrative and judicial powers.

My research demonstrates that the role of political ends predominated in the development of Russian legal techniques. Indeed in the late imperial period a deficit of legal certainty and subsequent arbitrariness had jeopardized modernization of the country and had weakened effectiveness of the state structures along with their legitimacy. The issue of political legitimacy had been receiving increasing attention from an enlightened public, which felt that it was capable of acting as civil society in order to provide checks and balances to the rule by the bureaucracy on behalf of the monarch. Under these circumstances, legal institutions, practices and techniques were introduced from the top in order to solve political problems.

These substantial developments in the institutionalization of law were rejected during the revolutionary years, when on the contrary, an instrumentalist and technical understanding of law was developed. The revolutionary years refined three key 'national' characteristics of the rule of law in Russia, which had been inherited and were developed by the Bolshevik Party after 1917. These characteristics allowed an infusion of law and politics and made inevitable complete dependence of law on the political agenda. The three key characteristics are:

- (a) an avoidance of binding principles in favor of an ad hoc instrumentalist short-term perspective;
- (b) formalism and a literal interpretation of law;
- (c) adherence to 'tradition' based on national values which are formulated by the political leadership in power.

In a more general context, the Russian experience of conceptualization of legality demonstrates that past experiences matter greatly even today, in the global village which shares virtually the values of justice and humanism. Sharing global language without a contextualized knowledge of the background of the conceptualization can be misleading. However, if known, the challenges of the past can and ought to be reviewed, and overcome to give greater efficacy to substantial development and productive co-operation in the global arena.

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## Russian National Legal Tradition: *Svod* versus *Ulozhenie* in Nineteenth-century Russia\*

Tatiana Borisova

### Abstract

The article describes and analyzes the competing approaches to codification in Russia during the first decades of the nineteenth century following Napoleon (and his Code Civil) and its evaluation in the late nineteenth century. Based on recent methodology—the history of notions (*Begriffsgeschichte*)—this article presents the history of codification through the perspective of the emergence and development of the Russian legal terms ‘*svod*’ (compilation/digest) and ‘*ulozhenie*’ (system/code). These terms represented the ‘battle flags’ of the two parties: on one hand, those whom one might characterize as rationalist, universalist, Enlightenment-oriented, based on the French Revolution and inspired by the Code Napoleon; and, on the other, those who might better be described as history-oriented, traditionalist, romantic, nationalist.

Speranskii, initially the prime representative of the first tendency, was ultimately successful as the leader of a Russian codification movement by claiming an original national approach to codification, while in practice combining the two elements.

The article seeks to demonstrate that the categories of ‘national’, ‘traditional’, ‘original’—as well as their opposites, ‘universalistic’, ‘rationalist’—which were used in the political and academic discourse on codification in nineteenth-century Russia, may be analyzed as a rhetorical means of argument skillfully applied by the ambitious drafters of new codes (as well as by their opponents). Contextual analysis of both the Russian and European political background of codification discussions are applied in this work, which leads to conclusions on the construction (and deconstruction) of a national mythology of legal traditions.

My view of the creation of a new code of laws (*ulozhenie*)—during the first three decades of the nineteenth century—is one of the completion of a Russian *national* project. It became such rather suddenly in the spring of 1812 as a result of both major forces and of chance circumstances, the movement of armies, global ideas and the passions of historical figures. The combination of a number of factors resulted in a situation whereby the political struggle over the new code was conducted through the language of nationalism by contrast

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ing the ‘national spirit of the law’ with ‘foreign principles’. In the struggle for a new code, the opposing sides not only used ‘national rhetoric’ introduced from outside but, also, changed the Russian language, inventing new ‘national’ meanings for legal concepts.

### Keywords

Civil Code, Code Napoleon, codification, international relations, law and autocracy, legal traditions, legal transplants, nationalism, Russian legal history, Russian legal profession

### 1. Introduction

In a relatively short period of time (1810s–1820s), the words ‘*svod*’ and ‘*ulozhenie*’—which had interchangeably been used to describe the systematization of legislation—were differentiated and contrasted with one another as different ideas of systematization. They were given additional political meanings that later—in the second half of the nineteenth century—began to be used outside of legal discussions as slogans, symbolically representing opposing political doctrines. The term ‘*ulozhenie*’ was associated with the reform-minded, pro-European tendencies of developing a domestic state and law. ‘*Svod*’, on the other hand, came to be used as the legal embodiment of an ‘original’ national-conservative movement. But what circumstances brought about this change? And what was the significance of introducing qualitative features to the specialized professional legal lexicon?

### 2. Codification as a Matter of Politics and Fashion

On 5 July 1801—shortly after taking the throne—Alexander I (reigned 1801–1826) published a writ (*reskript*)<sup>1</sup> in the name of Count Zavadovskii, who was ordered to “combine the scattered parts of legal regulations and to collect them in the form of a consolidated code [*svodnoe ulozhenie*]”. The young Emperor was essentially following a long tradition: beginning with the rule of Fedor Alekseevich (reigned 1676–1682), every new monarch on the Russian throne<sup>2</sup> had made an effort to create his or her

<sup>1</sup> Published in *Polnoe sobranie zakonov Rossiiskoi imperii* (Izdanie pervoe [1649–1825] No.19904) (Tipografiia Vtorogo otdeleniia Sobstvennoi Ego Imperatorskogo Velochestva kantseliarii, St. Petersburg, 1830).

<sup>2</sup> It was obviously part of a more general European tendency of the seventeenth and eighteenth centuries to codify law. See Reinhard Zimmermann, “The Civil Law in European Codes”, in Hector L. MacQueen, Antoni Vaquer and Santiago Espiau Espiau (eds.), *Regional Private Laws and Codification in Europe* (Cambridge University Press, Cambridge, 2003), 18–60; Helmut Coing, “An Intellectual History of European Codification in the Eighteenth and Nineteenth Centuries”, in Samuel J. Stoljar (ed.), *Problems of Codification* (Australian National University, Canberra, 1977), 16–29.

The drive to codify civil law in Russia, in particular, has extended across three different political systems: the Tsarist Imperial, Soviet and post-Soviet. For an overview of this process

own comprehensive collection of domestic law in place of the Council Code (*Sobornoe ulozhenie*) of 1649.<sup>3</sup> A number of attempts to develop a new code—the so-called ‘New Code Book’ (*Novoulozhennaia kniga*)—were undertaken by Peter I (reigned 1682-1725). Toward the second half of the eighteenth century, a code increasingly became, in a sense, an *idée fixe* of the monarchs: Elizabeth I, Catherine II and Paul I were already unsatisfied with the earlier practice of appointing commissions—which had proven unsuccessful—and sought new ways of structuring work aimed at the creation of a code.<sup>4</sup> Thus, Elizabeth (reigned 1741-1761) ordered the production of a new code (*ulozhenie*); and, from 1754 through 1756, representatives of various estates were called together to form a kind of council. However, neither this attempt nor the more widely-known Codification Commission of Catherine the Great II (reigned 1762-1796) produced any results. In order to finally achieve results, Paul I (reigned 1796-1801) limited the task to the compilation of a commercial code and came up with a radical method to realize his plan: the leading merchants of St. Petersburg were locked up in a wing of Gatchina Palace and told that they would be granted their freedom only in exchange for a code.

This anecdotal story is a quintessential example of the overall approach of European absolutists: toward the middle of the eighteenth century, concern over the creation of a code was a necessary part of the labors of an enlightened monarch, and its publication was the greatest compliment for philanthropic absolute power. This idea was best expressed by Frederick of Prussia (reigned 1740-1786), who wrote that, in his code, all legislation was “properly ordered, expressed in the language of the nation, and presented in such a way so as to be understood by every citizen who received even the most modest of educations”.<sup>5</sup>

On the whole, however, the codification projects of the Russian absolutists were fueled not by the need for practical enforcement of the law or the demands of interested groups but, rather, by fashion and

by the chairperson of the RF Civil Code drafting team, see Alexander L. Makovskii, “Civil Legislation in the Soviet Planned Economy and in the Russian Market Economy”, in Kathryn Hendley (ed.), *Remaking the Role of Law: Commercial Law in Russia and the CIS* (Juris Publishing, Huntington, NY, 2007), 63 *et seq.*

<sup>3</sup> Enacted by Tsar Alexei Mikhailovich, this was the most comprehensive compilation of Russian legislation since the *Russakaia Pravda*. The *Sobornoe ulozhenie*, in turn, evidenced some degree of influence by the Litovian Statute (*Lietuvos Statutas*). On the history of Russian law, see the detailed monograph of Semen Pakhman, *Istoriia kodifikatsii grazhdanskogo prava*, Vol. I (Tipografiia Vtorogo otdeleniia sobstvennoi ego imperatorskogo velichestva kantseliarii, St. Petersburg, 1876), 203-472.

<sup>4</sup> See Oleg Omel'chenko, *Kodifikatsiia prava v Rossii v period absolutnoi monarkhii (Vtoraia polovina XVIII v.)* (Vsesoiuznyi iuridicheskii zaochnyi institut, Moscow, 1989).

<sup>5</sup> Quoted in Alan Watson, *The Making of Civil Law* (Harvard University Press, Cambridge, MA, 1981), 101.

considerations of the prestige of the monarch and his monarchy.<sup>6</sup> Yet, overshadowed by more urgent political matters, these ambitions ultimately could not be realized.

As one of the departments of the state apparatus, the Commission for the Compilation of Laws (*Komissiiia sostavleniia zakonov*, hereinafter “the Commission”) was inherited by the young Alexander I (reigned 1801–1825) from his predecessor Paul I. As was often the case in eighteenth-century Russia, the monarch sought to use structural innovations as a means of speeding up the work at hand: in 1803, the Commission was placed under the direction of the Ministry of Justice; in 1809, it was reformed; and, thereafter—on 1 January 1810—became an institution under the State Council (*Gosudarstvennyi Sovet*). On this same day, a draft Civil Code (*Proekt Graszdanskogo Ulozheniia*) prepared by the Commission was submitted to the State Council.

The persistently fruitless attempts of previous rulers had finally been crowned with success, which has justly been linked with the appointment, in 1808, to the Commission of Mikhail Speranskii, whose career was then at its zenith. Speranskii’s golden quill—or, to be exact, his pencil, with which he was always capable of writing about any subject with both style and logic—made him a unique figure of, as Pushkin put it, the “splendid beginning” of Alexander’s reign. The codification of laws was not completely unfamiliar to Speranskii. His contemporaries said that, according to Speranskii, it was thanks to his organizational talents that the merchants were released from their confinement under Paul at Gatchina. At that time, the young Speranskii was able, in record time—by questioning the merchants and using the palace library—to draft a commercial code and to appease the madcap monarch.<sup>7</sup> Readers will not find any mention of this story in major works on the history of Russian law.<sup>8</sup> It is likely that, for legal historians, the participation of the creator of the Digest of Laws of the Russian Empire in such an odd tale could be seen as denigrating to Speranskii’s dignity in the eyes of readers.

Nonetheless, in 1808, Speranskii began to work just as quickly as he had previously with the arrested merchants in Gatchina, guided by his desire to achieve results as soon as possible. Unlike his many predecessors, Speranskii tried to define the problem of codification as concretely as possible, turning it into a manageable bureaucratic task. The practical significance of reviewing existing legislation was obvious: a clear system

<sup>6</sup> On the political aspects of codification in Europe, see Jan H.A. Lokin and Willem Jans Zwalve, *Hoofdstukken uit de Europese Codificatiegeschiedenis* (Kluwer, Deventer, 3rd ed. 2001).

<sup>7</sup> Nikolai Grech, *Zapiski o moei zbizni* (A.S. Suvorin, St. Petersburg, 1886), 64–65.

<sup>8</sup> An exception is the very detailed study on Speranskii by Marc Raeff, *Michael Speransky: Statesman of Imperial Russia, 1772–1839* (Martinus Nijhoff, The Hague, 2nd rev. ed. 1969).

of legislation free of contradictions would be able to rescue the existing practice of administration (which also included legal proceedings at that time) from inevitable defects.

In order to ensure that the work of systematizing Russian law did not occupy too much time, Speranskii's Commission was organized into several editorial departments, which divided the work in accordance with European practices of the time: the branch (*otrasl'*) principle. Several branch codes—criminal, civil and commercial, as well as civil and criminal procedure—were compiled by the Commission simultaneously.<sup>9</sup> The Commission based itself on the successful experience of France, where—at the beginning of the century—five branch codes had been developed and adopted in a short time, the best-known of which was the Civil Code of 1804, which was officially renamed the Napoleonic Code in 1807.

For the problem of codification, Speranskii borrowed not only a general approach but, also, specific details. The draft 1809 Russian Civil Code, which had been submitted to the State Council, clearly resembled the French Code. Such a conclusion is evident from a mere comparison of the structure of both works. Gianmaria Ajani has noted that—beginning in modernity—codification efforts could not be original since they used the experience of other national codes.<sup>10</sup> From this point of view, Speranskii's borrowing of the structure and of portions of the Napoleonic Code was a normal part of contemporary European practice. Speranskii could not have avoided taking into account the experience of countries that had recently systematized their own civil legislation—Austria, Prussia and, especially, France, the empress of fashion.

In order to consider using foreign experience, Speranskii employed foreign experts in his codification work. For instance, it is known that a German professor of philosophy and political economy Ludwig Heinrich von Jakob, who came to Russia after Napoleon's troops invaded Halle, headed the drafting group of the Criminal Code (*Ulozbenie o nakazaniiax*).<sup>11</sup> Such practices were fully consistent with the general openness of the reform efforts at the beginning of the nineteenth century. It is also known that Alexander had also seriously considered the option of inviting foreigners to be involved in the codification of Russian law. This question was discussed a number of times at sessions of the Unofficial (*Neglasnyi*)

<sup>9</sup> *Trudy komissii sostavleniia zakonov*, Vol.1 (Senatskaia tipografiia, St. Petersburg, 1822), 113.

<sup>10</sup> Gianmaria Ajani, "The Role of Comparative Law in the Adoption of New Codifications", in *Italian National Reports to the XVth International Congress of Comparative Law* (Giuffrè editore, Milano, 1998), 65-82, at 69.

<sup>11</sup> See, further, Georg Sacke, "L.H. von Jakob und die russische Finanzkrise am Anfang des 19. Jahrhunderts", *Jahrbücher für Geschichte Osteuropas* (1938) No.3, 606-619.

Committee during the period 1801-1802.<sup>12</sup> In part, the Committee had drafted a letter in which—in the name of His Royal Highness—lawyers from Europe were invited to submit their recommendations for devising criteria for classifying and systematizing Russian legislation. It is also known that similar proposals had been made, in particular, to an authoritative German state functionary Friedrich von Stein, as well as to Jeremy Bentham. The first invitee refused, while the second failed to agree the terms of his engagement with Alexander I.<sup>13</sup>

But we shall not dwell here on the degree of influence that the Napoleonic Code actually had on Speranskii's draft.<sup>14</sup> We are primarily interested in what contemporaries thought of these borrowings. And here we see an interesting dynamic, the critical point of which was reached in 1812. Toward the beginning of that year, the first and second parts of the 1809 draft—which had been printed for general informational purposes—had been adopted (with only several minor changes) both by the Commission for the Compilation of Laws and by the General Assembly of the State Council.<sup>15</sup> Truly significant changes were made to the chapter on divorce, which was found in Part I. Discussion of Part III began in 1812, but this was soon left hanging due to a reform of the Commission for the Compilation of Laws. Its new leadership had asked the Emperor for guidance on how to proceed with the existing draft and, indeed, on just what form the new codification should take.

<sup>12</sup> Velikii kniaz' Nikolai Mikhailovich, *Graf Pavel Andreevich Stroganov, 1774-1814. Istoricheskoe issledovanie epokhi Aleksandra I*, Vol.2 (Ekspeditsiia zagotovleniia gosudarstvennykh bumag, St. Petersburg, 1903), 184, 193-194.

<sup>13</sup> Aleksandr Pypin, "Russkie otnosheniia Bentama", in *id.* (ed.), *Ocherki literatury i obschestvennosti pri Aleksandre I*, Vol.3 (Ogni, Petrograd, 1917), 1-109.

<sup>14</sup> Recent research has clearly shown that the chapters on proprietary interest, obligation and matrimonial and family law were influenced by the respective parts of the French Code. See, for example, Iuliia Tuikina, *Istoricheskoe sootnoshenie rossiiskogo grazhdanskogo zakonodatel'stva XVIII-XIX vv. i Kodeksa Napoleona 1804 goda: Avtoreferat dissertatsii na soiskanie uchenoi stepeni kandidata iuridicheskikh nauk* (Bashkirskii gosudarstvennyi universitet, Ufa, 2002). See, also, William Benton Whisenhunt, *In Search of Legality: Mikhail M. Speranskii and the Codification of Russian Law* (East European Monographs, New York, 2001).

<sup>15</sup> See Chapter 1, "O prave lichnom", and Chapter 2, "Ob imushchestvakh", in *Proekt Grazhdanskogo Ulozheniia Rossiiskoi imperii* (Senatskaia tipografiia, St. Petersburg, 1810).

### 3. The National *versus* the Rational Approach to Codification

“What can be said about the strange spawn of fancy, of the bad taste and ignorance that are forcefully invading our language, subverting its rules, offending our ear and good taste! Words such as *vdokbnovit'*, *vdokbnovitel'*, *vdokbnovitel'nyi*. With these words they wanted to translate the words *inspiré*, *inspirateur*. But these words are barbarous, non-transferable, and a place for them in Russian should not be granted.”

Nikolai Grech, *Obteniia o russkom iazyke* (1840).

The Commission's difficulties can be linked with one circumstance in particular: the sudden removal from state affairs on 12 March 1812 and the subsequent fall of its patron, Speranskii. The new leadership hurried to protect itself from errors and to gain approval from 'on high' of its understanding of the task of codification. In the Considerations (*Soobrazheniia*)<sup>16</sup> handed up to the Emperor, the Council (*Sovet*) of the Commission—appointed in place of the ousted Speranskii—specified two contradictory paths for the publication of a code of laws. The *first* suggested the systematization of existing legislation with necessary additions, while the *second* called for the adoption of new principles borrowed from foreign legislation. It is not difficult to guess that the second path was linked with the drafts of branch codes prepared by Speranskii and was decisively rejected by the new leadership.

Speranskii's successors contended that the very idea of legislators voluntarily changing the institutions making up the existing system was out of the question. The strength of the state, they said, was in the preservation of existing laws: “[a]ny law can more befit a state when it has been illuminated by time [...] Not just people but also time establishes and determines the principles of legislation.”<sup>17</sup> Thus, the conclusion was that—when systematizing law—it was necessary to be guided, first of all, by the existing system and not to reply upon borrowing from foreign law. Therefore, the Commission suggested concentrating on the collection of existing legislation and thereafter—on the basis thereof—to extract new legal provisions. The Considerations argued that these extracts from Russian law, on specific topics, had already begun to be collected in the form of the compilations (*svody*) of Russian legislation. From these, it should have been “obvious [to everyone] that all materials were obtained

<sup>16</sup> *Soobrazheniia* were a special type of document designed to explain the future policy goals of a particular government ministry or department to the wider state apparatus. These are to be distinguished from *poiasnitel'nye zapiski*, which traditionally accompanied pieces of draft legislation, e.g., in the late imperial period as well as in the Soviet era—and even in post-*perestroika* times.

<sup>17</sup> “Soobrazheniia Komissii sostavleniia zakonov”, in *Trudy ...*, *op. cit.* note 9, 138.

in Russian law”.<sup>18</sup> It was suggested that commentaries and comparisons with foreign laws—while beneficial for legislative work—should not be publicized.

It should be stressed that the Commission considered it especially important to present the code as a collection of Russian laws based on existing law collected in *svody*. The term ‘*svod*’ is highlighted there on purpose, as it designates a new, national approach to codification. The emphasis on the collection of domestic legislation did not exclude comparisons with foreign systems, but it did demand that this be hidden from fellow countrymen. What was the basis of this secrecy? Here, we should consider the expectations caused by law-drafting, in general, and by the codification of laws, in particular, among the educated public at the beginning of the nineteenth century. According to one contemporary, jurisprudence was, at that time, “in high fashion”,<sup>19</sup> as a part of the general reformist mood and, consequently, legal romanticism of the era.

Interest in matters of legal policy was, in many respects, initiated by the authorities: the monarch and his ‘young friends’—who were captivated by debates about a ‘constitution’—tried to share their enthusiasm for reform with their educated subjects. With this in mind, and following the model of the English ministries, the Russian departments that were reformed in 1802 began to publish their own journals, which contained an unofficial part for the publication of articles on topical social and political problems. As a study by Viktoriia Kalendarova has shown, some of the most popular topics were ‘the law’ (*pravo*), ‘laws’ (*zakony*) and ‘legal monarchy’ (*zakonnaia monarkhiia*).<sup>20</sup> For example, the *St. Petersburg Journal* (*Sankt-Peterburgskii Zburnal*) of the Interior Ministry, following the French historian Andre Ferran, suggested to its readers that:

“[T]he construction of any society assumes three things: a ruler [*gosudar*], a nation [*narod*], and laws [*zakony*]. Without a nation, there is no state; without a ruler, there is no nation; without laws, there is no government, no legitimate ruler; without laws, power is tyranny; without power, laws are useless; without a ruler, power is ineffective.”<sup>21</sup>

<sup>18</sup> *Ibid.*

<sup>19</sup> A letter from Aleksandr Turgenev to his brother Nikolai, 10 March 1809, in *Arkhiv brat'ev Turgenevykh*, Vol.2 (Otdelenie russkogo iazyka i slovesnosti Imperatorskoi akademii nauk, St. Petersburg, 1911), 382. See, further, Arkadii Fateev, “K istorii iuridicheskoi obrazovannosti v Rossii”, 1 *Uchenye zapiski, osnovannye russkoi uchebnoi kollegiei v Prage* (1924), 158-174.

<sup>20</sup> Viktoriia Kalendarova, “Liberal'nye idei v Rossii v nachale 19 v.: popytki pravitel'stvennoi propagandy (opyt kolichestvennogo analiza sodержaniia pervikh ministerskikh zhurnalov)”, in European University at St. Petersburg (ed.), *Istochnik. Istorik. Istorii: Sbornik nauchnikh rabot* (Izdatel'stvo Evropeiskogo universiteta v Sankt-Peterburge, St. Petersburg, 2001), 52-72.

<sup>21</sup> *Ibid.*, 62.

Ferran did not assign a key role to the nation: for him, just as for Alexander's friends, the nation was one link in the chain of ruler-power-laws. The educated subjects, on the other hand, were prone to correlate the concepts of *laws* and *nation*. In his journal of 1803, the first director of the lyceum in Tsarskoe Selo, Vasilii Malinovskii, noted that:

“[L]egislation [*zakonopolozhenie*] without the participation of those subject to the legislation [*zakonopolagaemye*], without their advice and ideas, is a greater calamity than the existing defects in the laws.”<sup>22</sup>

By *zakonopolozhenie*, Malinovskii understood the creation of a system of law that would get rid of the disastrous “defects in the laws”. Malinovskii thought that representatives of the people should certainly participate in the creation of a new code (*ulozhenie*) since the law proceeded from the “national [*narodnyi*] idea”.

For Malinovskii, the code should have been an object of national pride—an original work of Russians:

“Up to now, just as [the Russians] are renowned in Europe for their courage and victories, their legislation will show just how deserving they are of great respect for the talents of their quick minds and keen understanding.”<sup>23</sup>

A view of the code as an act of “national victory” was elaborated in 1811 in the influential publicist tract *Memoir on Ancient and Modern Russia (Zapiska o drevnei i novoi Rossii*, hereinafter “Memoir”) by Nikolai Karamzin, the historian who “awakened” national ideas and feelings in Russians.<sup>24</sup>

The spirit of this work clearly lay in its overall critique of the reformist impulses of the young Emperor Alexander I:

“Russia has existed for about a thousand years and not in the form of a wild horde, but yet some insist that we need new institutions and regulations as if we just exited the dark American woods! We need a greater sense of preserving than creating.”<sup>25</sup>

In the area of the systematization of legislation, this general thesis was reduced to the idea of creating a *national ulozhenie*, i.e., one based on the principles of Russian law.

<sup>22</sup> “Razmyshleniia V.F. Malinovskogo o preobrazovanii Rossii”, *Golos minuvshago* (1915) No.10, 257.

<sup>23</sup> *Ibid.*, 258. Maria Andreeva provides other examples of patriotic rhetoric in discussions of the issue of codification in Russia in the first quarter of the nineteenth century. See Maria Andreeva, “Kodifikatsionnye proekty nachala tsarstvovaniia Aleksandra I”, *Vestnik Leningradskogo gosudarstvennogo universiteta* (1982) No.11, 75-78.

<sup>24</sup> On Karamzin and his Memoir, see Joseph L. Black, *Nicholas Karamzin and Russian Society in the Nineteenth Century: A Study in Russian Political and Historical Thought* (University of Toronto Press, Toronto, 1975); and Richard Pipes, *Karamzin's Memoir on Ancient and Modern Russia* (Harvard University Press, Cambridge, MA, 1959).

<sup>25</sup> Nikolai Karamzin, *Zapiska o drevnei i novoi Rossii v ee politicheskom i grazhdanskom otnosheniiakh* (Nauka, Moscow, 1991), 63. The *Zapiska* was known as a manuscript since 1811. It was first published in March of 1837 (with some deletions) in *Sovremennik*.

It should be stressed that Karamzin—who was also reputed to be an expert in the Russian language—did not himself write about a ‘national’ (*natsional’noe*) *ulozhenie*. Avoiding use of the French word ‘national’, Karamzin wrote about the necessity for Russians to create an orderly system of law on the basis of ‘our own’ (*svoi*), ‘domestic’ (*sobstvennyye*), ‘Russian’ (*russkie*) laws. This general principle and the details of the argumentation were repeated later, in the spring of 1812, in the Commission’s *Soobrazheniia*, which were drafted after Speranskii’s dismissal. In essence, they presented the main substance of Karamzin’s arguments. Leaving aside for the moment the question of the reasons for the sometimes striking similarity of views, let us turn our attention to a number of differences in Karamzin’s arguments.

*First*, Karamzin saw the possibility of legal borrowing in the broader (in comparison with the Commission’s leadership) geopolitical sense as a blow to the prestige of the state. He stressed that adoption of the French Code was the fate of conquered nations.

“Thanks to the Almighty, we have not yet fallen under the iron scepter of this conqueror—[Russia] is not yet Westphalia, not the Italian Kingdom, not the Duchy of Warsaw, where the Napoleonic Code, translated through tears, serves as the Civil Code [*Ustav grazhdanski*].”<sup>26</sup>

Karamzin was right in that Napoleon, indeed, saw the Civil Code as one of the means of asserting his dominion. For example, in a letter to his brother—Jerome, the King of Westphalia—Bonaparte professed that the introduction of the Napoleonic Code in German territory under French rule would give a strategic advantage to the new authorities, since it would introduce new freedoms that were unknown in the rest of Germany.<sup>27</sup>

*Second*, in Karamzin’s Memoir, contrary to the Considerations, the Russian state was endowed with anthropomorphic characteristics: legislative policy as the ‘deeds’ of the state were viewed from the point of view of the qualitative categories of ‘proprieties’ and ‘virtue’. In Karamzin’s interpretation, Speranskii’s Draft Civil Code (*Proekt Grazhdanskogo Ulozseniia*) was not only a foolish endeavor but, also, disgraceful for the state:

“Have we been laboring for some hundred years on the composition of our own complete *ulozhenie* in order to solemnly admit in the face of Europe that we are fools and to shove our heads under a book thrown together in Paris by six or seven ex-lawyers and former Jacobites?”<sup>28</sup>

*Third*, in Karamzin’s mind, legislation created under foreign conditions could not be borrowed from the practical point of view. Karamzin was convinced that the legal regulations of revolutionary France would not

<sup>26</sup> *Ibid.*, 90.

<sup>27</sup> Quoted in Pieter Geyl, *Napoleon: For and Against* (Jonathan Cape, London, 1957), 62.

<sup>28</sup> Karamzin, *op.cit.* note 25, 90.

work in Russia, where the existence or absence of civil rights was determined by belonging to a particular social group and not guaranteed by the national status of being ‘Russian’ (*russkii*):

“Would it be appropriate to begin a Russian *ulozhenie* with, for example, a chapter on civil rights that have never actually existed, and do not exist, in Russia? We have only political [rights] or the particular rights of various state ranks; we have noblemen, merchants, the petty bourgeois, etc.—they all have particular rights—they have nothing in common except that they are called Russians.”<sup>29</sup>

This is a very important point although there is a clear contradiction in the logic of his argument: Karamzin says that there were no rights and obligations that belonged to ‘Russians’ as a collective; instead, they developed at the same time in the various legal realities of the social groups defined by the state. If that was the case, then what ‘Russian concepts’ or, rather, the concept of what type of Russians—noblemen, merchants, petty bourgeois or members of other social groups—should form the basis of the national code?

Most likely, it was the diversity of legal rights in the hierarchy of Russian society that—for Karamzin—was the basic ‘concept’ of Russian law.<sup>30</sup> Enshrinement of the nation’s ‘legal habit’ (*pravovoi obychai*), within the strict categories of jurisprudence, would have ensured the protection of the old order, which was especially necessary from the point of view of the conservatives in their battle with foreign innovations. Here, Karamzin took a pragmatic look: legal transfer is a labor-intensive process for practical reasons. In criticizing the utopian nature of the reform plans at the beginning of the nineteenth century (Speranskii’s Draft Civil Code of 1809), Karamzin—as its greatest opponent—used a key argument: the doubtful practical feasibility of using a French post-revolutionary model of civil law legislation. Indeed, the hierarchical, disjointed Russian society, which was fragmented into numerous groups, each with a separate legal status,<sup>31</sup> was incapable of accepting the declarations of equality contained in the French Civil Code without a fundamental restructuring of the entire state system—political, social and economic. The luxury of large-scale borrowings was something to which only the draftspersons of legal reforms

<sup>29</sup> *Ibid.*, 90.

<sup>30</sup> For example, a right to have *krepostnye* (serfs) belonged only to *dvoriane* (the Russian aristocracy).

<sup>31</sup> On the diversity of the legal rights of different social groups in Imperial Russia, see Elise Kimerling Wirtshafter, *Structures of Society. Imperial Russia’s “People of Various Ranks”* (Northern Illinois University Press, De Kalb, IL, 1994); and the inspiring theoretical framework of Alfred J. Rieber, “The Sedimentary Society”, in Edith Clowes *et al.* (eds.), *Between Tsar and People. Educated Society and the Quest for Public Identity in Late Imperial Russia* (Princeton University Press, Princeton, NJ 1991), 343–367.

in revolutionary times could commit themselves—for example, those who created the Russian Civil Code at the beginning of the 1990s.<sup>32</sup>

We arrive here at the key questions: if the practical impossibility of the transfer of Napoleon's Code to the Russian legal system was evident, what was the sense of national rhetoric and what exactly was meant by the term 'the nation' (*narod*), the legal traditions of which were disputed by the adherents of national codification free from any kind of foreign borrowing?

This issue has already been addressed by those who have tried to explain the similarity of the nationalist positions of Karamzin's Memoir and the Commission's Considerations. In the opinion of Fedor Sevast'ianov,<sup>33</sup> the Speranskii factor was primarily responsible for the demands, *e.g.*, of Karamzin and of the authors of the Considerations, to stick to 'Russian legal principles' (*nachala russkogo prava*). On the basis of archival materials, Sevast'ianov has convincingly shown that the Commission's Considerations were the work of the Livonian baron, Gustav Andreevich Rozenkampf, who—from 1804 through 1808, until Speranskii's arrival—was the real leader of the codification effort and who, in 1812, exerted all of his efforts to regain his lost position. Thus, for Sevast'ianov, the appearance of demands for a conservative approach to codification was the embodiment of two tendencies: a general dissatisfaction with Speranskii's politics, concentrated in Karamzin's Memoir, and the private interests of Rozenkampf, who tried to contrast his own position with the actions of the out-of-favor patron.

Sevast'ianov uses this pragmatic explanation to argue that the opposition to Speranskii's work was (more) based on personality and not (at all) on a view that the draft itself was, in any way, deficient.<sup>34</sup> On the one hand, this view of Sevast'ianov—to us—is not an unreasonable one. Sevast'ianov is, thus, able to illustrate the true motives of interested actors who were on the stage with Speranskii. On the other hand, Sevast'ianov's argument needlessly reduces the complexity of the situation. It ignores the independent question of the means (*e.g.*, why and which?), used by the enemies of Speranskii to attempt to defeat him and his draft; in particular, the question of treating the 'national' (*natsional'nyi*) language of the

<sup>32</sup> There are obvious parallels involving large-scale borrowings that can also be drawn with other 'revolutionary' eras in Russian history, such as the 1922 Russian Civil Code; however, a detailed consideration of this analogy is beyond the scope of this study.

<sup>33</sup> Fedor Sevast'ianov, "Konservativnaia al'ternativa kodifikatsii russkogo prava v pervoi treti 19 v. (k postanovke problemi)", paper presented at the conference "Conservatism in Russia and Worldwide: Past and Present", 30 October–1 November 2002, Voronezh, Russia, available at <<http://conservatism.narod.ru/oktober/oktober.html>>.

<sup>34</sup> This is in distinction to the late nineteenth-century criticism of failing to properly evaluate Speranskii's work at the beginning of the twentieth century. See *infra* note 101.

political conflict surrounding the code as an important research object. Why did this language become such an effective weapon in the political debate among interested parties that, as we will see later, even Speranskii himself subsequently used it with the aim of legitimizing his own later attempt at codification?

It seems that there is no simple answer to this question. Indeed, the circumstances surrounding Speranskii's dismissal could have brought about the change in the general spirit of the program document of the new leadership of the Codification Commission. In the spring of 1812, Petersburg was buzzing with rumors about Speranskii's parricide in favor of the French, which led to his sudden replacement. From this point of view, the borrowing revealed by Karamzin in Speranskii's Draft Civil Code provided additional evidence of Speranskii's criminal Gallicism. In this situation, cutting oneself off from the previous non-Russian<sup>35</sup> method of codification was a natural step for the new leadership of the codification effort.

However, one should not exaggerate the significance of Karamzin's denunciatory criticism and of the personal motives of individuals involved in the sad fate of Speranskii's draft. Both Speranskii and the leadership of the Commission for the Compilation of Laws had expressed ideas similar to many others, the source of which could be found in the national-patriotic feelings of the Russian elite, who were united by the great desire for a 'nation'—a 'Russianness' (*russkost'*), a distinct community (*soobschestvo*). We should remember that Malinovskii demanded this when he spoke about the initiatory nature of codification for the Russian nation as a way of "proving" itself: "their legislation will show just how deserving they are of great respect".<sup>36</sup>

The calls for Russians to create their own 'national code' were a reflection both of specifically Russian circumstances and of the wider circulation of ideas. On the one hand, as the twentieth-century historian, Lea Greenfeld, has noted, this was one stage in the development of the nationalism of the nobility, which was linked with a crisis of identity of the 'state' estate (*gosudarstvennoe soslovie*).<sup>37</sup> In the demands to establish 'national' legal principles, the Russian first estate (*dvorianstvo*) sought salvation in antiquity, in the established system of socio-economic relations. These are the same ideas that had been expressed in Karamzin's Memoir.

<sup>35</sup> Karamzin, *op.cit.* note 25, 92: "No Russian, in reading this draft, would guess that he was reading our *ulozhenie* if it were not written in the title: nothing is Russian, nothing is written in Russian."

<sup>36</sup> "Razmyshleniia V.F. Malinovskogo ...", *op.cit.* note 22, 256.

<sup>37</sup> Lea Greenfeld, *Nationalism: Five Roads to Modernity* (Harvard University Press, Cambridge, MA, 1992).

And they had also been expressed earlier by other members of the elite. For example, Denis Fonvizin took from his travels around France at the end of the 1770s the idea that Russian serfs enjoyed a great deal more freedom than France's poor:

"I learned to distinguish between freedom in law and real freedom. Our people don't have the former, but they enjoy the latter in great measure. On the contrary, the French, who have the right to freedom, live in absolute servitude."<sup>38</sup>

In addition, the demands for their own special law reflected the usual swinging of the pendulum of Russian nationalism, forever moving between extremes of attraction and repulsion in relations with the West. The stage of proximity—"optimistic nationalism", in Greenfeld's terminology—was characterized by the certainty that Russia was developing along the same path as the West. This was understood as the path of progress, the path of the modern, meaning a potentially stronger state. France was just such a state, whose cultural hegemony gradually took the form of the military aggression of the Napoleonic wars. The grandiose French expansion was a visible confirmation of the strength of that which was modern, superior, and imposed itself as universal.

Nationalism was one of the driving forces behind the movement of the masses of peoples that accompanied the bloodletting at the beginning of the nineteenth century, first from the West to the East and then back again from the East to the West. Nationalism researchers often use as a theoretical basis the juxtaposition of 'Western', 'civic' nationalism and 'Eastern', 'ethnic' nationalism.<sup>39</sup> Moreover, Eastern/ethnic nationalism, as Gregory Jusdanis has convincingly shown, entails not only the 'liberating'—in its own fashion—national self-awareness of subjugated nations or, in other words, 'colonial' nationalism.<sup>40</sup> Ethnic nationalism was also a natural reaction to the claims of modern states/peoples to economic, ideological and political hegemony. From this point of view, the appearance of German and Greek nationalism is an indicative example of the so-called Eastern type of nationalism reacting to a more modern 'other'.<sup>41</sup>

It seems that, despite the conventionality of this system of classification—which has been subjected to justifiable criticism for the insertion of qualitative criteria, contrasting good/civic/democratic/Western

<sup>38</sup> A letter from Denis Fonvizin to Petr Panin, 18 September 1778, in Denis Fonvizin, *Sobranie sochinenii: v dvukh tomakh*, Vol.2 (Gosudarstvennoe izdatel'stvo khudozhestvennoi literatury, Moscow, Leningrad, 1959), 485-486.

<sup>39</sup> Anthony D. Smith, *National Identity* (Penguin, London, 1991); Greenfeld, *op.cit.* note 37; Michael Ignatieff, *Blood and Belonging: Journeys into New Nationalism* (Vintage, London, 1994); Ernst Gellner, *Nationalism* (Weidenfeld and Nicolson, New York, 1997).

<sup>40</sup> Gregory Jusdanis, *The Necessary Nation* (Princeton University Press, Princeton, NJ, 2001).

<sup>41</sup> *Ibid.*

nationalism with bad/ethnic/totalitarian/Eastern nationalism<sup>42</sup>—we can nevertheless still use it. The discussion of the national codification of Russian law was, on the whole, provoked by ‘other’ foreign nationalism. The French Civil Code, as a modern intellectual product, was not simply a technocratic instrument—a legal technique accessible to others. It was, first and foremost, a national product, superior in its essence to the legal acts of other states, a unique modern instrument of subsequent national expansion.

The 1804 code is known as one of the chief documents of French civic nationalism for a number of reasons. One of the defining characteristics of being French was the equal possession of civil rights, as was established in Article 8 of Book 1 of the Code (‘On Persons’): “*Tout Français jouira des droits civils* [Every French citizen enjoys civil rights]”.<sup>43</sup> Two points should be made here. *First*, legal particularism was eliminated: the various civil-law norms of the individual provinces were replaced by a unified French law, which covered the entire territory of the state. *Second*, in the Declaration of Rights of Man and Citizen, in the sphere of civil relations, the central institution of which is ownership, the difference in the legal rights of various social groups was eliminated in law. Thus, the French Civil Code was a unique constitution<sup>44</sup> of the citizens of France who were born along with the Revolution.

