THE INSTITUTIONAL RESILIENCE OF RUSSIAN LAW THROUGH 1905–1917 REVOLUTIONS

TATIANA BORISOVA,
National Research University Higher School of Economics
(St. Petersburg, Russia)

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The article aims to describe the dynamics and characteristics of Russian law throughout 1905–1917 Revolutions. It considers how Russian law survived through the gradual breakdown of the autocratic state. The resilience studies' approach is introduced to the study of the continuity of the Russian legal tradition. A fresh outlook of the resilience framework allows to answer the main research questions: how did the legal system of the Russian empire lose its equilibrium in the beginning of the 20th century and what resources were exploited in order to make Russian law work for the Soviet state and people?

Keywords: revolution; legal tradition; Russian legal tradition; resilience; Russian sovereignty; Russian parliament.

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1. 1917: Russian Law at the Crossroads

There is a remarkable continuity which bridges past and present in the debate on the essence of Russian law. One of the pillars of this historical bridging is the public discussion reflecting an ideological clash between two opposite approaches to law and legality. Both approaches are embedded in the Russian legal tradition: both in legal institutions and discourses on law.

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. The clash of the two approaches is articulated in the contrast between two slogans: "*verkhovenstvo prava*" (the Russian analogue of "rule of law") versus "*diktatura zakona*" (dictatorship of law).[1] 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, as stipulated in legislation (*zakon*).

From 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 18th century, opposition between the two approaches has taken the form of political discussion. It became most visible in the time of radical political changes in the beginning of the 20th century.[2]

This debate forms an important continuity in the Russian legal tradition that has been balancing between the two poles of "*zakon*" and "*pravo*." My article aims to explore the survival of this continuity during the time of the radical political break of the Bolshevik Revolution in October 1917. I am interested in a deeper understanding of how Russian law as an institution made its way through the revolutions when the very idea of law (both *pravo* and *zakon*) was suppressed by violence.

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[1] Нерсесянц В.С. Право и закон [Vladik S. Nersesiants, *Law and Legislation*] (Moscow: Nauka, 1983); Лапаева В.В. Основные типы правопонимания [Valentina V. Lapaeva, *Major Types of Perception of Law*] in Проблемы теории государства и права [*Problems of Theory of State and Law*] 41 (V.M. Syrykh (ed.), Moscow: Eksmo, 2008).

[2] *See, for example*, discussion on "legal consciousness" and legal education of peasants in: Тисье М. Какое юридическое просвещение нужно в России?, 44(6) Неприкосновенный запас 21 (2005) [Michel Tissier, *What Legal Education is Needed in Russia?*, 44(6) NZ 21 (2005)].

Indeed, the Revolutions of 1905 and 1917, the abdication of the monarchy, and collapse of the Russian empire, resulted from a legitimacy crisis of the imperial elites, the imperial state, and its legal order. The law itself as an institution was questioned by the radical propaganda of the Bolsheviks. However, at a long run, the institute of law survived the October Revolution and appeared to be a very resilient element of the structure of state power.

Existing literature suggests two major factors that ought to be considered in relation to the emergence of Soviet law. The first factor is violent nature of the Soviets' rule executed through legalized terror. The second factor is inertia of social and governmental practices, including usage of legal practices from pre-revolutionary times. Violence and inertia did not necessarily contradicted each other. On the contrary, they intertwined and provided a complex functional context of laws' working in Soviet Russia.

Violence as a key factor of the foundation of the Soviet state is a well-researched theme.[3] The Bolsheviks took power during war, and the practices of wartime mobilization provided a foundation for the Soviet political and legal order.[4] Still, in spite of military practices and in addition to them, among the very few institutional checks on formulating and implementing Soviet policy, law played a remarkable role. *There* is a developing field of literature that describes the *novelties* of Soviet law that made its existence possible in the Soviet state.[5] In line with an analysis of norms of Soviet law, there are studies on how the Soviets used the *form of law* as an instrument of legitimized violence, domination and control.[6]

However, studies of the foundational period of the Soviet state demonstrate that law was not only an instrument of Soviet policy – it remained a *context* that continued. Continuity was relevant for both the pinnacle of political power and the local levels of everyday workings of Soviet law. At the top we have evidence of the meaningfulness of law as an institution in the development of Soviet ideology[7] and

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[3] *See* an overview in Aaron B. Retish, *Controlling Revolution: Understandings of Violence Through the Rural Soviet Courts, 1917–1923*, 65(9) Europe-Asia Studies 1789 (2013).

[4] Peter Holquist, *Violent Russia, Deadly Marxism? Russia in the Epoch of Violence, 1905–21*, 4(3) Kritika: Explorations in Russian and Eurasian History 627 (2003).

[5] In terms of substantial understanding of Soviet law, a lot of energy has been spent on highlighting ideological novelties of the socialist law and justice in the USSR. The Cold War narratives of competition of socialist and capitalist systems affected heavily these accounts, which still provide relevant descriptions of the Soviet legal institutions. *See, for example*, Harold J. Berman's path-breaking study of Soviet law: *Justice in the USSR: An Interpretation of Soviet Law* (Cambridge: Harvard University Press, 1983), that was a revised and expanded edition, entitled "Justice in Russia" published in 1950 also by Harvard University Press.

[6] Фельдман Д.М. Терминология власти: Советские политические термины в историко-культурном контексте [David M. Feldman, *Terminology of Power: Soviet Political Terms in Historical and Cultural Context*] (Moscow: RSUH, 2006); Tatiana Borisova, *The Legitimacy of the Bolshevik Order, 1917–1918: Language Usage in Revolutionary Russian Law*, 37(4) Review of Central and East European Law 395 (2012).

