BOOK REVIEW NOTES

INTERNAL AND EXTERNAL LAW OF MEDIEVAL RUSSIA: A LOOK FROM THE CURRENT WEST[1]

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The law of medieval Russia (Rus') has been the subject of research for several generations of researchers, starting with V.N. Tatishchev (the 18th century), including V.O. Klyuchevskii, V.N. Leshkov, A.A. Shakhmatov (the 19th century) and finishing with Soviet, contemporary and foreign authors. Within this period, an extensive historiographical material has been accumulated; hundreds of scientific papers and primary sources have been published, well established approaches and stereotypes have been developed. Therefore, it is difficult to make a new contribution to the study of legal and state institutions of that time. Despite that, F. Feldbrugge managed to find his own niche of scientific research. He raises the question of a common source for the first Indo-European peoples, as well as the role of Roman law reception, reveals an important impact of Byzantium on the formation and evolution of ancient Russia medieval law, and establishes the role and place of ancient public contracts in the system of law sources of that time.

The book is written in the genre of a scientific monograph and presents, as stated in the preface, the result of the author's professional scientific activity that has been carried out for several decades. It reflects F. Feldbrugge's revised and supplemented research materials dated from 1977 to 2008.

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[1] Reviewed book: Ferdinand J.M. Feldbrugge, Law in Medieval Russia (= Law in Eastern Europe. Book 59) (Martinus Nijhoff Publishers, VSP 2009).

The empirical basis of the work is substantial. The author, demonstrating a broad scientific outlook, disputes the key issues with the representatives of various Russian scientific and foreign schools. He quite frequently refers to the classical works of Russian scientists, such as B.D. Grekov, M.N. Tikhomirov, A.A. Zimin, as well as foreign authors H. Frank, O. Keller, S. Zimmer, D.P. Hammer and others. In the monograph the statement of the author's individual concept is based on the analysis of a large range of primary sources such as ancient legal acts (Russian Justice (*Russkaya Pravda*), the texts on public law contracts of Slavic princes, grand Charters, historical records of Canon law and others).

A variety of analyzed sources determines the breadth of the author's approach to the subject of the study: in fact he shows the origin, initial formation of current (existing nowadays) sources of law, positive (written) law (actually the origins of legislation), law of courts (judicial precedents), customs as the sources of law, the doctrine, external treaties with foreign sovereigns, rulers and merchants (the origin of current international treaties).

The book is composed of ten chapters and each one is preceded by a short introduction aimed at explaining the logic of material presentation and is completed by a small concluding part summarizing the essence of the chapter. Structurally, the book is not quite balanced. The volume of chapters varies from 14 to 70 pages. Judging by the amount of information submitted by the author, we can guess his scientific preferences, namely the role and significance of Roman law in the formation and evolution of ancient Russian law, as well as the issues of ancient Russia Treaty law.

F. Feldbrugge presents an extended overview of various conceptual approaches by Russian and foreign scholars to the presence or absence of Roman law elements in ancient Russian legal acts. Most Western scholars state that Slavic law was highly selective, borrowing only some elements of Roman law, thus rejecting the idea of Roman law acceptance by medieval Russia.

In general, sharing this concept and having analyzed a wide array of legal material the author comes to a very well-reasoned conclusion that the relationship with old Roman law was mediated by the Byzantine Canon law. Church hierarchy, in particular ecclesiastical jurisdiction, was the medium through which this influence was made. The subjects of the influence were mostly the questions in which the church took a special interest because of their connection with the doctrine of the church; relevant legal norms were usually based on moral precepts of Christianity but not on norms of Roman law.[2]

The desire of F. Feldbrugge to avoid the stereotypes that have been formed in historical theories for many decades inspires great respect. In his study of ancient Russian law, the author does not come from the evaluative estimations (positive or negative result of foreign culture elements borrowing), but looks at the need of the

[2] Feldbrugge, *supra* n. 1, at 155.

legal system itself and of the society for borrowing from Byzantium,[3] including the ability to use 'non-progressive' elements regulating social relations. His thesis is that traditional Russian law rather than borrowed canonical norms met the social needs of medieval Russian society.