French civic nationalism—founded on the universal principles of natural law—was repulsed in the face of the ideas of the cultural nationalism of German intellectuals. The sources of this nationalism could be found in the metaphysical philosophy of Friedrich Schelling, who contrasted the idea of revolution with the idea of limited development: organicism. Contrary to the cosmopolitanism and rationalism of the French Enlightenment, the German Romantics attached the most importance to the unique experience of an individual nation, “explaining it in the attractive forms of national poetry and in a number of metaphysical systems”.<sup>45</sup>

<sup>42</sup> Rogers Brubaker, “Myths and Misconceptions in the Study of Nationalism”, John A. Hall (ed.), *The State of the Nation* (Cambridge University Press, Cambridge, 1998), 298–302.

<sup>43</sup> Ivan S. Pereterskii (trans.), *Frantsuzskii grazhdanskii kodeks 1804 goda* (Iuridicheskoe izdatel'stvo Narodnogo Komissariata Iustitsii, Moscow, 1941), 7.

<sup>44</sup> On the constitutional function of the Napoleonic Code, see John H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press, Stanford, 2nd ed. 1985), 49. This recalls the words of Sergei Sergeevich Alekseev (a Russian legal philosopher and former Chief Justice of the USSR Committee of Constitutional Supervision and a member of the Russian constitutional and Civil Code drafting commissions) who has termed the new Russian Civil Code as a constitution of a market economy. See, for example, Sergei Sergeevich Alekseev, “Misiia Rossiiskoi nauki”, *Iurist* (December 2000) No.49, 2.

<sup>45</sup> Sergei Platonov, *Lektsii po russkoi istorii* (Lan', St. Petersburg, 1996), 18. On German romanticism, see Dietrich von Engelhardt, “Romanticism in Germany”, in Roy Porter and Mikulas

Karamzin's early nineteenth-century *History of the Russian State (Istoriia gosudarstva rossiiskogo)* was an experience in the creation of such a system—the invention of the tradition of national statehood. Just as with history, a nation's law—as visible evidence of that which is unique about the nation—was a buttress of cultural nationalism, inventing the spirit of the nation. Furthermore, legislation, as the quintessence of the political and socio-economic order of the state, was the most important political institution—requiring protection from unfavorable comparisons with foreign models. And, in this case, the language of nationalism was becoming an important instrument in the political battle for preservation of the existing system. It was not by chance that the jurisprudence of the nineteenth century was clearly characterized by nationalism, which was expressed in the persistent search for national features of legal systems and representatives of the legal profession of this or that state. Although the national factor, as Alan Watson wrote, has been “the major, if not always the main, factor in legal change in the western world since the later Roman Empire”,<sup>46</sup> the invention of national law was made possible thanks to the theoretical developments of the historical school of nineteenth-century legal studies, which had a strong influence on global jurisprudence.<sup>47</sup>

When Karamzin insisted that Russians find their own legal principles instead of borrowing from foreign experience, Professor Friedrich Carl von Savigny of Berlin University was teaching that the law—as the embodiment of the national spirit (*Völkgeist*)<sup>48</sup>—was as much a sign of the nation as was language, which was not in the power of rulers to change. The historical school of legal studies of von Savigny was based on general organic theory.<sup>49</sup> In place of the ideas of natural law and its universalism of the rights of citizens and disdain for traditions and national borders

Teich (eds.), *Romanticism in National Context* (Cambridge University Press, Cambridge, 1988), 109-133.

<sup>46</sup> Alan Watson, *Legal Transplants and European Private Law/Ius Commune Lectures on European Private Law 2* (Metro, Maastricht, 2000), 14.

<sup>47</sup> See, for example, the case studies of Stephen Jacobson, “Law and Nationalism in Nineteenth-Century Europe: The Case of Catalonia in Comparative Perspective”, 20(2) *Law and History Review* (2002), 338-343; and Eric H. Reiter, “Imported Books, Imported Ideas: Reading European Jurisprudence in Mid-Nineteenth-Century Quebec”, 22(3) *Law and History Review* (2004), 473-480.

<sup>48</sup> Here it is worth noting that, according to the unpublished research of Markus Dubber (“The Sense of Justice in German Jurisprudence”), Savigny referred to the term ‘*Völkgeist*’ only after his follower Georg Friedrich Puchta had extensively used it in his *Das Gewohnheitsrecht* (1828-1837, 2 vols.). See Walter Otto Weyrauch, “Book Review: Folk Law: Essays in the Theory and Practice of Lex Non Scripta by Alison Dundes Renteln and Alan Dundes”, 42(4) *American Journal of Comparative Law* (1994), 807-810, fn.5.

<sup>49</sup> See, also, Elena Timoshina, “Organitsizm’ kak metodologicheskaia orientatsiia konservativnoi pravovoi filosofii”, *Pravo i politika* (2000) No.10, available at <[http://www.nbpublish.com/lpmag/lpmag.php?in=mags&rub\\_id=9](http://www.nbpublish.com/lpmag/lpmag.php?in=mags&rub_id=9)>.

came an understanding of the national idea, which determines a nation's way of life, morals and political and social institutions.

The search for the nation undertaken by philosophers, historians, legal scholars and poets reflected the general tendency towards disappointment in the ideas of the natural cosmopolitan, who turned out to be an armed French soldier, a barbarian with hands stained by the blood of revolt. Against this background, the political theory of conservatism, working in the name of tradition, became particularly popular. Laws, in the understanding of conservatives, were the fruit of tradition, a visual incarnation of inherited order. On the whole, this ideology was crystallized in the principle of “from the opposite”—from the ideas of the Enlightenment inscribed on the standards of rebels. As the British ideologue of conservatism, Edmund Burke, had written, the essence of the French Revolution could be summed up in the “violation of property, law, religion united in one object”.<sup>50</sup>

According to the ideas of conservatives, a ‘legal monarchy’, on the other hand, should be based on the “great hereditary wealth and hereditary dignity of a nation”.<sup>51</sup> Language allows for the personification of the abstract concepts ‘wealth’ and ‘dignity’ as an indication of the unified control of social forces by those who possessed capital and aristocratic titles. Because it was necessary for the guardians of legality in a ‘legal monarchy’ to maintain their positions of power, they had to look for national/popular traditions of the existing order to contrast them with seditious ideas about the international natural rights of people.

Within this atmosphere of the circulation of ideas at the turn of the eighteenth and nineteenth centuries—described by the late nineteenth/early twentieth-century historian Sergei Platonov as a time “of a great break in the spiritual life of humanity”,<sup>52</sup> which was characterized by a movement away from rationalism toward romanticism—the historical figures in this drama formulated their notions of national law. Two students of German professors—Rozenkampf (who received his education in Leipzig) and Karamzin (who studied at the boarding school of Professor Schad at Moscow University)—can be included within the ‘German group’ of the Russian elite, whose opposition to the so-called ‘gallophiles’ was described by contemporaries.<sup>53</sup> The former, to one degree or another, developed the ideas of national romanticism and organic political development. The lat-

<sup>50</sup> Jonathan C.D. Clark (ed.), *Edmund Burke, Reflections on the Revolution in France: A Critical Edition* (Stanford University Press, Stanford, CA, 2001, first published in 1790), 283.

<sup>51</sup> *Ibid.*, 291.

<sup>52</sup> Platonov, *op.cit.* note 45, 655.

<sup>53</sup> Raeff, *op.cit.* note 8, 178.

ter remained adherents of the rationalistic views of the Enlightenment, which were popular at the beginning of the reign of Alexander I—a time of reform. Based on the example of the codification efforts of Speranskii, an acknowledged *gallophile*, we have seen how the rational approach to legislative policy worked: the creation of a code was perceived as a rational task that required the most modern legal solutions. Law was seen, first and foremost, as a technical matter, as a means—if not to the modernization, then at least to a certain optimization—of state rule. Moreover, one should take into account that, after the 1789 French Revolution, the French Civil Code was celebrated as not only the most modern but, also, as the most “liberal”<sup>54</sup> (or even ‘democratic’), as it embodied equality in civil rights. This reputation of the French Code also played a role in Russian debates on codification patterns in the nineteenth century.

In addition to the general context of the circulation of ideas, the particularities of the Russian situation should be added, which—as the late-nineteenth-century civil-law scholar, Gabriel’ Shershenevich, wrote—ensured the historical school of law’s “success in Russia thanks to the favorable circumstances which existed for it.”<sup>55</sup> In the changing ideological situation, the external political situation brought about a number of changes. In the face of the French threat to the sovereignty of the Russian Empire, national feelings intensified, becoming a driving force for building a state ideology. The penchant for cultural nationalism, which was seen as being in opposition to the “Other”,<sup>56</sup> was already taking shape under Catherine the Great. The caustic satire of Nikolai Novikov, Iakov Kniazhnin and Denis Fonvizin ridiculed the lame attempts of some of the national elite (noblemen) to renounce what was Russian in blind admiration for what was French. The stupidity and impropriety of the behavior of such gentlemen were depicted in contrast to the patience, kindness and wisdom of their servants, who symbolized nation (*narod*).

The war of 1812—known since the 1830s as the Fatherland War (*Otechestvennii voina*)—was a powerful catalyst for the idea of nationalism. The greatness of the conqueror symbolically underlined the greatness of that which was not subjugated—or, expressed in ‘national’ terms—of the nation that defeated the conqueror.<sup>57</sup> Having proved its impregnability

<sup>54</sup> Aristides N. Hatzis, “The Short-Lived Influence of the Napoleonic Civil Code in 19th Century Greece”, 14 *European Journal of Law and Economics* (2002), 253–263, at 254.

<sup>55</sup> Gabriel’ F. Shershenevich, *Nauka grazhdanskogo prava v Rossii* (Tipografia Kazanskogo Imperatorskogo universiteta, Kazan’, 1893), 22.

<sup>56</sup> See, further, on the role of the “Other” in cultural studies, Homi K. Bhabha, *The Location of Culture* (Routledge, London, New York, 1994).

<sup>57</sup> Here, it is worth mentioning that an analysis of Soviet-Russian history textbooks shows that—regardless of changes in the dominant ideology—Napoleon has been the most cited

in the battle with the ‘new Attila’, the particular spirit of the Russians began to be seen as an object that required research, discussion and the attention of society.

Here, it is worth noting the irony of language: the formation of the Russian patriotic lexicon was made possible thanks to the national rhetoric drawn from the experience of the French Revolution. The Russian elite’s acquisition of a national identity was accompanied by the instability of new concepts in the language. As the twentieth-century scholar of Russian literature, Victor Vinogradov, has noted, when the leading figures of the second decade of the nineteenth century—who made a great contribution to the development of Russian culture—used the words *narodnyi* and *natsional’nyi*, they referred to the French source of the terms to ensure that they were understood correctly. For example, such a double Russian-French usage can be found in Pushkin, who put a French translation for his Russian expression “*vo vsekh otnosheniakh samyi narodnyi (le plus national et le plus populaire)* [in all respects, the most national]”.<sup>58</sup>

At the same time as representatives of the cultural elite were still discussing how to use the French discourse of ‘nation’ in a Russian context,<sup>59</sup> the codification issue started to be clearly perceived as an act of the self-affirmation of the Russian people. Moreover, taking into account that representatives of the people were only allowed to take part in legislative activities under the pressure of the 1905 revolution, then the ‘Russian nation’ (*russkii narod*), in this case, was understood to mean only the state. Thus, the creation of a code began to be seen as a part of the national course of domestic politics and, subsequently, as of its further formulation through the principles of the ideology of so-called ‘official nationality’ (*ofitsial’naia narodnost’*); the concept of this ideology was originated by Minister of Education Count Sergei Uvarov in his famous motto of 1832 “*Pravoslavie, Samoderzhavie, Narodnost’* [orthodoxy, autocracy, nationality]”.<sup>60</sup> Long before, however, Karamzin’s Memoir clearly had outlined the fundamental idea of the national popular approach to codification: “an old nation [*narod*] doesn’t need new laws”. In other

foreigner, leaving in his wake even classics of Marxism. See Iuliia Titova, “Rossiiskaia istoriia glazami shkol’nika”, *Pervoe sentiabria* (2001) No.28, available at <<http://his.iseptember.ru/article.php?ID=200102802>>.

<sup>58</sup> Viktor Vinogradov, *Iazyk Pushkina: Pushkin i istoriia russkogo literaturnogo iazyka* (Academia, Moscow, Leningrad, 1935), 263 and 265-266.

<sup>59</sup> See Iurii Lotman, “Problema narodnosti i puti razvitiia literatury preddekabristskogo perioda”, in Pavel Gromov (ed.), *O russkom realizme i voprosakh narodnosti literatury* (Goslitizdat, Moscow, Leningrad, 1960), 3-51.

<sup>60</sup> See, further, Cynthia H. Whittaker, *The Origins of Modern Russian Education: An Intellectual Biography of Count Sergei Uvarov, 1786-1855* (Northern Illinois University Press, De Kalb, IL, 1984), 86-127.

words, inspiration should be sought not in foreign models but, rather, in the adaptation of existing law.

#### 4. *Svod versus Ulozhenie*

“The essence of a metaphor is understanding and experiencing one kind of thing in terms of another.”

George Lakoff and Mark Johnson, *Metaphors We Live By* (1980).

Karamzin described the procedure of creating “a consolidated book [*svodnaia kniga*] of Russian laws” as a very simple matter: by combining scattered legislation under defined topics and adding whatever was necessary, the legislator would soon get a book of laws essential for court proceedings. It should be stressed that Karamzin called this collection of laws not a code (*ulozhenie*) but, rather, a consolidated book (*svodnaia kniga*)—shortened to *svod* (usually translated as ‘digest’).

Prior to Karamzin and the Commission for the Compilation of Laws, there was no meaningful difference between the terms *svod* and *ulozhenie*. From the seventeenth century to this moment in time, they were used interchangeably.<sup>61</sup> But Karamzin—as a founder of Russian conservative (legal) thinking—clearly contrasted the *svodnaia kniga* with that which he deemed to be a more unreliable form of systematizing laws: the *ulozhenie*. In his view, an *ulozhenie* was linked with Napoleon and his Code Civil. Karamzin and his ‘school’ were not oblivious to the seventeenth-century *Ulozhenie* of Alexei Mikhailovich (Council Code) which they saw as a traditional Russian legal document. But they were convinced that introducing an *ulozhenie* at the beginning of the nineteenth century posed innumerable more difficulties for the Russian Emperor than it did for his predecessor. In particular, the Karamzin school saw dangers for the Russian Emperor in a legal instrument that was now associated with the revolutionary product of Europe’s *enfant terrible*—revolutionary France. They doubted that the Russian Emperor could lead the drafting process as Napoleon had done; and, in such a case, the task would fall upon the shoulders of the Russian (legal) elite, which, in the mind of Karamzin and his supporters, had become ‘poisoned’ by the Western European philosophy of *liberté, égalité et fraternité* (*svoboda, ravenstvo i bratstvo*). It should be noted that the meaning of *svod*—in this case, as an independent means of classification, as used by Karamzin and Rozenkampf—was a linguistic innovation, a new broadening of an existing concept.

<sup>61</sup> For example, the 1649 *Sobornoe Ulozhenie* and the *svody zakonodatel'stva*. More examples are in *Polnoe Sobranie zakonov Rossiiskoi imperii. Sobranie pervoe* [1649-1825] (18 February 1700) No.1765; and (6 February 1735) No.6686.

As a 1847 dictionary of the Russian language (considered to be the most authoritative) illustrates, the term *svod* meant—first and foremost—“the effect of bringing together, collation” (*svedenie, slichenie*).<sup>62</sup> In the list of definitions, the dictionary fails to provide any specific legal meaning of the term *svod*. *Svod zakonov* (digest of laws) was used in the dictionary as an example of the use of the word *svod*. Similar to the noun *svod*, which has its roots in the verb (*svesti, svodit*), *ulozhenie* also came from a verb (*ulozhit*). The dictionary gave a general definition for it: “an indication of the effect of laying something out or structuring something”.<sup>63</sup> Contrary to *svod*, however, *ulozhenie* was presented by the compilers of the dictionary as a legal term with two meanings: “1. *Uzakonenie, uchrezhdenie, ustav* [statute, regulation]; 2. *Kniga, soderzhashchaia v sebe izdannye zakony* [a book containing published laws]”.

We will return to the question of how the meaning of *ulozhenie*—as a type of normative act—appeared. For now, however, there is another important point: with respect to the variety of its usage, the term *svod* was much more general than the specific legal term *ulozhenie*. Nevertheless, in documents spanning from the seventeenth to the beginning of the nineteenth century, these terms were usually used side-by-side to indicate attempts to create a replacement for the *Sobornoe Ulozhenie* of 1649.<sup>64</sup> From an analysis of the edicts related to the activities of codification commissions of that time, it is possible to see regular usage in official language of the formulation *svod ulozheniia*.<sup>65</sup> Implying the codification (*kodifikatsiia*) and systematization (*sistemizatsiia*) of legislation, which were unknown in Russia at that time, the term *svod ulozheniia* included both a process (*svod*: collection) and a result of the work (*ulozhenie*: structure). In general, as some historians of the codification of Russian legislation have pointed out, the word *svod* indicated at that time a technical process: the thematic ordering of laws regulating a particular area of legal relations.<sup>66</sup> Whenever the codification of laws was discussed, the terms *svod* and *ulozhenie* were used together, which—by the beginning of the nineteenth century—had given rise to a hybrid term: *svodnoe ulozhenie*. We should remember that

<sup>62</sup> *Slovar' tserkovnoslovianskogo i russkogo iazyka, sostavlennyi Vtorym otdeleniem Imperatorskoi akademii nauk*, Vol.3 (Tipografiia imperatorskoi akademii nauk, St. Petersburg, 1847), 102.

<sup>63</sup> *Ibid.*, 340.

<sup>64</sup> The 1649 *Sobornoe ulozhenie* was a key legal document of late medieval Russia. For an example of the attempts to replace it, see, e.g., *Polnoe Sobranie zakonov Rossiiskoi imperii. Sobranie pervoe* [1649-1825] (18 February 1700) No.1765; and (6 February 1735) No.6686.

<sup>65</sup> *Ibid.*

<sup>66</sup> Lev Kasso, “K istorii Svoda zakonov grazhdanskikh”, *Zhurnal ministerstva iustitsii* (1904) No.3, 53-89, at 64; Evgenii Nefed'ev, *Prichina i tsel' izdaniia Polnogo sobraniia zakonov i Svoda* (Tipografiia Kazanskogo Imperatorskogo universiteta, Kazan', 1889), 11.

the draft civil law *Ulozhenie* and criminal law *ulozhenie* were prepared by Speranskii in fulfillment of an order of Alexander I to create a *svodnoe ulozhenie*.

Differentiating the terms ‘*svod*’ and ‘*ulozhenie*’—and using the former to mean a Russian national type of the systematization of laws—Karamzin and the leadership of the Commission for the Compilation of Laws had changed the language in accordance with the national task of the codification of the law: to establish particular legal principles of the Russian people. On the whole, after 1812, patriotic rhetoric and the language of nationalism began to play an important role in discussions about a code. The State Council—which had previously accepted two parts of Speranskii’s Draft Civil Code—now, in 1813, required of the Commission that all further amendments and improvements to the Draft needed to be in accordance “exclusively with the historical roots [*korennyye nachala*] of Russian laws”.<sup>67</sup> A member of the State Council, the well-known Russophile, Aleksandr Shishkov, when criticizing the “suspicious” Speranskii’s Draft Civil Code—insisted that the new document be renamed ‘National Code’ (*narodnoe ulozhenie*) rather than ‘Civil’ (*grazhdanskoe*).<sup>68</sup>

Compromised by long-term association with the disgraced Speranskii, the ‘old’ codification work grounded to a halt in 1815. In 1816, the Commission’s staff was reduced and financing was cut off, and work on the branch codes (commercial, criminal, procedural) was abandoned. Instead, the limited funding of the Commission—in accordance with the predominant mood—was used in the search for legal materials from which it could extract “the foundations [*osnovaniia*] of Russian law”.<sup>69</sup> The new focus of codifiers on the foundations (or basic principles) of Russian law was a part of what had become a popular trend (*ein System der ganzen Jurisprudenz*) in legal studies in Europe in the last decades of the eighteenth/beginning of the nineteenth century,<sup>70</sup> and provided an example of the combination of the previous rational approach—since principles

<sup>67</sup> “Rassmotrenie proekta grazhdanskogo ulozheniia v Departamente zakonov i Obchshem sobranii Gosudarstvennogo Soveta”, *Arkhiv Gosudarsvennogo soveta. Zhurnaly departamenta zakonov*, Vol.4 (Gosudarstvennyi Sovet, Departament zakonov, St. Petersburg, 1874), Part 1, 12-173. This is reminiscent of the language contained in the 1994 RF Civil Code: “The norms of civil legislation, contained in other laws, must be in accordance with the present Code.” Art.3(2), “Grazhdanskii kodeks Rossiiskoi Federatsii, Chast’ 1”, No.51-FZ, signed 30 November 1994, *Rossiiskaia gazeta* (8 December 1994) No.238-239.

<sup>68</sup> “Rassmotrenie proekta ...”, *ibid.*

<sup>69</sup> *Osnovaniia Rossiiskogo prava, izvlechennye iz susbchestvuiushchikh zakonov Rossiiskoi imperii*, Vols.1 and 2 (Komissia sostavleniia zakonov, St. Petersburg, 1821-1822). While the terminology was slightly different in the “Rassmotrenie proekta ...”, *ibid.*, reference was to one and the same concept.

<sup>70</sup> Peter Stein, “Book Review of *Systema Iuris* by Paolo Capellini”, 59(3) *The Journal of Modern History* (1987), 618.

were to be designed rationally—with the new historical emphasis on the search for tradition.

Yet, while Speranskii's successors continued to collect domestic legislation, the topic of creating a Russian national *ulozhenie* (code) was revived. The rhetorical calls to protect national legislation from foreign influence and to establish domestic legal traditions became a way of expressing loyalty to the authorities. This reflected the above-mentioned merging of the concepts of 'national' (*narodnyi*) and 'state' (*gosudarstvennyi*). As a historian of Russian patriotism, Irina Sandomirskaia argues that patriotic rhetoric became "a part of the rhetoric of political loyalty".<sup>71</sup>

The most striking example of this is a note written by Speranskii's former friend—his right hand in the Department of Laws of the State Council, Mikhail Magnitskii (who is better known for the position which he later held as head of the Kazan' Education District). In 1823, he composed and sent to the Emperor a note titled "The Opinion of a Russian Nobleman on the Civil Code for Russia" (*Mnenie russkogo dvorianina o grazhdanskom ulozhenii dlia Rossii*).<sup>72</sup> Even in the author's introduction of himself—"The Opinion of a Russian Nobleman"—there is a declaration of 'nationality' (*narodnost'*) in two senses: national self-actualization—the author's stressing of his Russianness—and the author's attributing of his position to the entire group of noblemen—*narodnyi* in the sense of 'popular'.

Magnitskii spoke out as a fierce opponent of legislative innovations such as those that had been poisoned by the alien spirit of pagan Roman laws and the laws of the Catholic Church (*i.e.*, those of Speranskii). He proposed the creation of a "truly Russian" *ulozhenie* based on the traditional principles of the law of their forefathers, *i.e.*, "agreeing with Orthodoxy, everything appropriate to autocratic rule, the customs and spirit of our own people".<sup>73</sup> To achieve this, in his opinion, the Commission ought to collect and systematize existing legislation on the basis of a special national system of law (as opposed to Speranskii's first approach of copying foreign (French) concepts). We can see that this is the very same idea as Karamzin's

<sup>71</sup> Irina Sandomirskaia, *Kniga o Rodine. Opyt analiza diskursivnykh praktik. Wiener Slavistischer Almanach*, Sonderband 50 (Ludwig-Maximilians-Universität München, Institut für Slavische Philologie, Wien, 2001), 49.

<sup>72</sup> Mikhail Magnitskii, "Mnenie russkogo dvorianina o grazhdanskom ulozhenii dlia Rossii", in *Pis'ma glavmeisbikh deiatelei v tsarstvovanie imperatora Aleksandra I, 1807-1829* (N. Dubrovin, St. Petersburg, 1883), 369-374. Magnitskii, however, had not been trained in law; like Speranskii, he graduated from an Orthodox seminary. Likewise, Karamzin was best known for his writings on history, as well as his works of fiction; he, too, lacked formal training in the law. But, his university education—at the *pension* (boarding school) of Professor Schad in Moscow—had been in the humanities and not in religion, and was heavily influenced by German romantic philosophy.

<sup>73</sup> "[D]ukh i obychai nashego naroda". *Ibid.*, 373.

thinking a decade earlier about a *svod*. Not having had an opportunity to take part in the creation of the Draft Civil Code, Magnitskii tried to defend the purity of Russian law in the areas entrusted to him—geographically, as well as in his chosen field of education. In the 1820s, thanks to his efforts as an educational administrator, a course on Roman law at Kazan' University was replaced by one on Byzantine law, which he believed to be a more fitting subject for future Russian lawyers.<sup>74</sup>

At the same time, the ideas of the educated class on the supremacy of the rational and universal in the system of social institutions were subjected to persecution. In 1819, a book by Professor Aleksandr Kunitsin of the Lyceum in Tsarskoe Selo—*Natural Law (Pravo estestvennoe)*—was removed by order of the Minister of National Education from all institutions under the Ministry. The book claimed that “in natural law, all of the rights and duties of people as rational beings are the same and equal”.<sup>75</sup> The conservatives saw in it “a vast code of rights conferred upon some sort of natural person” that was harmful to youth.<sup>76</sup>

On the whole, in the matter of codifying laws, the general rational approach of deducing the fundamental principles of law from notions of universal rules that were common to all mankind was rejected. This, by and large, coincided with the common European phenomenon of the actualization of political and cultural forms of nationalism expressed in the zealous search for ‘tradition’.<sup>77</sup> Yet, in the end, a code of the rights of Russians was not compiled. As had been the case in the eighteenth century, attempts at codification became more active at the beginning of the reign of the new Emperor.

<sup>74</sup> Irina Emelianova, *Vseobshchaia istoriia prava v russkom dorevoliutsionnom pravovedenii (19 vek)* (Kazanskii gosudarstvennyi universitet, Kazan', 1981), 34; *id.*, *Istoriko-pravovaia nauka v Rossii 19 v. Istoriiia russkogo prava* (Kazanskii gosudarstvennyi universitet, Kazan', 1988), 21.

<sup>75</sup> Aleksandr Kunitsin, *Pravo estestvennoe, sochinenie professora Imperatorskogo litseia Aleksandra Kunitsina*, Kniga 1 (Tipografiia Ios. Ioanessova, St. Petersburg, 1818), 6.

<sup>76</sup> Quoted in Iurii Margolis and Grigorii Tyshkin, “*Edinym vdokhnoveniem*”: *Ocherki istorii universitetskogo obrazovaniia v Peterburge v kontse 18–pervoi poloviny 19 v.* (Izdatel'stvo Sankt-Peterburgskogo Universiteta, St. Petersburg, 2000), 145.

<sup>77</sup> Eric Hobsbawm, “Introduction: Inventing Traditions”, in Eric Hobsbawm and Terence Ranger (eds.), *The Invention of Tradition* (Cambridge University Press, Cambridge, 1983), 1-9.

## 5. The Invention of the Russian Legal Tradition in the Form of *Svod*

“We had a little book of general history, written I don’t know by whom, which was hardly twenty pages, and on the cover was written: ‘For soldiers and for civilians.’ Earlier, it had read: ‘For soldiers and *for citizens*.’ That’s how its skilful author had written it, but this made somebody too uncomfortable, and in place of ‘*for citizens*’ [*grazhdane*] was written ‘for civilians’ [*obyvateli*].”

Nikolai S. Leskov, *Kadetskii monastyr*’ (1880).

Having ascended to the throne in 1825, Nicholas I (reigned 1825–1855) appointed Speranskii to again compile a code within the Second Section of His Majesty’s Own Chancellery (*Vtoroe otdelenie sobstvennoi ego imperatorskogo velichestva kantseliarii*), which was created especially for this purpose. Sources suggest that the work of the Section was, on the whole, structured in the same way as it had been for the compilation of branch codes in 1809–1810.<sup>78</sup> A subject plan was created, and employees collected legislative material according to its categories. The corresponding parts of the code were then developed on this basis. The chief innovation was the overall presentation of the Section’s work, which was imparted by the Section’s leadership, chiefly Speranskii. Codification was presented as a ‘national’ (*natsional’nyi*) project, the foundation of which was the *svod*, in the sense given to this term by the opponents of the 1809 Draft Civil Code.

By 1833, the Second Section had prepared a Complete Collection of Laws of the Russian Empire (*Polnoe sobranie zakonov Rossiiskoi imperii*) and a Digest of Laws of the Russian Empire (*Svod zakonov Rossiiskoi imperii*), which Speranskii had presented for the first time as two variations of a *svod*: (1) a historical *svod* of all legislation (promulgated after 1649); and (2) a smaller *svod* of existing laws, respectively.<sup>79</sup> The *former* (Complete Collection of Laws) was meant to show the development of the law that Speranskii had described in the spirit of the theory of organicism: “as legislation sprouted”. Therefore, this multivolume work included all legislative material in chronological order, beginning with the publication of the *Sobornoe ulozhenie*. The *latter* (Digest of Laws) entailed, first and foremost, the selection—by Speranskii and the Second Section (on behalf of the Emperor)—and then the systematization (according to the main division of law: public law (*zakony gosudarstvennyye*) and private law (*zakony grazhdanskiye*)) of legislation from the Complete Collection of Laws.

The completion of codification in the next and final stage (after the Complete Collection of Laws and Digest of Laws) was supposed to be

<sup>78</sup> Nikolai Il’inskii, “Vospominaniia”, *Russkii arkhiv* (1879) No.12, 431–434.

<sup>79</sup> Mikhail Speranskii, “O sushchestve Svoda”, *Russkaia starina* (1876) No.15, 587.

an *Ulozhenie* in which the legislation systematized in the Digest would be reshaped in accordance with a defined system.

It seems that the ‘rehabilitated’ Speranskii differentiated between *sobraniel'svod*, on the one hand, and *ulozhenie*, on the other—as distinct stages of codification, one which was designed to replace the other—only as a way of stressing why his new path was correct. He reduced the lack of success of the work of his predecessors, including his own, to a very simple explanation: the mixing of both approaches, where “the beginning work was at the end, *i.e.*, they began to compile a code [*ulozhenie*] without a digest [*svod*] of existing laws”.<sup>80</sup>

In order to legitimize his codification plan under Nicholas’ sponsorship, Speranskii replied upon the arguments of his opponents from a decade earlier, who had criticized the Draft Civil Code for its isolation from Russian reality. This *Svod* of Speranskii as the basis of the new code symbolized adherence to the traditions of historical Russian law and, in doing so, ensured protection from earlier suspicions.

This clear contrast between system (*ulozhenie*) and collection (*svod*) revealed a new meaning of the word ‘*ulozhenie*’, which, until then, had not existed. With time, the language absorbed it: the most complete and authoritative of contemporary Russian dictionaries (published in 1964), provides as a figurative meaning of ‘*ulozhenie*’ “a system of rules of any type”.<sup>81</sup>

Such linguistic pliancy was the result of the political significance of the process of the codification of laws under Nicholas I. The voice announcing the Digest was the voice of power—first and foremost, of the Emperor himself, for whom the Digest was a bulwark of national legal tradition and a counterbalance to the foreign constitutional ideas that inspired the 1825 revolt of the Decembrists. In a manifesto prepared by Speranskii himself, the Emperor had said:

“It is not from daring dreams, which are always destructive, but from somewhere above that state institutions are gradually refined, deficiencies improved, abuses corrected. Through gradual improvement, any modest wish for the better, any idea aimed at affirming the force of law, at broadening true education and industry, which we have achieved in a lawful, open way for everyone, will always be accepted with reverence.”<sup>82</sup>

<sup>80</sup> Mikhail Speranskii, “Ob”iasnitel’naia zapiska sodержaniia i raspolozheniia Svoda zakonov grazhdanskikh”, *Arkhiv istoricheskikh i prakticheskikh svedenii, otnosiashchikhsia do Rossii* (N. Kachov, St. Petersburg, 1859), 2.

<sup>81</sup> *Slovar’ sovremenogo russkogo literaturnogo iazyka*, Vol.16 (Nauka, Moscow, Leningrad, 1964), 550–551.

<sup>82</sup> *Polnoe Sobranie zakonov Rossiiskoi imperii. Sobranie vtoroe* [1826–1880] (31 January 1833) No.5947.

It should be stressed that, in the eyes of the Russian autocracy, changes for the better were linked with “affirming the force of law”, which should be done only from above and gradually, by means of refining existing institutions. The establishment of complete ‘legality’, as the authorities saw it, replaced the need for a constitution—something that was alien to domestic traditions.

That is why the Emperor—in appealing to the legality of traditional Russian law—stressed in the State Council in particular that: “[t]he Digest (*Svod*) will not create new laws, but will put old ones in order.”<sup>83</sup> This phrase was used as a definition of Russian codification for a long time thereafter, and became even common place in nineteenth-century textbooks of Russian law. In addition, beginning at the end of the nineteenth century, it was often held among the progressive (legal) intelligentsia that the monarch had rejected a ‘liberal’ plan for the creation of an *Ulozhenie*—limiting himself, instead, to a ‘conservative’ *Svod*.

This stereotype of rejecting the liberal for the conservative is based on an insufficiently critical evaluation of the simplistic ‘traditionalistic’ representation of the Digest (*Svod*) by those leaders who were most directly involved in codification efforts. I have already noted above that Speranskii was himself the original author of this stereotype by sharply differentiating between the terms ‘*svod*’ and ‘*ulozhenie*’. In 1831, there had been attempts to create the most politically advantageous notion of the *Svod* as ‘national codification’ during the final stage of its composition, when the *Svod* was supposed to be sent to revision committees that had been especially created in key ministries. The editors-in-chief, Mikhail Balug’ianskii and Speranskii, made special efforts to ensure that the provisions of the Digest did not cause any doubts about the existence of sources. In a new instruction to the Section on 21 February 1831, its employees were directed to generally “retain the words” (*priderzhivat’sia teksta*) of the source of the law, making corrections only in exceptional cases.<sup>84</sup> This usage of legal language of previous times was to provide the visible antiquity of the Digest, which was a necessary outward sign of legality, a persuasive counterargument against the natural rejection of the code as a suspicious innovation.

It should be noted that—proceeding from the political considerations of the success of their creation—the editors of the Digest (*i.e.*, Speranskii

<sup>83</sup> Quoted in Petr Maikov, *Vtoroe otdelenie Sobstvennoi Ego imperatorskogo velichestva kantseliarii, 1826-1882. Istoricheskii ocherk* (Tipografiia I.N. Skorokhodova, St. Petersburg, 1906), 191. These words were undoubtedly inspired by the work and publications of Speranskii; see, *e.g.*, Speranskii, *op.cit.* note 80.

<sup>84</sup> “Pravila, nabliudaemye pri ispravlenii Svodov (21 February 1831)”, in Gugo Blosfel’dt, “*Zakonnaia sila Svoda zakonov v svete arkhivnikh dannykh*” (Senatskaia tipografiia, Petrograd, 1917), 12-13.

and his assistants in the Second Section) were eager to have its form accepted as one that was traditionally Russian in nature. For this purpose, they stylized it to a not insubstantial degree (*i.e.*, using the legal language of Russian law from the Middle Ages). Nevertheless, despite the outward stylization of the Digest as a historical collection of Russian legislation, the work of Speranskii and the other codifiers of the Second Section can without doubt be considered to be innovative: a system of domestic law that distinguished between private and public law.

Furthermore, the 1826 Instruction of the Second Section—which was in force until 1831, the entire period of drafting the Digest—allowed for the creative (*i.e.*, selective) use of the original sources contained in the Complete Collection of Laws from which Speranskii and the Second Section had drafted the Digest.<sup>85</sup>

However, there was more that was only first observed in the late nineteenth century: the power of Speranskii and the Second Section included “legislative initiatives” directed towards filling the gaps in Russian legislation that had been “discovered” by the Digest drafters.<sup>86</sup> These gaps were formally filled once the Second Section had turned to the Supreme Legislator (*i.e.*, the Emperor) who would promulgate the relevant edict(s).<sup>87</sup> Thus, despite Speranskii’s declarations about the extraordinary conventionality of the *Svod*/Digest as a specific Russian product based exclusively on Russian legal traditions,<sup>88</sup> it undoubtedly represented a significant legal reform inspired—certainly in part—by non-Russian models.<sup>89</sup>

This observation was forcefully underscored at the end of the nineteenth century through research undertaken by the legal scholar (and politician), Maksim Vinaver. While he was not the first to note the overall borrowings from foreign sources in the Russian consolidation of laws in the Digest (a critique had already appeared in 1882, when a drafting commission was convened to produce a new codification of civil law),<sup>90</sup>

<sup>85</sup> “Nastavlenie Vtoromu otdeleniiu o poriadke ego trudov (24 April 1826)”, in Maikov, *op.cit.* note 83, Appendix 1.

<sup>86</sup> Kasso, *op.cit.* note 66, 64; Aleksandr Makarov, “K istorii kodifikatsii osnovnykh zakonov”, *Zhurnal ministerstva iustitsii* (1912) No.10, 23; and Aleksandr Nol’d, “Retseziia na trudy Maikova”, *Zhurnal ministerstva narodnogo prosvetcheniia* (1908) No.5, 178.

<sup>87</sup> New statutes (1826-1833) were enacted on wills, custom dues, government property and inventory of property. See Maksim Vinaver, “K voprosu ob istochnikakh X toma Svoda zakonov”, *Zhurnal ministerstva iustitsii* (1895) No.10, 1-68, at 11-12.

<sup>88</sup> See *supra* notes 79 and 80.

<sup>89</sup> In my earlier Russian-language work on this subject, I have called this “*original’nost’ Svoda*”. See Tatiana Borisova, “Bor’ba za russkoe ‘natsional’noe’ pravo v pervoi chetverti 19 veka: izobretenie novykh smyslov starykh slov”, in Kuposov, *op.cit.* note \*, 123-151.

<sup>90</sup> See German Baratts, “O chuzhezemnom proiskhozhdenii bol’shinstva russkikh grazhdanskikh zakonov”, *Zhurnal grazhdanskogo i ugovnogo prava* (1882) No.9, 45-80.

Vinaver's work yielded a detailed study of the similarity of the institutions of domestic civil law—which had been systematized in Volume Ten of the Digest—and the Napoleonic Code.<sup>91</sup> The subjects in question concerned matrimonial and family law, proprietary interest, obligation and specific forms of legal relations: the demarcation of property and ownership, the concept of easement,<sup>92</sup> types and sources of pledges, and the principle of the freedom of contract and equality of parties.<sup>93</sup> In the *Svod* of Civil Laws (Volume Ten), the rules regulating the above-mentioned institutions were provided with references to domestic Russian legislation of the eighteenth century. The check of these references by Vinaver demonstrated that the 'sources' had almost nothing in common with the provisions of the *Svod* and most likely had been used by Speranskii and the Second Section as a sort of 'smoke screen'. Thus, unlike Speranskii's 1809 Draft Civil Code, direct and indirect borrowings were hidden behind the outward appearance of their domestic roots. To describe this phenomenon in Russia, Ajani has used the terms "open" and "closed" modes of legal borrowing.<sup>94</sup>

Thus, a *svod* had become a particular form of legal reform that was meant to accent the continuity of Russian legal traditions. Here was a measure of the success of the *Svod*, which later gave rise to skepticism of those who had been educated by using its fifteen volumes as textbooks, as well as the primary source of Russian law. If at the end of the 1820s and beginning of the 1830s, the invention of a national form of legislation had ensured its success as a tool of codification of law, then—from the second half of the nineteenth century—the situation began to reverse itself. Domestic critics of the authorities pointed with increasing indignation to the incomplete nature of the codification process—at the fact that the *Svod* was only a compilation from Russian legislative antiquity, an interim step toward the creation of a real code, an *ulozhenie*.