[7] Jane Burbank, *Lenin and the Law in Revolutionary Russia*, 54(1) Slavic Review 23 (1995).

the practices of governance.[8] At the same time, local histories of early Soviet rule highlight the role of law and legal procedures in dispute resolution and control over social violence in rural and urban Russia.

The juncture of both "top" and "bottom" evidence law's working (both as imagined by contemporaries and law's actual working "as it was") may be recognised in Stalin's words addressed to Kaganovich in 1932 in relation to the means of collectivization: "A peasant man loves legality" ("*muzhik liubit zakonnost'*"). With this argument Stalin insisted on the usage of ordinary courts rather than the political police to prosecute theft of "socialist property."[9] Of course it was possible to allow *by law* the political police to prosecute violations of the socialist property. However, Stalin wanted to have the courts involved. Thus, one might suggest that it was not only enforcement by police that was needed. In order to make "socialist property" into a legal concept recognized by people, courts were to be used. Court procedures would involve various intermediaries of law to propagate the concept of "socialist property" and people in the courtroom either involved in the process, or just as audience, would participate in making "socialist property" the people's legal will.

This article does not claim that Russian legalism was of essentialist nature, forming one of Russia's "permanent conditions."[10] Indeed, as Peter Holquist puts it, historical heritage matters within the context of a particular time and space.[11] Still, when historians are to capture changes in a particular setting of time and space it is methodologically fruitful to engage in debate on "persistent factors"[12] since they influence the adaptive capacity of the social systems.

In this article I will consider how Russian law as survived through the gradual breakdown of the autocratic state during 1905–1917. For this purpose I will introduce the resilience studies' approach to the studies of legal traditions as an example of the continuity of the Russian legal tradition. My main research questions will be: how did the legal system of the Russian empire lose its equilibrium in the beginning of the 20th century and what resources were exploited in order to make Russian law work for the Soviet state and people?

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8 Feldman 2006; Borisova 2012.

9 Сталин и Каганович. Переписка. 1931–1936 гг. [*Stalin and Kaganovich, Correspondence. 1931–1936*] 246 (O.V. Khlevniuk et al. (eds.), Moscow: ROSSPEN, 2001). *See further* in Yoram Gorlizki, *A Theft under Stalin: A Property Rights Analysis*, 69(1) Economic History Review 297 (2016).

10 *See* the critique of this approach in Alfred Rieber, *Persistent Factors in Russian Foreign Policy: An Interpretive Essay* in *Imperial Russian Foreign Policy* 315, 322 (H. Ragsdale (ed.), Washington: Wilson Center Press, 1993).

11 Holquist 2003, at 630.

12 Rieber 1993, at 322.

1.1. Studies of Legal Traditions and Resilience Studies

For years continuity has been the main focus of the studies of traditions. This was stressed in Eric Hobsbawm's classical definition of tradition as

> a set of practices, which seek to inculcate certain values and norms of behavior by repetition, which automatically implies continuity with the past.[13]

Within this theoretical framework, scholars carried out research on practices of making traditions. Legal scholarship also followed this development.

The classical works of Harold Berman and Patrick Glenn provide an important contribution to the conceptualization of legal tradition as cultural information brought from the past into the present.[14] This understanding of Berman and Glenn has been further developed by Edgar Schein and Jan Smits, who further explored the *socio-legal* dimension of "the transfer of information."[15] The socio-legal approach is focused on understanding the role of tradition for a certain community. As Schein summarized it: tradition is "the transfer of information within a community over a substantive period of time."[16]

This notion of "information transfer" bridges studies of legal traditions to more general "biological" explanatory patterns of natural science. In general the field of legal studies is open for attempts to utilize natural science and interpret law as an informational code, necessary for survival of particular socio-political identities recognized as "nations."[17] My article departs from these attempts and proposes to use the conceptual framework of resilience for analysis of continuities and changes in the development of the Russian law through the political break of 1917.

The concept of *resilience* has been used since the 1970s as a systematic conceptualization of adaptivity and survival of ecological, social and political systems. As Holling put it in his classical definition of resilience, it is

> a measure of the persistence of systems and of their ability to absorb change and disturbance and still maintain the same relationships between populations or state variables.[18]

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13 Eric Hobsbawm, *Introduction: Inventing Tradition* in *The Invention of Tradition* 1, 1 (E. Hobsbawm & T. Ranger (eds.), Cambridge: Cambridge University Press, 1983).

14 William Twining, *Glenn on Tradition: An Overview*, 1(1) Journal of Comparative Law 107 (2005); Jaakko Husa, *Legal Culture vs. Legal Tradition – Different Epistemologies?*, Maastricht European Private Law Institute Working Paper No. 2012/18 (November 2012) (Nov. 5, 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179890.

15 Jan M. Smits, *Is Law a Parasite? An Evolutionary Explanation of Differences among Legal Traditions*, 7(3) Review of Law and Economics 792 (2011).

16 Edgar H. Schein, *The Corporate Survival Guide* (San Francisco: Jossey-Bass, 2009).

17 Smits 2015.

18 Crawford S. Holling, *Resilience and Stability of Ecological Systems*, 4(1) Annual Review of Ecology and Systematics 1 (1973).

The focus of the resilience approach derived from studies of ecological systems and further developed its stress on adaptability.[19] Unlike engineering resilience, which emphasizes when things return to a stable state, the ecological conceptualization of resilience is interested in restructuring.[20] It is both through inner resources of the system and outside sources that a system recovers from instability and maintains its key features.