It is necessary to define some significant issues omitted by F. Feldbrugge. Together with Orthodoxy and autocracy the Slavs borrowed Byzantium legal doctrine. The fundamentals of social regulation between Western and Eastern (Byzantine) Roman empires differed significantly. The Western Roman Empire had law as the foundation of social regulation which was understood to be the basic social contract as the universal and indestructible regulator. Law is universal in character, *i.e.* makes all people equal, guarantees everyone the inalienable rights and determines his duties. Within this model, all social groups and powerful structures are forced to coexist and achieve their goals within the norms of law.

Another model (the Byzantine) had hierarchy, *i.e.* power, as the foundation of social regulation. Power also creates law, but it is purely instrumental in character and is directed downwards. The source of law (Power) is outside and above law. Law in the East was the will of sacred authority. An individual had only to fulfill the sent from above norm. Although Roman law was preserved and codified in the Byzantine Empire, the Byzantine legality could never develop into Law, because it was always subordinated to the tasks and dictatorship of the Power.

The final embodiment of the principle of extra-legal forces in Russia took place only in the 16th century. In autocracy, that principle had a state form. Mongol influence was undeniable. It was not declared and was not likely to be realized. Muscovy Rus' institutionalized the principle of force in an autocratic form of government but still remained Orthodox Christian country. It was ideologically and culturally connected with the Byzantine Empire but not with the Horde. Borrowing the ideas of 'above law' and uncontrolled power from the Mongols was legitimized by the Greek faith. This phenomenon was quite thoroughly investigated by Russian scholars.[4]

The comprehensive nature of the study, issues complexity, aspiration to express the author's own point of view on the problem analyzed, predetermine some disputable aspects of the monograph.

The title of the book presupposes the analysis of medieval Russia legal material. The generally accepted chronological framework of the Middle Ages, the period following antiquity and prior to modern times, covers the 5th and the beginning of the 16th century.[5] In Russia, this period took place in the 10th and the beginning

[3] Feldbrugge, *supra* n. 1, at 156.

[4] *Ахиезер А., Клямкин И., Яковенко И.* История России: конец или новое начало? [Akhiezer A., Klyamkin I., Yakovenko I. *Istoriya Rossii: konets ili novoe nachalo?* [Alexander Akhiezer et al. History of Russia: the End or a New Beginning ?]] 190–213 (Novoe izdatel'stvo 2005).

[5] Большая Российская энциклопедия [*Bol'shaya Rossiiskaya entsiklopedia* [Great Russian Encyclopedia 1488 (Bol'shaya Rossiiskaya entsiklopedia 2006).

of the 18th century. The material presented in the book expands the chronology of research greatly, including characteristics of the sources of law ranging from the Hammurabi Code (18th century BC) to the Universal Declaration of Human Rights 1948. As a supporter of the theory of Indo-European law genesis, the author focuses his attention on the characteristics of Hammurabi Code, but the most important source of the Indo-European peoples law the Laws of Manu (the 1st century BC) is surprisingly not the point of his attention.

If we consider the issue of the sources of medieval Rus' law, in this respect F. Feldbrugge is very selective. The study presupposes the analysis of the material in its dynamics: the evolution of legal matter that has been taking place for several centuries should be presented. However, the texts of such important sources of law as the Statute books of Ivan III of 1497, Ivan IV in 1550, and the Council Code of Tsar Alexei Mikhailovich 1649 for some reason have not been analyzed by the author. Therefore it is difficult to speak about an objective overview of the medieval Russian law evolution, which is competently presented by the author on the basis of sources, but quite selectively. The author investigates Kievan Rus', mainly and the period of political fragmentation (10th–14th centuries). Unfortunately, the Moscow kingdom period (15th–17th centuries), except for public treaties and issues of localism, is virtually omitted. Since the book considers only the fragments of ancient law, it might have been entitled 'The Problems of the History of Ancient Law' but not 'Law of medieval Russia.'