They characterized the national traditions of the *Svod zakonov* not as a virtue but as defects.<sup>95</sup> Its "uniqueness" was seen to be an argument against its further application.<sup>96</sup> After the authorities refused to continue the

<sup>91</sup> Vinaver, *op.cit.* note 87.

<sup>92</sup> An easement is the limited right to the use of another's property as established by law, e.g., the right to pass through a neighbor's property.

<sup>93</sup> See, further, Tuikina, *op.cit.* note 14.

<sup>94</sup> Gianmaria Ajani, "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe", 43 *American Journal of Comparative Law* (1995), 93-127.

<sup>95</sup> See, for instance, Nikolai Korkunov, "Znachenie Svoda zakonov", in *Sbornik statei N.M. Korkunova (1877-1897)* (Izdatel'stvo N. K. Martynova, St. Petersburg, 1898), 77-96; Avgust Kaminka, "Sila Svoda zakonov", *Pravo* (1908), 10-11.

<sup>96</sup> The *Svod* was periodically reedited (at times, even on an annual basis) after its first edition in 1833 to include 'new' legislation that applied to all citizens and institutions. See Tatiana Borisova,

'Great' reforms of the 1860s of Aleksandr II, liberals (e.g., the legal scholars and publicists, Aleksandr Gradovskii and Konstantin Kavelin) began to criticize the *Svod* as a symbol of "particularly national rule", which, when elevated to the level of government policy, allowed the government "to treat us like Negroes or Zulus".<sup>97</sup> In the end, they accused the authorities of taking an Orientalist or, in essence, a colonial approach to society.<sup>98</sup> It should be stressed that this view did not apply to the entire population of the Russian Empire but, rather, only to its educated part—the readers of the journal *The Observer (Nabliudatel')*—who referred to themselves as 'society' (*obshchestvo*).<sup>99</sup>

The liberals contrasted the official conception of 'national originality' (*teoriia ofitsial'noi narodnosti*) with a thesis on the universality of the achievements of world civilization (*universal'nost' mezhdunarodnogo pravovogo poriadka*). It is only natural, of course, that here the accent was on the social-political system, as well as on 'the legal structure': "Legal order, both international and national, as well as railroads, telephones, telegraphs, universities, the printing of books, and freedom of conscience and thought."<sup>100</sup>

In the process of highlighting this contrast, the old term '*ulozhenie*' acquired a new meaning, i.e., that of a symbol of the late nineteenth-century reform efforts, which, ostensibly, should have brought Russia closer to international achievements—at least in terms of legal development. This metamorphosis was based on the mythologization of the codification efforts of Catherine the Great and Speranskii.<sup>101</sup>

Liberal authors idealized the Codification Commission (*Ulozhennaia komissiiia*) of Catherine the Great (in the years 1767-1768), as a precedent for involving representatives of Russian society in the work of this quasi-

"Zakon i zakonnost' v russkom kodekse, 1906-1917", in European University at St. Petersburg, *op.cit.* note 20, 11-41.

<sup>97</sup> Aleksandr Gradovskii, "Biurokratizm i pravovoi poriadok", *Nabliudatel'* (1882) No.7, 51.

<sup>98</sup> This reminds one of the study of the late Edward Said, *Orientalism* (Vintage Books, New York, 1979), the link to which, however, is outside the scope of this work.

<sup>99</sup> I shall resist the temptation in this article to grapple with the question of the opinion(s) of the other parts of Russian society of that time or of the more fundamental issue of whether or not it had an opinion (on this question).

<sup>100</sup> Gradovskii, *op.cit.* note 97, 63.

<sup>101</sup> This mythologization, in large part, resulted from a search that began in the middle of the nineteenth century for historical evidence of earlier liberal reforms in Russia, including in its legal system. One can assume that the intelligentsia thereby hoped to convince the Emperor to continue these reforms, which had been begun by his great predecessors but which had been halted primarily due to war.

parliamentary institution, which the enlightened Empress had created.<sup>102</sup> Thus, Kasso wrote at the beginning of the twentieth century as if it was an indisputable truth that, “under Catherine the Great, the idea of undertaking numerous reforms in all areas of legislation was linked with the creation of an *ulozhenie*”.<sup>103</sup> Despite the fact that work on Catherine’s *Ulozhenie* had never been commenced by the Commission and, therefore, that the spirit of her *Instruction (Nakaz)* of 1767 to the deputies turned out to be just as brilliant and useless as the gilded shrine especially designed at the same time—upon order of the Empress—for the original Council Code,<sup>104</sup> the overall assessment of her well-intentioned efforts was positive. In Gradovskii’s view, the Commission’s work “strengthened and refreshed” domestic law “with new elements drawn from a national source”.<sup>105</sup> At first glance, this may seem contradictory to the criticism of *Svod*’s narrow traditionalism that he and others had articulated and that I have highlighted above. But, upon deeper consideration, this praise of Catherine’s *Ulozhenie* reflected the same liberal view of the usefulness of foreign models for Russia (e.g., parliamentary practices) upon which the ‘universality’ thesis mentioned above was based.

In a certain sense, the Empress’s initiative was close to the ideals of Russian liberals of the late nineteenth century, who saw in her Codification Commission an attempt to combine European ideas of natural law—appearing in the *Instruction* as the basis for the future *Ulozhenie*—with the creation of national laws. For the purposes of comparison, let us remember that almost nothing is known of the previous efforts of the Empress Elizabeth to draft a new *Ulozhenie* (with assistance from the representatives of three classes). On the contrary, the notion of Catherine’s Codification Commission—as an original attempt to chart a new political course of a ‘legal monarchy’—has firmly entered the literature.<sup>106</sup>

<sup>102</sup> See, for instance, the remarks of Aleksandr Pypin (a leading late-nineteenth-century historian of Russian literature) in Catherine II, *Sochineniia Imperatritsy Ekateriny II na osnovanii podlinnykh rukopisei i s obiasnieniiami akademika A.N. Pypina*, Vol.2 (Imperatorskaia Akademiia nauk, St. Petersburg, 1901).

<sup>103</sup> Kasso, *op.cit.* note 66, 58.

<sup>104</sup> Ivan Zabelin, “Svedeniia o podlinnom ulozhenii tsaria Alekseia Mikhailovicha”, *Arkhiv istoriko-iuridicheskikh svedenii, otnosiasbikhsia do Rossii*, Vol.1 (Izdatel’stvo N. Kalachev, Moscow, 1850), 1-18.

<sup>105</sup> Aleksandr Gradovskii, *Nachala russkogo gosudarstvennogo prava*, Vol.1 (Izdatel’stvo M. Stasiulevicha, St. Petersburg, 1875), 42-43.

<sup>106</sup> Oleg Omel’chenko, “*Zakonnaia monarkhiia*” *Ekateriny II: Prosveshchennyi absolutizm v Rossii* (Iurist, Moscow, 1993), 128. Similar views are held by other scholars in the field. See Aleksandr Kamenskii, *Ot Petra I do Pavla I. Reformy v Rossii 18 v. Opyt tselostnogo analiza* (Izdatel’stvo Rossiiskogo gosudarstvennogo gumanitarnogo universiteta, Moscow, 1999), 411-418; and Isabelle de Madariaga, *Russia in the Age of Catherine the Great* (Yale University Press, New Haven, London, 1981), 139-151.

This glowing evaluation of subsequent generations has, in a certain sense, been caused by the special attention that the enlightened Empress herself paid to this question. Catherine the Great—unlike other Russian monarchs—took a very active part in the organization and popularization of the project of the Codification Commission, which was expressed in the writing of an extensive Instruction and its distribution in Russia and abroad,<sup>107</sup> as well as in official print coverage of the Commission's sessions.

Added to Catherine's role in mythologizing the *Ulozbenie* as the only true form of rational codification was the idealization (by Russia's late nineteenth-century liberals) of the still-born drafts of the 'reformer' Speranskii, which were conventionally united under the term '*ulozbenie*'.<sup>108</sup> (In my mind, there is nothing surprising about this idealization even though the disgraced reformer's Draft Civil code was never adopted; it is never difficult to idealize something which was not brought to life.) This mythologization of the *Ulozbenie* efforts of Catherine and Speranskii also included his extensive work, *Introduction to the Code of State Laws (Vvedenie k ulozbeniiu gosudarstvennykh zakonov)*,<sup>109</sup> which found its inspiration in the same sources as Catherine's *Nakaz*.

Nostalgia for the unfulfilled *Ulozbenie* was directly or indirectly projected onto the perceived defects in the *Svod*, which was portrayed as a symbol of a useless political-legal system:

"No one, of course, will doubt that our position [in the area of legislation] is so dreary thanks to the fact that we still do not have a real code, that our *Svod* was compiled from scraps of all possible historical origins, domestic and foreign, ancient and modern."<sup>110</sup>

These words were written in 1902 by Iosif Gessen, a practicing lawyer and one of the leaders of the Constitutional Democrat Party (*kadety*). In an atmosphere of social dissatisfaction with the policies of the authorities, ironic articles and satires about the Digest of Laws became a matter of course at the beginning of the twentieth century.<sup>111</sup> The idea of the *Svod*

<sup>107</sup> As William Butler's research has demonstrated, Empress Catherine certainly succeeded in the popularization of her Enlightened *Nakaz*, which became well-known in Europe. See William Butler, "Foreign Impressions on Russian Law to 1800: Some Reflections", in *id.* (ed.), *Russian Law: Historical and Political Perspectives* (A. W. Sijthoff, Leiden, 1977), 69.

<sup>108</sup> For one of the first articles in this tradition of Speranskii apologists, see Nikolai Chernyshevskii, "Russkii reformator", *Sovremennik* (October 1861), 222-229.

<sup>109</sup> Mikhail Speranskii, "Vvedenie k ulozheniiu gosudarstvennykh zakonov", in *Plan gosudarstvennogo preobrazovaniia grafa M.M. Speranskogo (Vvedenie k ulozheniiu gosudarstvennykh zakonov 1809)* (Russkaia mysl', Moscow, 1905), 1-120.

<sup>110</sup> Iosif Gessen, *Iuridicheskaia literatura dlia naroda* (Tipografiia pechatnogo dela E. Evdokimov, St. Petersburg, 1902), 4-5.

<sup>111</sup> "Kur'ezneishii kodeks (fel'eton)", *Sudebnaia gazeta* (1903) No.38; and "Prodolzhenie kur'ezneishego

was compromised, first and foremost, by politically-active lawyers, who used the language of their profession and, on the whole, their professional position to realize their political goals, *i.e.*, to finally lead the opposition to power, since only they believed that they should rule as the most prepared members of society. Thus, they declared that the structure of the Digest—the main source of legislation for citizens and institutions in Russia<sup>112</sup>—was neither legal (*nepravovoi*) nor legitimate (*nezakonnyi*). One needs to keep in mind, however, the following: a recent study by Jane Burbank on the legal practices of Russian peasants at the beginning of the twentieth century shows that they successfully used provisions of the *Svod* in court. This runs counter to the professional evaluation of Russian lawyers of that time about the autocratic nature of the Russian legal system. They were convinced that the legal system was irrelevant and unusable; but, in light of Burbank's work, these claims of the legal profession should be treated carefully.<sup>113</sup>

## 6. Conclusions

“Western concepts of ‘liberalism’ are rather relativistic and indeterminate, and as applied to the realities of Russian life, they can cause harmful confusion in the leaders and in those who are led, especially as regards the former.”

Ivan Aksakov, *Ob uezdnom samoupravlenii* (1887).

In this article, I have used the tool of contextual analysis to examine the codification attempts in Russia in the first decades of the nineteenth century. I have sought to show how a wide variety of factors—philosophical ideas, foreign and domestic politics and the thoughts and acts of individual historical actors—in equal measure have influenced that which by 1833 had developed as a ‘national’ model of codification: the fifteen-volume Digest of Laws (*Svod zakonov*). The national project of codification was adopted by rejecting the branch codes (*ulozbeniia*) that had previously been elaborated prior to 1809 and confirmed at the highest level. From the very beginning of the second project, Speranskii—the primary author of both projects—proclaimed to Nicholas (and numerous others) that there was a dramatic difference in the two codification projects of 1809 and 1833. To emphasize this shift, he even introduced a differentiation in the terms ‘*svod*’ and ‘*ulozhenie*’, which previously had been considered to be synonyms. Contrary to the first *ulozhenie*, which was to a large extent

kodeksa”, *Sudebnaia gazeta* (1903) No.3.

<sup>112</sup> Art.66(7), “Uchrezhdenie Pravitel'stvuiushchego Senata”, *Svod zakonov Rossiiskoi imperii*, Vol.2 (Senatskaia tipografiia, St. Petersburg, 1906).

<sup>113</sup> Jane Burbank, *Russian Peasants Go to Court: Legal Culture in the Countryside, 1905-1917* (Indiana University Press, Bloomington, IN, 2004).

innovative precisely because of its heavy reliance on Western borrowings, the goal of the Digest/*Svod* was to summarize and preserve existing Russian legislation, to crystallize the Russian national legal tradition. However, in the late nineteenth century, Vinaver's detailed consideration of the civil legislation contained in the *Svod* revealed that certain innovations of French origin had been included (hidden) there, as they had also been in the Draft Civil Code of 1809.

Unfortunately, as with any method of historical investigation, immersing oneself in a plethora of context may lead to an imperfect impression of the uniqueness of the phenomenon that is being described. A comparative historical perspective helps one to overcome this aberration of a fragmentation of knowledge. Therefore, in the conclusions to my article, I shall focus on the possible trajectories for combining the phenomenon of Russian codification with the experience of other peoples/times. Inasmuch as (a view of) history is not always comprised of a single straight line, and rather is a patchwork of various strands that are interconnected, in my conclusions I will, therefore, concentrate on the juncture of several of these lines, rather than attempt to only trace a single line.

The case of hidden borrowings in the Digest demonstrates that, under certain historic circumstances (I will mention them later), national argumentation became a very important tool of high policy in the Russian Empire, beginning in the second decade of the nineteenth century. My analysis of the codification issue in the first decades of the nineteenth century shows the manner in which a fashionable Western concept—'national'—was received in Russia; after some discussions, 'traditional' became the dominant meaning of 'national'. Even though the original Russian terms for 'national' and 'traditional' were still in the process of being developed during this time, the case of codification proves that Speranskii's work gave a certain Russian meaning to this Western concept. The changes that were introduced under his leadership in the legal language, within the framework of the overall stylization of the Digest, convinced people—first of all, decision makers such as Emperor Nicholas I—of the traditional, *e.g.*, 'national', character of Russian codification in the 'original' form of a *Svod*.

After the powerful work of Patrick Glenn, who has shown how legal traditions are constructed, one of course is able to view the game of Speranskii as a part of a general seeking for 'legitimate sources' for new codification—a search that is well known to the civil law tradition.<sup>114</sup> The Russian experience of codification in the first quarter of the nineteenth century is of interest to us as something in the way of a mirror in which the prevailing ideas of that time were reflected and intertwined with high

<sup>114</sup> H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press, Oxford, 2000), 116-119.

politics—those Russian as well as those of a broader, European nature (especially after the Holy Alliance of European monarchs of 1815).

The analyses that I have made of the circumstances of the Russian acquisition of its own national legal tradition enable one to arrive at an important conclusion concerning the influence thereupon of the foreign policy sphere. As I have attempted to demonstrate in my article, the Napoleonic factor had a great influence on Speranskii's first codification project. At first, the Russian government—in seeking to follow the ideas of the Enlightenment—was enamored by the modernizing activities in France, which were reflected in Bonaparte's codes, and Speranskii was assisted by foreign experts who openly used legal solutions from the French for the Russian codification. Thereafter, however, after the bloody resistance to and victory over Napoleon, Alexander I—celebrated as Liberator of Europe—joined the mainstream of the European elite, who were disillusioned in the Enlightenment. The ideas of the *philosophes* about the unfairness of existing laws and the possibility of reforming the world by rational legal change were compromised by the blood of the French Revolution and, thereafter, by the satanic usurper Napoleon.<sup>115</sup> His dazzling successes, which made it possible for him to influence the fate of Europe, coupled with his equally mind-boggling fall from power, brought about a change in thinking in the minds of the European elite. A realization of the danger in fundamental social transformation and even the idea about such transformations that resulted—as it was put in the nineteenth century—in the 'fall' of France, demanded a reconsideration of the system of coordinates. Mystical sentiments about the role of providence in guiding history empowered a shift to an organic, historical approach that received its theoretical bases in the works of the German Romantic philosophers. This priority was, in particular, enshrined at the highest level of European politics in Vienna in November 1815, when the Holy Alliance of European monarchs—with Alexander I at its head—took upon itself the solemn obligation to protect European peoples and, first of all, their thrones from a further dissemination of revolutionary infestation.

I wish to emphasize here that there was no immediate reincarnation of Russian reformers from the beginning of the nineteenth century—including Alexander I—into reactionaries in the mid-1810s. In line with the ideology of organic development that was becoming more and more popular at that time, they did not totally reject change; rather, they insisted on the principle of continuation of national tradition by “the ac-

<sup>115</sup> It is known that before the 1806 Tilsit peace negotiations between Alexander and Napoleon, anathema to the latter was declared in all Russian orthodox churches. See Nikolai Shi'der, *Imperator Aleksandr Pervyi, ego zhizn' i tsarstvovanie*, Vol.2 (A.S. Suvorin, St. Petersburg, 1897), 357-358.

cordance of ancient and new institutions” of peoples, as Uvarov, the leader of Russian conservatism, had put it.<sup>116</sup> The political acts of Alexander in Europe after 1815 are a good example of implementing organic ideology. As a leader of the Holy Alliance, its ‘soul’, he strove to stifle revolutionary rebellions in the turbulent Europe of 1815-1825; but, simultaneously, he forced Louis XVIII to accept the French Charter of Liberties in 1814 and granted a Constitution to Poland in 1818, and also sponsored similar documents in Baden and Württemberg. According to the doctrine of organic development, Alexander had to sanction these constitutions, as their embodiment in the national tradition accorded them with a necessary legitimacy. He revealed these ideas at the opening session of the Polish *Sejm* on 15 March 1818:

“The tradition existing in your country has permitted me immediately to enact this constitution. I am guided by the principles of constitutionally endowed institutions, which are constantly the object of my thoughts and whose salutary influence I hope, God willing, to extend to all countries entrusted to me by Providence.”<sup>117</sup>

In speaking about Russia in his address, Alexander expressed the belief that she would be able to enjoy a constitutional order, at the will of the Emperor, when she has achieved “the desired maturity” (*zrelost*). But, until this time would come, the monarchy—the power of a wise Emperor and obedience of the people to this power—was proclaimed to be the key national institution. The reactionary portion of the elite, fearing changes in its privileged status, had convinced the Emperor that he was right about his doubts concerning Russia’s readiness for constitutionalism. While the representatives of the educated elite were able to openly discuss the Emperor’s ideal, a constitutional monarchy, the people who were ‘not ready’ for a constitution were consigned—by an order of the Emperor—to live in militarized villages (*voennye poseleniia*), *i.e.*, in addition to their primary agricultural labors, they were now also forced to engage in daily military exercises. This highly unpopular measure provoked visible discontent on the part of the peasants already at the end of the 1810s and gave rise to the efforts of the first revolutionary organizations in the later years of the reign of Alexander.

As Richard Wortman has observed, the reign of Nicholas I was marked by consistent attempts to elaborate a national image of Russian monarchy.<sup>118</sup> This new tendency was already clearly visible at the coronation of Nicholas,

<sup>116</sup> “[S]oglasie drevnikh i novikh poniatii narodov”. Sergei Uvarov, *Desiatiletie ministerstva narodnogo prosveshcheniia. 1833-1843* (Ministerstvo narodnogo prosveshcheniia, St. Petersburg, 1864), 3-4.

<sup>117</sup> Quoted in Whittaker, *op.cit.* note 60, 45.

<sup>118</sup> Richard Wortman, “‘Ofitsial’naia narodnost’” i natsional’nyi mif rossiiskoi monarkhiii 19 veka”, 3(11) *Rossia/Russia, Kul’turnye praktiki v ideologicheskoi perspective. Rossiia, 18–nachalo 20 veka* (1999), 233-244.

for which a new folk scenario was written, *e.g.*, a triple bow of the people before the monarch.<sup>119</sup> This emphasis of the monarch on Russianness was inspired by the revolt of the Decembrists—young representatives of the highest strata of society who had called out the troops to appear before the Senate building on 14 December 1825 demanding a constitution. They had failed to use, to their full advantage, the short interregnum after the death of Alexander I. Nicholas, who personally interrogated all who had been indicted for their revolutionary acts (more than 1200 persons), in his coronation manifesto called the evil ideas of the revolutionaries ‘alien’ to Russia (*chuzherodnye*). To counter the ideas of popular (national) sovereignty of Thomas Hobbes, John Locke and Jean-Jacques Rousseau, which had inspired the Russian conspirators, Nicholas brought to bear ‘the brightest and the best’, who were well acquainted with the pernicious influence of these ideas, to develop a national alternative to constitutional aspirations. The need to compete with other national projects of national sovereignty compelled the government to use a top-down approach in developing its ‘cultural nationalism’. By the beginning of the 1840s, the concept of a lawful people’s monarchy (*zakonnaia narodnaia monarkhiia*) had taken shape in the works of Uvarov, Karamzin and Speranskii. The creators and disseminators of this national myth extended it in the crucial spheres in which state ideology was produced: Sergei Uvarov (as head of the Ministry of Education), Nikolai Karamzin (the royal historiographer) and Mikhail Speranskii (the creator of the *Svod*). Having gone through the Enlightenment, they naturally tended to use the earlier and even more influential experience of the other discoverers of the ‘nation’ in Europe—the Germans.

In Germany, after Napoleon had been routed, when the old question of uniting the fragmented states once again rose to the surface, it was the philosophy of romanticism and idealism that served as the basis for discovering the original German national spirit. There, as in Russia, the role of the carrier of the national spirit was taken by the (first and foremost, Prussian) monarch who strove to become the embodiment of the whole project.<sup>120</sup> The necessity of competing with the ideologies of national sovereignty of more ‘developed’ France, Britain and the US forced the elites of autocratic Germany and Russia to exploit the national myth

<sup>119</sup> Richard Wortman, *Scenarios of Power: Myth and Ceremony in Russian Monarchy*, Vol. I, *From Peter the Great to the Death of Nicholas I* (Princeton University Press, Princeton, 1995), 382–387.

<sup>120</sup> Takashi Fujitani, *Splendid Monarchy: Power and Pageantry in Modern Japan* (University of California Press, Berkeley, 1996); Heim Dollinger, “Das Leitbild des Bürgerkönigtums in der europäischen Monarchie des 19. Jahrhunderts”, in Karl Ferdinand Werner (ed.), *Hof, Kultur und Politik im 19. Jahrhundert. Akten des 18. deutschfranzösischen Historikerkolloquiums, Darmstadt, 27–30 September 1982*, *Pariser Historische Studien* Vol. 21 (Ludwig Röhrscheid Verlag, Bonn, 1985), 325–362.

and to use one another's experience at home. The national-conservative priorities dictated that appropriate choices be made in the development of legal traditions: the historical school (typified by Puchta's works, who, as with von Savigny, was inspired by Hegelian idealism) reigned in Prussia as well as in Russia. By the second half of the nineteenth century, the German historical school had already acquired the solid reputation of conservatism, which fueled the interest of lawyers and other key actors in more (semi-)autocratic regimes, e.g., Japan.<sup>121</sup>

The question of the degree of influence of the German historical school on Russian legal traditions is outside the framework of this article; however, I cannot fail to highlight the fact that such influence clearly has taken place. The invention by Speranskii of the *Svod* took place against the background of a new stage in the reception of European idealism and organicism. If, at the eighteenth and the beginning of the nineteenth centuries, the development of a national spirit was largely viewed as taking place within the framework of an artistic movement typified by art and literature, by the second quarter of the nineteenth century the national spirit had entered a phase of institutionalization. No longer was Russian-ness only a matter of the inspiration of poets or painters; it had become an affair of the state through such key institutions as the monarchy, the church, legislation and education. And, here, Russia looked to the experience of Prussia, where—in the works of the representatives of the historical school—the philosophical search for an ideal people's spirit had begun to be materialized within the framework of their legal project(s).

Speranskii considered the theoretical developments of the German historical school to be of principal importance for his own second draft of the Russian codification (*Svod*). In 1830-1831, when travel abroad was difficult, he received special permission and even funding from the Emperor Nicholas for talented young seminary students to study at the University of Berlin with none other than Savigny himself.<sup>122</sup> A condition of this travel was for these young persons to participate in the work of creating the Digest of Laws. Thereafter, many of them continued their career as professors of law in the universities that had been founded by Alexander I.<sup>123</sup> This little-known fact enables one to acquire a better understanding of the reasons for the attraction of the Russian legal thinkers

<sup>121</sup> Carl Steenstrup, "German Reception of Roman Law and Japanese Reception of German Law", 1(1) *Intercultural and Communication Studies* (1991), 273-293, at 284-287.

<sup>122</sup> Iakov Barshev, *Istoricheskaia zapiska o sodeistvii Vtorogo otdeleniia sobstvennoi ego imperatorskogo velichestva kantseliarii razvitiuu iuridicheskogo obrazovaniia v Rossii* (Tipografia Vtorogo otdeleniia sobstvennoi ego imperatorskogo velichestva kantseliarii, St. Petersburg, 1876), 9-11.

<sup>123</sup> *Ibid.*, 16.

to the German Pandectist tradition, first formulated by Georg Puchta (who was highly respected in Russia).

One can say without a doubt that the German experience of the legal institutionalization of conservative priorities became a counterweight to the French legal tradition, which was viewed as liberal owing to such legal products as the Code Civil. In the second decade of the nineteenth century, Russia—as an increasingly influential player on the world political scene—made its ‘national choice’: German tradition over French innovation. To a great degree, it was predetermined by the possibility to construct its own tradition on the basis of the metaphysical insights of the Germans. The Russian devotees of German romantic philosophy with particular creative enthusiasm received the “lessons in patriotism” of Schlegel and Fichte.<sup>124</sup> Yet despite the alien origins of this patriotism, its reception was not considered to be a shame for the ‘Great Russian Nation’. To the contrary, from the time in the late fifteenth century that Moscow had developed its own ideology as the ‘Third Rome’, Russian elites took for granted the transmission of worldly power under the scepter of the Russian Tsar. The idea of Russian greatness stemming from the decline of the Western world since that time has, to one degree or another, pervaded the ruling ideology in both the Imperial as well as the Soviet periods, and culminated in the concept of the ‘*zagnivaiushchii Zapad*’ (decadent West), which was also actively exploited by Soviet propaganda.<sup>125</sup>

Despite the reliance upon national-conservative rhetoric, there remained an overwhelming need to modernize social and economic institutions in order to obtain improved economic performance. However, this resulted in a degree of hidden borrowing and, in addition, the masking of something alien as one’s own. Thus, foreign-policy concerns and memory-of-the-day conflicts have been reflected in the history of the interaction of legal systems. If, on the level of rhetoric, the possibility of using the legal experience of a recent enemy might be challenged, this does not necessarily mean that this cannot be used in reality. Here, the Russian experience of denying French models may be compared to a similar historical situation in Germany. Omitting the obvious analogy of national rhetoric surrounding the codification projects of the Russian and German empires, we can recall the analysis by Dubber of the borrowing

<sup>124</sup> For an interesting analysis of the German roots of a key Russian ideological credo of the epoch of Nicholas II—“*Pravoslavie, Samoderzhavie, Narodnost*” [orthodoxy, autocracy, nationality]—see Andrei Zorin, “Ideologiya ‘Pravoslavie-samoderzhavie-narodnost’ i ee nemetskie istochniki”, in Evgeniia Rudnitskaia (ed.), *V razdum’iakh o Rossii (XIX vek)* (Institut rossiiskoi istorii Rossiiskaia akademiia nauk, Moscow, 1996), 105–128.

<sup>125</sup> The senility of the West (*driakhlenie Zapada*) is a recurring metaphor. In Uvarov’s words: “Russia has that superb character which Europe as the exhausted elder views as the energy and strength of youth in its bloom.” Sergei Uvarov, *O prepodavanii istorii otноситel’no k narodnomu vospitaniu* (Tipografiia F. Drekhsslera, St. Petersburg, 1813), 24.

of the institution of jury trials by German states in the second half of the nineteenth century. He wrote that, despite consistent denials by almost all academic commentators, the French pedigree of the German jury—adopted by German states after 1848—was evidence of its roots.<sup>126</sup> Here, as well as in Russia, the leading Germanists in the legal debates—such as Carl Joseph Anton Mittermaier and Friedrich Gottfried Leue—shared the enthusiasm of Thibaut, who believed that the march of German soldiers on Paris in 1814 was the beginning of a new era in the development of German law. This prevented them from openly acknowledging such borrowing.<sup>127</sup> While in this article I have concentrated on the development of a Russian national legal tradition, one cannot fail to highlight the similarity between this and the discourse about a German national path in history, culture and legislation in the nineteenth century.<sup>128</sup>

I have also examined not only the process of constructing a Russian national tradition but, also, the attempts in the late nineteenth century to ‘deconstruct’ it. By ‘deconstruction’, I have in mind the efforts of Maxim Vinaver in his writings and public appearances to propagate the results of his research on the hidden borrowings in the ‘true’ Russian Digest of Laws from the French Code (the results of which put in question the original, specific character of the Digest/*Svod*).<sup>129</sup> What were the causes of this denunciation and the message of his critique? I believe that in exposing the foreign elements in Speranskii’s work, Vinaver—who was in the first place a politician and a founder of the Constitutional Democrats (*Konstitutsionnye demokraty*)—was attempting to underline the necessity for continuing legal reforms in Russia.

As Douglas North has written, history is to demonstrate how the choices of yesterday define the choices of today. Thus, to understand Vinaver of yesterday, one needs to appreciate the day before yesterday; therefore, in general terms, I shall describe the historical context of the deconstruction, albeit with no pretensions to a complete examination

<sup>126</sup> Markus Dubber, “The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology”, 43 *American Journal of Comparative Law* (1995), 227–271, at 232–235.

<sup>127</sup> Such blindness was also dictated, in part, by the continuation of the German-French confrontation later in the nineteenth century. On the impact of historical and political factors on the exchange of ideas among German and French academics, see the inspiring essay of Pierre Bourdieu, “La cause de la science: comment l’histoire des sciences sociales peut servir le progrès de ces sciences”, *Actes de la Recherche en Sciences Sociales* (1995) Nos.106–107, 3–10.

<sup>128</sup> On the German usage of the most malleable concept of ‘Volk’ throughout history, see the classic study of Reinhart Koselleck, “Volk, Nation, Nationalismus, Masse”, in Otto Brunner, Werner Conze and Reinhart Koselleck (eds.), *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, Vol.7 (E. Klett, J.G. Gotta, Stuttgart, 1992), 141–431.

<sup>129</sup> Vinaver, *op.cit.* note 87; and *id.*, *Obščajaia čast’ učeniiia ob obiazatel’stvakh v proekte ulozbeniia* (Senatskaia tipografiia, St. Petersburg, 1901).

of this issue. The criticism of Vinaver began to appear against the background of a general disappointment in the counter-reforms of Alexander III (reigned 1881-1894). During the reign of his predecessor Alexander II (reigned 1855-1881), a remarkable liberalization had shifted Russian society, in general, and the Russian legal community, in particular.<sup>130</sup> In the framework of widespread reforms, the crux of which was the abolition of serfdom in 1861, the Russian judicial system was transformed in 1864: a free profession of lawyers emerged.<sup>131</sup> However, the institution of the monarchy continued to rely on the fragmented nature of social groups enjoying different legal statuses, which continued to be reflected in the new judicial statutes (*sudebnye ustavy*).<sup>132</sup> The all-powerful nature of the monarchy, unrestricted by a representative organ, constructed ideologically as the bedrock of the 'national' basis of the Russian state, stood against developing modern institutions and resulted in even greater discontent: the 'Tsar-emancipator' was assassinated in the thirteenth attempt on his life in 1881. Alexander III sought to return control of the system to the monarch by affirming administrative power in all spheres of the state in the last decades of the nineteenth century, which only worsened the general situation.

The knowledge of the legal immaturity of the autocratic regime enabled lawyers to lead the opposition in their struggle for representation. It was their expertise that lawyers put forward as the basis of their demands for admittance to (the drafting work of) a yet-to-be-established legislative institution. And, here, it seems to me that one can again observe the influence of the German historical school. Educated under the strong influence of the German legal tradition,<sup>133</sup> Russian lawyers took up the ideas of von Savigny, which held that, as a result of developments in an increasingly complex world, the *Volk* distributed responsibility to

<sup>130</sup> Here, I am relying on research from a recent article by Professor Richard Wortman, "Russian Monarchy and the Rule of Law: New Considerations on the Court Reform of 1864", 6(1) *Kritika: Explorations in Russian and Eurasian History* (Winter 2005), 145-170.

<sup>131</sup> On the legal community in Tsarist Russia, see Brian L. Levin-Stankevich, "The Transfer of Legal Technology and Culture: Law Professionals in Tsarist Russia", in Harley D. Balzer (ed.), *Russia's Missing Middle Class: The Profession in Russian History* (M.E. Sharpe, Armonk, NY, 1996), 223-249.

<sup>132</sup> The rights of the major part of the Russian population—peasants—were collected in "The General Regulation on Peasants" (*Obsheee polozenie o krestianakh*), where it was established that peasants should appeal to *volostnye sudy* (township courts). See, further, Jane Burbank, *op.cit.* note 113; and Gareth Popkins, "Code versus Custom? Norms and Tactics in Peasant Volost Court Appeals, 1889-1917", 59(3) *Russian Review* (July 2000), 408-424.

<sup>133</sup> Dzhovanna Chilliani, "Pozitivistskaia uchenost', pedagogicheskie ustremlenia i liberal'naia politika v rabotakh M.M. Kovalevskogo", in Nikolai Smirnov (ed.), *Vlast' i nauka, uchenye i vlast' 1880-e—nachalo 1920-kh godov: Materialy mezhdunarodnogo nauchnogo kollokviuma* (Dmitrii Bulanin, St. Petersburg, 2003), 379-401, at 388.

jurists to create law.<sup>134</sup> Thus, by the end of the nineteenth century, lawyers should have achieved the right to exercise the responsibility of the *Volk*, imposed upon them by history—to legislate.

Yet there was not only the heritage of the historical school, there was also the weight of the ever-growing influence of French ideas. Despite the fact that the authors of the 1864 judicial reform had attempted in every possible way to avoid the revolutionary connotations surrounding the French word ‘*avocat*’ and, thus, had contrived a new word in the Russian language (*prisiazhnye poverennye*), Russian lawyers often followed the example of their predecessors of 1789.<sup>135</sup> According to the memoirs of Vinaver—who, prior to his political career, was one of the most active leaders of the Russian *advokatura* (the legal establishment)—they had placed in the forefront of their activities the “struggle for the rights of the individual and its protection from the immense dictatorship of state authorities”.<sup>136</sup> Starting from the case of the Nechaev group, when lawyers had achieved acquittals for revolutionaries, political trials became a vivid example of the professional power of the Russian legal elite.<sup>137</sup> 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 legal professionals was romanticized in society and even, in large part, led to the popularity of legal education at the end of the nineteenth century.<sup>138</sup>

The uncovering of hidden borrowings in the Digest of Laws by Vinaver can be seen as one of the manifestations of the late nineteenth and early twentieth-century criticism of the Digest. The attacks on the Digest and, thus, on the whole system of applied law can also be viewed as another dimension of the growing political struggle; in an earlier work, I have shown that this contained a distinct anti-bureaucratic message.<sup>139</sup> The characterization of bureaucratic arbitrariness as an inevitable feature of the autocracy was itself borrowed from the French. The historian,

<sup>134</sup> Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, Vol.I (Scientia Verlag, Aalen, 1981, first published in 1840), 45.

<sup>135</sup> Nadeshda Cherkasova, *Formirovanie i razvitie advokatury v Rossii. 60-80-e gg. XIX v.* (Nauka, Moscow, 1987).

<sup>136</sup> Maksim Vinaver, *Nedavnee. Vospominania i kbarakteristiki* (Izdatel'stvo M. Vol'f, Petrograd, 1917), 66.

<sup>137</sup> See Nikolai Troitskii, *Bezumstvo kbrabrykb: Russkie revoliutsionery i karatel'naia politika tsarizma 1866–1882 gg.* (Mysl', Moscow, 1978).

<sup>138</sup> Inna Kovaleva, *Tsemnosti pravovoi kul'tury v predstavleniakb rossiiskogo obschestva kontsa XIX-nachala XX v.v.* (Novgorodskii gosudarstvennyi universitet, Velikii Novgorod, 2002).

<sup>139</sup> Tatiana Borisova, “Svod zakonov Rossiiskoi Imperii v 1905-1917 gg.: politicheskaia bor'ba vokrug kodifikatsii”, *Avtoreferat dissertatsii na soiskanie uchenoi stepeni kandidata istoricheskikh nauk*, St. Petersburg, 2005.

Ekaterina Pravilova,<sup>140</sup> has demonstrated that anti-bureaucratic rhetoric at the end of the nineteenth and the beginning of the twentieth centuries was a reception of the criticism in the 1850s and 1860s of the French bureaucracy, the hymn of which was the work of Alexis de Tocqueville, *L'Ancien Régime et la Révolution* (also quite popular in Russia). It seems to me that the unmasking of Speranskii, who employed bureaucratic tricks during the preparation of the Digest of national legislation, *i.e.*, references to unpublished or little-known legislative acts in order to hide borrowing from an anti-borrowing autocrat, also clearly had an anti-bureaucratic message. The case with the Digest demonstrates that trust and the absence of expertise of the supreme legislator could be used (and abused) by skillful (and scheming) bureaucrats such as Speranskii, who, at the end of the day, could mislead the one who had delegated to them his absolute legislative power. However, it was the model bureaucrat—not personally Speranskii—who was being attacked; on the contrary, he was honored by intelligentsia of the second half of the nineteenth century as an unsuccessful reformer.<sup>141</sup>

Furthermore, Vinaver's misgivings threw a cloud over the national origins (originality) of the *Svod*, which appeared to be not as Russian as had traditionally been presented by its draftspersons. In 1904, Lev Kasso—a professor of law at Moscow University and Minister of Justice after 1910—published in the same prestigious law review (*Zhurnal Ministerstva Iustitsii*) his alternative research on the sources of civil law legislation in the tenth volume of the Digest. By offering the reader new evidence, he supported the view of the originality of the Digest, which was not an easy undertaking after the persuasive comparative tables that Vinaver had used to support his position (in one column of which was the text of the Russian provision, while, in the other, the French terminology from the Code Civil). Kasso used the same technique to present his evidence except—in place of the French Code—he compared the provisions from the tenth volume of the Digest with the Foundations (*Osnovaniia*) of Russian law.<sup>142</sup> As I have highlighted above, the *Osnovaniia* had been collected and published in 1821 by the Commission for the Compilation of Laws after the banishment of Speranskii (in 1812) and the rejection of his Draft Civil Code (in 1813), which followed the course of uncovering the national principles of Russian law.<sup>143</sup> Kasso demonstrated that several provisions of

<sup>140</sup> Ekaterina Pravilova, *Zakonnost' i prava lichnosti: administrativnaia iustitsiia v Rossii (vtoraiia polovina XIX v—Oktiabr' 1917)* (Izdatel'stvo Severo-Zapadnoi Akademii Gosudarstvennoi Sluzhby, Izdatel'stvo "Obrazovanie-Kul'tura", St. Petersburg, 2000), 87–88.