In social sciences the conceptual of framework resilience has been implemented for analyses of change in political and social processes. As for law, it has been mainly a nexus of ecology and sustainability that recently introduced the concept of resilience to legal studies.[21]

In addition to this, resilience might be a productive conceptual framework for research of continuities and changes in law. It clearly enables us to avoid the dichotomy of either a "top-down" or a "bottom-up" point of view that scholars need to choose in order to provide a substantive and contextualized historical analysis. Resilience broadens the systematic understanding of a state as an eco-system, in which authorities and people are interrelated in dynamic relationships of interdependence, which are more complex than just domination and compliance.

However, there is no consensus on resilience as an explanatory model for an analysis of social and political systems. A critical stance about it was voiced by left intellectuals and other critics of neo-liberalism.[22] They criticized resilience as a neoliberal construct that is profitable for elites as a new "eco-discourse" of domination over subaltern. Taking this critical view resilience might serve as a neo-liberal political fiction that takes agency from the suppressed people and helps those in power to present their domination in the natural science language of pure eco-survival.[23]

This critique is useful, especially for my study of law through revolution. In my previous research I have studied how the relationship of domination and power were contested and reestablished by law in Russia, 1905–1918. Now, I would like to switch focus from the instrumentalist approach to law – as a means for struggling

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19 Lance H. Gunderson et al., *Resilience of Large-Scale Resource Systems* in *Resilience and the Behavior of Large-Scale Systems* 3 (L.H. Gunderson & L. Prichard Jr. (eds.), Washington: Island Press, 2002).

20 Jonathan Joseph, *Resilience as Embedded Neoliberalism: A Governmentality Approach*, 1(1) Resilience 38 (2013).

21 *Social-Ecological Resilience and Law* (A.S. Garmestani & C.R. Allen (eds.), New York: Columbia University Press, 2014).

22 Joseph 2013; Charlotte Heath-Kelly, *Resilience and Disaster Sites: The Disastrous Temporality of the "Recovery-to-Come"* in *The Routledge Handbook of International Resilience* 307 (D. Chandler & J. Coaffee (eds.), Abingdon, Oxon; New York: Routledge, 2017); Brad Evans & Julian Reid, *Dangerously Exposed: The Life and Death of the Resilient Subject* in *Id.* at 331.

23 Sarah Bracke, *Is the Subaltern Resilient? Notes on Agency and Neoliberal Subjects*, 30(5) Cultural Studies 839 (2016).

for power – to a more systematic understanding of law, which goes beyond power manipulations. Being inspired by my joint project with Jane Burbank on Russia's legal trajectories[24] I will explore resilience of Russian law through three key groups of actors that were involved in functioning of law in Russia: the sovereign (and his aides), intermediaries, and the people. Revolutionary changes dramatically affected all three groups and within each of them there resources were found to face the instability and empower legal system's further functioning.

2. The System Losing Equilibrium

The Revolution of 1905 challenged the mainstay of Russian state power: the institution of autocracy. In order to calm down radical uprisings all over the country and prevent bloodshed, some of the revolutionaries' demands were fulfilled. A recognition of civil and religious liberties included people's political rights – freedom of speech, freedom of assembly, and the right to organize unions and political parties. However, the Nicholas II's greatest concession to society was an elected legislative body. The famous Manifesto of 17 October was published with the long-expected statement of "an immutable principle that no law could be implemented without its approval by the State Duma."[25]

Liberals saluted the start of a Russian parliament, which they viewed as allowing 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 (*zakonnyi poriadok*).[26]

Legal order was considered to be a panacea for the severe political crisis coupled with the resounding military defeat in the Russian-Japanese war.

2.1. Sovereign Power

However, the ruling elite could not condone substantial participation in lawmaking by representatives. As Richard Wortman demonstrated, the tsar's role as a pillar of the Russian Empire was telegraphed in numerous scenarios of power that presented the sovereign's essential significance for the state. When Nicholas II

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[24] Tatiana Borisova & Jane Burbank, *Russia's Legal Trajectories*, 20(1) Kritika: Explorations in Russian and Eurasian History (2018) forthcoming.

[25] Государственная дума в России в документах и материалах [*The State Duma in Russia: Documents and Materials*] 90–91 (Moscow: Gosyurizdat, 1957).

[26] Гессен В.М. На рубеже [Vladimir M. Gessen, *On the Edge*] 166 (St. Petersburg: Publishing of the legal book store "Pravo," 1906).

filled in the "occupation" field in the 1897 census form he put down "landowner" and clarified "Master of the Russian land."[27]

Nicholas II found the very idea of representation extremely dangerous for the state.[28] As his diary and other personal materials demonstrate, the last Romanov tsar viewed his role according to the enduring tradition of a Russian sovereign autocrat whose laws enable him better to fulfil his function of the people's protector and guarantor of justice. As Nikolay Karamzin put it in a classical formula:

> 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![29]

In opposition to this conceptualization of sovereign Russian law, there has been an influential dissident critique of the despotism of the Russian sovereigns as a prerequisite of "no law in Russia."[30] Indeed, the concept of autocratic legality was based on the unrestricted power of the autocrat. Both in theory and in practice an autocrat could overrule any law. However, the institution of autocracy did not prevent the development of legal institutions.[31] The sovereign's supreme power in lawmaking was the source of legitimacy of political power in Russia. Thus, the key legal and political issue arising out of the 1905 Revolution was the crucial structural challenge to autocratic sovereign power provided by the newly established representative lawmaking body that emerged in 1906.

Sovereign authority did its best to maintain its power within its former limits while, as one of Nicholas' aides put it,

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27 Richard S. Wortman, *Scenarios of Power: Myth and Ceremony in Russian Monarchy, Vol. 2* 375 (Princeton: Princeton University Press, 2000).

28 Ганелин Р.Ш. Российское самодержавие в 1905 г.: Реформы и революция [Rafail Sh. Ganelin, *Russian Autocracy in 1905: Reforms and Revolution*] (St. Petersburg: Nauka, 1991).