Several questions arise concerning the territorial scope of conducted scientific research. The phenomenon of 'Medieval Russia' geographically and chronologically should include, at least, the state of Kievan Rus', ancient kingdoms of political fragmentation period and the Golden Horde, and the Moscow kingdom (the 15th–17th centuries). The book under review, as has been noted above, has practically no information about the evolution of legal institutions of the Moscow kingdom era. At the same time, an entire chapter is devoted to the study of Transcaucasian medieval law (Armenia and Georgia). F. Feldbrugge clarifies the inclusion of the material into the book by the fact that 'over the past two centuries, Armenia and Georgia were closely linked to Russia and the Russian (Soviet) law,'[6] so according to the author the main reason for including this research unit is the need to define 'the place of medieval Armenian and Georgian legislation in the context of European legal history.'[7]

Indeed, law evolution of the Transcaucasian states, since the 19th century, was closely connected with the Russian law (Armenia – 1801–1828, Georgia – 1801–1864). It happened due to the joining of disparate Armenian and Georgian principalities to the Russian Empire. However, this fact has no direct connection with the evolution

[6] Feldbrugge, *supra* n. 1, at 14.

[7] Feldbrugge, *supra* n. 1, at 322.

of legal institutions of 'Medieval Russia,' which was the target setting denoted by the author. In this case, argumentation based on the typology of linguistic and legal systems taken as the basis by the author does not work. If the Armenian language belongs to the Indo-European language family, the Georgian language is a part of a separate Ibero-Caucasian (Kartvelian) group.[8]

F. Feldbrugge's attempt to create the conception of a unified genesis center (the origin and development) of law for Indo-European peoples seems interesting, but not reasonable enough. Following the authors of this concept (C. Zimmer, É. Benveniste) F. Feldbrugge proposed to take the linguistic principle of unification of different world cultures as the basis for the typology of legal systems early stage of development.[9] The author assumes that written law appeared on the basis of proto-legal institutions, practices and techniques that had already existed in the society and were common to the Indo-European peoples, and that the first legal texts were written in the languages belonging to the same family (Indo-European). This approach also implies the existence of an ethnolinguistic community of people speaking the same language at a certain period in the past. Moreover, the steppe region to the North of the Caspian Sea and to the West of the Dnieper the author identifies as the springboard from which the Indo-Europeans spread their culture and language in several directions.[10]

The Indo-European language family, as one of the largest, includes multiple language groups: Indian, Iranian, Greek, Albanian, Italic, Baltic, Slavic and others. So, in order to create and justify the concept of a single law for such different cultures a more thorough reasoning is required, rather than finding some similar elements of legal institutions in those legal systems.

We would like to give special consideration to F. Feldbrugge's point of view on the impact of Mongolian culture and law on Russian culture and law. The author believes that 'modern views on the medieval Russia, and on the Mongol era especially, still predominantly consist of stereotypes, most of which are incorrect. Mongol ruling was depicted as cruel and despotic; that made some aspects of the Russian state worse in the century to follow.'[11] In other words, F. Feldbrugge expresses a negative judgment towards the quality of research made by Russian scholars on this matter.

We cannot agree with such an opinion on the issue in question. The question of Mongolian culture and law influence on the Russian culture and law has been debated frequently by Russian scholars. It is significant to note that diametrically opposite points of view have been expressed. Supporters of one of them (N.M. Karamzin, N.I. Kostomarov, W.W. Leontovich, V.S. Sergeevich, N.S. Troubetzkoy, I.V.

8 Great Russian Encyclopedia, *supra* n. 5, at 576.

9 Feldbrugge, *supra* n. 1, at 33–47.

10 Feldbrugge, *supra* n. 1, at 38.

11 Feldbrugge, *supra* n. 1, at 248.

Kondakov and others) believed that the Mongols had a great and sometimes decisive influence on the development of the Moscow state, which developed under the influence of Mongolian statehood.