<sup>141</sup> See note 110.

<sup>142</sup> *Osnovaniia Rossiiskogo prava ...*, *op.cit.* note 69.

<sup>143</sup> Kasso, *op.cit.* note 66.

the Digest's tenth volume were comparable with provisions of the *Osnovaniia*, including those that Vinaver had 'shown' were borrowed from the Code of Napoleon. However, the argument of Kasso had a clear weakness: he represented the *Osnovaniia* to be the unconditional manifestation of the national legal tradition, but failed to address directly the issue of the sources of the *Osnovaniia* itself. His second claim for defending the 'Russianness' of the Digest was the old argument that Speranskii had used in his letter to Alexander written while he was in exile. There, Speranskii defended himself from criticism that he had borrowed provisions from foreign models for his Draft Civil Code of 1809 by pointing to the fact that he had never been educated (in law) at a university; therefore, how could he have looked to foreign legal sources?<sup>144</sup> Yet, this had always been a weak argument: as I have shown in this work, Speranskii had relied upon foreigners, educated in the law, who were members of his Commission for the Compilation of Laws.

The arguments of Vinaver, to my mind, were more profound than was the 'defense' offered by Kasso. In addition to clear references to borrowings from the French, Vinaver demonstrated the references that Speranskii had given as Russian sources for his work in the tenth volume were, in fact, only so much window dressing; they did not relate to the specific provisions of the Digest for which they were cited and were offered more (if not exclusively) to impress the reader. It is worth mentioning here that such a decorative usage of sources for legitimizing codification projects has been observed in another, rather different context: *i.e.*, the codification of Dutch civil law in the second half of the twentieth century.<sup>145</sup> In a comparative context, it is interesting to consider the diametrically opposed tasks of Speranskii in the first quarter of the nineteenth century and his colleagues in the second half of the twentieth century—for example, the codifiers in The Netherlands. If the latter sought to refer to foreign sources to legitimize a particular innovation or a Dutch legal tradition, Speranskii attempted to cover up the comparative law component of his Digest and, rather, uniformly made reference to domestic legal history as the ultimate legitimizing argument for his position.

This comparison of epochs shows at first glance the wisdom of the dominant position of research in nationalism, which has been most clearly formulated by Hobsbawm, that—in the contemporary world of

<sup>144</sup> Mikhail Speranskii, "Permskoe pi'smo k imperatoru Aleksandru", in *Plan preobrazovaniia grafa M. M. Speranskogo (Vvedenie k Ulozheniiu gosudarstvennykh zakonov 1809)* (Russkaia mys', Moscow, 1905), 303.

<sup>145</sup> I am grateful to Dr. Elena Ioriatti for having drawn my attention to this analogy and kindly provided me with literature on the subject. See, further, Elena Ioriatti, "Il nuovo codice civile dei Paesi Bassi fra soluzioni originali e circolazione dei modelli", *Rivista di diritto civile* (1992) No.1, 117-180, at 175-177.

a developed international economy and advanced communication and transportation—nationalism “is simply no longer the historical force it was”.<sup>146</sup> However, at the level of grand political rhetoric, nation-states are still unable to free themselves from according national emphasis to one act or another. In recent times, this tendency has most clearly shown itself during the ‘parade of sovereignties’ after the fall of the Soviet regime in the late 1980s. Because of well-entrenched traditions, the codification of national legislation has often been used as a field for symbolic demonstrations of national-cultural distinction and greatness. In fact, as has been noted in the literature, this symbolism can rise even above considerations of (technical) modernization.<sup>147</sup> For example, in post-Soviet Latvia, the 1937 Civil Code<sup>148</sup>—which was re-enacted in 1992—was not much more modern than the 1965 Soviet codification, which thereby had been repealed. So, as Ajani has put it: “the stress on national identity and the insistence on the continuity between pre-Soviet Latvia and post-Soviet Latvia has not left too much room to a comparative analysis of competing methods.”<sup>149</sup>

More stable nation-states of Western Europe also appear not to be totally free from nineteenth-century cultural nationalist ideas. As the debate on the unification of European private law demonstrates, the national framework of legal thinking is still very much at stake. French academic scholars<sup>150</sup> who are severe critics of the idea of such unification are supported by some other European thinkers. The issue of national borders in the consciousness of lawyers has been verbalized in a number of publications calling upon legal historians and comparativists to reconsider the emphasis on the national originality of legal systems.<sup>151</sup>

<sup>146</sup> Eric J. Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (Cambridge University Press, Cambridge, New York, 2nd ed. 1992), 169.

<sup>147</sup> Ajani, *op.cit.* note 10, 70.

<sup>148</sup> Dietrich Andre Loeber, “Latvia’s 1937 Civil Code: A Quest for Cultural Identity”, in John Henry Merryman and David S. Clark (eds.), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Duncker and Humblot, Berlin, 1990), 197–204.

<sup>149</sup> Ajani, *op.cit.* note 10, 70.

<sup>150</sup> Pierre Legrand, “Against a European Civil Code”, 60(1) *Modern Law Review* (1997), 44–63; *id.*, “Sens et non sens d’un code civil européen”, 48(4) *Revue Internationale de Droit Comparé* (1996), 779–812; Bénédicte Fauvarque-Cosson, “Faut-il un Code civil européen?”, *Revue Trimestrielle de Droit Civil* (2002) No.3, 463–480, at 463; Jan Smits, “The Good Samaritan in European Private Law, On the Perils of Principles without a Programme and a Programme for the Future”, (2000), 41, available at <[http://works.bepress.com/jan\\_smits/8/](http://works.bepress.com/jan_smits/8/)>; and *id.*, “The Europeanisation of National Legal Systems: Some Consequences for Legal Thinking in Civil Law Countries”, in Mark van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (Hart, Oxford, 2004), 229–245.

<sup>151</sup> See, for instance, Reiner Schulze, “European Legal History: A New Field of Research in Germany”, 13 *Journal of Legal History* (1992), 270–295.

Furthermore, it has been suggested that efforts should be concentrated on studying the common roots of European private law. From this point of view, legal historians call upon their colleagues to pay close attention to the development of law in the period of the *ius commune*, which enables one to more fully appreciate the mechanism of the effect of “European legal principles”.<sup>152</sup>

In his criticism, Vinaver himself offered only one reason that compelled him to take up the cause of uncovering the hidden borrowings in the tenth volume of the Digest. In May 1882, a commission within the Ministry of Justice began work on the preparation of a new civil code (*ulozhenie*). However, these efforts progressed very slowly and were not marked with particular success: the draft that had finally been completed in 1905 was never enacted into law.<sup>153</sup> Vinaver had already written in 1895 that doubts had surfaced in the legal community about the need for a radical revision of the historical milestone of Russian legislation, and his research was intended to quell such misgivings. As we have seen, the criticism of the national character of the *Svod* was not unequivocal. It had clear national political goals. And, from a purely professional perspective, the exploding of the myth about the exclusive national character of the *Svod* was directed at forming a positive opinion among the legal community *vis-à-vis* the idea of continuing legislative reform using foreign experience. In an even broader context of the struggle for representation, criticism of the Digest pointed to the impossibility of continuing to engage in ‘reform’ solely by employing bureaucratic instruments.

The politicization of language whereby a word (in my case, the legal terms ‘*svod*’ and ‘*ulozhenie*’) becomes an attribute of a particular political camp—an essential marker of its self-identification and a weapon in the struggle with its enemies—is an important phenomenon in political and intellectual history. A close look at modern Russian politics provides at least one striking historical analogy. The phenomenon of using nationalistic discourse as an argument in the sphere of legislative policy in the concluding period of the imperial history of Russia remains important even today, when the topic of the ‘national particularities’ (*natsional’nye osobennosti*) of democracy is—once again—at stake.

As was the case some two hundred years ago, changes in the language can become remarkable markers of ideological changes. A recent Russian

<sup>152</sup> Reinhard Zimmerman, “Savigny’s Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science”, 112 *Law Quarterly Review* (1996), 598.

<sup>153</sup> Vladimir Slyshchenkov, “Proekt grazhdanskogo ulozheniia 1905 g. i ego mesto v istorii prava”, Avtoreferat dissertatsii na soiskanie uchenoi stepeni kandidata iuridichaskikh nauk, Moscow, 2003, available at <[http://planetadisser.com/see/dis\\_242908.html](http://planetadisser.com/see/dis_242908.html)>; and *id.*, “Proekt grazhdanskogo ulozheniia 1905 g. i modernizatsiia russkogo grazhdanskogo prava”, *Pravovedenie* (2004) No.4, 243-253.

concept—‘*suverennaia demokratiia*’ (sovereign democracy)—is a prime example. This term of a Kremlin ideologist, Vladislav Surkov—coined as a Russian(!) national(!) concept in opposition to the universalistic Western ‘liberal democracy’—has been popularized, *inter alia*, by way of secondary school teachers’ manuals on history recommended by the Russian Ministry of Education as the crowning characteristic of the era of Vladimir Putin’s rule.<sup>154</sup> The irony of language is such that the borrowing of a foreign political term *suverennaia* (sovereign)<sup>155</sup> as the defining feature of a specific Russian variant of democracy comes across less clearly for the majority of Russians than the more familiar (to the intelligentsia) term characteristic for Western democracy: *liberal’naia* (liberal).<sup>156</sup> The incomprehensibility of the ‘sovereign’ component of Russian democracy renders it an ideal ‘empty box’, which can be filled with any content one wishes. Here, any and all creativity will be well placed, since that which is national, in the hands of ideologues, will always mean ‘originality’.

<sup>154</sup> See, for instance, Aleksandr Fillipov, *Noveisbaia istoriia Rossii 1945–2006: Kniga dlia uchitelii* (Prosveshchenie, Moscow, 2007), available at <<http://www.prosv.ru/umk/istoriya/index.html>>.

<sup>155</sup> It goes without saying that the Russian word ‘*demokratiia*’ itself is of Western origin. A good example of historical research on reception of this term and its wide usage in revolutionary Russia of 1917 is provided by Boris Kolonitskii, “Iazyk demokratii: problemy ‘perevoda’ tekstov epokhi revoliutsii 1917 goda”, in Kuposov, *op.cit.* note \*. On the history of the reception of the concept of ‘sovereign’ in Russia, see Evgenii Roshchin, “Istoriia poniatii ‘suverenitet’ v Rossii”, in Kuposov, *op.cit.* note \*, 190–231.

<sup>156</sup> While we do not wish to become embroiled in the detail of the reception of the term ‘liberal’, we should not fail to note that words are used in Russian that are derived from this foreign word—*i.e.*, *liberal’nicbat’* (to act as a liberal). See Rossiiskaia Akademiia Nauk, Institut lingvistichekikh issledovani, *Slovar russkogo iazyka v 4kh t.*, Vol.2 (Russkii iazyk, Poligrafresursy, Moscow, 1999), 181, available at <<http://feb-web.ru/feb/mas/mas-abc/12/maz181o8.htm>>.

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

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TATIANA BORISOVA

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.<sup>1</sup> 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.

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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,<sup>2</sup> 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,<sup>3</sup> 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.”<sup>4</sup> 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*).<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> The further history of the *Digest’s* maintenance and editing remain unaddressed.

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*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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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*.<sup>12</sup>

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.<sup>13</sup> 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 18<sup>th</sup> 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.”<sup>14</sup> 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.<sup>15</sup>

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.”<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> 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 19<sup>th</sup> 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,”<sup>20</sup> 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.”<sup>21</sup>

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.<sup>22</sup> 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 19<sup>th</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup>

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 samodierzhtsa. 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 Nikolaia 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.”<sup>27</sup> 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.<sup>28</sup> 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*.”<sup>29</sup> 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 16<sup>th</sup> December 1916*] *Sobranie zakonov i raspriazsenii 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.<sup>30</sup> 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.<sup>31</sup> 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;<sup>32</sup> 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.<sup>33</sup> 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*.<sup>34</sup> 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”<sup>35</sup> 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.”<sup>36</sup> Thus, a minister whose position was dependent exclusively on the emperor could,<sup>37</sup> 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.<sup>38</sup> 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 Blösfel’dt, “*Zakonnaia” sila Svoda zakonov v svete arkhivnykh dannykh* (Petrograd: Senatskaia tipografia 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.<sup>39</sup>

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.<sup>40</sup> 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!’”<sup>41</sup>

39. Nikolai Lazarevskii, *Leksii 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 otosheniiax* [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!”<sup>42</sup> 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.<sup>43</sup> 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.”<sup>44</sup>

### **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.<sup>45</sup> Take, for example, the apocryphal story of Senator Aleksandr Chelischev.<sup>46</sup> 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.<sup>47</sup> 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."<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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.”<sup>51</sup> 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 Tsinkerlinga, 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.”<sup>52</sup> 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.”<sup>53</sup> 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,”<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> 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*.<sup>57</sup>

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: vtoraia polovina XIX – nachalo XX v.* (Saratov, 1999).

57. Wortman, *Development*, 269.

emergence of Russian lawyers (*advokaty* or *prisiazhnye poverennye*).<sup>58</sup> 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.”<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup>

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.<sup>62</sup> 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 20<sup>th</sup> 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.”<sup>63</sup> 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.<sup>64</sup>

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.”<sup>65</sup>

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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

The historical articles of practicing lawyers German Baratts and Maksim Vinaver<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup> 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.”<sup>72</sup>

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.<sup>73</sup>

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.<sup>74</sup> 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 19<sup>th</sup> century – Beginning of the 20<sup>th</sup> 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."<sup>75</sup> 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*).<sup>76</sup> 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."<sup>77</sup> 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.<sup>78</sup> *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.”<sup>79</sup> 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.”<sup>80</sup> 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.

TATIANA BORISOVA

## **Legislation as a Source of Law in Late Imperial Russia**

### **I. Introduction\***

In addition to shared moral logic and intercultural exchange, legal traditions are also based on regional tendencies, so that in order to understand a legal event, a researcher should study its local character. As the classic anthropologist Clifford Geertz fairly emphasized, ‘law and ethnography are crafts of place: they work by light of local knowledge’.<sup>1</sup> It is well known from the general history of law that the European legal theories and legislation in the 19<sup>th</sup> century abided by the legality principle. The Russian empire was not an exception. However, local features of political and administrative culture and legal professionalism determined the specific practical application of this principle. This article investigates an important aspect of the legality principle: the problem of the publication of law.

Compulsory access to all potential legal sources is one of the main components of the legality principle. All European codifications of the 19<sup>th</sup> century declared this objective, but in a system of more advancing social relations, the result was often quite the opposite. Legal knowledge became more specific, more technical, and thus, inaccessible to the lay population. As a result, a legal historian should study the legality principle in a particular context, as a deviation from an ‘ideal type’, a relevant instrument of social phenomena research suggested by Max Weber at the end of 19<sup>th</sup> century.

I will approach the problem of the publication of legislation in late imperial Russia to show how the legality principle functioned there. Russian legal literature offers a descriptive approach to this issue: the publication of laws has been frequently described with minimal attention to the context; the juridical procedure with regard to publication is studied only to the extent as it is described in other written laws.<sup>2</sup> This account reflects the general tendency of

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<sup>1</sup> Geertz, Clifford: *Local Knowledge: Further Essays in Interpretive Anthropology*, New York: Basic Books, 1983, p. 167.

the Soviet approach, its inclination toward positivism, as opposed to the law in action approach. Foreign legal specialists have viewed publication of legislation in Russia as a sociopolitical event, defined by political power and the weakness of the legal profession.<sup>3</sup> The problem with this approach is that the political component is easily exaggerated: this is another extreme, which frequently leads to the amplification of political rationality and subjectivity of a state as the main actor in the legal field.

In this essay, I aim to present the problem of publishing legislation through two questions: for whom were laws published; and how and why was the concept of recipient of legislation changed in view of the development of law and the juridical profession in late imperial Russia. The research of concepts is the first step for understanding historical reality or nonfunctioning of positive law. It allows us to imagine interests of different groups of historical actors and to show legal history as history of turf wars, which reflect the essence of the transformation of the sociopolitical system in general.

## II. For whom laws were published?

The Fundamental Laws of 1906 introduced the compulsory publication of *all* laws in the Russian Empire. Article 91 declared:

‘Laws are proclaimed for general attention by the Governing Senate in the prescribed manner and before proclamation are not into effect.’<sup>4</sup>

It should be noticed that article 91, as well as article 95, which claimed that ‘no one can ‘shelter himself’ behind unfamiliarity with a law if it has been proclaimed in the prescribed manner’, was borrowed from the 1892 edition of the General Laws. However, the 1892 edition included a rule that adjusted significantly the necessity of publishing the *entire* corpus of legislation. According to article 57 note 3, acts that ‘did not change or supplement general laws but defined only the manner of their actual execution’ and that ‘did not require overall attention and awareness’ could remain unpublished. These acts had to

<sup>2</sup> See, e.g.: *Kolesnikov, A.N.*: *Khronologicheskoe sobranie kak forma inkorporatsii zakonodatel'stva*. Avtoref. dis. kand. iurid. nauk. Vsesoiuznyi nauchno issledovatel'skii institut sovetskogo zakonodatel'stva, Moscow, 1967, *Zakonodatel'stvo zarubezhnykh stran: Opublikovanie normativnykh aktov v evropeiskikh sotsialisticheskikh stranakh i formy ih sistematzacii*, *Nikolaeva, M.N./Pigolkin, A.S.* (eds.) Moscow, 1976, *Opublikovanie normativnykh aktov*, *Pigolkin, A.S.* (ed.), Moscow, 1978.

<sup>3</sup> See e.g.: *Buxbaum, Richard/Berman, Harold* (eds.): *The Soviet Sobranie of Laws. Problems of Codification and Non-Publication*, Berkeley, 1991, especially *Berman, Harold*: *Some Jurisprudential Implications of Codification*, in: *Ibidem*, p. 173–83.

<sup>4</sup> *Osnovnye gosudarsvennye zakony*, in: *Svod zakonov Rossiiskoi imperii* (hereafter SZ), Vol. 1, 1906.

be 'addressed only to those places and persons to which they belong by their matter'.<sup>5</sup>

As we can see, the general requirement of publishing legislation was supplemented by the aforementioned important note, which relied on realms of the imperial state with autocratic-bureaucratic rule. On the one hand, the typically imperial, flexible approach in regulating law for different territories and social classes inhibited the development of a basic, practical procedure for the publication of imperial legislation.<sup>6</sup> The existence of various legal regimes, depending on the region and social group,<sup>7</sup> cannot be ultimately viewed as the politics of central power only, but there are signs of it in sources from the 18<sup>th</sup> and 19<sup>th</sup> centuries, as Vitaly Voropanov shows.<sup>8</sup> Special regulations were frequently created within a dialogue between interested parties; local authorities in particular initiated negotiations and requested specific guidelines from the central authority due to their unprofessionalism or fear of responsibility.<sup>9</sup> Konstantin Pobedonoshev, a noted jurist and statesman of the last third of the 19<sup>th</sup> century, wrote:

'The notion of law itself has not been developed in a straight and clear way. Administrative institutions, especially at the lower branches, do not have yet a clear view of the limits of their power and the sphere of their activity. They have to call constantly for the authority of the higher power, so that almost every action of the lower authorities echoes in the higher spheres of power and the most trivial issue of local administration might be decided by central authorities.'<sup>10</sup>

On the other hand, the autocratic-bureaucratic rule was itself not aware of the separation of executive, legislative and court powers. Legislative politics was theoretically and practically based on unified governance of supreme power of

<sup>5</sup> Osnovnye gosudarsvennye zakony, in: SZ, Vol. 1, 1892.

<sup>6</sup> Bergel, Jean-Louis: Principal Features and Methods of Codification, in: Louisiana Law Review, 48, 1988, p. 1073.

<sup>7</sup> On the diversity of the legal rights of different social groups in Imperial Russia, see: *Wirtshafter*, E.K.: Structures of Society. Imperial Russia's "People of Various Ranks", Illinois, 1994; and *Rieber*, Alfred: The Sedimentary Society, in: Clowes, Edith et al. (eds.), Between Tsar and People. Educated Society and the Quest for Public Identity in Late Imperial Russia, Princeton, 1991, p. 343–67.

<sup>8</sup> Voropanov, V. A.: Regional'nyi faktor stanovleniia sudebnoi sistemy Rossiiskoi imperii na Urale i v Zapadnoi Sibiri (posledniaia tret' XVIII – pervaiia polovina XIX vv.). Istoriko-iuridicheskoe issledovanie, Cheliabinsk, 2011.

<sup>9</sup> See e.g. the case study on penal politics in Siberia: *Gentes*, Andrew: No Kind of Liberal: Alexander II and the Sakhalin Penal Colony, in: Jahrbücher für Geschichte Osteuropas, 3, 2006, p. 321–44.

<sup>10</sup> Pobedonoshev, K.P.: O zhalobakh na deistviia dolzhnostnykh lits administrativnogo vedomstva in Materialy po sudebnoi reforme. Vol. 45, p.2. Pagination 25, p. 5. Quoted in: *Pravilova*, E.A.: Zakonnost' i prava lichnosti: administrativnaia iusticiia v Rossii (vtoraia polovina XIX v. – oktiabr' 1917 g.). SPb, 2000, p. 60.

the autocrat over every sphere of imperial life, thus the separation of laws from executive acts did not appear to be realistic.<sup>11</sup> In this respect, the absence of the ‘notion of law itself’, as Pobedonosstev complained, was a natural consequence of the political system of state power, which created a deficiency of clear, unified rules in lawmaking and enforcement; the multiple attempts of regulators in St. Petersburg to offer a uniform legal system were more exercises of imagined state-building and assertion of authority than anything actual meaningful or productive.<sup>12</sup>

This feature of legal development, or lack thereof, in imperial Russia, could be analyzed using the concept of ‘representative publicness’ (*representative öffentlichkeit*) by Jürgen Habermas, the classic social theorist. He argued that the ethos of power structure which had dominated in European culture prior to the 18<sup>th</sup> century, and even persisted until the beginning of the 19<sup>th</sup> century, was to ‘display the inherent spiritual power or dignity before the audience’.<sup>13</sup>

The legislative initiatives of Peter I (r.1682–1725) clearly illustrate the political direction of representative supremacy. The succession law of 1722 is probably the most impressive example: it stipulated that ‘the ruling tsar always has the freedom (*volia*) to designate (...) whom he wishes and to remove the one who has been designated’.<sup>14</sup> Richard Wortman who recently researched the tradition of legal dynastic succession underlined that in doing so, Peter and his later successors represented themselves as mythical heroes and defenders of the state.<sup>15</sup>

Wortman draws attention to a simple fact: the public presentation of the mythical image of the monarch and the exercise of absolute power were reciprocal processes. Absolute rule sustained an image of the transcendent monarch, which in turn warranted the exercise of his unlimited power. This clear observation is very important in order to estimate correctly the legislative politics of Russian monarchs and the ‘representative’, or theatrical, essence of their actions towards strengthening legality in the state. Peter I introduced compulsory publication of legislation by the Senate, but this reform was no success.<sup>16</sup> He also initiated

<sup>11</sup> *Kazanskii*, P.E.: *Vlast’ Vserossiiskogo imperatora*. Odessa, 1911.

<sup>12</sup> *Burbank*, J. / *von Hagen*, M.P., *Coming into the Territory: Uncertainty and Empire*, in: *Burbank*, J. et al. (ed.), *Russian Empire: Space, People, Power, 1700–1930*, Bloomington, 2007, p. 4.

<sup>13</sup> *Habermas*, Jürgen: *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, Boston, 1991, p. 5.

<sup>14</sup> *Polnoe Sobranie zakonov Rossiiskoi imperii* (hereafter PSZ) [the Complete Collection of the Laws of the Russian Empire], *Sobranie pervoe* [1649–1825], February 5, 1722, No. 3893. The collection is available at [http://www.nlr.ru/e-res/law\\_r](http://www.nlr.ru/e-res/law_r).

<sup>15</sup> *Wortman*, Richard: *The Representation of Dynasty and “Fundamental Laws” in the Evolution of Russian Monarchy*, in: *Kritika: Explorations in Russian and Eurasian History*, 13(2), 2012, p. 265–300.

many attempts to codify the Russian law and so to create a new codification instead of the Council Code (*Sobornoe ulozhenie*) of 1649. Each of his successors continued these attempts to different extents.<sup>17</sup> Even though this project of codification was clearly beneficial, and even necessary given the antiquity of the existing law, its continuing lack of success was caused by the emphasis on presentation and re-presentation – codification as a display of authority – as shown simply by the dates of the beginning of this project (early 17<sup>th</sup> century) and its completion (in 1835).

In this perspective, important questions are: what were the changes that made a new, proper codification project the main priority of Nicholas I (r. 1825–1855), and who completed it with the publication of the Digest of Laws of the Russian Empire in 1832?<sup>18</sup> Previous codification efforts – with ‘representation’ as their main purpose – have in the past been explained as unsuccessful due to the immaturity of domestic jurisprudence (i.e., there was no real juridical profession or study). While this was important in stalling the development of the legal system, in my opinion, this was not the main reason. After all, foreign codes were translated before the 19<sup>th</sup> century, foreign experts were invited, and if there was an imperial will, borrowed laws or parts of codes could have been accepted.

I suggest that the key source of change was the rise of public discussion and a growing demand for legality. The Decembrist Uprising at the Senate Square on December 14, 1825, which took place in the interregnum after Alexander I’s death (r. 1801–1825), signaled no return to the previous exclusively representative models. The uprising clearly defined a change in the elite’s concepts of power, justice and legality: many rebels stood up with arms and demanded the change of the autocratic regime. The open demonstration of these intentions changed the representative mode of authority in Russia: it finely drafted a new axis of ‘legal autocracy’. We can find it in the Coronation Manifesto of Nicholas I prepared by the future architect of the Digest, Mikhail Speransky:

‘It is not from daring dreams, which are always destructive, but from somewhere above that state institutions are gradually refined, deficiencies improved, abuses corrected. Through gradual improvement, any modest wish for the better, any idea aimed at affirming the force of law, at broadening true education and industry, which We [the Emperor] have achieved in a lawful, open way for everyone, will always be accepted by Us with reverence.’<sup>19</sup>

<sup>16</sup> *Petrovskii*, S.O.: Senate v tsarstvovanie Petra Velikogo. Istoriko-iuridicheskoe issledovanie, Moscow, 1875, p. 224–30.

<sup>17</sup> See further in: *Borisova*, Tatiana: Russian National Legal Tradition: Svod versus Ulozhenie in Nineteenth-Century Russia, in: Review of Central and Eastern European Law, 3, 2008, p. 295–342.

<sup>18</sup> Svod zakonov Rossiiskoi Imperii: poveleniem Gosudaria Imperatora Nikolaia Pavlovicha sostavlennyi (The Digest of Laws of the Russian Empire, compiled at the Command of Emperor Nicholas the First), St. Petersburg, 1832.

The quote directly presents legislation and legality as concepts existing only under the supervision of the tsar and his designated persons: they functioned as active creators and defenders of legality. In this light, the Manifesto placed an interesting stress on the disorder in the beginning of Nicholas' rule, which could be described as a consequence of the new monarch's commitment to legal order and to the procedure of publishing legislation in particular. This should be discussed in more details.

The interregnum lasted due to the rules of precedence: the throne should be passed to Constantine Pavlovich, the next brother in turn. But in 1822 he informed Alexander I about his decision to renounce his right to inherit the throne. Alexander signed a manifesto declaring that Constantine had renounced the throne and named the next in line, the young Nicholas Pavlovich, as heir to the throne. The manifesto was to be announced after his death – before that it was secreted in the State Council and the Assumption Cathedral.<sup>20</sup> Since only very few people knew about it, after Alexander's death on November 19, 1825 officials, clerics, and officers in St-Petersburg, including a guards' commander Nicholas Pavlovich took the oath of fealty to Emperor Constantine Pavlovich.

Some members of the State Council hesitated if the will of a dead Alexander should be promulgated. Nicholas asked Constantine to confirm his declaration of abdication, and only after Nicolas received this, on December 12, 1825, was Nicholas's accession manifesto, dating his ascension to the throne on November 19, drafted and presented to the State Council, on December 13. In the manifesto Nicholas I found it appropriate to describe the chaos in the beginning of his rule in the categories of 'right' and 'law':

'In these acts, we saw the renouncement of His Highness, which occurred during the Emperor's life and was confirmed by His Majesty. But we did not want and did not have the right to accept this renouncement that had not been publicly announced and turned into a law, as ever irreversible.'<sup>21</sup>

As we can see, Nicholas I explained his confusion by his commitment to legality and to the inappropriateness of non-public legislation in particular. There was a certain political motivation for doing so: after Peter's law of the succession to the throne, Nicholas' ancestors acceded to the throne with active support of the Guard and sometimes through the assassination of the ruling monarch, as was the case with Nicholas' grandmother Catherine the Great and his father Alexander I. The circumstances of the rebellion and the confusion caused by Alexander's secret manifesto on passing the throne to Nicholas showed a definite advantage of following legislative formalities of making and promulgating law.

<sup>19</sup> PSZ. *Sobranie vtoroe* [1826–1880], 31 January 1833, No. 5947.

<sup>20</sup> *Wortman*, *The Representation of Dynasty*, op. cit. note 15, p. 282.

<sup>21</sup> PSZ. *Sobranie vtoroe* [1826–1880], 31 January 1833, No. 5947.

The Decembrists's rebellion on the Senate square, which called for a constitution, clearly indicated the need for a change toward formal legality. For however intensely the Russian monarchs made codices to show their ability to create and defend the law, they were, as the ultimate demonstration of their authority, above it. The basic idea of the autocratic legal doctrine was formulated by historian Nikolai Karamzin in 1811:

'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!'<sup>22</sup>

Nicholas I tried to enforce the formalities of legal procedure that actually existed before. The eighteenth century decrees of Peter the Great and his descendants required legislation to be published by the Senate.<sup>23</sup> In the first half of the nineteenth century, legislation was to be officially published in two Senate periodicals: the *Senate Bulletin* (from 1808) and the *Senate Announcements on State, Governmental and Court Affairs* (from 1822). In addition to the periodicals, special editions and collections of legal acts were published as well. However, the procedure of law publication by the Senate was not necessary followed: the power relied on the principles of expediency and discretion. State actors dominated in legislation and law enforcement; their responsibilities were not clearly divided and included legislative, executive, court and supervisory functions. These circumstances definitely affected the quality of legislation and legal drafting. In practice, officials from different ministries or departments were informed about new legislative acts 'by affiliation', that is, by the sphere of their expertise, not necessarily by publication. As for publication, ministries also published their regulatory acts in various departmental periodicals bearing official status. We will come back to the issue of ministerial publication of law later.

As for the population, according to Peter's decree of 1720 it had to be necessarily acquainted with laws on collections of money or property.<sup>24</sup> The decree required the distribution of information in a printed and not rewritten form. Peter's choice to have these acquisitions published was possibly made in order to stop abusive additions from local authorities. The procedure compelled priests to read out the acquisitions on Sundays – this draws our attention to the very important issue of illiteracy. Without going into details, it must be noted

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<sup>22</sup> Karamzin, N.M.: *Zapiska o drevnei i novoi Rossii v ee politicheskom i grazhdanskom otnošeniiakh*, Moscow, 1991, p. 102.

<sup>23</sup> *Petrovskii*, Senate, op. cit. note 16, p. 224–30.

<sup>24</sup> PSZ. *Sobranie pervoe* [1649–1825], 10 February 1720, No. 3515. The author is thankful to Dr. Galina Babkova, who kindly shared information on the eighteenth century legislation on law publication.

that the low level of literacy and education in general in Russia slowed down, probably to a large extent, the development of law and legal culture.

Articles 51 and 52 of the Police Statute of Catherine II of 1782 slightly widened this policy, deciding to publish other legislation to regional authorities (governors), who would pass the new law to police institutions for actual publication and announcement.<sup>25</sup> In line with the Statute, a district attorney – a prosecutor assistant who supervised legality (Article of from the Statute on Provincial Administration)<sup>26</sup> – had to decide whether received legislation should be published. As we see, the discretion of local authorities in the issue of publication of legislation was stipulated by the law.

Nicholas I expected the Digest of Laws of the Russian Empire to be the official and final collection of law in force and so reduce abuse among officials, which was frequently based on deficient or fragmental knowledge of legislation. The Second Section of His Majesty's Own Chancellery (*Vtoroe otdelenie sobstvennoi ego imperatorskogo velichestva kantseliarii*) was created directly for this purpose. A subject plan was created, and employees collected legislative material from the whole body of the Russian legislation according to its categories. The corresponding parts of the code were then developed on this basis.<sup>27</sup> Law-drafting techniques used in the Digest were essential: old laws were transformed into new laws, the technique later called 'codification recycling' in Russian legal literature.

The issue of coordination of the original legislation and its codified version in the Digest was inevitable. During the discussion on 'the power of the Digest' its chief editor Mikhail Speranskii insisted on the necessity of applying the original law in case of a doubt, as showed in a pre-revolutionary legal historical research by Alexander Pakharnaev.<sup>28</sup> However, the attendees of this discussion saw clearly that many parts of the Digest, for example, The Fundamental Laws of the Russian Empire, originated during the codification process, that is, were compiled from a body of detached legislative materials. This explains why Nicholas I did not support Mikhail Speranskii and the Digest was put into force as a positive law that cancelled all legislation prior to it.<sup>29</sup>

<sup>25</sup> *Ibidem*, 8 April 1782, No. 15379.

<sup>26</sup> *Ibidem*, 7 November 1775, No.14392.

<sup>27</sup> On the procedure of codification see *Raeff*, Marc: Michael Speransky: Statesman of Imperial Russia, The Hague, 1969, p. 320–46 and *Borisova*, Russian National Legal Tradition, op. cit. note 17.

<sup>28</sup> *Pakharnaev*, Alexander: *Obzor deistvuiushchego Svoda zakonov Rossiiskoi imperii*, SPb., 1909, p. 75–8.

<sup>29</sup> The legislation on army and on some provinces – e.g. Finland and Poland – was placed separately and was not included in the Digest of laws.

It was considered inappropriate for addressees of the law to consult the original legislation if they wanted to clarify, for example the Fundamental Laws of the Russian Empire that were placed in the first volume of the Digest. Finally, the Digest was prepared with the monarch's direct participation<sup>30</sup> by the organ that was extremely close to him (the Second Section of His Majesty's Own Chancellery), so its legitimacy could not be questioned in the 1830s.<sup>31</sup> The State Council statement 'On the Application and Use of the Digest of Laws of the Russian Empire' explained that, from this time on, the articles of the Digest were the only source of actual law and substituted previously applied 'excerpts from decrees and resolutions'.<sup>32</sup>

This statement further described in detail how the Digest was to be implemented by appropriate personnel. In order to solve a case, first of all, a chancellery of an institution – e.g. a court chancellery – had to prepare a list of the Digest's articles that were relevant for the case. The format of references to the Digest was also defined (volume, name of the law, number of the article). Next, a secretary had to check the articles and bind the list. Amid the discussion on the case the listed articles 'had to be read out during the meeting from the Digest's volumes'. Finally, the statement required to 'include in definition' word by word those articles that would found the decision. In the case of an ambiguity in a law from the Digest one had to address a higher institution for clarification.

The analysis of the codification process in the Digest and the assigned procedure of its use demonstrate the paternal administrative approach the state had towards law.<sup>33</sup> In this perspective, the compulsory publication of new legislation for public awareness obviously was not of the highest priority. Another aspect of legislative practice was even more important: the codification department would add a new law to the Supplements of the Digest or new editions of its particular parts. While the new legislation was undergoing codification work, the information about it was sent by affiliation to the specifically assigned organs and authorities that had to know about the changes.

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<sup>30</sup> *Telberg*, G. G.: *Uchastie imperatora Nikolaia I v kodifikatsionnoi rabote ego tsarstvovaniia (po povodu 80-letia deistvia SZRI)*, in: *Zhurnal Ministerstva iustitsii* (hereafter *ZhMIu*), 1, 1916, p. 233–44.

<sup>31</sup> The situation with the legitimacy of the Digest's new editions and Supplements changed radically after the abolition of His Own Majesty's Chancellery in 1882. Since that time, the participation of the emperor in the codification process was purely nominal. The task of editing the Digest was passed on to the State Council; 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.

<sup>32</sup> PSZ. *Sobranie vtoroe* [1826–1880], 12 December 1834, No 7654.

<sup>33</sup> See further in: *Borisova*, Tatiana: *The Digest of Laws of the Russian Empire: The Phenomenon of Autocratic Legality*, in: *Law and History Review*, 30(3), 2012, p. 901–925.

Regardless of the changes from the original text (and sometimes meaning) of a legal act that were caused by adding new legislation in the Digest and the Supplements, the advantage was given to the codified law: the citizens and institutions had to refer to the codified version. The respective rule was confirmed in the Statute of the Governing Senate<sup>34</sup> and stayed in force until the Bolshevik October Revolution of 1917.<sup>35</sup>

Referring to my initial question – for whom laws were published – we should consider the aforementioned realms of the Digest’s functioning. Obviously non-governmental domain was not addressed in the governmental practice of drafting laws. Legislation was published and codified first of all (if not exclusively) for the bureaucrats. This can be illustrated by the absence of any non-governmental projects in this field – law clubs, societies and journals. The only exception is *Juridical writings (Iuridicheskie zapiski)*, an open ended periodical that was published by Pyotr Redkin, a famous law professor of the Moscow University (and from 1863 the St. Petersburg University) since 1841. However, the content of this periodical did not have a single doubt in the exclusive competence of governmental institutions in legislative and judicial power. The absence of criticism was largely a consequence of a general political direction undertaken after the victory over Napoleon and the growing reaction in the whole of continental Europe. In Russia, it resulted into severe censure that suppressed attempts of dissent, especially in the affairs of national importance, legislation obviously among them.

### **III. Emergence of a legal community and a change in the procedure of law publication**

Several aspects of the social life of the first half of the 19<sup>th</sup> century led to the changes in the understanding of legality. The public sphere was developing, state politics were focused on systematization of legislation, legal education was expanding, and the practice of administrative work was progressing. Culture in 1850s offered the prerequisites for the emergence among the elite of a ‘legal consciousness’ and even a ‘jurisprudential enthusiasm’,<sup>36</sup> initiated by the ‘new people’, i.e. the officials from the central administration organs who obtained special legal education, jurists whose influence started spreading across the Empire because of the educational development.<sup>37</sup> Public attention to the problems

<sup>34</sup> Uchrezhdenie Pravitel’stvuiushchego Senata. Art.66, in: SZ, Vol. 2., SPb, 1906.

<sup>35</sup> Uchrezhdenie Pravitel’stvuiushchego Senata, izdaniia 1915 goda, i ego izmenenie zakonom 16 dekabria 1916, in: Sobranie zakononii i raspriazsenii pravitel’sva, No.11, 1917, Item. 68.

<sup>36</sup> *Wortman*, Richard: *The Development of a Russian Legal Consciousness*, Chicago, 1976.

of legislation initially produced a severe resistance of the government. One of the examples of this reaction is the story with the anonymous article 'On the oral proceedings in Russia', published in the *Russian Messenger (Russkij Vestnik)*, a literary journal of Mikhail Katkov, in 1857.<sup>38</sup> It evoked a tart disapproval of Viktor Panin, the Minister of Justice, and, as a result of his special report to the emperor, further discussion of subject in press was prohibited.<sup>39</sup> What in this article made the Minister so scared?