29 Карамзин Н.М. Записка о древней и новой России в ее политическом и гражданском отношениях [Nikolay M. Karamzin, *Memoir on Ancient and Modern Russia*] 102 (Moscow: Nauka, 1991). This is exactly how the charisma of a Russian monarch, not abstract "law," should be treated as a key legitimizing aspect of power.

30 It has been shared in the literature on the history of Russian law: Richard S. Wortman, *Russian Monarchy and the Rule of Law: New Considerations of the Court Reform of 1864*, 6(1) Kritika: Explorations in Russian and Eurasian History 145 (2005). *See also* Анисимов Е.В. Самодержавие 18 века: Право править без права, 7 Нестор 200 (2005) [Evgeny V. Anisimov, *Autocracy in the 18th Century: The Right to Rule Without Law*, 7 Nestor 200 (2005)]. The extremes of this critique are challenged by Nancy Shields Kollmann, *The Russian Empire, 1450–1801* 139 (Oxford: Oxford University Press, 2017). *See further* in Borisova & Burbank, *supra* note 24.

31 *See further* Richard S. Wortman, *The Development of a Russian Legal Consciousness* (Chicago; London: Chicago University Press, 1976).

> from the outside point of view complying with the demands of establishing a parliamentary legal order.[32]

Legislative activity by the people's representatives was designed in such a way, as a secretary of Council of Ministers' sessions revealed,

> to provide the monarch with the ability to rule if necessary without their participation yet by means of legitimate instruments.[33]

This trend was embedded in the main documents of the "renewed regime," as it was then called: the Statutes of the State Duma (20 February 1906) and State Council (20 April 1906), new Fundamental Laws (23 April 1906), and State Budget Laws (8 March 1906). The laws mentioned could not have been changed by either the State Council or the Duma – the two chambers of Russian elective body.

Thus, on the one hand, from the very beginning, crucial aspects of the political system were withdrawn from the competence of the people's representatives. On the other hand, supreme monarchial rule, inseparable from the executive authorities, retained a legislative mandate for operating, irrespective of the parliamentary structure. Nevertheless, sovereign's the authority was challenged and its prestige diminished.[34]

The institution of the Romanov dynasty's sovereign autocratic power was challenged but law was seen as a means of sovereignty's resilience. The power of law was used in order to retrieve sovereign domination by limiting the capacities of the State Duma and putting down revolution through legalized repression. At the same time, the first State Duma was elected and many of the representatives were actually legal specialists. Legal means became the forum for severe political struggle between the supporters of autocracy and its opponents. The intermediaries of Russian law played a crucial role in this struggle. After the 1905 Revolution the most influential of them made their way to the Duma in order to be able to make law in Russia and challenge the sacred right of the Russian sovereign and his aides.

2.2. Intermediaries of Russian Law

Numerous groups of intermediaries of Russian law were involved in the communication of legal norms, their interpretation and enforcement.[35] They can

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[32] Крыжановский С.Е. Воспоминания [Sergey E. Kryzhanovskiy, *Memories*] 16 (Berlin: Petropolis, 1929).

[33] Quoted in Власть и реформы. От самодержавной к советской России [*State Power and Reforms. From Tsarist to Soviet Russia*] 525 (B.V. Anan'ich et al. (eds.), St. Petersburg: Dmitry Bulanin, 1996).

[34] Колоницкий Б.И. "Трагическая эротика": Образы императорской семьи в годы первой мировой войны [Boris I. Kolonitskiy, *"Tragic Eroticism": Images of the Imperial Family During the World War I*] (Moscow: New Literary Observer, 2010).

[35] *See further* in Borisova & Burbank, *supra* note 24.

be categorised into three groups: (a) officials, (b) people from different social strata who participated in administration and court practice, but were not themselves "professional" officials, and (c) trained legal experts and entrepreneurs employed in both the public and private sectors.

The last group was the most visible and influential especially after the progressive achievements of the Judicial Reform of 1864 that exemplified a messianic attitude towards law.[36] Adversarial procedures in the reformed courts enabled some legal professionals to propagate ideas of natural law by contrasting them to the repressive measures taken against the political opponents of the autocracy in Russia. Also, jury trials were introduced in 1864 as a form of societal participation in judicial process. 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 by jurors of revolutionary terrorists, the reforms were revised. Following Alexander II's assassination by terrorists in 1881, administrative measures were used in order to prevent revolutionary activities. The intelligentsia voiced concerns about the "illegality" of these measures, which were followed by repressions. The lack of parliamentary institutions, nontransparent autocratic law-making, and administrative repressive measures that changed existing rules further propelled the intelligentsia to support the revolutionary movement.

Lawyers who became politicians used their professional expertise based on their knowledge of jurisprudence, in particular the natural law doctrine, to oppose the legal regime of the Russian empire. Preparing to use the law mainly as an instrument, they 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 ground 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 may be observed from the perspective of the sociological studies of Bourdieu, who attributed "juridical formalism" as being a basic element of lawyers' symbolic power.[37] He observed that

> strong juridical competence especially that of lawyers is closely connected with the competence of experts in juridical struggle trained to use forms and formulations instead of a weapon.[38]

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[36] The classical example is Люблинский П.И. Суд и права личности [Pavel I. Liublinskiy, *Court and Personal Rights*] in Судебная реформа. Т. 2 [*Judicial Reform. Vol. 2*] 1 (N.V. Davydov & N.N. Polianskiy (eds.) (Moscow: Ob'edinenie, 1915).

[37] Pierre Bourdieu, *La force du droit: elements pour une sociologie du champ juridique*, 64(1) Actes de la recherche en sciences sociales 3 (1986).

[38] *Id.*

Having enlisted the support of the constituency, liberal leadership pressed change the rules of the game, not on the pages of specialist professional writings but from the rostrum of the State Duma, in which many of them saw a parliament, despite the reality. Opposing their own understanding of what the law should have been to the actual meaning of current state laws, they nullified the opportunity for their own legislative activity. This is demonstrated in a fragment of a speech by the jurist Professor Moisei Iakovlevich Ostrogorskiy (1854–1921) 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.[39]

2.3. The People

Ostrogorskiy's lecture on the rights of representatives was not only addressed to his fellow deputies of the first State Duma. His speech was also an example of legal populism that had developed in last decades of imperial Russia and targeted mostly the intelligentsia and those below – the people. The political message of his speech was to challenge the existing basis of the autocratic legal equilibrium. By saying that the Duma possessed a certain right without its formal stipulation in law Ostrogorskiy was claiming that after the 1905 Revolution the consensus of the autocratic legal order had to be reconsidered.

The connection between the sovereign and his people was essential for this consensus. That is why peasants were privileged in the electoral law of the first Duma (December 1906) among already privileged classes. The tsar insisted that a literacy census was not to stipulated in the electoral law, hoping that illiterate representatives will be more "traditional" in their support for autocracy.[40] The "people's history" of Russian law still has to be written but research during recent decades allows us to highlight several major points.

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[39] Деятельность М.Я. Острогорского в первой государственной думе [*M.Ya. Ostrogorskiy in the First State Duma*] (St. Petersburg: Tipo-litogr. Vol'pina, 1906).

[40] Ganelin 1991, at 189.

Firstly, the Russian sovereign ruled over diverse groups of the population, united in a vague concept of the "people" (*narod*) that puzzled Russian imperial elites.[41] As Karamzin put it:

> Would it be appropriate to begin a Russian code 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.[42]

Jane Burbank described this diversity as the "collective rights" regime of imperial rule.[43] Indeed, the typical 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, cannot be ultimately viewed as the politics of central imperial power. Special regulations were frequently created through 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, as well as unprofessionalism or fear of responsibility.

Secondly, the collective rights of the people developed within an imperial structure of enlarging the Eurasian empire. Thus, "collective rights" stipulated in the written law of the Russian empire and guaranteed by the sovereign were not actually imposed by the tsar but negotiated with each group's elites. The order and social justice provided by imperial law were perceived in terms of "tradition." The continuity of people's traditions was guaranteed by a sovereign whose power was presented as patriarchal. That is why the peasants were supposed to be natural supporters of autocracy and were remarkably privileged as desirable representatives, unlike workers. Even workers who actually had strong connections with the countryside were supposed to be contaminated by alien ideas of socialism.

Thirdly, the fact that the tsar granted the law and supervised its enforcement underlined the mutual responsibilities of sovereign and people.[44] The sovereign protected people by providing order and justice through the legislative and judicial

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41 Вишленкова Е.А. Визуальное народоведение Российской империи, или увидеть русского дано не каждому [Elena A. Vishlenkova, *Visualization of Ethnicities in the Russian Empire, or to See the Russian is Not Given to Everyone*] (Moscow: New Literary Observer, 2011); Marina Mogilner, *Homo Imperii: A History of Physical Anthropology in Russia* (Lincoln: University of Nebraska Press, 2013).

42 Karamzin 1991, at 90.

43 Jane Burbank, *Imperial Rights Regime: Law and Citizenship in the Russian Empire*, 7(3) Kritika: Explorations in Russian and Eurasian History 397 (2006).

44 Nancy Kollmann calls it "moral economy" of people – ruler relationships in Russia in a long term perspective of imperial time: Kollmann 2017, at 139.

institutions of imperial power. At the same time the people provided the resources for institutions functioning within the empire. The administrative layer that had to make the imperial institutions work was the most complex and vulnerable link in this vertical chain. During the Russian monarchy intermediaries of Russian law were in charge of meeting the expectations of both the rulers and the people. These were intermediaries of Russian law who through centuries made it resilient, and it was due to their doubts about the justice and order of the "renewed" autocratic regime that the Duma monarchy did not persist through challenges of World War I.

3. The October Revolution of 1917: Law's Survival

Significant hardships because of problems with the supply of resources as well as the personal vulnerabilities of Nicholas II as a sovereign and radicalization of the elites made the nexus of people – tsar – intermediaries very problematic. The elected legislative body within the autocratic imperial state could not help to overcome the elites' radical natural law critique. The insurmountable challenges of World War I dramatically worsened the political and economic situation. In 1917, the Romanov dynasty vanished literally in several days. Since the sovereign was missing, in some months the moderate regime of the Provisional Government collapsed prior to the gathering of the Constituent Assembly. In October 2017 power was taken by the Bolsheviks acting under the banner of "Down with Minister-Capitalists! All Power to the Soviets."

3.1. Sovereignty

Leon Trotsky acknowledged that the Bolsheviks had drawn lessons from the 1848 Paris Commune in understanding the need to conquer the state, in order to use the state instruments of coercion against their foes.[45] Russian revolutionaries knew about the state's functioning not only from their prison experiences; many of them, not exclusively Vladimir Ulyanov "Lenin," had also studied law at university level with exactly the purpose of using it in the struggle against the autocratic regime.[46] Now they used it along with the practices of terror in order to build up the core concept of the new political and legal system: sovereign power.

The first decrees of the Soviet authorities "On Peace"[47] and "On Land"[48] were adopted during the night of the take-over, 25–26 October 1917,[49] at the Second All-Russian

[45] Leon Trotsky, *Terrorism and Communism* 69–90 (1920; reprint, Ann Arbor: Ann Arbor Paperbacks, 1961).