The article was devoted to the problem of the implementation of oral proceedings that was prescribed in a number of court regulations in Volumes 10 and 11 of the Digest. The regulations allowed oral proceedings in commercial and trade courts, special oral proceedings for civil processes, and particular cases of regional courts. The article criticized how court clerks abandoned oral proceedings that had been prescribed by law in favor of written legal proceedings, which the author ironically called a bureaucratic law 'improvement'. As a result of this preference for written documents, in the commercial courts against law 'several registration books started by inspectors-bureaucrats, passionate for clerical order, lie constantly on a registration desk [whereas internal paperwork had to be written in one 'court book', according to the law]. In the corner of the court room there is a small table and a permanent secretary is writing behind it ... Don't know whether it is everywhere, but everything aforementioned is present in some 'improved' courts.'<sup>40</sup>

Available research literature confirms that the practices of legal proceedings in the chancellery described in the article were common in various regions of the Empire.<sup>41</sup> The author's attitude to such circumstances, and in particular his appeal to the legal order that was familiar to him and his outcry against its nonobservance are primarily important for us.

The author emphasized that the clerical deformation might finally discredit the authorities. In his opinion, the existing justice system made people ask for the services of private 'attorneys, aides, lawyers and rest of the crowd that rub shoulders in chancelleries'.<sup>42</sup> The competence of this 'crowd' was not in their familiarity with law but in 'the ability to sneak into so-called 'secret of chancellery'. They should be changed by properly educated people among

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<sup>37</sup> Voropanov, Regional'nyi faktor stanovleniia, op. cit. note 8, p. 322–93.

<sup>38</sup> O slovesnom deloproizvodstve v Rossii, in: Russkii vestnik, 1857, September, 11, p. 153–73.

<sup>39</sup> Pobedonoscev, K. P., Graf V.N. Panin, in: Golosa iz Rossii. Sborniki A.I. Gertsena i N.P. Ogareva. Vyp. 3. Kn. VII, Moscow, 1976.

<sup>40</sup> O slovesnom deloproizvodstve v Rossii, p. 156.

<sup>41</sup> Voropanov, Regional'nyi faktor stanovleniia, op. cit. note 8, p. 284–99.

<sup>42</sup> O slovesnom deloproizvodstve v Rossii, op. cit. note 38, p. 160.

university, lyceum and law school graduates, who would form the national advocacy.

The analysis of this article shows that the key author's violation was that his article became *a private attempt for public discussion on the disregard of the law* concerning legal proceedings that were prescribed by the law. Thus, it was a threat to the stable official notion of legality as a field defined and controlled by the state only. Minister of justice Panin might find particularly inappropriate the fact that the anonymous author posed himself as a person who is involved in the legal process. He demonstrated a perfect awareness of the legislation in force and, with support of his practical experience, showed how the bureaucratic approach angled the lawmaker's will. In conclusion the author formulated a sentence about the existing bureaucratic system of legal proceedings with a colloquial expression: 'Where the hand is, there the head is!'.<sup>43</sup>

The author's solution for the situation was essentially new for the traditional understanding of law and legality as the sphere of the Emperor's expertise and appointed persons or institutions. The leading power of the change should become not the wise power and its new laws, but the private element – the advocates enforced by the knowledge of legislation in force and the acknowledgement of its public value. Therefore, in 1857 on the pages of the *Russian Messenger*, Panin discovered a new claim, dangerous to the declaration of power, from an individual who claimed his right to participate in the state sphere of law by *his knowledge of legislation*.

The discussed article and Panin's repressive reaction to it (sanctioned by the Emperor) signaled a clash between the 'former / state' and 'new / public' understandings of legality. Familiarity with legislation played a key role as a ground for a professional opinion on the matter of legal order and the problems of its distortion. Very soon the authorities had to cooperate with public expectations and reject the politics of repressions and suppression of legality issues. The Crimean war (1853–1856) was the reason: it unmasked all of the imperfections of the state administration. Russia's shattering defeat in the war, at the very end of Nicholas I's rule, with the coalition of Great Britain, France, the Ottoman Empire and the Sardinian Kingdom, signaled sharply a need for modernization of the whole state system.

In these circumstances, the government of Alexander II (r. 1855–1881) started developing the reformations, which figure in history as The Great Reforms of 1860–1870's. They concerned all sides of social life, starting from the liquidation of serfdom to reforms of the army, the education, the local administration and the court. For the sake of efficiency, drafters were determined to abandon the prior paternalist model of the secret preparation of reforms. For instance, in

<sup>43</sup> *Ibidem*, p. 172.

1862 the major details of the later court reform (1864) were published with a deadline for feedback. It should be noticed that, in accordance with the former concept of legality, and possibly for the sake of time, public discussion was not initiated: the community was offered to address their private comments directly to the commission preparing the reform. Nevertheless, the event of a governmental call for such a public initiative through reports was unprecedented in Russian history. Work in the legal field started to require not just professional expertise of invited specialists or experienced managers, as it used to be, but reports from social representatives. The novelty of this approach is clear from the reaction expressed in the reports. For example, Alexander Chebyshev-Dmitriev, a criminal law professor at the Kazan University, supplemented his report with the following comment:

‘We are certainly more or less familiar with scientific demands, but the conditions and demands of Russian life, as well as actions of our courts, are wrapped in mystery. We know extremely little about Russia, and those facts which literature tells us, require a close check ... But the commission doubtlessly possesses all necessary information and means that are unavailable for individuals, in order to collect essential materials and to check the facts from the Russian literature.’<sup>44</sup>

As it was mentioned in prior research,<sup>45</sup> this quote explains very well the reasons why only two reports out of 448 were received from the representatives of legal science.<sup>46</sup> In line with the official state paternalist concept of legality, jurists considered teaching and research studies as the sphere of their competence, and legislation and its application as the exclusive sphere of state appointed individuals.

Another innovation was the coverage of the court reform preparation in the *Journal of the Ministry of Justice*, founded in 1860 before the reforms for distribution of legal information. The December 1863 volume of the journal published ‘Materials on the condition of the work on the court reform in Russia’, which described in detail who participated in drafting new court statutes and in which parts.<sup>47</sup>

It was no coincidence that the reforms in legislation publication through the new legislation bulletin – *The Collection of Legislation and Resolutions of the Government, Published by the Ruling Senate (Sobranie zakononii i rasporiazhenii pravitel'stva, izdavaemoe pri Pravitel'stviushchem senate)* – was

<sup>44</sup> Quoted in: *Nabokov, V.D.: Raboty po sostavleniiu sudebnkh ustavov*, in: Davydov, N.V./Poljanskij, N.N. (eds), *Sudebnaia reforma*, Vol. 1, Moscow, 1915, p. 311.

<sup>45</sup> *Ibidem*.

<sup>46</sup> See further in: *Tel'berg, G.G.: Vliianie sudebnoi reformy na nauku prava*, in: Davydov/Poljanskij (eds), *Sudebnaia reforma*, Vol. 1, p. 357.

<sup>47</sup> *Svedeniia o polozhenii rabot po preobrazovaniiu sudebnoi chasti v Rossii*, in: ZhMIU, 12, 1863, p. 655–64.

initiated at the end of 1862, during intensive work on court reform, although at present there are no ostensible documents proving a direct connection between these events. It is indicative that the implementation of the new legislation bulletin on December 24<sup>th</sup>, 1862 was introduced as an exclusively technical reform that was suggested by the Ministry of Justice. ‘All manifestos, tsar’s and Senate’s decrees, treaties and regulations that have *the force of law* [italics TB]’ were required to be placed in the *Collection of Legislation*. *The Senate Bulletin* was assigned to publish subordinate legislation.<sup>48</sup>

There were no clear conventions in theory, doctrine or legislation on which subjects regulated only by the law in a true sense of this notion, were compulsory to everyone;<sup>49</sup> thus legislation publication was gaining special significance. As a result, a normative act received the status of an obligatory act through its publication in the *Collection of Legislation*. Therefore, the use of a legal technique solved the relevant questions of administration and law enforcement and allowed to postpone a political decision on the issue of non-division of legislative and executive power in imperial Russia.

The practice of publishing the most important acts in a special bulletin and the fact that publication itself brought them the ‘power of law’ were very illustrative for the legal system in Russia. The law on the *Collection of Legislation* mentioned indirectly that legal force was attributed by a legislating institute, but not exclusively. The Emperor’s manifestos and decrees, for example, were defined as potentially having the ‘significance of law’, but the Emperor’s edicts and the State Council’s opinions approved by the Emperor (the law on the *Collection of Legislation* was published this way) were not mentioned at all, because they were possibly included as ‘regulations’. Since there was no convention on the relations between the form of a regulatory legal act and its meaning, these relations had to be declared every time in an ad hoc manner through publishing or not publishing it in the *Collection of Legislation*.

The Ministry of Justice’s offer to publish an official bulletin for legislation of general importance was motivated by the lack of clarity in legislative publishing.<sup>50</sup> Even though the Fundamental Laws required laws to be published by the Senate in order to be in force,<sup>51</sup> ministries frequently ignored this regulation, preferring to inform the subordinate institutions and officials first, for the sake of expediency. For this purpose, the mechanisms of departmental publishing were functional.

<sup>48</sup> Sobranie uzakonenii i rasporiazsenii pravitel’stva, No.1, 1863, Item 3.

<sup>49</sup> *Ibidem*.

<sup>50</sup> See further in: *Korkunov*, N.M.: Ukaz i zakon, In: SPb., 1894; *Kochakov*, B.M.: Russkii zakonodatel’nyi dokument XIX- nach. XX vekov, in: *Vspomogatel’nye istoricheskie discipliny*, Moscow, 1937, p. 319–73.

<sup>51</sup> Osnovnye gosudarsvennye zakony, Art. 57–58, in: SZ, Vol. 1, SPb., 1857.

Thus, for example, since 1829 the Ministry of Home Affairs published a periodical, the *Journal of the Ministry of Home Affairs*. Although its name and the style of publications changed over time,<sup>52</sup> the official part remained very important: laws developed in the Ministry were published there. As it will be discussed below, despite the clear requirement for compulsory publication of legislation in the Senate's bulletins, after 1863 the practice of departmental publishing was still relevant, and in certain periods it was even increasing. This increase is proved by the publication of a special index of legislation in the departmental periodical of the Ministry of Home Affairs during the First World War – *The Index of the most important legislation, governmental regulations and reports, placed in the official part of the newspaper the Governmental Newsletter in 1915–16*.

Summing up, the systematical publication of important legislation in the widely available bulletin<sup>53</sup> in the *Collection of Legislation* was expected to solve the mess in the new legislation. Henceforth, this bulletin had to present the full system of the new legislation with an important distinction of compulsory for all and not compulsory for all. This step was definitely necessary for the better efficiency of legislative politics in times of reforms. Of course, the citizens were potentially interested in this. To which extent did they feel legal indefiniteness as an important problem?

One case described in the press in the beginning of 1863 illustrates the importance of publishing legislation for lay people. It attracted the attention of contemporary lawyers: the reprinting in the Journal of the Ministry of Justice of the original article, from the popular newspaper 'Russian Bulletin', demonstrates this interest.<sup>54</sup> The article described a case with a merchant in St. Petersburg in 1862. On December 20<sup>th</sup>, several newspapers distributed information about a newly accepted law that significantly extended the group of people who had a right to take a loan in the form of *veksel*, promissory notes that were much more strictly protected by the state than normal loans. According to the 1832 Statute on promissory notes, this right was the prerogative of tradesmen: nobility, honorary citizens, *raznochintsy* (people of miscellaneous ranks) and peasants could not bind themselves with promissory notes unless they were registered in a guild or in a trade association; foreigners had to participate in special corporations of capital, craft or trade.<sup>55</sup>

<sup>52</sup> *Dement'ev, A. G. et al (eds): Russkaia periodicheskaia pechat', 1702 – 1894, Moscow, 1959, p. 206, 430 and 524.*

<sup>53</sup> Unfortunately we do not have information on the exact number of copies of the Collection of Legislation. The *Collection* was provided to all state organs on all levels for free; for non-state individuals and organizations, the *Collection* was available at a very low price.

<sup>54</sup> *Bartenev, V.: Zametka ob obnarodovanii zakonov, in: Russkii listok, 9, 18 February 1863, reprinted in: ZhMIU, 3, 1863, p. 739–42.*

The announcement of the new law, reprinted in many newspapers on December 20<sup>th</sup>, was written in such a language that the merchant got an impression that the law was in force:

‘On giving a right to all classes to take loans as *veksel*. After discussing a report of the Minister of Finance on giving a right to all nobility to bind themselves to agreements of *veksel* loans, the State Council announced an address approved by His Majesty. In supplement of Articles 2260 and 2261 of the law on civil legal proceedings from the Digest of Code of 1857, vol. 10 p. 2 and Articles 546, 653, 655, 656 of the trade statute from the Digest of Code of 1857 Vol. 11 P. 2 and in cancellation of Article 2243 of the law on civil legal proceedings from the Digest of Code of 1857 Vol. 10 P. 2, all individuals are allowed to bind themselves to agreements of *veksel* loans, both regular and transferrable. Only clergy of all religions, peasants without immobile property and if they don’t have any trade certificates, and lower ranks of all departments are exceptions to this general rule.’<sup>56</sup>

As we can see, the law was approved by the tsar on December 3<sup>rd</sup>, however, it was not published in the Senate periodicals, so the announcement in the newspapers was not official, as the article’s author explained. The Senate sent an announcement about this law on January 16<sup>th</sup>, 1863 in a form of special printed decrees that were sold in the Senate bookstore from the same day, and on January 17<sup>th</sup> the law was added to the *Collection of Legislation*. This is why the official declaration was only on January 16<sup>th</sup>.<sup>57</sup> The merchant who accepted a promissory note from a nobleman on December 20<sup>th</sup>, faced the fact that the nobleman simply rejected to pay, which was just a debt obligation and not so strictly protected as promissory note, according to the old law. The court refused to protect the merchant’s right, since the right had not yet emerged: the accepted law had not yet been officially published.

The article’s author emphasized the insufficient accessibility of legal knowledge for lay people. Furthermore, his text could give the impression that the nobleman used the merchant’s knowledge against him, as the latter was aware of the legal order of publishing laws by the Senate, declared in the 1857 edition of the Fundamental Laws (Articles 57 and 58):

‘The nobleman rejected simply from the payment. This already surprised the merchant. But what was his surprise when a notary refused to protest the *veksel* note, and the public office found that it was not a *veksel* note but a simple obligation.’

The author concluded with a complaint:

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<sup>55</sup> On the history of legislation on exchange of loans in Russia, see: *Fedorov, A.F.*: *Veksel’ noe pravo*, Odessa, 1906; *Zholobova, G.A.*: *Ustav o vekseliakh 1902 goda. K 100-letiu so dnia priniatia*, in: *Zhurnal rossiiskogo prava*, 5, 2000, p. 7–19.

<sup>56</sup> *Russkii listok*. No. 50, 20 December 1862.

<sup>57</sup> *PSZ (Sobranie tretie 1856–1881)*, 16 January 1863, No. 38993.

‘The understanding of a legal order, even in publishing laws, is not greatly spread among the audience. Especially lay people believe every printed word, especially if this word is in an official newspaper of some ministry – e.g. the *Stock Journal* of the official department is the organ of the Ministry of Finance – and if something is printed on behalf of the legislative power.’

The end of the article stressed that when publishers ‘publish a new general law [they] should specify every time, from which number of the *Collection of Legislation* it is taken, and if it is not yet there, then, that according to the Fundamental Laws, it is not yet an official publication.’<sup>58</sup>

The case discussed reflects the specificity of the critical time of the 1860s reforms, which, as commentators underlined later, defined an important accomplishment in changing the mode of relations between the state power and the citizens. As Pavel Lyublinsky, a famous jurist of the beginning of the twentieth century and a professor of St. Petersburg University, wrote, the accomplishment was in the rejection of ‘enlightened care of the state’.<sup>59</sup> The choice for the change of political direction was perceived as necessary both for the state and society.

On the one hand, a necessity to modernize the country economically and technologically made the state power reject the paternalist models in legislative politics. This rejection is reflected in the very essence of the *veksel* reform that was described above: nobility and representatives of other classes, previously protected by the state from the strict punishments of defaulting on *veksel* loans, were acknowledged as responsible subjects who are ready to realize the consequences of their legal decisions.

On the other hand, as it is seen from the example of the article in the *Russian Messenger*, society persistently rejected ineffective governmental paternalism which was reduced in the legal field to the domination of clerical principles. In the circumstances of isolation of the state practices from control and participation in society, the power controlled itself, and this favored corruption and general ineffectiveness of governmental institutions.

Leading jurists believed that in the legal field paternalist governance of the letter of the law and administrative discretion ought to be changed by a rational formal regulating system that would be defined by law. This system would recognize citizens as capable individuals who are ready to apply formal rules and respond for their actions. This understanding of the court reforms can be found in the work of Ivan Foinitskii, a famous specialist of criminal legal proceedings: ‘Court statutes, along with liquidation of serfdom, have a general liberating basis, defined in the personality principle. It carried new content to the

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<sup>58</sup> *Bartenev*, *Zametka*, op. cit. note 54.

<sup>59</sup> *Liublinskii*, P.I.: *Sud i prava lichnosti*, in: Davydov, N.V./Polianskii, N.N. (eds): *Sudebnaia reforma*, Vol. 2, Moscow, 1915, p. 1–41, at p. 3.

legality principle'.<sup>60</sup> That said, Foinitskii asserted that the personality principles and state principles do not contradict one another: "The state principle is reached best of all through recognition of the personality principle, through allowance of personal initiative and energy given the responsibility for them".<sup>61</sup>

What was the representation of the new individual principle in the legal field and understanding of legality, described by Foinitskii? There are three key improvements in 1864 Court statutes that are typically mentioned: abandonment of written legal proceedings in favor of oral argument, participation of criminal defense lawyers in trials, and addition of a jury. As to our topic – legislation as a legal source – more specific aspects should be noted:

1. The formal proof theory was cancelled: henceforth a judge was freer to estimate a crime.
2. Inevitable in legal proceedings, interpretation of a law by the judge could be made with more freedom, without referring to a specific rule for every point of the court's decision. Notions such as 'according to inner belief' and 'in good conscience' started to play an important role in the formulation of the court's decision.
3. Revision control of judges was cancelled.

As we can see, judges were viewed not as merely state personnel acting according to the letter of the law, as it followed from the previous model from the Digest, but as full participants of a vivid judicial process. Within the framework of Kantian 'Metaphysics of Morals', they transformed from objects – means of execution of another's will – to subjects who made decisions in line with their own will, and carrying responsibility for them.

A Kantian understanding of subjectivity as freedom and responsibility was not developed in late imperial Russia.<sup>62</sup> The institutional support of the idea of an independent and responsible individual-subject was problematic in the legal field. Citizens were not trusted to estimate the legal meaning of newly published laws – there was a special codification organ for it, which included new legislation in the legal system. Along with the compulsory publication of generally important legislation and freedom of judges to interpret it (from the 1860s), the law still required the use of codified legislation in court and not its originally published form in the *Collection*.

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<sup>60</sup> Foinitskii, I. Ia.: Ideia lichnosti v Sudebnykh ustavakh i kodifikatsionnoe ikh znachenie, in: Pravo, 1899, p. 2280–1.

<sup>61</sup> *Ibidem*, p. 2281.

<sup>62</sup> Plotnikov, N.: Ot "individual'nosti" k "identichnosti" (istoriia poniatii personal'nosti v russkoi kul'ture), in: Novoe literaturnoe obozrenie, 91, 2008, p. 64–83.

It has to be emphasized that although jurists heavily criticized this requirement to apply the codified rather than the original legislation,<sup>63</sup> in reality, deviations from this rule were regarded as unacceptable. ‘Administrative interpretation’ through codification was still much preferred to a judge’s and other legal practitioner’s freedom of interpretation and his independent definition of legal consequences of new legislation.

As it was discussed above, codification in Russia assumed the definition of legal consequences of new legislative acts through adding changes to the Digest of laws, made by a specially appointed organ. To refer to legislation in force, it was necessary to first check the last edition of this part of the Digest, where it was placed in the first edition of 1832, and, second, check the last Digest’s Supplement, where the latest changes were included. A famous jurist, Nikolai Lazarevskii, analyzed this system of compulsory ‘administrative interpretation’ and wrote that state officials considered it most effective since they had information about all valid and repeatedly published regulatory legal acts and the specificity of their application.<sup>64</sup> This explanation of keeping priority of the codified legislation over the original clarifies why the governmental actors did not follow well the requirement of compulsory publishing. The expediency principle continued to dominate over the legality principle despite outcry of jurists.<sup>65</sup>

Moreover, there were cases of laws being made simply out of old laws by the codifying body – not by the legislators – when the latter took too long or were unable to come to a decision about a necessary piece of legislation. As an example, consider a case with the statute of the Ministry of Trade and Industry. Founded on October 27, 1905, the Ministry existed without a statute: discussion on a statute to create it was delayed on the legislative level.<sup>66</sup> Eventually, the codifiers of the Department of the Digest in the State Chancellery prepared a document that regulated the Ministry as a combination of regulations of those departments that constituted the new Ministry. It was published in the 1906 Sup-

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<sup>63</sup> See, e.g.,: *Korkunov*, N.M.: *Znachenie Svoda zakonov*, in: *Zhurnal ministerstva narodnogo prosveshcheniia*, 9, 1894, p.77–102; *Lazarevskii*, N.I.: 1. *Svod i zakon*, St-Petersburg, 1899, p.2; *Lektsii po russkomu gosudarstvennomu pravu*, Vol.1, *Konstitutsionnoe pravo*, St-Petersburg, 1908; *Lozina-Lozinskii*, M.A.: *Kodifikatsia zakonov po russkomu gosudarstvennomu pravu*, in: *ZhMfu*, 4–5, 1897; *Pobedina*, E.K.: *K voprosu o iuridicheskoi sile Svoda*, in: *Ibidem*, 4, 1909.

<sup>64</sup> *Lazarevskii*, N.I.: *Administrativnoe tolkovanie zakona*, in: *Vestnik grazhdanskogo prava*, 1, 1916, p.104–29.

<sup>65</sup> *Shershenevich*, G.F.: *Primenenie norm prava*, in: *ZhMJu*, 1903, January, p.34–82; *Pergament*, M.Ia.: *Pamiati dvukh russkikh tsivilistov*, in: *Vestnik grazhdanskogo prava*, 1, 1913, p.11.

<sup>66</sup> *Gorfein*, G.M.: *Osnovnye istochniki po istorii vysshikh i tsentral’nykh uchrezhdenii XIX-nachala XX v.*, in: *Nekotorye voprosy izucheniia istoricheskikh dokumentov XIX – nachala XX vv*, Leningrad, 1967, p.79.

plement of the Digest of Code (supplement to part 2 volume 1) as ‘Content and Subjects of the Ministry of Trade and Industry’ in the absence of new legislative acts on the matter. This caused a tart criticism in the legislating organ – the State Duma, founded in 1906 for the participation of people representatives in legislative work. Despite the criticism, the document remained in force.

This example shows that the lawmaking practices in Russia were transforming extremely slowly. It seems that what was possible at the end of the 1820s – a special codifying organ under the Russian Emperor that created new legislation for the Digest from old laws – was also possible in the beginning of the twentieth century. A single distinction was important: the expression of doubts on the legality of such methods of lawmaking politics. These doubts appeared as a result of a serious development in education and legal consciousness in Russian society and, above all, the emergence of the legal profession. Representatives of the legal community, with their professional knowledge of formal legislative institutions, played a crucial role in promoting the legality principle, against the unlimited discretion of ‘a fair administrator’ (tsar, governor or simply chief).

The conflict of conceptions of legality between state and civil actors was indicated in the middle of nineteenth century and sharpened as time passed. According to the archive materials of the codifying organ from the beginning of the twentieth century, editors of the Digest – high-rank officials – expressed concerns on the legality of the codification. However, the opinions of two editors were not supported by their colleagues.<sup>67</sup> Still, this case shows clearly the seriousness of the problem of seeing a law as ‘illegal’, and this problem definitely affected the usage of written law as a legal source.

#### IV. Conclusion

Having discussed certain aspects of the usage of legislation as a legal source in the Russian Empire, we can conclude that during the whole imperial period, the central legislative power considered law as *a means of governing* above anything else. The emergence of the legal profession and the growth of social activity in the nineteenth and twentieth centuries brought new actors in the legality field, but did not change the overall notion of an official as a primary addressee of legislation. Sociopolitical features of the Russian Empire formed certain constant characteristics of the Russian legislation that remained very stable regardless of political changes. Based on the research on publishing legislation, the following characteristics can be listed:

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<sup>67</sup> *Borisova, T.: Zakon i zakonnost’ v russkom kodekse 1906–1917 gg., in: Istochnik. Istorik. Istorija, SPb., 2001, p. 11–41.*

1. Imperial component. The flexible approach of the central legislative power toward the local character of certain regions undermined the validity of legal definiteness and consequently the legality principle in the empire.

2. Representation of the monarch's power as unlimited by law. Here the term 'representation' is used according to Habermas' conception, which demonstrated a theatrical element of power, a display of its absorbing and irrational spiritual nature. The Russian Empire's legislation embodied this conception through an emphasis on the unrestricted power of Russian autocrats, above the law

3. Domination of a paternalist basis of state institutions toward citizens, fixed in legislation. This appeared especially in the procedure of the compulsory inclusion of new legislation in the Digest of Code of the Russian Empire by a special state organ. Since the Digest was created as a 'codification' of the Russian law, its updating was called 'codifying recycling of law' ('кодификационной переработкой закона'). State officials, judges, as well as citizens and their advocates were rejected in their ability to interpret independently new legislation.

4. The aforementioned characteristics questioned the necessity of a compulsory proclamation of legislation for general awareness, which weakened the actual observance of the legality principle.

5. The conflict between administrative and legal understandings of legality started in the middle of nineteenth century because of the emergence of the legal profession. This conflict escalated into the beginning of the twentieth century, at which point, for the elite, questions of law became purely political, and law itself was in a way discredited.

The legality principle, which requires full accessibility to legislation, existed in Russia, but only with very serious restrictions. This aspect of the legality principle was, however, achieved in 1906, at least in terms of written law: *all* legislation had to be published. In reality, though, the five aspects listed above significantly narrowed the meaning and action of this legal requirement.

## The Legitimacy of the Bolshevik Order, 1917-1918: Language Usage in Revolutionary Russian Law<sup>1</sup>

Tatiana Iu. Borisova

### Abstract

This article describes and analyzes the legislative politics of the revolutionary regimes in Russia in 1917-1918. The author aims to demonstrate the political meaning of the form of early Soviet legislation and its legitimizing effect. Revolutionary legislators often used specific language in new laws as a vehicle for legitimacy, i.e., as a means of making the people comply with those laws. The two main types of legal language used by the Bolsheviks can be interpreted from the perspective of different types of legitimacy. The revolutionary strategy used propagandistic legislation, written in the language of lay people, which urged them to act according to the new law. This can be seen as a request for the people to take certain actions and thus to legitimize the soviets. On the other hand, they also used the traditional strategy by employing old bureaucratic means of writing and distributing legislation to the local soviets. The language used by this strategy could not be easily understood by a lay audience and implied a tradition of obeying the law written in familiar legal language, which in turn implied rational/legal legitimacy. The second strategy had already become dominant after the first months of the Bolshevik Revolution. This observation demonstrates that, from the very beginning of their rule, Soviet leaders approached legislative policy from a technocratic point of view, which determined the further development of Soviet legal theory and practice.

### Keywords

language of law, legal history, legal profession, legality, legislation,  
legitimacy, revolution, Russia, Soviet law

<sup>1</sup> The author has also written two articles in Russian on this subject, though from a different perspective. See Tat'iana Borisova, "Revoliutsionnoe zakonodatel'stvo v 1917-1918 gg.: Vybor iazyka", *Novoe Literaturnoe Obozrenie* (2011) No.108, 110-116, available at <<http://magazines.russ.ru/nlo/2011/108/bo10.html>>; and *id.*, "Sovet pri Narodnom komissare prosit trebovat': Zhenskii sub"ekt v revoliutsionnom zakonodatel'stve", *Novoe Literaturnoe Obozrenie* (2011) No.112, available at <<http://magazines.russ.ru/nlo/2011/112/bo13.html>>.

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## 1. Introduction

Is legitimacy of revolutionary order an oxymoron? Marxist-Leninist theory postulated that revolution would demolish institutions of state power as well as other structures of the exploitative classes. This declaration from the *Manifesto of the Communist Party* (1848)<sup>2</sup> was further developed in the 1870s in the criticism that Marx<sup>3</sup> and Engels<sup>4</sup> made on *The Gotha Program*<sup>5</sup> of the German Social Democratic Party (1875); Marx and Engels stressed that the state was needed in order to fulfill a certain functional role, *i.e.*, to suppress the proletariat's rivals. In contrast to the use of (revolutionary) violent force, state power certainly needed what political philosophers of today call 'political legitimacy',<sup>6</sup> which meant obedience to authority, implying voluntary compliance, thus making the domination legitimate.<sup>7</sup>

The main thesis of this article is based on the following proposition: the theory of the dictatorship of the proletariat could not apply in Russia in 1917 without the compliance of other classes with its dictates because of the remarkably small population of the predominately rural Russian proletariat. The author's research on decrees and other archival documents in legislative politics from late 1917 through 1918 demonstrates that, at the very top level of authority (the Soviet government and ministries), revolutionaries relied heavily on both tsarist legislative practices and tsarist legislation itself. The revolutionary leaders' constant efforts to retain formalism in legislative practices during that period served, *inter alia*, as a means of establishing the new order as legitimate and (quasi-) legal. This phenomenon, which had a major impact on Soviet legal and political culture, dates back to the very first days of Soviet rule.

In his classification of pure types of legitimacy, Weber considered *rational/legal* legitimacy as being the most modern, a result of the evolution of two earlier types: *traditional* legitimacy and *charismatic* legitimacy. This article will

<sup>2</sup> Karl Marx, Friedrich Engels, "Manifest der Kommunistischen Partei", Karl Marx, Friedrich Engels, *Werke* Vol. 4 (Dietz Verlag, Berlin, 1972), 459-493. The author used an electronic version of this work, available at <[http://www.mlwerke.de/me/me04/me04\\_459.htm](http://www.mlwerke.de/me/me04/me04_459.htm)>.

<sup>3</sup> Karl Marx, "Kritik des Gothaer Programms", in Karl Marx and Friedrich Engels (eds.), *Werke* Vol. 19 (Dietz Verlag, Berlin, 1973), 13-32. The author used an electronic version of this work, available at <[http://www.mlwerke.de/me/me19/me19\\_013.htm](http://www.mlwerke.de/me/me19/me19_013.htm)>.

<sup>4</sup> Engels' critique can be found in his letters to leading Social-Democrats August Bebel (18-28 March 1875, 12 October 1875), Wilhelm Bracke (11 October 1875), and Karl Kautsky (January-February 1891). The author used an electronic version of this work, available at <<http://www.mlwerke.de>>.

<sup>5</sup> An English translation of *The Gotha Program* is available at <<http://history.hanover.edu/texts/gotha.html>>.

<sup>6</sup> For a discussion of the basic aspects of the theory of political legitimacy, see Peter Fabienne, "Political Legitimacy", in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy (Summer 2010 Edition)*, available at <<http://plato.stanford.edu/archives/sum2010/entries/legitimacy/>>.

<sup>7</sup> Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press, Berkeley, CA, 1978), 212.

demonstrate that, in the case of revolutionary Russia, the usage of legal language, along with other legislative practices borrowed from the tsarist regime, indirectly implied a *tradition* of domination as a source of legitimacy for the Soviet order. The author will show how tsarist traditions and customs of administration were able to help instill the legitimacy of a revolutionary order.

There is a well-developed field of historical literature that touches upon the tendency of soviets—in both the center and the regions—to continue certain tsarist administrative practices.<sup>8</sup> Recent scholarship by Peter Holquist provides an important attempt to understand this continuation phenomenon as a development of Russian institutional culture. Holquist bases his research on Alfred Rieber's concept of the technocratic ethos of late imperial bureaucracy<sup>9</sup> that served, as Holquist demonstrates, as “a crucial bridge for many specialists to service with the Soviet state”.<sup>10</sup> In dealing with the legislative politics of the Bolshevik Revolution, however, existing research is concentrated mainly on the *substance*, not the *form*,<sup>11</sup> of the new regime's legal acts. The aim of this article is, on the contrary, to study the *form* and the additional political meaning that it contained.

With respect to methodology, the article relies on the in-depth comparative study of legal linguistics by Heikki Mattila, which clearly shows that the authority of tradition and old forms (*i.e.*, legal language, including certain terms and syntax) is grounded in the law.<sup>12</sup> In analyzing the language of legislation,

<sup>8</sup> M.P. Iroshnikov, *Sozdanie sovetskogo tsentralizovannogo gosudarstvennogo apparata. Sovet narodnykh komissarov i narodnye komissariaty* (Nauka, Leningrad, 1967); T. H. Rigby, *Lenin's Government: Sovnarkom 1917-1922* (Oxford University Press, London, 1979); E.N. Gorodetskii, *Rozhdenie Sovetskogo gosudarstva (1917-1918)* (Nauka, Moscow, 1984); Anna-Liisa Heusala, *The Transitions of Local Administration Culture in Russia* (Kikumora Publications, Helsinki, 2005); Peter Holquist, “‘Information Is the Alpha and Omega of Our Work’: Bolshevik Surveillance in Its Pan-European Context”, 69(3) *Journal of Modern History* (1997), 415-450; James Heinzen, “‘Alien’ Personnel in the Soviet Revolutionary State: The People's Commissariat of Agriculture under Proletarian Dictatorship, 1918-1929”, 56(1) *Slavic Review* (Spring 1997), 73-100; Alessandro Stanziani, *L'économie en révolution. Le cas russe, 1870-1930* (Albin Michel, Paris, 1998); and Don K. Rowney, “Narrating the Russian Revolution: Institutionalism and Continuity across Regime Change,” 47(1) *Comparative Studies in Society and History* (January 2005), 79-105.

<sup>9</sup> Alfred Rieber, “Bureaucratic Politics in Imperial Russia”, 2(4) *Social Science History* (Summer 1978), 399-413; and *id.*, “Patronage and Professionalism: The Witte System”, in B.V. Anan'ich (ed.), *Problemy vsemirnoi istorii: Sbornik statei v chest' A.A. Fursenko* (Dmitrii Bulanin, St. Petersburg, 2000), 286-298.

<sup>10</sup> Peter Holquist, “‘In Accord with State Interests and the People's Wishes’: The Technocratic Ideology of Imperial Russia's Resettlement Administration”, 69(1) *Slavic Review* (Spring 2010), 151-179, at 152.

<sup>11</sup> Most researchers take this approach, although there is some interesting research on the form of the Russian Revolutions of 1917. See, for example, Orlando Figes and Boris Kolonitskii, *Interpreting the Russian Revolution: The Language and Symbols of 1917* (Yale University Press, New Haven, CT, 1999). On transformation of language, see Michael S. Gorham, *Speaking in Soviet Tongues: Language Culture and the Politics of Voice in Revolutionary Russia* (Northern Illinois University Press, DeKalb, IL, 2003).

<sup>12</sup> Heikki E.S. Mattila, *Comparative Legal Linguistics* (Ashgate, Aldershot, UK, 2006), 81-88. For more on the historical and theoretical aspects of symbolism and formalism of legal language, see, also, Ferdinand Feldbrugge (ed.), *The Law's Beginnings* (Martinus Nijhoff Publishers, Leiden, 2003).

this article uses the approach of John J. Austin's twentieth-century Speech Act Theory, along with the positioning theory of language usage developed by sociologists.<sup>13</sup> Both theories focus on the usage of discursive practices as a means of using language to exercise power in social relations.

This article is structured as follows. First, it starts with a discussion of the Provisional Government's approach to the problem of the legitimacy of its power. Thereafter, it briefly focuses on the legitimacy of revolutionary power in the view of Lenin's theoretical writings and legislation during the October Revolution. Finally, the last section provides an analysis of the language used by the central authorities in their legislative acts in relation to the soviets. The entire discussion is an attempt to answer the following question: how were relations of power and domination/subservience expressed in the language of early Soviet legislation?

“*Es erben sich Gesetz und Rechte  
Wie eine ew'ge Krankheit fort.*”  
(Laws and rights are hereditary,  
like an eternal sickness.)  
Goethe, *Faust* (1808)

## 2. Legitimacy of Power After the February Revolution

On 2 March 1917,<sup>14</sup> the February Revolution put an end to monarchical power in Russia. In anticipation of the Constituent Assembly, which was supposed to determine the future political structure of the state, the Provisional Government published laws on political and civil freedoms and began preparations for reforms, beginning with the courts. These measures were intended to modernize backward social institutions and to help bring about the changes proclaimed by the Revolution; they were meant to turn yesterday's subjects into citizens capable of making independent, responsible political decisions for the country. In their administrative practices, ministers of the Provisional Government relied on structures of state authority from tsarist times. They seemed efficient for introducing revolutionary changes, despite the (often sharp) contrast of the latter with the customs of the former political and legal culture. To give an example from the middle of April 1917, the terms “Russian subjects” (*russkie poddannye*) and “lower ranks of the army and navy” (*nizshie chiny armii i flota*) were changed in official documents

<sup>13</sup> John L. Austin, *How to Do Things with Words* (Clarendon, Oxford, 1962); and Bronwyn Davies and Rom Harre, “Positioning: The discursive production of selves”, 20 *Journal for the Theory of Social Behavior* (1990), 43-63, available at <<http://www.massey.ac.nz/~alock/position/position.htm>>.

<sup>14</sup> The author will use references to the Julian calendar that was used in Russia and the Soviet Union up until 14 February 1918, and to the Gregorian calendar after it was introduced on 14 February 1918. The difference in calendars is embedded in the commonly used references to the revolutions of 1917, which were named according to the old Julian calendar. The February Revolution actually took place in March according to the new calendar, while the October Revolution took place in November.

to “Russian citizens” (*grazhdane*) and “soldiers and sailors” (*soldaty i matrosy*).<sup>15</sup> The change was mandated by a special memo for the Interior Ministry issued by the Legal Conference (*Iuridicheskoe soveshchanie*), the administrative organ in charge of developing the Provisional Government’s agenda for reform.

And this is where we encounter one of the main problems facing the Provisional Government: the continuity of governing practices from the previous state structure. The government itself was not elected or approved by a representative body. To a certain extent, the Provisional Government as an institution was only possible because of the support of the revolutionary state apparatus (including the military). It is likely that the new leaders adopted a policy of administrative continuity as a means of projecting political legitimacy.

But this raises the following question: what was the source of the *ancien régime’s* legitimacy of state power? When Nicholas II abdicated on 1 March 1917, the symbolic basis of authority consisted of two components: *spiritually*, it was the blessing of the Orthodox Church, while, *materially*, the mechanism for exercising sovereign power was the state bureaucracy. But they were closely connected. Under Orthodoxy, the monarch, who was anointed by God, ruled and delegated his power to state officials. Moreover, as part of the state structure, governed by the Synod, the Church bound the people by both law<sup>16</sup> and ritual<sup>17</sup> to submit to the sovereign power.

But Russian Orthodoxy could not be used as a spiritual basis of obedience after the February Revolution. In developing the revolutionary ideas of equality, the Provisional Government issued two acts that separated state and religion: “On abolishing religious and national restrictions” (*Ob otmene religioznykh i natsional’nykh ogranichenii*), dated 20 March 1917, and the Freedom of Conscience Act (*O svobode sovesti*), dated 2 August 1917.<sup>18</sup> Before this, however, the Synod, as a part of the state bureaucracy that had been transferred under the power of the Provisional Government, rushed to publish its own resolutions following the abdication of the monarch. By the end of March 1917, the rites of the Russian Orthodox Church, where tsarist power had been mentioned before, had already been corrected. Just as in the case of legal regulations on “soldiers

<sup>15</sup> See the letter of the chairman of the Legal Conference to the Interior Ministry (14 April 1917), Russian State Historical Archive (*Rossiiskii gosudarstvennyi istoricheskii arkhiv*, hereinafter “RGIA”), fond 1288, opis’ 5 (1917), delo 38, 1. See more in Tat’iana Borisova, “Zakon ‘v godinu tiazhkih ispytanii’: Sobranie uzakonenii i rasporiazhenii pravitel’sтва v 1917-1918 gg.,” 5(123) *Istoricheskie zapiski* (2002), 129-165.