[46] Ковалева И.В. Ценности правовой культуры в представлениях российского общества конца XIX – начала XX вв. [Inna V. Kovaleva, *Values of Legal Culture as Imagined by the Russian Society in the End of 19th – Beginning of the 20th Century*] (Velikiy Novgorod: NovSU, 2002).

[47] Декрет «О мире» [Decree "On Peace"] in Декреты Советской власти. Т. 1 [*Decrees of the Soviet Authorities. Vol. 1*] 14–16 (Moscow: Politizdat, 1957) (hereinafter DSA).

[48] Декрет «О земле» [Decree "On Land"] in *DSA. Vol. 1*, at 17–20.

[49] Hereinafter the dates are given in the "old style," i.e. according to Julian calendar, until the Gregorian calendar was introduced on 14 February 1918.

Congress of Soviets, which was convened the day of the uprising. These decrees aimed to claim sovereignty by a radical departure from the existing order. The decree "On Peace" repudiated agreements with allies and created the result that the Bolsheviks broke with the international community. The decree "On Land" rejected private property and disavowed the basis of the national socioeconomic structure.[50]

The Bolsheviks' first decrees symbolized a breakdown of the existing rules which the Provisional Government had not dared to undertake without the approval of the Constituent Assembly. The Bolsheviks used the cover of the Second All-Russian Congress of Soviets for these radical changes but still they acted exactly as a Russian sovereign was supposed to: they changed the rules. According to the Russian legal tradition, ultimate authority to grant, make, and change law belonged to the sovereign.[51] How then did they claim this authority?

Already at the very beginning of Soviet power, the source of its legitimacy was declared to be the people (*narod*) and their agencies, 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.[52]

Later, the Declaration was included as the first chapter of the 1918 Constitution of the Russian Socialist Federative Soviet Republic (RSFSR), with some very important amendments – there was no mention of the Constituent Assembly.[53]

The Bolsheviks had proposed that the Assembly adopts 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 declared that the Assembly was "counter-revolutionary." To strip the Assembly of its legitimacy, the Soviets were proclaimed as the only institution that could truly represent the people's will. Freedom of the press was abolished. On 5 January 1918, when the Constituent Assembly finally

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50 Ekaterina Pravilova, *A Public Empire. Property and the Quest for the Common Good in Imperial Russia* (Princeton: Princeton University Press, 2014).

51 Borisova & Burbank, *supra* note 24.

52 Декларация прав трудящегося и эксплуатируемого народа [Declaration of Rights of the Working and Exploited People] in *DSA. Vol. 1*, at 320, 321.

53 Конституция (Основной закон) РСФСР 1918 г. [1918 Constitution (Fundamental Law) RSFSR] in *DSA. Vol. II* 550–564 (Moscow: Politizdat, 1959).

gathered, the All-Russian Central Executive Committee declared that its supporters challenged the power of the Soviets and thus were "enemies of the worker-peasants and of the October Revolution."[54]

Thus, Bolsheviks appeared to be extremely expeditious in acting like a sovereign by making essential laws and claiming that their sovereignty was legitimized. The latter was possible due to the support of many intermediaries of law who continued their work in spite of the radical political changes of the regime.

3.2. Intermediaries of Soviet Law

Those who communicated law to the people but wanted to keep their jobs had to face both ethical and pragmatic choices: to accept the Soviet rule and survive or to oppose it and become a counter-revolutionary. To give an example, the General Assembly of the Ruling Senate, a major judicial body of the former regime that supported the Provisional Government, issued a resolution on 23 November 1917 "against the insurrection against the legal authority of the Provisional Government." However, the meeting of the workers of the Senate Typography section issued another resolution: not to publish the counterrevolutionary resolution of the senators. The Senate was shut down the next day.

This case demonstrates the revolutionary shift in power structures: in addition to violent suppression of counterrevolutionary forces, the technical workers of the state apparatus also played a crucial role in building the new Soviet state. As my previous research demonstrates, the Bolsheviks were most interested in making the intermediaries of Russian law work for them in order to establish their rule all over the country.[55] Thus, as well as taking violent action against counterrevolution, the revolutionary leaders also tried to create clear formal practices for exercising the power that they had seized. Law intermediaries from the previous regime sympathetic to the new authorities were in huge demand.

By the fifth day of the revolution, 30 October 1917, the Council of People's Commissars had already published the decree "On the Procedure for the Affirmation and Publication of Laws."[56] 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. This decree and the others that followed shortly after were aimed at enabling the country's new leadership quickly to take possession of prerevolutionary governing practices. The decree stipulated

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[54] Телеграмма ВЦИК «О созыве Третьего Всероссийского съезда Советов» [Telegram of the All-Russian Central Executive Committee "On the Convocation of the Third All-Russian Congress of the Soviets"] in *DSA. Vol. 1*, at 284.

[55] Borisova 2012.

[56] Декрет «О порядке утверждения и опубликования законов», Газета Временного Рабочего и Крестьянского правительства [Decree "On the Procedure for the Affirmation and Publication of Laws," Gazette of the Provisional Workers' and Peasants' Government] (30 October 1917).

the rules for official publication of laws which continued pre-revolutionary practice. The Bolsheviks were not the only force that aimed to seize the publication of law by trained intermediaries as a technical practice of governing.

Throughout 1918, the government in Siberia, under one of the Bolsheviks' most powerful antagonists, Aleksandr Kolchak, published its own bulletin called "*Sobranie uzakonenii i rasporiazhenii pravitel'stva, izdavaemoe pri Pravitel'stvuiushchem Senate*" ("Collection of Legislation and Resolutions of the Government Published under the Ruling Senate"). Of course, it might come as a surprise to some that in fact there 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 utilize the legal practices of the former regime underline the legitimacy of their rule and to give it the appearance of legal order.

The similarity of the formal features of legislation as a specific function of the exercise of power by both the Reds and the Whites (for example, in the form of the publication of legislation in the Collection of Legislation or in the specific language of decrees) is striking. It suggests that law 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 in helping to legitimize the new regime.

However, in addition to the pre-revolutionary practices of publishing law, the Bolsheviks successfully used new forms of revolutionary adaptivity that were crucial for the dissemination of new laws. According to the aforementioned decree of 30 October 1917 "On the Procedure for the Affirmation and Publication of Laws" new laws had to be published in key newspapers.[57] These publications were also considered official. When publishing revolutionary laws addressed to a general public, newspapers were provided with semi-explanatory semi-propagandistic articles about the new laws. Thousands of copies of Soviet newspapers of the formative years of the Soviet state aided immeasurably the dissemination of the Soviet law throughout the country.

The popular articles about Soviet legislation propagated the ideas of Soviet law. Their messages resembled and actually continued the ethos of prerevolutionary law: that law was to protect the good people and punish the evil doers.

3.3. The People

The Government of Workers and Peasants and its Commissars informed the population that Soviet law would provide justice and order. Also, the Government of Workers and Peasants declared that it would safeguard the interests of the working people. While lawmaking was done by a powerful sovereign which protected the people, those people would foster the "revolutionary legality" of the new regime and make the new law theirs through usage.

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[57] Decree "On the Procedure for the Affirmation and Publication of Laws," *supra* note 56.

For people, the easiest way to operate with the new laws was by dealing with skillful intermediaries from the previous era. Thus, in addition to this continuity of usage by the revolutionaries of prerevolutionary legal techniques and legal ideas, the people themselves facilitated continuity of legal expectations in spite of the innovations of the Soviet legislators.

One of these innovations was a judicial reform aimed at strengthening the "popular" component of court practices by the inclusion of more representatives of the people. The involvement of ordinary people in court procedures was supposed to strengthen the anti-bureaucratic stance of the Bolshevik leaders and provide popular justice informed by the "revolutionary consciousness" of the people. However, instead of new people "bringing life" to courts via their revolutionary aspirations, the local population tended to rely on those who had experience in administrative and legal practices.

There was an interesting continuity in the very pre-revolutionary language of the officials of Bolsheviks' Ministry of Justice (*Narkomiust*) unsatisfied with the performance of the local "backward" peasants' judges in rural courts. In accordance with the will of the local peasants, the same judges continued in their posts, while some officials from the autocratic time – e.g. a former land captain (*zemskii nachalnik*)[58] – were elected as people's judges. This did not live up to the revolutionary expectations of "revolutionary legal consciousness" of the Party leaders and confirmed the intelligentsia's recurrent stance on peasants' backwardness.

At the same time the Bolsheviks themselves relied heavily on the expertise of "*spetsy*" – specialists from the imperial administration. This phenomenon has been interpreted as exemplary of the pragmatism of the Soviet administration.[59] If we shift our angle of view away from the political aspirations and practical needs of the top level of the Soviet authorities to that of the ordinary law users, we see another kind of legal pragmatism. The choice of a land captain who did well as part of previous administration to be a judge reflected the value of his legal expertise to the villagers who elected him.

Thus, intermediaries of Russian law and their knowledge of law's functioning seemed to be pragmatically useful both for those who claimed sovereignty of a new state and also for those who continued to live in it. The Russian legal system was under a process of reconstruction with its basis being restored: the sovereignty of the Soviet government was realized through laws by intermediaries that were recognized by the people.

The system of Soviet-type power relations, in spite of its ideology of suppression of the autocratic past by the centralized command of law, was a continuation of the previous power relations in which people could use the tools of state power

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58 As it was reported in Viatka region, in 1918: Retish 2013, at 1794.

59 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 151 (2010).

(e.g. fostering legality) in order to protect themselves. People who had normally been seen by elites as positioned politically outside and below the "authorities" were actually involved in the diffusion of the instruments of power,[60] including laws, before and after both the 1905 and 1917 Revolutions. The irritation of the party inspector over the former land captain as a "people's judge" resulted from an understanding that people did not just comply with legal commands from the center but appropriated legal order through intermediaries. The system of Russian law was more complex and resilient than top-down thinking in the extreme terms of exclusion versus inclusion, backward versus developed. In a situation of institutional change, the key features of Russian law were delineated more sharply in reaction to the challenges of the social and political environment.

Conclusion

In spite of the traditional interpretation of the October Revolution as a breakdown of the imperial state and its law, the revolutionary changes should be considered as a culmination of prerevolutionary legal trajectories.[61] The crisis of legitimate power in Russia in 1905–1917 resulted from the clash of extremes of two major modes of elitist legal thinking. The natural law discourse of the universalist/liberal approach was opposed to the traditionalist/conservative approach, which underlined the supreme role of the tsar as a guarantor of rights. The theoretical and political discussions of the representatives of both approaches were fixed on the relationship of the three major elements of Russian law's functioning: the sovereign, the people, and the intermediaries. In general, a fair allocation of power and justice between these three elements, as I have shown, should be considered as an equilibrium of forces that provided the resilience of Russian law.

The 1905 Revolution forced the autocratic sovereign to accept basic civil rights of that time (as demanded by universalist/liberal elites) but at the same time it challenged conceptualization of sovereign legality that developed in Russia (as defended by the traditionalist/conservative elites). Indeed, according to Russian legal tradition, the tsar was the supreme lawmaker responsible before God for order and justice in the Russian empire. No laws or legal principles could overrule this unique position of the Russian sovereign. That is why natural law rhetoric was treated as a major threat to the autocratic regime, while law was considered as a means to achieve order and provide justice to the population.