<sup>16</sup> “The Russian monarch is a sovereign monarch. Not only fear and conscience, but God himself commands obedience to his authority.” Art. 4, *Svod zakonov Rossiiskoi imperii* (Senatskaia tipografia, St. Petersburg, 1906), Vol. 1, Part 1. All translations in the present article are by the author unless otherwise noted.

<sup>17</sup> Richard Wortman, *Scenarios of Power: Myth and Ceremony in Russian Monarchy* (Princeton University Press, Princeton, NJ, 1995), Vol. 1, 2.

<sup>18</sup> Resolution of the Provisional Government, “Ob otmene religioznykh i natsional’nykh ogranichenii” (20 March 1917), *Sbornik ukazov i postanovlenii vremennogo pravitel’sтва* (Petrograd, 1917) Vyp. 1; and Resolution of the Provisional Government, “O svobode sovesti” (2 August 1917), *Sbornik ukazov i postanovlenii vremennogo pravitel’sтва* (Petrograd, 1917) Vyp. 1.

and sailors”, the approach here was textual: instead of mentioning the emperor, they now mentioned the “blessed [*blagovernoe*] Provisional Government”.<sup>19</sup>

The very same method of replacing undesirable words was used for the church’s blessing of the new authorities, even though these authorities did not directly order this act. This case clearly demonstrates the strength of institutional inertia, where previous structures, especially those deeply rooted in everyday practices, seemed virtually indestructible.

One of the most influential members of the Provisional Government, Pavel Miliukov, wrote in his memoirs that this institutional continuity was not a goal but, rather, a temporary means used by ‘temporary’ authorities.<sup>20</sup> Under the circumstances of a severe crisis, and weighed down by Russia’s involvement in World War I since 1914, the Provisional Government turned to the mechanisms that had been used to legitimize and exercise power earlier.<sup>21</sup> Innovations were introduced, of course, with respect to certain formal procedures, *e.g.*, the Provisional Government decided, in reference to prior legislation, to change the words “imperial majesty” (*imperatorskoe velichestvo*) and “supreme power” (*vysochaishaia vlast’*) to read “the Provisional Government”.<sup>22</sup> In doing so, the new authorities were trying to do the impossible: to project as legal the same governing practices that had been used by the previous regime, the legality of which had been nullified by the revolution.

### 3. October 1917: The Problem of Legitimacy—Rhetoric v. Formalism

“Quiet, orators!  
You  
have the floor,  
Comrade Mauser!  
Too long we’ve lived by the laws  
Adam and Eve have left.  
Run down old History’s horse!  
Left!”

Vladimir Maiakovskii, *Left March* (1918)

If the February Revolution was spontaneous, with power ending up in the hands of a body that was admittedly provisional, the October coup was aimed precisely

<sup>19</sup> See M.A. Babkin, *Dukhovenstvo Russkoi pravoslavnoi tserkvy i sverzhenie monarkhii (nachalo XX v. – konets 1917 g.)* (Izdatel’stvo Gosudarstvennoi publichnoi istoricheskoi biblioteki Rossii, Moscow, 2007); and *id.* (ed.), *Rossiiskoe dukhovenstvo i sverzhenie monarkhii v 1917 gody (Materialy i arkhivnye dokumenty po istorii Russkoi pravoslavnoi tserkvy)* (Indrik, Moscow, 2006).

<sup>20</sup> P.N. Miliukov, *Vospominaniia* (Politizdat, Moscow, 1991, originally published as M.M. Karpovich and B.I. El’kin (eds.), *Vospominaniia (1859-1917)*, New York, NY, 1955), 295.

<sup>21</sup> See V.I. Startsev, *Vnutrenniaia politika Vremennogo pravitel’stva pervogo sostava* (Nauka, Moscow, 1967), 95.

<sup>22</sup> See the record of the Provisional Government session (13 May 1917) in the journal of the Provisional Government, State Archive of the Russian Federation (hereinafter “GARF”), fond 1779, opis’ 2, delo 1, chast’ 2, list 52.

at seizing power for the purpose of radical revolutionary reorganization. Unlike the Provisional Government, which had tried to maintain order, the Bolsheviks proclaimed the previous order to be antiquated and declared the start of a new revolutionary era. Therefore, the problem of legitimacy was posed in a completely different manner. Bolshevik revolutionary teleology did not need any competitors in the form of religious faiths, even in exchange for legitimacy. A genuine revolution is a decisive break that, rather than contradicting, simply destroys any reminders of the legitimacy of the previous order.<sup>23</sup> Therefore, the legal and religious legitimacy of the earlier rule was swept away.

In his work "State and Revolution" (*Gosudarstvo i revoliutsiia*), Lenin stressed that the task of revolution is to break the state itself, not to improve its institutions, as the Provisional Government and the soviets that had co-operated with it had tried to do.<sup>24</sup> Written in the summer of 1917, the ideas expressed in Lenin's book were implemented in the first decrees of the Soviet authorities: "On Peace"<sup>25</sup> and "On Land".<sup>26</sup> Adopted during the night of 25-26 October 1917 at the Second All-Russian Congress of Soviets, which was convened the day of the uprising, these decrees constituted a decisive breakdown of the former state and the beginning of a new era.<sup>27</sup> By backing out of agreements with their allies in the decree "On Peace", the Bolsheviks broke with the international community. In rejecting private property in the decree "On Land", they disavowed the basis of the national socioeconomic structure.

Already at the very beginning of Soviet power, the source of its legitimacy was declared as the people itself and their organs, *i.e.*, the soviets. This order was first established in practice at the Second All-Russian Congress. Thereafter, it was postulated in the first article of the Declaration of Rights of the Working and Exploited People enacted on 3 January 1918:

"Russia is hereby proclaimed a Republic of Soviets of Workers', Soldiers' and Peasants' Deputies. All power, centrally and locally, is vested in these Soviets."<sup>28</sup>

Later, the Declaration was included as the first chapter of the 1918 Constitution of the Russian Soviet Federative Socialist Republic (RSFSR), with some very

<sup>23</sup> For more on the negativity of the revolution, see A. Magun, *Otritsatel'naia revoliutsiia: k dekonstruktsii politicheskogo sub'ekta* (Izdatel'stvo Evropeiskogo universiteta v S-Peterburge, St. Petersburg, 2008).

<sup>24</sup> V.I. Lenin, *Gosudarstvo i revoliutsiia: uchenie marksizma o gosudarstve i zadachi proletariata v revoliutsii*, in V.I. Lenin, *Polnoe sobranie sochinenii* (Izdatel'stvo politicheskoi literatury, Moscow, 5th ed. 1974), Vol. 33, 1-120, at 30.

<sup>25</sup> Decree "O mire" (26 October 1917), *Dekrety sovetskoi vlasti* (Gosudarstvennoe izdatel'stvo politicheskoi literatury, Moscow, 1957), Vol. 1 (hereinafter "DSV"), 14-16.

<sup>26</sup> Decree "O zemle" (26 October 1917), *DSV*, Vol. 1, 17-20.

<sup>27</sup> For details of the beginning of the Bolsheviks' rule, see Alexander Rabinowitch, *The Bolsheviks in Power: The First Year of Bolshevik Rule in Petrograd* (Indiana University Press, Bloomington, IN, 2007).

<sup>28</sup> "Declaratsiia prav trudiashchegosia i ekspluatiruemogo naroda" (3 January 1918), *DSV*, Vol. 1, 320-323, at 321.

important amendments, *e.g.*, there was no mention of the Constituent Assembly.<sup>29</sup> The Bolsheviks had proposed that the Assembly adopt the Declaration in order to promulgate the supremacy of the soviets as the main source of power. Otherwise, the long-awaited Constituent Assembly would be able to compete with the soviets in their role as representatives of the will of the people. At the same time, the revolutionary government had declared that the Assembly was “counter-revolutionary”. And to strip the Assembly of its legitimacy, the soviets were proclaimed as the only institution that could truly represent the people’s will. On 5 January 1918, the day of the dissolution of the Assembly, the All-Russia Central Executive Committee sent a special telegram to the soviets. It stated:

“The soviets must counter the slogan ‘All power to the Constituent Assembly’ with the slogan ‘All power to the Soviets’, the consolidation of the Soviet republic. The first slogan unites all enemies of the worker-peasants of the October Revolution [...]”<sup>30</sup>

In these turbulent times of revolutionary changes, a denial of legitimacy was symbolically embodied in the refusal of the Assembly’s guards to further defend the building where the meeting was being held, which led to sailor Zselezniak’s famous quote: “The guard is tired” (*karaul ustal*). The legendary history of the October Revolution depicts this phrase as the anecdotal end to useless speeches by now-illegitimate delegates.<sup>31</sup>

At that time, the niceties of legitimacy were less important than gaining and exercising the physical power to block the activity of the Bolsheviks’ (potential) enemies in the Assembly. As a means of revolutionary politics, Bolshevik leaders also worked hard to formalize this element of force (*sila*) as a part of Soviet state power. The Declaration and other major decrees of the first months of Soviet rule sought to establish the basic principles of the new rule and thus can be considered as a part of this formalization/legalization of revolutionary power.<sup>32</sup>

However, when referring to these legislative acts as a means of formalization, the author is also fully aware of their declarative nature and propagandistic meaning. To a certain extent, they resembled pamphlets and continued the tradition of propaganda of the prerevolutionary period. Lenin himself acknowledged that decrees served as “a form of propaganda”, and that, without them, the Bolsheviks

<sup>29</sup> Konstitutsiia (Osnovnoi zakon) RSFSR (1918), *DSV*, Vol. II, 550-564 (hereinafter “1918 RSFSR Constitution”).

<sup>30</sup> Telegram from the All-Russia Central Executive Committee, “O sozyve tret’ego vserossiiskogo s’ezda sovetov” (5 January 1918), *DSV*, Vol. I, 284.

<sup>31</sup> See O.F. Solov’ev, *Velikii Oktiabr’ i ego protivniki* (Mysl’, Moscow, 1968), 97-98; I.E. Amurskii, *Matros Zselezniakov* (Moskovskii rabochii, Moscow, 1968); and Rabinowitch, *op.cit.* note 27, 67-127.

<sup>32</sup> In using the term “legalization” here, the author has in mind the process of making a phenomenon official; especially during revolutionary transitions, this is to be distinguished from legitimacy acquired by compliance. The difference between the two phenomena is described in Carl Schmitt, *Legalität und Legitimität* (Duncker & Humblot, Munich and Leipzig, 1932).

“would not be able to occupy leading positions”.<sup>33</sup> The same idea is to be found in an article by Nikolai Osinskii, the first head of the Supreme Council of the People’s Economy (*Vyssbii sovet narodnogo khoziaistva*) of the RSFSR, in which he admitted that his criticism of declarative decrees was mistaken. In the middle of 1918, he wrote that he fully recognized their political importance:

“Declarative legislation in the form of decrees is extremely important during critical moments of the revolution [...] At the moment of a massive assault on the capital, it is necessary to declare a goal, in the form of a decree, toward which the masses should strive.”<sup>34</sup>

According to a resolution of the Military Revolutionary Committee of 28 October 1917, thousands of copies of the decrees of the new authorities were to be printed and posted in the streets.<sup>35</sup> This flow of decrees, partly propagandistic, was aimed at formalizing and legalizing the new regime. Can this general tendency be considered as a step toward Weberian rational/legal/bureaucratic legitimacy of power? It would seem that, to a certain extent, the answer to this question should be in the affirmative, since, from the very first days after the October coup, together with major declarations, revolutionary leaders also took important measures to create clear formal practices for exercising the power that they had seized.

By the fifth day of the revolution, 30 October 1917, the Council of People’s Commissars had already published a decree “On the procedure for the affirmation and publication of laws”.<sup>36</sup> The importance of this document was indicated by its rhetorical conclusion “in the name of the republic”, which was included only in legislative acts of fundamental political importance. Its three main points are presented below, along with a brief commentary.

- (1) A legislative act entered into force on the day of its publication in the official *Gazette of the Provisional Government of Workers and Peasants* (*Gazeta Vremennogo rabocheho i krest’ianskogo pravitel’stva*), which succeeded the previous government publication, *Bulletin of the Provisional Government* (*Vestnik Vremennogo pravitel’stva*), which itself was a modification of the tsarist *Government Bulletin* (*Pravitel’svennyi vestnik*).
- (2) The previous practice of publishing laws by the Ruling Senate was abolished. From 1863—from the time of the reforms of Aleksandr II—up

<sup>33</sup> Cited in M.P. Iroshnikov, *Sozdanie sovetskogo tsentralizovannogo gosudarstvennogo apparata. Sovet narodnykh komissarov i narodnye komissariaty* (Nauka, Leningrad, 1967), 120.

<sup>34</sup> V. Obolenskii (N. Osinskii), “Iz pervykh dnei Vysshego soveta narodnogo khoziaistva”, (11) *Narodnoe khoziaistvo* (1918), 14.

<sup>35</sup> See *Predpisanie Voennogo otdela Ispolkoma sovetov rabochikh i soldatskikh deputatov komissaru Tipografii Izvestiia* (28 October 1917), GARF, fond R-130, opis’ 1, delo 111, list 1.

<sup>36</sup> “Dekret SNK ‘O poriadke utverzheniia i opublikovaniia zakonov’”, (2) *Gazeta Vremennogo rabocheho i krest’ianskogo pravitel’stva* (30 October 1917).

until this point, the publication of laws and the preliminary assessment of their legality had been the task of the Ruling Senate in the form of a bulletin called the *Collection of Legislation and Resolutions of the Government, Published by the Ruling Senate* (*Sobranie uzakonenii i raspriazhenii pravitel'stva, izdavaemoe pri Pravitel'stviushchem senate*). The text of a legislative act published in this bulletin was considered official. This procedure was left in place by the Provisional Government.<sup>37</sup> Following the October Revolution, the General Assembly of the Senate issued a resolution on 23 November “against the insurrection against the legal authority of the Provisional Government”;<sup>38</sup> the Senate was shut down the next day.

- (3) In place of publication by the Senate, the decree stipulated a new procedure: “The Department of Legislative Proposals, under the Soviet of People’s Commissars, shall periodically publish the *Collection of Legislation and Resolutions of the Government*, which has the force of law.” The collection (hereinafter the “*Collection of Legislation*”) was issued on 1 December 1917. The above-mentioned decree on the publication of laws was printed in issue No. 12. Throughout this entire time, the legislative acts of the new regime entered into force in accordance with the decree, *i.e.*, by being published in the *Gazette*. In the middle of November, another decree was published confirming the entry of laws into force through publication in the *Gazette*. In the atmosphere of the early days of the revolution, when decrees were being published at a feverish pace, the authorities were trying to introduce order above all else.

This 1917 decree had been drafted with great attention to the details of procedure, which formed a remarkable contrast to the well-known early major decrees of the Soviet government. Unlike those early decrees, emphasizing the revolutionary break with previous institutions and practices, here was a different intention: to continue the practice of officially publishing legislation. This practice from the old order of legitimizing acts of the authorities in the form of a special bulletin (the *Collection of Legislation*), as described in points two and three of the above-mentioned decree, was emphasized by repeating the very name of the bulletin. It retained its prerevolutionary foundation—*Sobranie uzakonenii i raspriazhenii pravitel'stva* (Collection of Legislation and Resolutions of the Government)—throughout the first twenty years of the Soviet regime. Subsequent modifications were insignificant.<sup>39</sup>

<sup>37</sup> For more, see Borisova, “Zakon”, *op.cit.* note 15.

<sup>38</sup> Resolution of the Governing Senate (23 November 1917), RGIA, fond 1341, opis' 548, delo 105, p. 140.

<sup>39</sup> From October 1917 to 1920, it was called *Sobranie uzakonenii i raspriazhenii rabochego i krest'ianskogo pravitel'stva* (Collection of Legislation and Resolutions of the Government of Workers and Peasants);

Since the *old* name of the legislative bulletin stayed in use for twenty years in the Soviet state, it is clear that it was retained not because of a shortage of time or imagination; the conclusion cannot be avoided that the revolutionary leaders had retained it intentionally.<sup>40</sup> It was old both from the point of view of the fact that it was part of the tsarist structure and also from the point of view of the anachronistic word *uzakonenie*, which by the second half of the nineteenth century was no longer found in legal discourse. This adherence to the old name can be explained by the fact that, for those who had seized power in October, the very name of the bulletin was used as a source of power or, in Weber's classification, rational/legal/bureaucratic legitimacy.

The soundness of such an interpretation in the historical context of revolutionary Russia is supported by the following fact. Throughout 1918, the government in Siberia, under one of the Bolsheviks' most powerful antagonists, Aleksandr Kolchak, published its own bulletin called *Sobranie uzakonenii i raspriazhenii, izdavaemoe pri Pravitel'stvuiushchem Senate* (Collection of Legislation and Resolutions Published Under the Ruling Senate). It might come as a surprise to some, of course, that there in fact was no Senate in the governing bureaucracy of Kolchak. However, it is likely that the Whites' usage of the old name for their own legislative bulletin had the very same purpose: to underline the legitimacy of their authority and to lend it the appearance of order.

#### 4. The Language of Revolutionary Legislators

An analysis of the content of the *Collection of Legislation* of late 1917-1918 demonstrates that there was a choice of models in writing legislative acts. The materials contained in the *Collection of Legislation* of this period can, for the sake of argument, be put into three groups:

- (1) Documents of the revolutionary tradition that were basically agitprop in nature and did not have a specific regulatory function, *e.g.*, appeals (*obrashcheniia*) and proclamations of various commissars and of the Soviet of People's Commissars (a phenomenon already described in this work as "pamphlets" (*listovki*)). Throughout 1918, acts of this first group gradually decreased in number.

from 1920 to 1924—*Sobranie uzakonenii i raspriazhenii rabochego i krest'ianskogo pravitel'stva RSFSR* (Collection of Legislation and Resolutions of the Government of Workers and Peasants of the RSFSR); from 1924 to 1938—*Sobranie uzakonenii i raspriazhenii rabochego i krest'ianskogo pravitel'stva SSSR* (Collection of Legislation and Resolutions of the Government of Workers and Peasants of the USSR); only after 1938 was its name radically changed to *Vedomosti Verkhovnogo Soveta SSSR* (Gazette of the Supreme Soviet of the USSR).

<sup>40</sup> One could argue that this could also have been, to a certain extent, a function of the disorganized nature of the Soviet state. However, recent research into the policies of the Bolsheviks by James Heinzen, Alessandro Stanziani, and Peter Holquist (*op.cit.* note 8) has shown that there was a certain tendency to continue domestic policy from the previous regime. Maintaining the content of the political agenda was certainly interrelated with the continuation of the forms of administrative and legislative practices.

- (2) Legal acts created in accordance with the canon of the previous tradition of lawmaking, written in the same bureaucratic language. This canon is international, with a particular syntax (complex syntactical constructions), a particular vocabulary (conservative and filled with special terminology), and a system of broad formulations. By March 1918, the legal acts of this second group were seen more and more frequently in the pages of the *Collection*. The explanation for this is that the capital was moved from Petrograd to Moscow in March 1918. Before the move, however, the revolutionary government had purged its staff, and only those deemed to be the most professional civil servants were allowed to make the move. These individuals, relying heavily on their pre-revolutionary bureaucratic experiences, were largely responsible for maintaining the legal traditions and bureaucratic language that had been used prior to the Revolution.<sup>41</sup>
- (3) Legal acts that used both revolutionary features and elements of the old bureaucratic language. During 1918, acts of this third type gradually lost their revolutionary character and took on more and more characteristics of the old bureaucratic language: furthermore, new political phenomena, *e.g.*, nationalization,<sup>42</sup> received a 'legal scenario', *i.e.*, began to follow a particular legal procedure that was, stipulated in all legislative norms dealing with the same issues. The procedure was fixed in a certain 'blueprint' of legal language.

Let us consider in detail one act from the quickly disappearing third group. A study of the co-existence of the old and new in the context of one legal act seems to be advantageous from the methodological point of view. On the one hand, it provides insight into the essence of the old and new regimes. On the other hand, attempting to understand the reason for choosing either the old or new form with respect to a particular legal act with its own specific aim could possibly provide new explanations for the phenomenon of retaining prerevolutionary legal language during Soviet times.

Thus, let us examine a legal act from the Commissariat for State Welfare (social security). First, the text and a detailed analysis of it are provided below. Then, it will be compared with a more typical<sup>43</sup> legal act published by the same

<sup>41</sup> For more on the impact of the move of the capital from Petrograd to Moscow on the central administration, see Iroshnikov, *op.cit.* note 33; Thomas H. Rigby, *Lenin's government: Sovnarkom, 1917-1922* (Oxford University Press, London, 1979); and E.N. Gorodetskii, *Rozhdenie Sovetskogo gosudarstva (1917-1918)* (Nauka, Moscow, 1987).

<sup>42</sup> See Borisova, "Sovet pri Narodnom komissare prosit trebovat': Zhenskii sub"ekt v revoliutsionnom zakonodatel'stve", *op.cit.* note 1.

<sup>43</sup> It is typical in that it follows a standard formulation used for numerous other legal acts published by this commissariat.

commissariat. Finally, relying on archival documents, the author briefly will dwell on the reality of the law-making process in this commissariat. In the end, an analysis of specific legal acts and the circumstances in which they were created will allow the author to answer the main question of this study: was the issue of legitimacy at stake when revolutionary legislators retained existing conventions for exercising power?

“On the collection of a tax on public shows and entertainment

To all citizens of Great Russia and patrons of theaters, cinemas, circuses, and other places of entertainment.

A tax payable to the Ministry of State Welfare has been introduced on entertainment (theaters, cinemas, circuses, and other places of entertainment) throughout all of Great Rus’.

This tax constitutes the wealth of the people and is intended exclusively for the needs of supporting the disabled, the elderly, children, orphans, widows, the handicapped, etc., and, until the transition of power to the Soviet government, was collected on a regular basis.

Since power was transferred into the hands of workers and peasants, and also with respect to the sabotage of those people who were entrusted with monitoring the proper collection of this tax by attaching stamps, this tax is presently being collected only in exceptional cases.

Having noted this phenomenon, *i.e.*, the failure of rights holders to attach stamps in order to profit at the expense of citizens, the Soviet Under the People’s Commissar for the Ministry of State Welfare appeals [to everyone] to strictly ensure that every ticket received at the ticket counter has the appropriate stamp attached in accordance with the price printed on the ticket.

If there is no stamp on a ticket, the Soviet Under the People’s Commissar requests that you demand that the cashier affix the required stamp.

Otherwise, report this immediately to the district Soviet of Workers’ and Soldiers’ Deputies, and also include your report in the complaints book at the ticket counter.

The rights holders of places of entertainment are required to have a complaints book, tied shut, and to keep it at the ticket counter, as well as to keep in a visible place the address where the district Soviet of Workers’ and Soldiers’ Deputies is located.

Upon the request of visitors, the complaints book is to be handed over immediately.

Thus, every citizen will be doing a great deed for all of the poor, homeless, and forsaken citizens, and will also be helping in the extremely difficult and arduous time of the Great Democratic Workers’ Russia and its People’s Government.

People’s Commissar for State Welfare, A. Kollontai<sup>44</sup>

Unlike propagandistic decrees and declarations such as the 1917 Decrees “On Peace”<sup>45</sup> and “On Land”,<sup>46</sup> this is a legal act of a wholly different nature. It has at its foundation a specific pragmatic goal: to rectify the collection of a tax that

<sup>44</sup> “O vzimanii naloga s publichnykh zrelishch i uveselenii” (9 January 1918), *Sobranie zakonov i rasporyazhenii rabochego i krest’ianskogo pravitel’sva* (hereinafter “SURP”) (1918) No.14 item 205.

<sup>45</sup> *Op.cit.* note 25.

<sup>46</sup> *Op.cit.* note 26.

during prerevolutionary times went into the budget of the Ministry of Social Security. In the context of the revolutionary affirmation of the new people's government, the collection of taxes required a delicate approach, especially under the conditions of a serious economic crisis. This was even more the case when the revolutionary regime was trying to adjust the prerevolutionary order.

This regulation is undoubtedly of great value as a historical document. Unlike the fundamental decrees of the Bolshevik government (Soviet of People's Commissars), which presented more a picture of the regime from the top down—of the *sender* of the legal message—in Kollontai's regulation, the *recipients* take center stage: it is from the bottom up. It paints a vivid picture of the day-to-day establishment of the Soviet regime; the fact that it has a limited aim does not lessen its regulatory nature. However, the style of the regulation differs from the traditional legal one, which always embodies the state's peremptory power.<sup>47</sup> Therefore, legal acts usually do not contain justifications, appeals, or exhortations. The usual situation presupposes a certain maturity of the mechanisms of government, the stability of moral restraints, and state force. But Kollontai's regulation was drafted under the extraordinary conditions of the consolidation of Soviet power, and it sought to achieve broad political aims beyond the tax itself, which were also reflected in the language of the act.<sup>48</sup>

To show how the language of Kollontai's regulation served the political aims of the regime, communication theory and discourse analysis will be used to interpret the regulation from a linguistic point of view.<sup>49</sup> Let us start with how the regulation establishes the 'sender'—the sender is, of course, the legislator—and the recipient. In this case, we see that, in the introduction, the sender considers it necessary to specify the recipient: "To all citizens of Great Russia"; thereafter, this is narrowed down to "patrons of theaters, cinemas, circuses, and other places of entertainment".

In borrowing the appeal (*obrashchenie*) as a rhetorical technique of the agitprop genre, the sender initially uses the constructive function of discourse, creating an image of the audience in accordance with the regime's political aims.<sup>50</sup> As a part of the structure of a legal regulation, an appeal was unacceptable from the point of view of the language of prerevolutionary law. Being an extremely rhetorical formulation, appeals were used in decrees only in the most critical

<sup>47</sup> Mattila, *op.cit.* note 12, 45.

<sup>48</sup> Another peculiar aspect of Kollontai's legal language is gender. Before Kollontai, there had not been any female legislators in Russia after the reign of Catherine the Great (1762 and 1796). This gender perspective aspect—the ways in which women in power express themselves differently from men (*e.g.*, using language in more profound ways than men)—has been developed in an earlier article. See Borisova, "Sovet pri Narodnom komissare prosit trebovat': Zhenskii sub"ekt v revoliutsionnom zakonodatel'stve", *op.cit.* note 12.

<sup>49</sup> For a description of these approaches, see Mattila, *op.cit.* note 12, 31-39.

<sup>50</sup> For more, see Norman Fairclough, *Discourse and Social Change* (Polity Press, Cambridge, 1992); and *id.*, *Language and Power* (Longman, London, 2nd ed. 2001), 73.

political situations at the end of 1917 and the beginning of 1918 in the struggle with both the internal and external threats to the Bolshevik government.

What we notice straightaway is that, unlike the majority of other appeals published in the Soviet *Collection of Legislation* in late 1917-1918, the sender's target is the largest audience possible—"To all citizens of Great Russia"—which is then narrowed down to "patrons of theaters, cinemas, circuses, and other places of entertainment". For the sake of comparison, let us look at a couple more revolutionary examples of late 1917: "To all working Muslims of Russia and the East", "To working Cossacks".<sup>51</sup> In cases of an appeal "to the entire nation", for example, about the counterrevolutionary uprising of Kaledin and Dutov, the recipient is either not named at all or is generalized by the appeal, which is designed only for socialist "comrades" (*tovarishchi*).<sup>52</sup> The aim of such appeals is to present the Bolshevik view of a situation and to inform potential supporters, *i.e.*, comrades.

The message of Kollontai's decree is not emphatically political, and therefore a politically coded appeal is not used at the beginning of the text. Its purpose is to make people pay a tax voluntarily and to play a part in monitoring the collection of the tax, *i.e.*, to do their civic duty. This interpretation of the situation can be seen in the last phrase: "Thus, every citizen will be doing a great deed". It should be noted that the decree does not specify any penalties; instead, it appeals to the public spirit of citizens.

The sender is acting in the name of the "Soviet Under the People's Commissar for the Ministry of State Welfare":

"Having noted this phenomenon, *i.e.*, the failure of rights holders to attach stamps in order to profit at the expense of citizens, the Soviet Under the People's Commissar for the Ministry of State Welfare appeals [to those responsible] to strictly ensure that every ticket received at the ticket counter has the appropriate stamp attached in accordance with the price printed on the ticket."<sup>53</sup>

The legislator is presented as some sort of a collective subject. This was an innovation that began with the February Revolution. In the author's own findings, such a representation is rarely found in the legal acts of the 'old regime' after the beginning of the twentieth century. The actions of the institutions of power were almost always personified as the actions of an individual, the tsar ("the supreme imperial tsar is pleased to command", "seeing it as necessary, we command") or ministers ("the minister found it necessary", "finding it necessary, I propose").<sup>54</sup> Following the transition of power in March 1917 to a collective

<sup>51</sup> "Ko vsem trudiashchimsia musul'manam Rossii i Vostoka" (19 December 1917), SURP (1917) No.6 Appendix 2; and "K trudiashchimsia kazakam" (19 December 1917), SURP (1917) No.6 Appendix 2.

<sup>52</sup> "O kontrevoliutsionnom vosstanii Kaledina i Dutova" (12 December 1917), SURP (1917) No.4 item 53.

<sup>53</sup> "O vzimanii naloga s publichnykh zrelishch i uvesenenii", *op.cit.* note 44.

<sup>54</sup> These examples were selected from among those often used in the SURP of 1913.

body, the Provisional Government, the most common expression for the actions of the authorities was “The Provisional Government has decreed” (*Vremennoe pravitel'stvo postanovilo*).

Despite the fact that the text itself is written in the name of the Soviet Under the People's Commissar, the document is signed by Kollontai. This ‘splitting’ of the legislator is a reflection of the collegial form of government that was popular during the establishment of the Soviet regime as a more democratic form than the preceding undivided authority. As can be seen from both published and archival materials related to Kollontai's administrative activities as the People's Commissar for State Welfare, she was an active supporter of collegiality. This could be seen, in particular, in the fact that in medical institutions under the Commissariat for State Welfare, she replaced the positions of directors and their assistants with doctors' soviets.<sup>55</sup> Thus, the existence of two senders in the text is a manifestation of the actual division of power in the commissariat. Therefore, the text at least partially reflects the balance of power in the decision-making process, or how the process was presented, which was not seen in prerevolutionary legal acts.

The verbs used to express the relationship between the sender and the recipient are of particular interest. From a practical point of view, the text contains a legal message and is a regulation. The law genre assumes a ‘vertical hierarchy’ between the sender (the legislator) and the recipient (the agent). This relationship is recorded in the lexicon and grammar, in the language of the law, which since ancient times has served to express the relationship of the permanent supremacy of the holder of power over its subjects. This dominative nature of legal language is particularly relevant for the realm of administration via legislative means, and is less articulated in civil law.<sup>56</sup>

The role of the legislator in this text is not so simple, which can be seen in the changes of tone. In the beginning, the law is presented as an appeal: “The Council [...] appeals [to those responsible] to strictly ensure [...]” Also in relation to “citizens”, the authorities are acting, if not on an equal basis, then at least on the common ground of a revolutionary appeal.

In the next sentence, the sender ‘bows’ even further toward the recipient and formulates her statement as a ‘request’: “The Soviet [...] requests that you demand” (*Sovet prosit trebovat'*). The double meaning and the awkwardness of the role of requestor in the context of a legal regulation is expressed in the modal incongruity of the two verbs that have been placed next to one another: *prosit* and *trebovat'* (“request” and “demand”).

<sup>55</sup> Compare the Decree “O gosudarstvennoi sanatorii ‘Khalila’ v Finliandii” (12 January 1918), SURP (1918) No.15 item 206, and those signed by Kollontai, for example, Decree No.801 (20 January 1918), State Archive of Russian Sociopolitical History (Gosudarstvennyi arkhiv Rossiiskoi sotsial'no-politicheskoi istorii) (hereinafter “GARSPI”), fond 134, opis' 1, delo 126, list 3.

<sup>56</sup> The author would like to thank Mikhail Antonov, who kindly drew her attention to this aspect of the difference in style due to the realm of legal regulation.

However, in the following sentence, the sender abruptly changes this awkward position and uses the language of an ‘order’: “Otherwise, report this immediately [...]”. The effect of authority is strengthened by the absence of a modal verb (*e.g.*, you ought to report (*sleduet zaiavit*)) and by the grammatical structure of the sentence, namely the use of the imperative. Thus, the sentence sounds like an order or a resolution, which contrasts greatly with the earlier role of the sender.

The variety of forms of linguistic actions used by the sender (appeal, request, order) have a common aim: to make the recipient carry out specific actions without the threat of punishment. We can already partially explain this: the change of tone from request to order, along with other rhetorical constructs (to be discussed later), fulfills one task, namely not to leave the recipient feeling indifferent. If, however, one were to approach this question from the historical context, this one regulation can tell us much more about the policies of the Bolsheviks than it would seem at first glance.

*First*, the open nature of Kollontai’s regulation speaks to the fact that it is aimed not at governing bodies and administrators but, rather, at the widest audience possible. This aim is underlined by the fact that it is a broad appeal. The text contains an explanation for this: the resolution is addressed to *all* because the specialized agencies and administrators who had earlier been responsible for monitoring the collection of the tax are not working:

“Since power was transferred into the hands of workers and peasants, and also with respect to the sabotage of those people who were entrusted with monitoring the proper collection of this tax by attaching stamps, this tax is presently being collected only in exceptional cases.”<sup>57</sup>

*Second*, and no less important, the tone changes depending on who the recipient of the message is. Despite the openness of the recipient, the sender of the legal message, the legislator, separates the audience into layers. The citizens here are by no means the entire population; instead, “those people who were entrusted with monitoring the proper collection of this tax” and “rights holders of places of entertainment” have been singled out. The latter are precisely the target of the sender’s order “to have a complaints book, tied shut, and to keep it at the ticket counter”. In general, only a few remnants/characteristics of the old tsarist official discourse are used in the text in relation *only* to “saboteurs” and “rights holders of places of entertainment”. To describe these actors, the sender has used nominative constructions (verbal nouns) and a particular lexicon, underlined here (emphasis added by the author):

“also with respect to the sabotage of *those people who were entrusted with monitoring the proper collection of this tax by attaching stamps, this tax is presently being collected only in exceptional cases* [...]”.

<sup>57</sup> “O vzimanii naloga s publichnykh zrelishch i uveselenii”, *op.cit.* note 44.

*the failure of rights holders to attach stamps for the purpose of profiting at the expense of citizens [...].*

*The rights holders of places of entertainment are required to have a complaints book, tied shut, and to keep it at the ticket counter.*<sup>58</sup>

It seems that the sender is using bureaucratic discourse for different, albeit related, purposes. *First*, this is undoubtedly a strategy of distancing: the choice of language fulfills the aim of ‘othering’. The language juxtaposes the rights holders of places of entertainment with citizens, which is especially clear in relation to said rights holders: “the failure of rights holders to attach stamps for the purpose of profiting at the expense of citizens”. The fact that the sender speaks with the peremptory language of power only in relation to the former administrators and rights holders fulfills the classic principle of the politics of a new regime, which would later be embodied in many legislative acts, including the 1918 RSFSR Constitution.<sup>59</sup>

*Second*, this difference in language—*superior/formal/bureaucratic* for the rights holders of places of entertainment and former administrators, and *equal/informal* and even persuasive for all other citizens—can be seen from the perspective of power legitimacy. The legislator orders the rights holders of places of entertainment to have the address of the local soviets readily available for citizens and, on the other hand, urges people to apply to the soviets, which would resolve the situation. In reality, the legislator is inviting the population to act as if they had already internalized the authority of the soviets to solve the problem of tax collection, and even to assist them with this, and, in this way, to legitimize the soviets. This “invitation” was grounded in the basic human value of compassion toward those who need help; it was not an impersonal order to pay taxes and inform the authorities of any case of misbehavior.

To complete this analysis, we should stress once again the constructive function of the regulation. The connections among the sentences, in terms of their sense, are based on a system of definitions. This is already quite clear in the first few sentences (emphasis added):

*“A tax payable to the Ministry of State Welfare has been introduced on entertainment (theaters, cinemas, circuses, and other places of entertainment) [...].*

*This tax constitutes the wealth of the people and is intended exclusively for the needs of supporting the disabled, the elderly, children, orphans, widows, the handicapped, etc. and, until the transition of power to the Soviet government, was collected on a regular basis.*

*Since power was transferred into the hands of workers and peasants [...].*<sup>60</sup>

<sup>58</sup> *Ibid.*

<sup>59</sup> For more, see Sheila Fitzpatrick, “Ascribing Class: The Construction of Social Identity in Soviet Russia”, in Sheila Fitzpatrick (ed.), *Stalinism: New Directions* (Routledge, London and New York, NY, 2000); and *id.*, “The Bolsheviks’ Dilemma: The Class Issue in Party Politics and Culture”, in Sheila Fitzpatrick (ed.), *The Cultural Front: Power and Culture in Revolutionary Russia* (Cornell University Press, Ithaca, NY, 1992), 16-36.

<sup>60</sup> “O vzimanii naloga s publichnykh zrelishch i uveselenii”, *op.cit.* note 44.

The legislator's strategy is as follows: first, the subject matter is named, and she then gives it her own definition. Thus, "a tax on entertainment" is, in the next sentence, called a tax on "the wealth of the people", and the Soviet government becomes the "hands of workers and peasants". At the end of the text, it is presented as the "people's government".

As Austin's Speech Act Theory suggests,<sup>61</sup> a legislative act is performative: actions should carry out the letter of the law. Written during the revolutionary period, Kollontai's regulation uses linguistic and rhetorical means more than legal means to create a new political framework of reality. The regulation's recipient was the widest audience possible, who, through a sense of compassion, were supposed to adopt this new Soviet picture of the world and, moreover, to take part in its creation.

The Bolsheviks often used this double performative of revolutionary legislation, not simply the performative of the act permitted (required) by the law, but the performative of constructing a new reality. Kollontai's regulation was designed in part to construct a reality where citizens were *morally* stimulated to assist legitimate (by law—Declaration of Working and Exploited People, 1918 RSFSR Constitution) soviets to establish their authority.

If, in Kollontai's regulation, it was suggested that the widest-possible circle of recipients "read" the surrounding reality in the framework of a new ideology and act in support of its legitimacy, then other laws of the new regime were primarily intended not for citizens but, rather, for the soviets and implied relations of vertical submission. An analysis of the *Collection of Legislation* in the first months of the Soviet regime leads one to the conclusion that the language used in legislative acts was becoming a more specialized technocratic instrument. The regulations were the first that could be distinguished by a specific traditionalism with roots in the tsarist regime. As the basis for their decrees demanding obligatory payment of taxes, the People's Commissariat of Finance even openly referred to prerevolutionary legislation, citing the tsarist and Provisional Government's *Collection of Laws*; they were devoid of any kind of rhetoric, though they did threaten severe punishment: imprisonment.<sup>62</sup> This can be explained in terms of continuity—in both governmental structure and personnel in the realm of state finance—as well as by the fact that both the old and new governments had similar goals, namely the collection of taxes.<sup>63</sup>

<sup>61</sup> Austin, *op.cit.* note 13.

<sup>62</sup> See Decree "O vziimanii priamykh nalogov" (24 November 1917), *DSV*, Vol. 1, 142; and Regulation of the Council of People's commissars' "O novom poriadke nachisleniia nalogov na tabachnuiu produktiiu" (24 November 1917), *DSV*, Vol. 1, 143.

<sup>63</sup> Yanni Kotsonis, "No Place to Go: Taxation and State Transformation in Late Imperial and Early Soviet Russia", 76(3) *Journal of Modern History* (2004), 531-577.

### 5. Formalism as an Instrument

Kollontai's regulation was an exception to the new order, the new blueprint mentioned above. The rule had become that legislative acts originating in the People's Commissariat differed little from the style used in prerevolutionary regulations, in both the form and the substance of their regulatory message. Here is an example:

“On the establishment of departments for the allocation of pensions to injured soldiers within Soviets of Workers', Soldiers', and Peasants' Deputies

In view of the closure of all regional and district military offices, in accordance with the decision of the college of the People's Commissariat for Internal Affairs, and the transfer of all matters dealt with by these offices to the local soviets, it has now been suggested that departments for the allocation of pensions from the state treasury to injured soldiers be created within the local soviets according to the regulations established by the decree of the Soviet of People's Commissars of 16 December 1917 (*Collection of Legislation and Resolutions of the Government of Workers and Peasants*, No.9 item 143). Local pension departments should co-ordinate with the existing Central Department for the Allocation of Pensions to Injured Soldiers of the People's Commissariat for State Welfare.

Signed by Deputy of the People's Commissariat for State Welfare I. Egorov<sup>64</sup>

Some three months had elapsed between the issuance of Kollontai's regulation (at the end of 1917) and this one (in March 1918). During that time, Soviet institutions had begun to function more routinely. This change could also be seen in the legal language. As we can see in the quote above, the sender used special linguistic instruments developed throughout the centuries-long existence of the culture and practices of law-writing. These are international practices, with a particular syntax (complex syntactical constructions), a particular vocabulary (conservative and filled with special terminology), and a system of broad formulations.<sup>65</sup> In this text, the sender has demonstrated its ability to (re)institute this tradition and its appreciation of the value of this genre. The text contains a reference to the existing legislation of the new regime, and the regulation in question has been published in order to develop that further.

Let us try to answer the obvious question of why the first and second texts are so different. Knowledge of the historical context might suggest the simplest explanation. Studies of the period of the establishment of the Soviet state highlight

<sup>64</sup> “Ob uchrezhdenii pri Sovetakh rabochikh soldatskikh i krest'ianskikh deputatov Otdelov po naznacheniiu pensii voenno-uvechnym”, *SURP* (1918) No.28 item 375.

<sup>65</sup> K.A. Loginova, “Delovaia rech' i ee stilisticheskie izmeneniia v sovetskuiu epokhu”, in *Razvitie funkcional'nykh stilei sovremennogo russkogo iazyka* (Nauka, Moscow, 1968); A.S. Pigolkin (ed.), *Iazyk zakona* (Iuridicheskaja literatura, Moscow, 1990); N.A. Vlasenko, *Iazyk prava* (Vostochno-Sibirskoe knizhnoe izdatel'stvo, Irkutsk, 1997); I. Sukhinina, “Zhanr i iazyk postanovlenii Konstitutsionnogo suda RF”, (10) *Rossiiskaia iustitsiia* (2001); Vijay Bhatia, *Analysing Genre: Language Use in Professional Settings* (Longman, London and New York, NY, 1998); and John Gibbons (ed.), *Language and the Law* (Longman, London, 2001).

the role of old specialists in the building of new institutions.<sup>66</sup> Former officials did indeed help in fine-tuning the work of the People's Commissariat for State Welfare. This is discussed in Kollontai's memoirs<sup>67</sup> and, also, in the Commissariat's archived documents and records.<sup>68</sup>

By comparing these sources, the following picture emerges of the organization of the Soviet regime in the social sphere and at the level of the central leadership. Kollontai was able, as she wrote, "to run State Welfare" with the help of a union of young ministry staff formed in 1917. The union's founder and 'soul' was 'our party' operative Ivan Grigor'evich Egorov.<sup>69</sup> Following "the transfer of power into the hands of workers and peasants", power in state institutions was concentrated in the professional unions of workers, which were self-regulating quasi-trade unions. This is indicated by the following fact: many of the requests to work in the People's Commissariat were formulated as applications (*zaiavleniia*) to the Commissariat's Workers' Committee.<sup>70</sup>

The beginning of Soviet State Welfare can be traced to when the chairman of the ministry's Union of Young Workers, Egorov (a Bolshevik factory worker), invited Kollontai, who had recently been appointed to the post of People's Commissar, to the union's meeting of delegates.<sup>71</sup> In order to get the ministry under control, Kollontai appointed Egorov as her deputy. The most active members of the union headed the units within the Commissariat. And they were the very ones who formed the Soviet Under the People's Commissar for State Welfare, which played the role of legislator in Kollontai's regulation cited earlier. The work of the soviet was organized by several officials within the Ministry of State Welfare, who "declared that they were prepared to work with the Bolsheviks".<sup>72</sup> They became part of the Main Secretariat of the People's Commissariat. The Secretariat repeatedly reminded staff that the workday began at 10 a.m., as well

<sup>66</sup> See *op.cit.* note 5. On the involvement of former specialists in policymaking in the area of state welfare, see the recent monograph by David Hoffmann, *Cultivating the Masses: Modern State Practices and Soviet Socialism, 1914-1939* (Cornell University Press, Ithaca, NY, 2011).

<sup>67</sup> Drafts of Kollontai's memoirs stored in the State Archive of Contemporary Political History were used. Several of Kollontai's redactions of her memoirs provide more detailed information than the version that was published.

<sup>68</sup> "Otnosheniia Glavnoi kantseliarii Narkomata gosudarstvennogo prizreniia vo vse otdely narkomata – tsikuliarno", GARF, fond A-413, opis' 2, delo 5, list 1-3.

<sup>69</sup> A.M. Kollontai, "Pervye dni narkomsobesa; Ishchem rabotnikov", GARSPI, fond 134, opis' 1, delo 226, list 96-97.

<sup>70</sup> "Prosheniia o priniatii na sluzhbu v Narodnyi Komissariat Iustitsii", GARF, fond A-353, opis' 1, delo 7, list 35, 36, 74.

<sup>71</sup> Kollontai, *op.cit.* note 69, 102. One might get the impression from reading the text of the pension decree that Egorov was an older bureaucrat. However, as we have indicated, he was from the working class.

<sup>72</sup> *Ibid.*, 59.

as about the established succession for documents within the Commissariat and about the rules for formulating outgoing documents.<sup>73</sup>

The new regime tried to use the experience of the former administration from the point of view of ‘technical guidance’. This idea was expressed by People’s Commissar of Justice Petr Stuchka.<sup>74</sup> The Bolshevik factory worker Egorov took the principle of ‘technical guidance’ to its extreme: most likely, he simply signed the text drafted for him in the Main Secretariat. The text says as much: “Signed by Deputy of the People’s Commissariat for State Welfare I. Egorov”.

This later administrative regulation targeted fewer recipients than Kollontai’s earlier regulation. The sender addresses “Soviets of Workers’, Soldiers’, and Peasants’ Deputies” and “local soviets”. His aims do not include propaganda on behalf of the new regime or calling on citizens to carry out particular actions concerning the payment of pensions. Moreover, the soviets are presented in the regulation as consciously subordinate institutions that were to create a new administrative structure that, upon appealing to the relevant department of the People’s Commissariat, would receive the following instructions:

“Local pension departments should co-ordinate with the existing Central Department for the Allocation of Pensions to Injured Soldiers of the People’s Commissariat for State Welfare.”<sup>75</sup>

Unlike Kollontai’s regulation, here the channels of communication were extremely limited, as is the final recipient of the message: a future bureaucratic structure that would be permitted to receive special knowledge about the needs of disabled veterans and their families. Citizens have been excluded from among active actors, the very people into whose hands (according to Kollontai’s tax regulation) power had been transferred following the October Revolution.

A comparison of the different discourse practices used in Kollontai’s and Egorov’s regulations allows us to reach an important conclusion. The use of traditional forms of legal acts from the previous regime had a constructive effect. Not every worker, soldier, or peasant from the “local soviets”—addressed by this regulation—could understand and implement Egorov’s message. Only those with knowledge of the technical terminology of governing could fulfill this resolution and properly account for it. In essence, therefore, the message indirectly constructed a recipient at the local level—and, also, constructed relations of strict subordination through a bureaucratic hierarchy—and those relations were preserved in the linguistic forms used.

<sup>73</sup> *Ibid.*

<sup>74</sup> P.I. Stuchka, “Proletarskaia revoliutsiia i sud”, (1) *Proletarskaia revoliutsiia i pravo* (1918), 4.

<sup>75</sup> “Ob uchrezhdenii pri Sovetakh rabochikh soldatskikh i krest’ianskikh deputatov Otdelov po naznacheniiu pensii voenno-uvechnym”, *op.cit.* note 64.

## 6. Conclusions

Despite the paramount position of revolutionary terror as the basis of Soviet power, legislation played a key role in establishing Bolshevik rule. At first glance, this observation contradicts Bolshevik ideology, which is known for its skeptical approach to the law as a bourgeois value that was supposed to wither away and die along with the state. However, the specific traits of early Soviet law dispel this contradiction.

The rhetorical nature of Soviet legislation was reflected, above all, in major legislative acts, which were presented as a product of the revolutionary will. In the first months of the Soviet Union, laws of this type were already weighed down by the massive number of sub-legislative administrative regulations. The present study shows that, despite the actual revolutionary character of the Bolshevik regime, the country's new leadership took quick possession of the prerevolutionary practices of governing. It already has been noted<sup>76</sup> in the literature on Russian legal language that Soviet law borrowed specific features of the prerevolutionary period's legal language; however, this phenomenon is usually attributed to a later period, the 1930s of Stalin's rule. An analysis of the 1917 and 1918 Soviet *Collection of Legislation* allows us to conclude that the old language of the law was used by the Bolshevik regime from the very beginning.

Bolshevik legislation, in the early period of the regime, was a means of disseminating propaganda: at the same time, it was also a means of legalizing the new rule. To make new laws legitimate, *i.e.*, to make the people comply, legislators often used the particular vehicle of language. Different types of language can be interpreted from the perspective of legitimacy, and legitimacy can be generated in at least two possible ways:

- (1) By urging people to act in cooperation with the soviets on the basis of basic, shared human values (*e.g.*, in Kollontai's regulation). The paradox of this approach was that, since the soviets already had been legalized as the main organs of power, this invitation to the people could be seen as confusing: it seemed to be a request for legitimizing the soviets through acts of the people (although they already had been legalized by Soviet legislation).
- (2) By ordering the soviets (*e.g.*, in Egorov's act) to fulfill legislative acts of the central authorities, the Soviet of People's Commissars and the people's commissariats, in implementing new legislation. Here, the mechanism was different: the people were commanded to obey, and it was through

<sup>76</sup> Pigolkin, *op.cit.* note 65, 9. Alas, the history of legal language in Russia is a topic which has not (yet) been the subject of widespread scholarly research accounting for the fact that I only have encountered this in Pigolkin's work.

this obedience that the authorities created the illusion that they were in control of the situation. This was embodied in part by the “new” bureaucratic language of Soviet legislative acts: the later acts no longer needed to invite people to follow state policies but, instead, assumed that qualified administrators were in control. It was easier for people to adhere to known traditions of obeying the law written in technical legal language that was not easily understood by a lay audience; using this legal language was also easier for the administrators.

The rapid replacement of the first strategy by the second mirrors the process of the transformation of central power in late 1917-1918. The formal features of legislation as a specific function for exercising power (for example, in the form of the publication of legislation in the *Collection of Legislation* or the specific language of decrees) was seen as an administrative technique that ought to be seized alongside telephone lines, railway stations, and telegraphs. It is possible that the symbolic power of the customary form of the law also played a role by helping legitimize the new regime. This is precisely the reason why the Bolsheviks’ enemies published an alternative collection of legislation with the same name, borrowed from the tsarist regime (*Sobranie uzakonenii i rasporiazhenii pravitel’sva*).

It is most likely, however, that the Soviet leaders approached governance from a technocratic point of view and that, in their own legislative policy, they tried to minimize the cost of implementing the required response, *i.e.*, lower transaction costs. At the same time, language in a way could serve to empower local soviets, since the decrees that were published beginning in the first half of 1918 in the *Collection of Legislation* were not intended for lay people or their lay deputies in local soviets but were instead intended for qualified administrators. By bringing administrators from the former regime into both central and local Soviet institutions, the Bolsheviks were trying to immediately fulfill the will of the party leadership. At the same time, they retained the tradition of excluding citizens from meaningful participation in matters of governance. This gap between the soviets’ proclaimed power as declared in Articles 1 and 10 of the 1918 RSFSR Constitution and their actual subverted position was established in Article 65, which listed the first and most important duty of the soviets: “(a) To carry out all orders of the respective higher organs of the soviet power.”<sup>77</sup>

This tendency was clearly reflected in a decrease in the accessibility of Soviet legislation. In 1917-1918, there was a certain pluralism in the publication of legislation, as decrees were published in the central newspapers of the victorious soviets (*Armiia i flot, Izvestiia*); in the Bolshevik party paper, *Pravda*; and in the *Collection of Legislation* (*Sobranie uzakonenii*), the official legislative bulletin. The latter was a continuation of the tsarist bulletin tradition, both in form and

<sup>77</sup> 1918 RSFSR Constitution, *op.cit.* note 29.

in the practices of editing and publishing. As a means of consolidating Soviet power, however, the *Collection of Legislation* regained its status at the beginning of the 1920s as the only official bulletin for legislation intended for administrative needs and not for a wide circle of people. Unlike the newspapers mentioned above, the laws in the *Collection* began to be published earlier, and they were more complete but were much less accessible than the other sources had been.<sup>78</sup>

<sup>78</sup> A.N. Kolesnikov, *Khronologicheskoe sobranie kak forma inkorporatsii zakonodatel'stva*, Dissertatsiia na soiskanie uchenoi stepeni kandidata iuridicheskikh nauk (Moscow, 1967), unpublished manuscript, 25.

## 6 Conclusion

This dissertation contributes to an understanding of why, in spite of notable legal and cultural borrowings from the West, the Russian vision of the rule of law has been focused on legality. My research has determined and traced two main features of the difference between the Russian conceptualization of legality and rule of law as ideal type. These are: (a) an overwhelming formalism and positivism in the Russian interpretation of rule of law; and (b) a serious questioning of the relevance of any universal (legal) values to Russia. My research has underlined that these features ought to be considered as key to the Russian legal tradition and has provided an historical examination of their emergence and continuity.

Below I elaborate on my dissertation's conclusions in a broader sense, emphasizing its relevance to the general problem of the conceptualization of legality in Russia. Firstly, I discuss the methodological contribution of my approach to the study of legal techniques, emphasizing the political component in the creation of legal sources and their public access as a very topical issue, not only for Russia. Then I present the main conclusions of my research on the historical development of key features of the Russian conceptualization of legality. I emphasize that the Russian legal tradition matters since it sets a certain pathway which is difficult to change. Lastly, I draw attention to the modern 'practical' perspective of History & Policy research, which underlines the role of history for renewal, and thus might be used for a revision of the Russian legality experience.

### 6.1 Methodological Contribution

This dissertation has proposed a novel outlook on legal traditions studies through empirical research of legal techniques.<sup>1</sup> This outlook focuses on the historical pathways of national legal identities, preserved and re-produced as legal traditions. Using the example of Russia, I provide a scenario for underrepresented empirical research on the phenomenon of legal traditions, via legal techniques, that is: (a) the systematization of law in fifteen volumes of the *Digest of Laws of the Russian Empire*, which came into force in 1835 and continued until 1917; and (b) the obligatory publication of legislation in an official bulletin, the *Collection of Legislation*. Both techniques

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<sup>1</sup> Of course, sources of law as important objects of legal research are usually studied. My approach relied on some classical research on publication of legislation in comparative law scholarship and in European legal history: Jacques Bernard Herzog, Georges Vlachos, *La promulgation, la signature et la publication des textes législatifs en droit comparé* (Travaux et recherches de l'Institut de droit comparé de l'Université de Paris Les Éditions de l'Épargne, Paris, 1961), Almut Wittling, *Die Publikation der Rechtsnormen einschliesslich der Verwaltungsvorschriften* (Nomos Verlag, Baden-Baden, 1990).

provided important official sources of Russian law and became a crucial basis for the development of the Russian legal infrastructure.

An important finding of my empirical research into Russian legal techniques is their outstanding continuity. My research demonstrates that notwithstanding the radicalism of the Russian revolutions of February and October 1917, which put an end to Imperial autocracy and constituted a republic with proletariat dictatorship, the legal techniques were very carefully preserved. Moreover, the persistence of Bolsheviks' legislative efforts to continue the regular publication of legislation, which I considered in detail in Chapter IV, was impressive.

The reasons for it were both practical and symbolic. From a practical point of view, it was sensible to use legal techniques for efficient state building of the new regime. Symbolically, the usage of old and easily recognizable forms of law, for example, using the language and even the appearance of the books in which legislation had been published before the Revolutions, was to underline the legitimacy of the new governments and their regimes. Further comparative research on revolutionary legislation indicates that the political importance of legal techniques can be found more broadly.<sup>2</sup>

It is important to note that this focus on legal techniques has been partly elaborated by German legal historians, especially by the school of Professor Joachim Rückert which were interested in how different sources of law were used in German civil law practice.<sup>3</sup> However, my research perspective is different since I am interested in sources of law as research objects. Focusing on Russia, my research demonstrates that the creation and operation of official sources of law, and the practices for their continuation, play a key role in the further functioning of law as an institution. Analysis of legal techniques makes visible the professional procedures which make the law work, both for legal professionals and lay people.

In general, legal techniques provide the essential basis of the operation of a particular legal system, since they form the whole structure of formal rules, which are materially and physically present somewhere in book form in continental legal systems. Also, legal techniques enable new legal regulations to be incorporated into the system of existing legislation. Together, these aspects make legal techniques an important stage of law-making and law-functioning. Thus the way that these techniques are designed is essential for such important issues as access to law, public

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<sup>2</sup> I have written more on this in: Tatiana Borisova, Jukka Siro, 3(1) "Law between Revolution and Tradition: Russian and Finnish Revolutionary Legal Acts, 1917–1918," (2014) *Comparative Legal History*, 84-113.

<sup>3</sup> Joachim Rückert, Ralf Seinecke, *Methodik des Zivilrechts – von Savigny bis Teubner* (Nomos, Baden Baden, 2012, 2<sup>nd</sup> ed.). See also Günter Hager, *Rechtmethoden in Europa* (Mohr Siebeck, Tubingen, 2009). See further bibliography in Rückert, Seinecke, at 1575. I thank Prof. Marju Luts-Sootak for access to the wide range of reading materials of this school.

reliability of professional legal knowledge and procedures for governance, which makes them essential for the effective functioning of the rule of law and need to be studied in the future.

The general methodological contribution made by my thesis is to challenge the sharp distinction between the study of 'law in books' and 'law in action', putting an important stress on the necessity of studying 'books' as a separate object of research, which reveal a great deal about legal practice in a particular jurisdiction.<sup>4</sup> The notable political importance of legal techniques makes it clear that they ought to be studied as a separate research object, which lies between the two mainstream directions of legal scholarship and tend to focus either on legislation or on legal practice (predominantly court decisions). My dissertation establishes that the technical procedures of how laws become 'books' are actually an important dimension of the study of both 'law in books' and 'law in action'.

Future comparative research should further examine the political and legal meaning of the continuations of legal techniques and, the reverse, that is, discontinuities. The discontinuities are especially important because they are very easily neglected. Taken uncritically, publication practices sometimes seem to be a natural feature of legislation; something which is completely taken for granted and is just 'a given' since law should be published.<sup>5</sup> Since they are 'just' about formalities, legal techniques are not normally seen as important for substantial changes of law.

History shows us that this neglect of the 'formalities' in legal scholarship should be critically revised. As my dissertation demonstrates, during the periods of political crisis legal techniques are used in order to build up the legitimacy of political regimes. They are seen as proofs of transparency of the authorities' legislative policy and their strong efforts to provide legal certainty. However, as soon as political legitimacy has been more or less obtained, the legal techniques may easily be switched to administrative techniques of a merely regulatory nature, which do not entail the necessary principles of law such as public access to law via obligatory publication.<sup>6</sup>

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<sup>4</sup> This kind of approach can be found in the field of legal 'area studies', which, alas, are not noticed by a more general legal scholarship. See e.g.: Richard Buxbaum, Kathryn Hendley (eds.) *The Soviet Sobranie of Laws. Problems of Codification and Non-Publication* (International and Area Studies, University of California, Berkeley, 1991).

<sup>5</sup> On the political meaning of visibility of law see in: Christopher Kutz, "Secret Law and the Value of Publicity" 22(2) *Ratio Juris* (2009), 197-201, Id, "On Visibility in International Criminal Law," in Peter Cane (ed.) *The Hart-Fuller Debate in the 21<sup>st</sup> Century* (Hart Publishing, Oxford and Portland, Oregon, 2010), 97-105.

<sup>6</sup> In recent years this issue became very important in relation to the publication of EU regulations and 'invisible' regulations of international law. See further in research by Michal Bobek on EU secret legislation "Case C-345/06, Gottfried Heinrich, judgment of the Court of Justice (Grand Chamber) of 10 March 2009", 46 *Common Market Law Review* (2009), 2077-2094, and on the phenomenon of corrigenda - ex post change in the already published version of EU acts: Id, "Corrigenda in the Official Journal of the European Union: Community Law as Quicksand", 34 *European Law Review* (2009), 950-962. On international law, see: Kutz, *op. cit.* note 5.

## 6.2 Empirical conclusions

My analysis of the emergence and development of the tradition of Russian legality has provided three main observations. I will outline them here and then discuss them in more detail. My *first* observation deals with difficulties in the institutionalization of law in Russia, which explains the overwhelmingly technical Russian approach to law in general, and to the rule of law in particular. My *second* observation problematizes the relevance of Western legal borrowings for the purpose of modernization in late imperial Russia. In my *third* observation I discuss the reasons for the isolationistic discourse dominating the conceptualization of Russian legality. It is important to underline that these observations are based on the synthesis of my research presented in the articles. Based on a nuanced investigation of various aspects of legality in late imperial – early Soviet Russia, my conclusions provide a more general overview of the phenomenon of legality in Russia.

My *first* observation emphasizes problems in the development of the institutionalization of law in Russia. In my discussion on the institutionalization of Russian law, I rely on the classical study of institutional theory by Berger and Luckmann, along with Max Weber's theory of political legitimacy<sup>7</sup>. I also used Harold Berman's classical study on the institutionalization of 'Western law'<sup>8</sup>, as a mechanism for making the 'Western legal tradition'<sup>9</sup>. Berman's main contribution was precisely an application of institutional theory along with a Weberian approach to exploration of Western law as a formation of meanings and practices, which being institutionalized serve to the purpose of political legitimation.

Berger and Luckmann demonstrated that the authority of an institution is realized in the typification of certain actions within a certain field, constituted by historicity and control.<sup>10</sup> That means that, firstly, the institutions are products of history. Secondly, they “control human conduct by setting up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible”.<sup>11</sup> Based on the institutional approach, Berman demonstrated that the institutionalization of law implied first and foremost an institutional separation between law and politics, and protection of law from direct intervention by political power, especially state power.<sup>12</sup> The historical evidence of Berman's study of authority of law in the

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<sup>7</sup> Max Weber, *The Theory of Social and Economic Organization* (Oxford university Press, Oxford, 1964), 324–41. I thank Prof. Kathryn Hendley for her enlightening comments on Weberian theoretical background of Berman's study.

<sup>8</sup> See some critical remarks on the terminology of both 'Western' law and tradition in the Introduction.

<sup>9</sup> Harold J. Berman, *Law and Revolution: The Formation of Western Legal Tradition* (Harvard University Press, Cambridge, MA, 1983)

<sup>10</sup> Peter L. Berger, Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Penguin Books, London, 1967), 72.

<sup>11</sup> Ibid.

<sup>12</sup> This view is shared by modern comparativists. See for instance Ugo Mattei who defines three types of legal systems: 'professional law', characterized by separation of legal and political decision-making from 'political' and

West also relied on Weber's theory of historical development of legitimacy. According to Weber, modern authority that is based on rational grounds rests on a belief in the legality of patterns of normative rules and on the right of those elevated to authority under such rules to issue commands.<sup>13</sup> Such authority is derived from the popular perception that the government's power derives from established law and custom. This type of modern *rational* or *legal* legitimacy is a result of the evolution of two earlier types; *traditional* legitimacy and *charismatic* legitimacy in which law as such does not play a key role, while tradition and charisma do.

Based on the Berger and Luckmann theory, I refer to the 'institutionalization' of Russian law as processes by which legal knowledge as a special kind of valuable public expertise was constituted and reproduced within the public educational system in Russia. This was the case in the countries using continental European law, which served as role-models for the Russian institutionalization of law.<sup>14</sup> In other words, the process of developing the authority of law as a professional field defined by its own mechanisms of control had to be taken into account by other related key institutions, i.e. administration and politics. Although there were remarkable developments in Russian courts in the eighteenth century,<sup>15</sup> my research demonstrates that the most important period for the institutionalization of Russian law was the nineteenth century, which was the last phase of the imperial period of Russian history (1800 – 1917).

The *longue durée* perspective allowed me to trace two interrelated factors which jeopardized the development of Russian law as an authoritative institution before the nineteenth century and affected its formation afterwards from 1800 – 1917. They were: (a) the undermining political pressure of autocracy and its bureaucratic apparatus; and (b) the general underdevelopment of civil society in late imperial Russia. I demonstrate that these factors formed the Russian official/elitist understanding of legality as 'legality with adjectives' which implied first and foremost 'state-centered legality' which shaped the Russian legal mindset. In Weber's terms, Russian legality rested on other than rational/legal types of legitimacy; charismatic and traditional legitimacy, and implied their features to be fixed in the legal structure of the state.

My research reveals that drafting the *Digest of Laws of the Russian Empire* in the first decades of the nineteenth century was a benchmark for the conceptualization of the Russian

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'traditional law'. See Ugo Mattei "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems" *The American Journal of Comparative Law* 45 (1997), 1-24.

<sup>13</sup> Weber op. cit. note 7.

<sup>14</sup> I must acknowledge a pioneering empirical research by my colleague Marianna Muravyeva, who demonstrates that there were structures of legal profession, e.g. informal schools in Russian courts already in the eighteenth century. See: Marianna Muravyeva: "Russian Legal Profession and Criminal Procedure: Creating an Early Modern Criminal", *Social History* (2016) – forthcoming.

<sup>15</sup> Ibid.

national legal tradition. The tradition was articulated in terms of a 'state-centered legality' pathway in Russia which has been very influential. As I put it in Chapter I, its main idea was viewed as 'affirming the force of law' by refining existing institutions according to domestic traditions of law-making. This traditionalist pattern of legal mindset, which continued to be reproduced in imperial law schools for many years, became a very important feature of Russian 'legality with adjectives'. It emphasized the uniqueness of the Russian state and its traditions; a view which inevitably influenced Russian law, especially constitutional and administrative law.

Indeed, the key tradition, which Russian law had both to preserve and serve, was a tradition of autocratic authority with its predominance over legal limitations. It was formulated very clearly by the historian Nikolai Karamzin (1766-1826) in 1811 in his influential critique of legal borrowings and more generally reformist (legal) romanticism (see Chapter III):

“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 are not afraid of the tsar they are not afraid of the law!”<sup>16</sup>

As I show in Chapters II and III, in the late imperial period the development of law as a separate institution was determined and limited by the autocratic political framework. My dissertation argues that the domination of this instrumentalist and formalist understanding of law became a part of the Russian national legal tradition, invoked by attempts by tsars Alexander I, Nicholas I and Alexander II to make their rule efficient and legitimate. The personal aspiration of these Russian tsars played a very important role in the emergence and development of the legality tradition in Russia since the monarch was a supreme legislator.

At the same time, the unrestricted autocratic authority became a key challenge for any further development of Russian law as an institution. Quite ambivalently, the Russian political leadership promoted the institutionalization of law as an instrument, and simultaneously undermined its authority, based on its particular legal values and principles, as something challenging to the supremacy of the ruler. As a result, the close interrelation of law and state politics was overwhelming. This undermined the institutional guarantees needed for the separation of the principles and values of law from those dictated by political necessity.

This is particularly important given the fact that, because of the weakness of the public sphere and the underdevelopment of civil society, the institutionalization of law was a project initiated by the Russian state bureaucracy in order to achieve concrete political objectives. Briefly,

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<sup>16</sup> Nikolai Karamzin, *Zapiska o drevnei i novoi Rossii v ee politicheskom i grazhdanskom otnosheniakh* (Nauka, Moscow, 1991), 102. This is exactly how charisma of a Russian monarch, not abstract 'law' should be treated as a key legitimizing aspect of power.

these can be summarized in key terms as *legitimization of bureaucracy*, *efficiency of administration*, and *modernization*.

The *legitimization* of Russian autocratic rule was very topical after the Decembrists' uprising of 1825 with its claims for a Constitution and also afterwards, since the Digest was to provide 'material evidence' of Russian legality, accessible to all literate people. Also, with respect to *efficiency of administration*, the Digest was to provide greater administrative discipline since the fifteen volumes of the Digest were to be a compendium in which an administrator or a judge would find the solution relevant to any particular situation. Lastly, with respect to *modernization*, the Digest had a modernizing mission, since already in the very process of its drafting, gaps in existing law were filled, while comparison with European codifications provided ideas for further legal modernization, although still within the overall context of an authoritarian autocracy.

These three key objectives were aimed at strengthening the autocratic state; all of them supported the idea of a legitimate (but not constitutional) monarchy. As Karamzin underlined, the codification was to protect the premise of the monarch's supreme legitimacy: 'to preserve at any price the right to grant general benevolence from above.'<sup>17</sup> At the same time, as my research demonstrates, they shaped the main features of the Russian legal tradition, namely, its instrumentalist approach and positivism, and limited its development with national political characteristics. These characteristics, deriving from a monarch's unchallenged superiority in political and legal decision-making, were presented as a benchmark of Russia's unique legal tradition. At the same time the state-centered agenda jeopardized the institutionalization of Russian law as an institution having its own authority and long-term agenda which might be inconsistent with the short-term interests of politicians' and civil servants'.

The system of the *Digest*, which I consider in great detail in two chapters of this dissertation, may be viewed as: (a) a manifestation of this autocratic/bureaucratic legality; and (b) as a means of transfer of legal information, forming a legality tradition. The tradition was continued through the Digest in the sense that the Digest embedded an important message for the legal community in Russia. The message was an assumption that Russian legal professionals were not in a position to interpret new legislation, thus special state officials were to define the changes which every new law made to the existing legislation. These changes were indicated in the most recent editions of the *Digest* or its most recent *Continuation*. Both state authorities and citizens were to refer only to the

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<sup>17</sup> Ibid. Again, in Weberian terms this claim underlines tsars' *charisma* and *tradition* of tsars' unrestricted rule as a basis of legitimacy.

codified law in the Digest or its supplements, in which both the form and content of the original law could be (and frequently were) changed by the state officials in the process of their editing.<sup>18</sup>

These bureaucratic practices in relation to the creation of the official sources of Russian law were in stark contrast to the initial aspirations, which were to control bureaucracy's arbitrariness, and to foster the legitimacy of the autocratic regime based on the pillar of law. The contrast between the declared authority of law and the very practices for making the primary official sources of law was striking for the developing legal profession in Russia, which was based on educational models borrowed from the continental legal system. The western educational patterns embedded the more developed ideological basis of political legitimacy as legal/rational not traditional or charismatic. Thus, the existing ideological and political contexts imprinted in the making of Russian law were inevitably a very problematic basis for the sustainable institutionalization of professional law in Russia.

As a result, even though there was an idea of 'universalist legality' based on natural law concepts, along with a more or less effective system of positive law in late imperial Russia, Russia was still on the way to developing a strong institutionalization of law. The combination of an autocratic political regime and weak civil society did not promote the elevation of concepts of procedural justice and fairness to a safe level of political acceptance which state, administrative and legal operations were able to reach. As a result, the conceptualization of legality by the elites could be called 'technical legality'. The term 'technical' emphasizes the formalist approach to law, when legal procedures would work only if there was no interest involved on the part of political power. Where a political interest was involved, the legal framework could be ignored or revised by administrative means or direct political intervention.

This technical approach also dominated the law-making process itself, which resulted in an unclear division between administrative and legislative powers in late imperial Russia. As I show in Chapter III, this issue of the unclear division between legislative and administrative acts was planned to be solved technically by the establishment of the *Collection of Legislation* in which only acts having the 'power of law' (*silu zakona*) were to be published. As a result, a normative act received the status of 'law' of general importance through its publication. Therefore, the legal technique was used to deal with the political difficulties of the non-division of legislative and executive power in imperial Russia, which is very illustrative for the development of the legal system in Russia.

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<sup>18</sup> On the political dimension of codification practices in Digest see in: T. Iu. Borisova "Zakon i zakonnost' v rusском kodekse 1906–1917 gg.", in *Istochnik. Istorik. Istorii: Sbornik nauchnikh rabot* (Izdatel'stvo Evropeiskogo universiteta v Sankt-Peterburge, St. Petersburg, 2001), 11–41.

In the light of the development of a public sphere, the political use of 'technical legality' and problems of political legitimacy of power caused deep political crises and helped stimulate the revolutionary movement in the late nineteenth century. The Russian revolutions of 1905 and 1917 to a large extent were caused by public discontent with unrestricted and inefficient political power of tsarist administrators sanctioned by law. The tensions between the two opposing approaches to law, a universalist natural law approach versus a traditionalist approach of fostering legality sanctioned by an unrestricted monarch's power escalated. As Law Professor of Dorpat University, Fjodor Taranovski (1875-1936), put it in his lecture on 11 March 1917, the tsarist regime was demolished because 'it did not just violate rights, it undermined the very foundations of law and order' (*ona ne tol'ko narushala prava, no i podorvala samyia osnovy pravoporiadka*).<sup>19</sup> As I show in Chapter IV, the instrumentalist approach to law as a technical means of administration continued after the Bolshevik Revolution in October 1917 and resulted in rights being seriously violated.

My *second* conclusion deals with the limitations of Russian legal borrowing from the West as a means of modernization of the state.<sup>20</sup> In this respect, my research contributes to existing scholarship on legal borrowings in Russian law.<sup>21</sup> The novel outlook of my work is its focus on the interrelation of legal borrowing with the internal and foreign political background. My contextualized analyses of this interrelation, viewed through the perspective of the *longue durée*, stresses two main aspects: (a) the remarkable continuity in the political limitations of Russian legal reform via borrowing; and (b) the political sensitivity of the process, resulting in secret/hidden borrowing.

As I showed in Chapter I, in late imperial Russia, in line with the general political thought of the Enlightenment (borrowed from the West) good laws and legal certainty were viewed as important conditions to facilitate improved economic performance and consequently state power. Thus, in 1800 – 1812, drafts of the Russian codes were prepared on the basis of western codes and were almost adopted. However, the war against Napoleon marked a radical redirection to search for a national basis for Russian law and its unique pathway for future development. The open mode of borrowing from abroad was transformed into a hidden one and was severely limited.

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<sup>19</sup> University of Tartu Library. Fond 82 (Fjodor Taranovski). File 11. List 1.

<sup>20</sup> Foreign legislation regulating the use of modern technological innovations such as means of transport (e.g., railroads) or communication (e.g., telegraphs and post service) was consulted and some of the decisions borrowed. See, for example, on the history of railroads: Frithjof Benjamin Schenk, *Russlands Fahrt in die Moderne: Mobilität und sozialer Raum im Eisenbahnzeitalter* (Quellen und Studien zur Geschichte des östlichen Europa, No. 82.) (Franz Steiner Verlag, Stuttgart, 2014).

<sup>21</sup> Martin Avenarius, *Fremde Traditionen des römischen Rechts. Einfluß, Wahrnehmung und Argument des 'rimskoe pravo' im russischen Zarenreich des 19. Jahrhunderts* (Wallstein, Göttingen, 2014), V. A. Letiaev, *Vospriiatie rimskogo nasledii rossiskoi naukoj XIX- nachala XX veka* (Izdatel'stvo Volgogradskogo gosudarstvennogo universiteta, Volgograd, 2002), Anton D. Rudokvas "The Alien. Acquisitive Prescription in the Judicial Practice of Imperial Russia in the XIXth Century", 8 *Rechtsgeschichte* (2006), 59-69.

This kind of radical retreat, from a readiness to adopt a translation of Napoleon's Civil Code to a rejection of borrowing at all, illustrates the limitations of the Russian political leadership's instrumentalist approach to law. On the one hand, in their reformist aspirations, the law-drafters did not really take into account existing Russian legal practice since it was considered to be somewhat outdated and irrelevant. On the other hand, any selection made in favor or against particular western models was actually based on chance,<sup>22</sup> not on any substantial analysis of the relevant legislation. Both these limitations derived from the lack of legal professionalism and a predominance of both administrative and political approaches to any legal innovations, including borrowings. As a result, the law-makers completely overlooked the fact that the strong institutions of economic and social development in the West were based on the authority of law as a separate institution.

As I show in Chapter I, the Russian political leadership exploited western models in order to institutionalize the Russian national law/legal tradition through legal education. For example, German hornbooks were translated into Russian, and Russian students were sent to study in Prussia. As a result, some human resources were obtained to carry out the institutionalization of Russian law on the basis of western educational models.<sup>23</sup> However, as Chapter II demonstrates, the problem was that western legal norms were merely seen as technologies, while the whole idea of authority of law, which makes these technologies work efficiently, could hardly be borrowed. As I discussed in my earlier conclusion, the idea of the authority of law was rejected as irrelevant to an unrestricted autocracy based on tradition and charisma.

As a result, western ideas of law, used to educate Russian legal specialists, collided with the Russian reality of the state's domination. To illustrate this point, in Chapter III, I consider the problem of the authorities' repressive reactions to an attempt to discuss the difficulties of Russian law in a literary journal. I take the case of the critique of the administrative overruling of law in court procedures in an article which was published in the Russian Messenger (*Russkii Vestnik*) in 1857. The Minister of Justice considered this article to be dangerous, since making law and its critique had to be solely in the domain of the state. After his special report to the Council of

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<sup>22</sup> It was not a typically Russian issue. As Gianmaria Ajani writes, the role of chance is always important in any legal borrowings. Gianmaria Ajani, "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe", 43 *American Journal of Comparative Law* (1995), 93-127.

<sup>23</sup> The German input in Russian legal education was studied sufficiently both by Russian and German legal historians, see, e.g.: Anton D. Rudokvas, Alexei S. Kartsov, "Der Rechtsunterricht und die juristische Ausbildung im kaiserlichen Russland" in Zoran Pokrovac (ed.), *Juristenausbildung in Osteuropa bis zum ersten Weltkrieg* (Klostermann, Frankfurt am Main, 2007), 273-316, Martin Avenarius, *Rezeption des römischen Rechts in Rußland – Dmitrij Mejer, Nikolaj Djuvernua und Iosif Pokrovskij*, (Wallstein, Göttingen, 2004), S.V. Kodan, "Shkola professorov rossiiskogo prava M.M. Speranskogo", *Gosudarstvo i pravo* No 9 (2003), 88-95.

Ministers, a specific legal prohibition on discussing the state's law in the printed press was enacted.<sup>24</sup>

This case exemplifies the remarkable ambivalence in the Russian reception from the West of the authority of law in Berman's terms. This ambivalence may be portrayed in the very discussion on two different types of legality: 'universal legality' and 'legality with characteristics'. In the nineteenth century the latter was articulated as 'autocratic legality'. It is important to note that 'universal legality' was a concept used by Russian legal professionals in order to stress that there are some generally accepted legal principles and concepts that could not be overruled, since they make the basis of law as an institution and do not derive from the will of the state. Thus, the public should be free to protest against violations of these (natural) legal principles, as an author in *Russkii Vestnik* did. This conceptualization of universal legality was based on the cultural heritage of the Enlightenment and continental models of legal education,<sup>25</sup> based on continental theory and practice of law, in which the Russian legal specialists saw a pattern which could be used in Russia.