After the establishment in 1906 of an elective body (the State Duma) the sovereign power had to recover its authority in order to execute effectively its unseparated administrative and legislative powers. The extreme impetus for the recognition

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[60] Nikolay V. Ssorin-Chaikov, *The Social Life of the State in Subarctic Siberia* 11–13 (Stanford: Stanford University Press, 2003).

[61] Borisova & Burbank, *supra* note 24.

of natural rights stipulated in 1905 in the Manifesto of 17 October resulted in an extreme usage of law as a technical means for providing order. Extreme violence in the struggle against political crime was a means to protect and reestablish the sovereign's supremacy. New laws technically allowed all the harsh measures.[62]

As a result, the repressions and unfulfilled promises to let the representatives participate in lawmaking challenged loyalty of legal intermediaries to the tsarist just law. The functioning of the triad that had made Russian law resilient for centuries – the sovereign, the people and the intermediaries – was challenged. The justice and order provided by Russian law was questioned by the technically legal but nevertheless violent administrative measures of the government. Their legitimacy was in particular vulnerable in view of the newly established elective institution, members of which were not in a position to struggle against the political repressions.

World War I worsened the situation in terms of challenges to the existing legal order, subverted by military commands. The supremacy of the sovereign as a powerful protector of the people and guarantor of the legal system's proper functioning through intermediaries had broken down. The lost equilibrium of the Russian legal system started to be restored after the Bolsheviks directly and aggressively claimed sovereignty of the peoples' Soviets and managed successfully to seize the legal techniques of governance. They did what the Provisional Government did not: they claimed the sovereignty of the people through the Soviets and used legal means to make intermediaries operate it.

Both intermediaries and people complied with the Soviets' aggressive claims of sovereign power after the long-lasting political crises of contested sovereignty and an increase of military practices of administration. The leaders of the new Soviet state acted like a sovereign: they changed rules and were ready to enforce them. In relation to intermediaries, they relied heavily on prerevolutionary legal techniques and used some new ones, like propaganda of new laws through popular articles in newspapers, in order to get the new laws communicated by both former and new intermediaries. In relation to the people, the Bolsheviks used and imaginative legal discourse of fostering legality that promised order and justice to those who complied.

As my analysis of Soviet legislation demonstrates, the Soviet legislators invested a great deal of energy to continuing the Russian government's efforts to foster legality by means of legal techniques.[63] The technical ethos of Russian law as

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62 *See further* Holquist 2003.

63 *See further* in Борисова Т.Ю. Революционное законодательство в 1917–1918 гг.: Выбор языка, 108 Новое литературное обозрение 100 (2011) [Tatiana Yu. Borisova, *Revolutionary Legislation, 1917–1918: Problem of Language Choice*, 108 New Literary Observer 100 (2011)]; Борисова Т.Ю. Закон "в годину тяжких испытаний": Собрание узаконений и распоряжений правительства в 1917–1918 гг., 123(5) Исторические записки 129 (2002) [Tatiana Yu. Borisova, *Law in a "Year of Troubles": Collection of Legislation and Resolutions of the Government in 1917–1918*, 123(5) Historical Notes 129 (2002)]; Borisova 2012.

a means of governance was recognized by the Bolsheviks in their understanding of revolutionary legality as a technique. Russian law intermediaries of the autocratic regime appeared to cooperate with the Soviets. This co-operation enabled both the people and the new authorities to use law for their purposes.

The theoretical framework of resilience allows us to summarize that sovereign power has been a key element of Russian legal thinking through the 1905–1917 Revolutions. However, it was not the only element. The functioning of sovereign power also depended on two other elements: the intermediaries and the people. In general, the campaigns of "fostering legality" implied participation of all three groups of key stakeholders in the field of Russian law: the sovereign, the intermediaries and the people. The Bolshevik statesmen took power and could sustain it as sovereign power through use of law in addition to violence.

However, there was a new development in Soviet law within the long term Russian legal tradition. Soviet legal doctrine rejected an idea that something can be above the sovereign – an idea that was recognized by both universal and traditional legal thinking in prerevolutionary Russian law. The traditionalists put God's command for mercy above the tsar, while universalists claimed the principles of natural law were above sovereign power. The Bolsheviks were clearly against any limits of their sovereign power, thus both God and a higher education in law were put under repression, and departments of law were closed in 1919.[64]

However, by 1925 teaching of law was already back in Soviet higher education. The existing literature demonstrates that in 1925–1930s education in Soviet law was focused on the practical tasks of courts' functioning and administration.[65] This confirms the "technical" interpretation of Soviet law as a means of power. However, we should underline that the theory of law comes back into the educational curriculum in the beginning of 1930s. Was it a coincidence that it was literally in the very same year, 1932, when Stalin claimed that "a peasant man loves legality" that the Institute of Red Professors (*Institut Krasnoi Professury*) opened a department of "general theory of state and law"? Further research on the relationship of the people, the sovereign and the intermediaries in Soviet law will enable us to answer this question.

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[64] Олейник И.И., Олейник О.Ю. Становление системы подготовки юридических кадров в Советской России, 2 Вестник Ивановского государственного энергетического университета 89 (2005) [Irina I. Oleinik & Oleg Yu. Oleinik, *Emergence of the System of Juridical Cadres' Education in the Soviet Russia*, 2 Вестник Ивановского государственного энергетического университета 89 (2005)]; William E. Butler, *Russia and the Law of Nations in Historical Perspective: Collected Essays* 347–447 (London: Wildy, Simmonds & Hill, 2009).

[65] *Id.*

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Information about the author

Tatiana Borisova (St. Petersburg, Russia) – Associate Professor, National Research University Higher School of Economics (17 Promyshlennaya St., St. Petersburg, 198099, Russia; e-mail: tborisova@hse.ru).