In contrast to 'universal legality', 'autocratic legality' seen by political leadership as technical was articulated as a benchmark of the Russian legality tradition. Its tasks were to modernize Russia and protect Russian national traditions. These rather contradictory tasks resulted in the two main characteristics of the official Russian understanding of legality: (a) its focusing on legal certainty and the prevention of arbitrariness without focusing on procedural rights; and (b) allowing administrative interventions in case of political necessity. These Russian characteristics in the conceptualization of legality were criticized by those 'pro-western' legal professionals who emphasized that legality had universal standards, since legal values are international and derive from natural law concepts. However, the defendants of the tradition of autocratic legality clearly saw that what was being called 'universal' in the field of law was actually (continental) western and this was politically challenging for Russia.

My analysis of this debate on the ethos of autocratic legality led me to a more general observation that legal certainty was hardly achievable in the Russian Empire. This must be taken into account when the efficiency of legal borrowing is discussed in relation to the Russian legal system in general across a broad chronological period, including contemporary history. Since law

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<sup>24</sup> The Count's Panin report offered to censor "any elaborations, serving directly or indirectly to reprobation of monarchy as a political regime". See in: "On our literature" (Minister's of Justice report to the meeting of the Council of Ministers 11 December 1857), Russian State Historical Archive (*Rossiiskii gosudarstvennyi istoricheskii arkhiv*,"), fond 1261, opis' 2 (1857), delo 115, list 158-164.

<sup>25</sup> See further: V.V. Zakharov, *Kak gotovit' iurista: izuchaia russkie recepty. Ocherki istorii iuridicheskogo obrazovaniia v Rossii vtoroi poloviny XIX - nachala XX* (Izdatel'stvo Kurskogo universiteta', Kursk, 2006).

was viewed as a political instrument, legislation was changed rather frequently.<sup>26</sup> In addition, the difference between legislative and administrative acts were not clearly delineated, either in the theory of Russian law or in the positive law itself. Thus, as I show in all four Chapters, the central idea of the tradition of Russian legality was articulated in terms of an aspiration to legal certainty which would foster legal order.

The predominance of political aims, that is, the instrumentalist approach to law, along with attempts by the state to keep control over the institution of law in general, undermined the practical achievement of legal certainty. Indeed, as I show in Chapter II, the procedures for making the key sources of Russian law – for example, obligatory codification in the Digest<sup>27</sup>, could significantly change the original meaning of any legal borrowing. I demonstrate that changes inevitably occurred in the process of including every new piece of legislation into the system of the Digest by the special codificational agency of the tsar's administration. Since as a rule the legislator was reluctant to define clearly the changes to previous legal regulations resulting from new laws, the codifiers had to do this on the basis of their own interpretation of the new laws in relation to other laws in force, with the associated risk of altering the effect from that originally intended.

In general, my research on the making of the sources of Russian law – the *Digest of Laws of the Russian Empire* and the *Collection of Legislation* – has provided important empirical evidence of the substantial limitations of legal borrowing in states where law is not separated from politics. Legal techniques introduced to promote modernization by bringing in some legal certainty and some predictability could only partly fulfill this important task. Russian 'legality with adjectives' generated less efficiency, since it was based on unclear and changeable standards, which entailed their dependency on political leadership and altogether undermined predictability – a fundamentally important characteristic of law. Without fostering real predictability, neither national law nor legal borrowing, could be successfully implemented.

My *third* conclusion emphasizes continuity in the ideological opposition to the West, the significant other, articulated as a basis of the Russian legal tradition. This opposition was a key feature of the official 'legality with characteristics', embedded in 'autocratic legality' during Imperial times and further transformed after the Bolshevik revolution. My dissertation draws attention to a certain historical pathway in the contrast between the Russian and Western conceptualization of the rule of law, rooted in the enduring opposition of the Russian political regime to the anti-absolutist

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<sup>26</sup> Denis Galligan generalized that the instrumentalism of law in Eastern Europe lead to discord between legal norms and social norms: Denis Galligan, "Legal Failure: Law and Social Norms in Eastern Europe", in id, and Marina Kurkchiyan (eds.), *Law and Informal Practices: The Post-communist Experience* (Oxford University Press, Oxford, 2003), 3-9.

<sup>27</sup> I use a contextualized term for codification. See, Introduction *note* 57.

developments in western states. This opposition which served to make a specific Russian legal identity, can be dated back to the early nineteenth century, when the institutionalization of Russian law took place. Also, my research highlights the issue of the prestige of the national political regime and the legitimizing role of its legal system<sup>28</sup> in the international arena as an important factor promoting difference.

In Chapter I, I underline the strong impact of factors of both internal and foreign policies on the constitution of the Russian legal tradition as opposed to that of the West. I demonstrate that anti-western rhetoric came to prevail in the course of attempts at the codification of Russian law in 1800-1835 and played a significant role in the emergence of an ideal of a Russian national legal tradition. It derived from the Napoleonic wars in Europe (1803 – 1815) and progressed with the victory over Napoleon, which brought to the Russian tsars a leading role in protecting the other European monarchies from revolutionary threats.<sup>29</sup> Afterwards, the foreign policy of the Russian Empire was shaped by the anxiety of successive tsars about the anti-absolutist developments in Western European states. This anxiety was deepened by the Decembrists' uprising in 1825, which demonstrated that the sharing of western ideas by Russian elites could create a very serious threat to the autocracy.

My research highlights the impact of foreign affairs, previously overlooked in the academic literature, namely, the 'Napoleonic factor' for the constitution of the Russian legal tradition in general, and, in particular, for the constitution of its difference to the West. Chapter I examines the political conditions of a radical shift from open borrowing from the Napoleonic codes in the beginning of the nineteenth century to a populist denial of borrowing due to Russian particularities, which resulted in the adoption of the Digest of Laws of the Russian Empire. Chapters I and II stress that this shift was of an ideological nature; assumptions of universalistic legal values applicable for Russia were rejected in favour of an isolationistic discourse.<sup>30</sup>

In general, after the French Revolution, the Russian political leadership viewed ideas of 'universal legality' in the context of a natural law discourse and its revolutionary implications. Thus, ideas about any relevance of 'universal legality' for Russia were officially condemned and marginalized as being potentially dangerous. As I show in Chapter I, in the 1810s, academic discussion on 'natural rights' was considered harmful to youth by the Ministry of National

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<sup>28</sup> It seems that the issue of political prestige of national legal systems may and should be studied comparatively as an important part of legal history and current legal agenda. See further in: Jukka Kekkonen, Jukka Kekkonen, "The political role of courts in Finland 1809-2015: Some methodological and historiographical observations," 38(2) *Retfærd: nordisk juridisk tidsskrift* (2015), 32-47.

<sup>29</sup> Especially after the Holy Alliance of European monarchs was established in 1815.

<sup>30</sup> Especially in the field of public law. However, as I show in Chapter I, many institutions of civil law were borrowed.

Education. Based on research of over one hundred years decisive for Russian history, my research has demonstrated that, in spite of some periods of liberal reforms resulting from political crises, the isolationistic stance has prevailed in Russian political and legal discourse for the last two centuries.

In line with this continuity, Western liberties have been seen as opposed to Russian national political and legal traditions, in particular, to the 'tradition' of autocratic rule. At the same time, Western lawyers were viewed by both conservative Russian ideologists and liberal Russian legal professionals as an important driving force for revolutionary movements. My research has demonstrated that, indeed, calls to enforce 'universalist legality', advocated by the Russian 'lawyers-westernizers' such as Aleksander Gradovskii (1841-89), Sergei Muromtsev (1850-1910), Maxim Vinaver (1863-1926) and others, had an important political impact. These claims about the relevance of western legal standards for Russia can be studied as a historical part of the on-going debate over the Russian experience of the rule of law.

Indeed, as I show in Chapter I, in the late nineteenth century critique of bureaucratic practices of law-making and implementation in Russia, the eminent professor of law Alexander Gradovskii emphasized the political necessity of strengthening law as an institution. He questioned the efficiency of administrators' broad discretion as a part of political and administrative interventions into legal practices. His claim was precisely of a universalist nature; that legal order (*pravovoi poriadok*) was a part of human civilization and thus it was as international as technological progress.<sup>31</sup> His opponents, starting from Sergey Uvarov (1786-1855), father-founder of the Official Nationality doctrine, stressed that Russia was not yet ready for this stage of western progress. In the following section on the current conceptualization of the rule of law in Russia, I will demonstrate that these claims seem still to be relevant.

Later, at the very end of the nineteenth – beginning of the twentieth century, adherence to universal legality and western values became an important political contention in the struggle with the autocratic political regime. Thus, my dissertation stresses the important interrelatedness of the ideological confrontation between Russian and Western legal values in the Russian political agenda, both in internal policy and in the international arena. Taking foreign affairs into account, it is important to note that competition between political regimes in Russia and Western states, including

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<sup>31</sup> Aleksander Gradovskii, "Biurokratizm i pravovoi poriadok", *Nabliudatel'* (1882) No.7, 63. It is important to note that in last decades of the 19<sup>th</sup> nineteenth century there was a remarkable interest in Russian legal thought to natural law and rule of law issues. See further: Andrzej Walicki, *Legal Philosophies of Russian Liberalism* (NY, Oxford University Press, 1987). This makes an important theoretical heritage, often overlooked in Russia nowadays. Recently, Anastasia Tumanova's school has targeted this gap. See: A. S. Tumanova, R. V. Kiselev, *Prava cheloveka v pravovoi mysli i zakonotvorchestve Rossiiskoi imperii vtoroi poloviny XIX — nachala XX veka* (Izdatel'skii dom Vysshei shkoly ekonomiki, Moscow, 2011).

periods of open confrontation, has resulted in furthering the differences in positive law, key legal concepts, and the legal mindset in general.<sup>32</sup>

My dissertation has revealed a remarkable continuity of this confrontation, reproduced in both legal and political discourses in Russia.<sup>33</sup> The Bolshevik revolution further deepened this disparity. This conclusion is extremely important, since it draws attention to a complexity of anti-western isolationistic attitudes as being a part of the Russian legal tradition, which can not be exclusively attributed to the positions taken by the Russian leadership at different times. The 'otherness' of the Russian legal tradition has been constituted as its key marker, which prescribes a particular pathway and influences the current legal agenda in the Russian Federation.

### 6.3 Legality Tradition and Current Legal Agenda

Since 1996 Russia has been a member of the Council of Europe, which requires adherence to the rule of law in terms of the 1950 European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms)<sup>34</sup> as enforced by the European Court of Human Rights in Strasbourg.<sup>35</sup> However, in spite of this, Russian mainstream political discourse undermines any ideological unity with Europe and the West.<sup>36</sup>

Since the early 2000s, both western legal scholars and Russian human rights activists have emphasized that the Russian 'practical' understanding of the concept of rule of law (*pravovoe gosudarstvo, verkhovenstvo prava*, formally not defined in statutory law) differs significantly from standard western interpretations.<sup>37</sup> Valerii Zor'kin, Chairman of the Constitutional Court of the Russian Federation, has consistently insisted on the priority of the national legal tradition.<sup>38</sup> Moreover, in its December 2013 ruling, Constitutional Court of the Russian Federation has

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<sup>32</sup> See empirical evidence of human dimension of this confrontation in the Cold War era in: Jane Henderson, "Talking Across the Fence: Cold-War Academic Cooperation in the Legal Sphere", in Tatiana Borisova, William Simons (eds.), *The Legal Dimension in Cold War Interactions: Some Notes from the Field* (Martinus Nijhoff Publishers, Leiden, Boston, 2012), 1-41.

<sup>33</sup> And in the West.

<sup>34</sup> ECHR has had a binding force for Russia due to its membership in the Council of Europe since 1996.

<sup>35</sup> The Council of Europe's definition of the rule of law implies certain criteria of both procedural elements and substantive contents as defined in Report on the Rule of Law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2011\)003rev-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2011)003rev-e.aspx)

<sup>36</sup> See further in Viacheslav Morozov, "Western Hegemony, Global Democracy and the Russian Challenge", in Christopher S. Browning and Marko Lehti (eds.), *The Struggle for the West: A Divided and Contested Legacy*, (Routledge London, New York, 2010), 185-200, Olga Malinova, *Konstruirovaniye smyslov: Issledovaniye simvolicheskoi politiki v sovremennoi Rossii* (RAN, INION, Moscow, 2013), 281-370.

<sup>37</sup> See e.g. Katlijn Malfliet, Lien Verpoest, and Evgeny Vinokurov (eds.), *The CIS, the EU and: The Challenges of Integration* (Palgrave Macmillan, Basingstoke, 2007); Katlijn Malfliet, Rea Laenen (eds.), *Elusive: Current Developments in Identity and Institutional Reform under President Putin* (Leuven University Press, Leuven, 2007).

<sup>38</sup> Valerii Zor'kin, "Verkhovenstvo prava i imperativ bezopasnosti", *Rossiiskaia gazeta* (16 May 2012).

forbidden all Russian courts from implementing allegedly unconstitutional judgments of the European Court of Human Rights.<sup>39</sup> At the same time, the 'Russian national tradition' has been articulated in the reasoning of the Constitutional Court.<sup>40</sup>

Even though this trend does not encompass an historical investigation of *what the Russian legal tradition is*, it certainly brings to attention a manifestation of the *difference* in the Russian approach to law.<sup>41</sup> Today this difference contributes to the identity of Russian legal professionals and consequently to Russian law in general. It certainly influences discussion about the relevance to Russia of western rule of law standards.<sup>42</sup>

Last, but not least, one should take into account an additional factor as underlined by Valerii Zor'kin, that of recent developments in international politics in relation to human rights protection.<sup>43</sup> Kosovo, Libya and Syria proved that human rights “are no longer considered an exclusively domestic affair”, as Helmut Steinberger put it.<sup>44</sup> Needless to say, this view has been opposed in Russia by claims about strengthening national law and defending national sovereignty.<sup>45</sup> Naturally, this trend also supports the isolationistic discourse in the discussion about rule of law in Russia. My dissertation contributes to the substantial understanding of all these phenomena in a historical perspective. In general, my dissertation explains why this focus on isolationistic discourse has

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<sup>39</sup> Para. 3(1) of Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii (6 December 2013) No.27-P, “O proverke konstitutsionnosti polozhenii stat’i 11 i punktov 3 i 4 chasti chetvertoi stat’i 392 Grazhdanskogo protsessual’nogo kodeksa v sviazi s zaprosom prezidiuma Leningradskogo okruzhnogo voennogo suda” [On Verifying the Constitutionality of Art.11 and of points 3 and 4 of paragraph 4 of Art.392 of the RF Code of Civil Procedure in Connection with an Inquiry of the Presidium of Leningrad District Military Court], *Rossiiskaia gazeta* (18 December 2013) No.6261. See further in Mikhail Antonov, 'Conservatism in Russia and Sovereignty in Human Rights' 39(1) *Review of Central and East European Law* (2014), 1-40, at 1-30.

<sup>40</sup> See for instance the Opređenje Konstitutsionnogo Suda Rossiiskoi Federatsii (19 January 2010) No 151-O-O/2010, “Ob otkaze v priniatii k rassmotreniiu zhaloby grazhdan N.A. Alekseeva, N.V. Baeva, and I.B. Fedotovoii na narushenie ikh konstitutsionnykh prav stat’ei 4 Zakona Riazanskoj oblasti “O zashchite nravstvennosti detei v Riazanskoj oblasti” stat’ei 3.10 Zakona Riazanskoj oblasti “Ob administrativnykh pravonarusheniiakh”” [On Refusing to Accept for Consideration a Complaint of Citizens N.A. Alekseev, N.V. Baev, and I.B. Fedotova about a Violation of their Constitutional Rights by Art.4 of the Law of Riazanskaia Oblast' 'On protection of morals of children in Riazanskaia Oblast' and by article 3.10 of the Law Riazanskaia Oblast' “On Administrative Offenses”], available at <http://www.ksrf.ru/ru/Decision/Pages/default.aspx>. In the reasoning the judges relied on 'traditional values of family and motherhood' (Para. 3). See more examples in Alexander Kondakov, “The Silenced Citizens of Russia: Exclusion of Non-heterosexual Subjects From Rights-Based Citizenship”, 23(2) *Social & Legal Studies* (2014), 151-174.

<sup>41</sup> Legal scholars also seem to follow the trend. As Leena Lehtinen points out, they tend to turn to the Soviet legal doctrine in the field of private law. Leena Lehtinen, “The Relevance of the Cold War for Russian Jurisprudence: Private Law”, in Tatiana Borisova, William Simons, op. cit., note 30, 73-81. Also, ideology is getting important in academic discussions, e.g. on reception of western law: S.V. Tkachenko, “Ideologicheskii komponent retseptsii prava” *Juridicheskie zapiski* No. 2 (2014), 21-27.

<sup>42</sup> V.D. Zor'kin, “Vvedenie: Pravovaia transformatsia Rossii: vyzovy i perspektivy”, in V.D. Zor'kin, P.D. Barenboim (eds), *Doktriny Pravovogo Gosudarstva i Verkhovnstva Prava v sovremennom mire* (LUM, Iustitsinform, Moscow, 2013), 19-76; P.D. Barenboim, “Posleslovie: Ot gipotezy k doktrine”, in *ibid*, 543-551.

<sup>43</sup> Valerii Zor'kin, “Predel ustupchivosti”, *Rossiiskaia gazeta* (29 October 2010).

<sup>44</sup> Helmut Steinberger, “Sovereignty”, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (North Holland, Amsterdam, New York, NY, 2000), Vol. IV, 515, John Agnew, *Globalization and Sovereignty* (Rowman and Littlefield, New York, 2009).

<sup>45</sup> Zor'kin op. cit. note 37, note 41, note 42.

developed as a part of the Russian legal mindset since the late imperial times. It reveals a more complex perspective on the problematic institutionalization of law in Russia, which comprises its formalistic and positivist ethos, as part of a more general statist attitude to the nature of law and the functions of courts.

My research stresses the fact that policymaking derives from and relies on the Russian legal environment in general, which is determined to a large extent by past experiences. This conclusion challenges the assumption on the key role of political leadership in rule of law transformation.<sup>46</sup> As Thomas Carothers put it “Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law”.<sup>47</sup> While, obviously, the position of the leadership matters a lot, the legal profession and more broadly, the existing legal infrastructure are equally important political and human conditions of the rule of law success.

As was noted by Anatolii Kovler, former Russian Justice of the European Court of Human Rights, in the 2009 *Kudeshkina* case decided by that Court;

“A judge has specific responsibilities in the field of the administration of justice, [...] and performs duties designed to safeguard the general interests of the State.”<sup>48</sup>

Justice Kovler articulated the traditional domination of the institution of state politics over the institution of law inherited in modern Russia from the Soviet period, as a continuity of pre-revolutionary tsarist practices relating to the *Digest of Law of the Russian Empire*; a judge had to serve the state by literal implementation of the *Digest's* articles.<sup>49</sup> Based on this perspective of historical continuity, one has a clearer vision as to why the focus on publication for general information was considered to be a significant step towards the rule of law in Russia,<sup>50</sup> even stipulated in the RF Constitution.<sup>51</sup>

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<sup>46</sup> Thomas Carothers, “The Rule of Law Revival” 77(2) *Foreign Affairs* (1998), 95-106.

<sup>47</sup> Idid, 96.

<sup>48</sup> Dissenting opinions of Justices Kovler and Steiner *Olga Kudeshkina v. Russia*, Judgment (26 February 2009) Application No.29492/05, para. 34. In 2004, she was dismissed from her office inasmuch as her statements “undermined public confidence that the judiciary in Russia is independent and impartial”. Ibid. The ECtHR ruled that the dismissal of Kudeshkina was illegal because of Russia’s violation of Art.10 ECHR.

<sup>49</sup> A recent socio-legal research clearly demonstrates continuity of this state-judge perspective. Today, Russian judges decision-making is very formalized while 'accuracy' is leading foremost among professional values. See policy memos of Rule of Law Institute of European University in St-Petersburg (Institut problem pravoprimereneniia): 1) V.V. Volkov, Je.L. Panejah, et al. *Kak obespechit' nezavisimost' sudei v Rossii*. (Seriiia “Analiticheskie zapiski po problemam pravoprimereneniia”, July 2012) (Institut problem pravoprimereneniia Evropeiskogo universiteta v Sankt-Peterburge, St-Petersburg, 2012) available at the site of the institute. [http://www.enforce.spb.ru/images/analit\\_zapiski/pm\\_1207\\_judge\\_independence\\_web.pdf](http://www.enforce.spb.ru/images/analit_zapiski/pm_1207_judge_independence_web.pdf) and 2) V.V. Volkov, A.V Dmitrieva, et al. *Rossiiskie sud'i kak professional'naiia gruppai: sociologicheskoe issledovanie* (Institut problem pravoprimereneniia Evropeiskogo universiteta v Sankt-Peterburge, St-Petersburg, 2012.) On file with the author.

<sup>50</sup> The fact that a bulk of the Soviet legislation stayed unpublished was considered by Harold Berman as a very important obstacle to substantial transformation of Soviet legal culture to rule of law, proclaimed by Gorbachev in the end of the 1980s. Harold J. Berman, “The Rule of Law and the Law-Based State (Rechtsstaat). With Special Reference

The constitutional provision about the obligatory publication of law revealed a willingness to overcome the neglect of the autonomy of law as an institution in the USSR. Indeed, as I demonstrated in my dissertation, after the Bolsheviks gained power, the publication of legal acts for general public information was not considered to be necessary. Thus, in Soviet law this very basic prerequisite of the legality principle was undermined. My dissertation underlines the continuity of the tsarist practice of using law as a tool, as an instrument of modernization, which the Bolsheviks inherited and further developed.

The predominance of the power of politics over legal institutionalization creates a certain pathway of the Russian legal and political tradition, which *inter alia* stresses that the rule of law depends on the leader's will than on the law itself.<sup>52</sup> As my dissertation has demonstrated, this feature was fundamental for autocratic legality in Russia and after the revolution was further developed as a part of Soviet legality, getting even more technical than it used to be. Nowadays, as the authoritative political scientist Vladimir Gel'man emphasizes, further development of the state has been jeopardized by the subverted role of law, which is used in Russia to serve short-term political goals and legitimize the political regime.<sup>53</sup>

In general, my research demonstrates that the Russian legality tradition, based on a very close interrelatedness between law and the state's politics, inevitably does not comply with modern western standards of the rule of law. The lack of factual autonomy of Russian law as an institution predetermines the continuity of a formalistic and positivist understanding of the rule of law. It results in an avoidance of normative claims and substantial elements of the rule of law, such as, for example, 'legal protection of the individual vis-a-vis the state', stipulated as a part of the 'legal certainty' principle in the policy Report *'On the Rule of Law'* by the European Commission for Democracy Through Law (Venice Commission) adopted in March 2011.<sup>54</sup>

Along with this important continuity, my research also stresses the radical break in Russian legal tradition caused by the Bolsheviks' revolution. The revolutionary government eliminated all

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to the Soviet Union", in Donald D. Barry (ed.) *Toward the "Rule of Law" in Russia: Political and Legal Reform in the Transition Period* (M.E.Sharpe, Armonk, NY, 1992), 48, 59 n. 16. I thank Jane Henderson for drawing my attention to this important piece.

<sup>51</sup> Konstitutsiia (Osnovnoi zakon) Rossiiskoi Federatsii [Constitution (Basic Law) of the Russian Federation] (12 December 1993) *Rossiiskaya Gazeta* (25 December 1993). Art. 15: 'Para. 2. The bodies of state authority, the bodies of local self-government, officials, private citizens and their associations shall be obliged to observe the Constitution of the Russian Federation and laws. Para. 3. Laws shall be officially published. Unpublished laws shall not be used. Any normative legal acts concerning human rights, freedoms and duties of man and citizen may not be used, if they are not officially published for general knowledge.' The official translation provided by Garant-Service, available at <http://www.constitution.ru/en/10003000-02.htm>

<sup>52</sup> William E. Butler, "Civil Rights in Russia: Legal Standards in Gestation", in Olga Crisp and Linda Edmondson (eds.), *Civil Rights in Imperial Russia* (Oxford University Press, Oxford, 1989), 282. 3-12.

<sup>53</sup> V. Ia. Gel'man, *Iz ognia da v polymia: Rossiiskaia politika poste SSSR* (BkhV-Peterburg, St-Petersburg, 2013), 191.

<sup>54</sup> Op cit. note 34.

the important developments inspired by Western models of the pre-revolutionary Russian legal mindset and legal infrastructure. Influential centers of legal education, professional organizations and all the infrastructure which reproduced the value of law as a separate institution and built up a community of Russian lawyers were eliminated. The political interests of the Soviet people and their authorities were declared to be a priority. This break obviously widened the difference between Russian and Western legal traditions.

## 6.4 Contribution to History and Policy Studies

My research challenges the idea that the western rule of law is an inevitable stage of cultural evolution over the whole world.<sup>55</sup> It demonstrates that the historical experience of a particular state creates a certain pathway for the legal mindset within that particular jurisdiction. An effective implementation of the rule of law to a large extent relies on this mindset, constituted by past experiences, which give rise to certain expectations and form the range of opportunities (open or closed) for actors at the particular time.

Thus, to put it as simply as possible, it is very important what we *know* and what we *think* and *do* about our past. My research is in line with a new important trend: the *History & Policy network*, which is based on the assumption that historical research “can – and should – provide policy practitioners, advisors and decision-makers with equal measures of both admonition and inspiration”:

“History can enhance understanding of how policies have been framed according to historical circumstance, as a result of preoccupations of the time. The past can continue to set an agenda even though the origins and reasons for doing things in such a way have been forgotten. History thus provides a means for reflection and renewal, as well as evidence that policy framing *can* change”.<sup>56</sup>

My dissertation has demonstrated that historical circumstances have shaped the current legal agenda in Russia, characterized by claims of the uniqueness of Russia’s national legality tradition and a weak awareness by the Russian legal community of the rule of law as an important value which may be shared with the rest of the world.<sup>57</sup> At the same time, it has underlined that legal development in late imperial Russia was inspired by the western legal tradition and thus ought to be further researched within the more general context of western legal history. Thus, radically

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<sup>55</sup> Francis Fukuyama, *The End of History and the Last Man* (Free Press, NY, 2006).

<sup>56</sup> Lucy Delap, Simon Szreter, and Paul Warde, “History & Policy – a decade of bridge-building in the United Kingdom” 80(1) *Scandia* (2014), 97-118.

<sup>57</sup> Anton Burkoy, “Russia” in Leonard Hammer and Frank Emmert (eds.), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (Eleven Publishers, The Hague, 2012), 418.

opposing the Russian legal tradition to the western tradition does not seem either historically correct or politically efficient.<sup>58</sup>

On the contrary, the process of the institutionalization of law in late imperial Russia may be considered to be a basis for further co-operation by Russian lawyers with the international legal community.<sup>59</sup> It will enable the promotion of the further institutionalization of Russian law and a better understanding of the differences and similarities between the Russian and western perspectives on the rule of law.<sup>60</sup> The isolationistic rhetoric of the 'exclusion' of Russian legal practices from the western pathway may and ought to be overcome by strengthening co-operation in legal education and research.<sup>61</sup> This will hopefully provide a further understanding of shared experiences in the past, which will enable a better environment for further convergence of the different understandings of the rule of law as a means of justice in the future.

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<sup>58</sup> Ferdinand Feldbrugge emphasized that the contemporary debate on Russian rule of law has been overwhelmingly politicized, while historical perspective was unsatisfactory lacking. Ferdinand Feldbrugge, *Russia and the Rule of Law*, in Katlijn Manfiet (ed.) *Russia and Council of Europe: 10 Years After* (Palgrave Macmillan, London, 2010), 57-64.

<sup>59</sup> This is really needed given the fact of the rise of ideological pressure on the Russian legal community: see, e.g. S.V. Tkachenko, *op. cit. note 40*.

<sup>60</sup> To give an example, the common background of a continental legal system was a sufficient basis for productive co-operation in the time of large scale legal reforms in Russia in the 1990s. It was in particular relevant for drafting Russian Civil Code in co-operation with Dutch, German, and Italian civil law experts. Several working group sessions were organized by Leiden University and held in Leiden. The project was very efficient and was supported with further educational and research initiatives. This positive experience needs to be continued.

<sup>61</sup> It is important to note that there has been an understanding of the crucial role of the very *translations* of Russian 'law-based state'. The importance of choice to translate it or not in 'rule of law' was articulated by William E. Butler in 1990. Butler has chosen the 'rule-of-law state' since, as he put it "it gives the benefit of doubt to those who advocate the broader and most fundamental concept of law". William E. Butler, "The Rule of Law and the Legal System", in Stephen White, Alex Pravda, and Zhi Gitelman (eds.) *Developments in Soviet Politics* (Macmillan, London, 1990). Harold J. Berman objected it, writing that, "in light of the lack of a sufficiently developed legal culture the time is not yet ripe in the Soviet Union for constitutional proclamations of the rule of law". Harold J. Berman, *op. cit. note 49*, 58.

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## Errata list

**Doctoral candidate:** Tatiana Borisova

**Title of article:** Legislation as a Source of Law in Late Imperial Russia  
*Comparative Studies in Continental and Anglo-American Legal History*, Vol. 31, Pp.295-315

Page/ line	Original text	Corrected text
295/6	"...the European legal theories..."	"...European legal theories..."
295/19	"...of 19 <sup>th</sup> century..."	"...of the 19 <sup>th</sup> century..."
296/6	"...a state..."	"...the state..."
296/10	"...of recipient ..."	"...of the recipient ..."
296/13	"...imagine interests..."	"... imagine the interests..."
296/16	"For whom laws were published?"	"For whom were laws published?"
297/4	"... on realms..."	"...on the realms..."
297/12	"...between interested parties;"	"...between the interested parties;"
297/25	"...unified governance..."	"... the unified governance..."
300/1	"The quote ..."	"This quote ..."
300/36	"...a definite..."	"...the definite..."
301/2	"...For however..."	"...However..."
301/17	"...the Senate was not necessary..."	"... the Senate was not necessarily..."
301/30	"...in a printed ..."	"...in printed ..."
301/32	"...additions from local authorities. The procedure..."	"...additions by local authorities. This procedure..."
302/4	"...this policy deciding to publish ..."	"...this policy publishing ..."
302/7	"...(Article of from the Statute..."	"...(Article from the Statute..."
302/20	"...the technique..."	"...a technique..."
302/25	"...in case of a doubt..."	"...in case of doubt..."
303/4	"...by the organ..."	"...by an organ..."
303/12	"...a chancellery..."	"...the chancellery..."
303/16	"Amid the discussion..."	"Amid discussion..."
303/22	"...demonstrate..."	"...demonstrates..."
303/27	"...the information..."	"...information..."
303/28	"...to the specifically..."	"...to specially..."
304/7	"...for whom laws were published..."	"...for whom were laws published..."
304/8	"...nongovernmental..."	"...the nongovernmental..."
304/14	"...the Moscow University..."	"...Moscow University..."
304/15	"...the St. Petersburg University..."	"...St. Petersburg University..."
304/19	"...in the whole of..."	"...in all of..."
304/20	"...resulted into..."	"...resulted in..."
304/25	"...of the social life..."	"...of social life..."
304/26	"...the changes..."	"...changes..."
304/28	"Culture in 1850s..."	"Culture in the 1850s..."
304/31	"...i.e. the officials..."	"...i.e. officials..."
304/32	"...special legal education, jurists..."	"...a special legal education and jurists..."
305/2	"...the story with the..."	"...the story of the..."
305/4	"...a tart disapproval..."	"...the tart disapproval..."
305/6	"...discussion of subject in press..."	"...discussion of this subject in the press..."
305/6-7	"What in this article made..."	"What was it in the article that made..."
305/31	"... the ability..."	"...their ability..."
306/7	"...might found..."	"...might have found..."
306/26	"...a ground for..."	"...grounds for..."
307/11	"...the Kazan University..."	"...Kazan University..."
307/27	"...distribution..."	"...the distribution..."
307/29	"..., who participated..."	"..., those who participated..."
308/18	"...were very illustrative..."	"...was very illustrative..."

308/ 28	"...not publishing..."	"...not being publishing..."
309/ 26	"...had a right..."	"...had the right..."
310/ 18	"...in a form..."	"...in the form..."
310/ 24	"...as promissory note..."	"...as a promissory note..."
311/ 8	"...then, that according..."	"...then, according..."
312/ 7	"...in 1864 Court statutes..."	"...in the 1864 Court statutes..."
312/ 9	"...and addition..."	"...and the addition..."
312/ 18	"3. Revision control..."	"3. The Revisionary control..."
313/ 2	"...to apply..."	"...on applying..."
313/ 19	"...despite outcry..."	"...despite the outcry"
313/ 23	"...a decision about..."	"...a decision on..."
314/ 5	"Despite the criticism..."	"Despite criticism..."
314/ 19	"...archive materials..."	"...archival materials..."
314/ 34	"...research on publishing..."	"...research of publishing..."
315/ 9	"...a paternalist basis..."	"...a paternalistic basis..."

**Title of article:** The Digest of Laws of the Russian Empire: The Phenomenon of Autocratic Legality

*Law and History Review*, August 2012, Vol.30, No. 3, Pp. 901-925

<b>Page/ line</b>	<b>Original text</b>	<b>(Type of correction) Corrected text</b>
902/2	"...in state establishment..."	"...in the state establishment..."
902/19	"...of Russian state..."	"...of the Russian state..."
903/2	"...of Russian passion..."	"...of the Russian passion..."
903/3	"...played a role..."	"...played the role..."
903/11	"...public school..."	"...state school..."
903/23- 24	"...has been traditionally focused..."	"...has traditionally focused..."
904/9	"...of new courts..."	"...of the new courts..."
904/17	"...law of Friedrich the Great..."	"...law under Friedrich the Great..."
904/18	"...end of codification..."	"...end of the codification..."
904/24	"...toward establishing..."	"...to establish..."
904/25	"...reforms had been..."	"...reforms have been..."
905/8	"...of fruitless efforts..."	"...of the fruitless efforts..."
905/10	"...gives impression..."	"...gives the impression..."
905/11	"...by the deep..."	"...by a deep..."
905/16	"...needed for the success..."	"...needed for success..."
905/20	"...research demonstrated..."	"...research has demonstrated..."
905/21	"...judicial administration as well as other..."	"...the judicial administrators and other..."
905/21- 22	"...in the beginning..."	"...at the beginning..."
905/23	"...as it was under..."	"...as under..."
905/33	"...a draft for a..."	"...a draft of a..."
906/5-6	"...should be a business of the government..."	"...should be the business of government..."
906/12	"...governmental servants from noblemen..."	"...government servants from the nobility..."
906/14	"...rank of civil service..."	"...rank in the civil service..."
906/15	"...positions of important governmental level..."	"...positions at an important level in government..."
906/21	"...beginning January 1..."	"...beginning on January 1..."
906/27	"...against the hundreds..."	"...against hundreds..."
907/2	"...as compendium..."	"...as a compendium..."
907/3	"...by Russian authorities..."	"...by the Russian authorities..."

907/4-5	"...to be a legal foundation..."	"...to be the legal foundation..."
907/7	"...which was particularly..."	"...which had been particularly..."
907/7	"...by enlightened elite..."	"...by the enlightened elite..."
907/15	"...to work at governmental offices."	"...to work in government offices."
907/24	"...for princes Nicholas..."	"...to Grand Princes Nicholas..."
907/26	"...became a dean..."	"...became dean..."
907/28	"...and civil service..."	"...and the civil service..."
907/29	"...and recruit..."	"...and to recruit..."
908/17	"...an expert in specificity..."	"...an expert in the specificity..."
908/22	"...was appointed an official..."	"...was appointed official..."
909/6	"...was a product..."	"...was the product..."
909/11	"...the vexing question..."	"...the vexed question..."
909/12-13	"...the primacy..."	"...primacy..."
909/26	"...two times..."	"...twice..."
910/3	"...tsar..."	"...Tsar..."
910/19	"...to make references..."	"...to make reference..."
910/23	"...a possibility..."	"...the possibility..."
911/4	"...several severe obstacles..."	"...several serious obstacles..."
911/5	"The first of them..."	"The first of these..."
911/12	"...was loss..."	"...was the loss..."
912/3	"...the failure..."	"...its failure..."
912/10	"...of <i>Complete</i> ..."	"...of the <i>Complete</i> ..."
912/32	"...existed legislation..."	"...existing legislation..."
912/38	"...all the means..."	"...all means..."
913/1	"...existed order..."	"...existing order..."
913/9	"The chance of errors occurring in the process ..."	"The chance for errors occurring during ..."
915/16	"...of monarch's..."	"...of the monarch's ..."
915/25	"...with the oppositive positing the conflict as between ..."	"...with positing of the conflict between ..."
915/28	"... about formal..."	"...about a formal..."
915/32	"...the Russian society's..."	"...Russian society's ..."
916/8	"...of constitution..."	"...of a constitution ..."
917/7	"...the Russian society..."	"...the Russian society ..."
917/14	"Afterward, practical..."	"Afterward, the practical ..."
917/19	"...allowed the..."	"...allowed for the..."
917/29	"...by recognized expert..."	"...by the recognized expert..."
918/2	"...of unaltered Article..."	"...of the unaltered Article..."
918/8-9	"...based on uncritical..."	"...based on the uncritical..."
918/11	"...in interpretation..."	"...in the interpretation..."
918/13	"...on interpretation..."	"...on the interpretation..."
918/17	"...in 1860s..."	"...in the 1860s..."
918/19	"...the court reform..."	"...court reform..."
918/20	"Nethertheless..."	"Nevertheless... .."
918/22	"...than a letter..."	"...than on a letter..."
918/27	"...brought its fruit..."	"...beared fruit..."
919/4	"...avocet..."	"...avocat..."
919/4	"...the Russian lawyers..."	"...Russian lawyers..."
920/3	"...came be seen..."	"...came to be seen..."
921/5	"...in incorrect interpretation ..."	"...in the incorrect interpretation..."
922/13	"...valuation in last..."	"...valuation in the last..."
922/23	"...in broader context..."	"...in a broader context..."
923/16	"...drawbacks of codification..."	"...drawbacks of the codification..."
924/1	"With the purpose..."	"For the purpose..."
924/14	"...of the Richard Wortman's ..."	"...of Richard Wortman's..."
924/27	"...to the codifiers..."	"...to codifiers..."

924/29	"...considered as an efficient..."	"...considered to be an efficient..."
924/31	"...when a new..."	"...when new..."
925/5	"Under threat..."	"Under the threat..."
925/7	"...as embodiment..."	"...as an embodiment..."
925/15	"...of throne..."	"...of the throne..."

**Title of article:** The Legitimacy of the Bolshevik Order 1917-1918: Language Usage in Revolutionary Russian Law

*Review of Central and East European Law* 37 (2012) 395-419.

<b>Page/ line</b>	<b>Original text</b>	<b>(Type of correction) Corrected text</b>
410/footnote 55, line 2-4	"...State Archive of Russian Sociopolitical History (Gosudarstvennyi arkhiv Rossiiskoi sotsial'no-politicheskoi istorii) (hereinafter "GARSPI")..."	"...Russian State Archive of Sociopolitical History (Rossiiskiy gosudarstvennyi arkhiv sotsial'no-politicheskoi istorii) (hereinafter "RGASPI")..."
415/footnote 69, line 1	"...GARSPI..."	"...RGASPI..."