One of the founders of the ideological and philosophical, scientific and political doctrine of the 20th century – Eurasianism – N.S. Troubetzkoy in his classic work 'On the Turanian Element in Russian Culture,' wrote on this subject:

> Moscow State emerged thanks to Tatar yoke. Moscow Tsars, having not finished 'gathering of the Russian land,' began to collect the lands of Western ulus of great Mongol monarchy. Moscow has become a powerful state only after Kazan, Astrakhan and Siberia conquest. The Russian tsar was the heir of the Mongol Khan. 'The overthrow of the Tartar yoke' came down to the replacement of Tara Khan by Orthodox tsar and the transfer of the rates to Moscow. Even significant percentage of the boyars and other servants of Moscow tsar were the representatives of Tatar nobility. Russian statehood in one of its roots came from Tatar . . .'[12]

N.S. Troubetzkoy pointed out that Tatar roots in the emergence and development of such important functions of the state as the organization of finance and mail messages.

Representatives of this point of view also claimed that Mongolian state was built on the principle of unconditional submission of an individual to the collective – especially to the family, and through it to the state. According to researchers, the Mongolian idea was the basis of the Moscow State development first and then Petersburg monarchy in the form of a universal service of population to the state, its fixation on the state service.

The opposite point of view on the relationship between Mongolian and Russian cultures is expressed by S.M. Soloviev, V.O. Klyuchevskii, S.F. Platonov, L.A. Tikhomirov, N.Y Danilevsky, V.A. Ryazanovsky, *etc.* They did not deny the significant influence of Eastern culture on Russian culture and law. According to their opinion, the impact of the Scythian-Sarmatian culture, Persian, Indian, Finno-Ugric, Turkic, Mongolian, and even a remote Chinese affected Russian culture. But in this influence the Mongolian element did not play an exceptional role, it played no significant role at all. The main argument they considered to be was a relatively low level of the Mongolian society development for the beginning of successful hikes.

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[12] *Трубецкой Н.С.* О туранском элементе в русской культуре // Россия между Европой и Азией: Евразийский соблазн. Антология [Troubetzkoy N.S. *O turanskom elemente v rossiiskoi kul'ture* // *Rossiya mezhdu Evropoi i Aziei: Evraziiskii soblazn. Antologiya* [Nikolai Troubetzkoy, *About Turanian Element in Russian Culture*, in Russia between Europe and Asia: Eurasian Temptation. Anthology]] 72 (Nauka 1993).

> People with pastoral nomadic culture that did not come from the tribal and did not know settled life – could not have much cultural influence on people involved in agriculture with a developed urban life and culture . . . noted a famous scientist and a lawyer V.A. Ryazanovsky. In general (as opposed to the Moors) the Tatars didn't bring high culture, but on the contrary, having settled in the steppes of south-eastern Europe, they borrowed culture skills, learned from their neighbors: the Persians, Armenians, Russian, and upon the acceptance of Islam – mainly from Muslim folks.[13]

A leading expert on the history of nomadic peoples L.N. Gumilev, based on the passionarity theory, justified the idea of East principalities and the Golden Horde union against the Catholic onslaught from the West. He claimed that the system of ethnic Kiev in the 13th century was in a state of entropy and decay. Mongols assimilated in the eastern Slavonic environment contributed to the emergence of a powerful passionate impulse at the turn of the 13th–14th centuries, the axis of which was held from Pskov to Brousseau and further to the south up to the Abyssinian highlands. In Eastern Europe, this passionarity impulse raised to historical life two ethnic groups: the Great Russians and Lithuanians.

F. Feldbrugge warns himself and his colleagues against describing the phenomenon of medieval law only by means of modern legal categories (civil law, criminal law, public law, *etc.*). Specificity of social relations of those times suggests a multidimensional approach. The comprehensive character of his study is that he explores not only the internal (domestic) law of medieval Russia but also its external law – its treaties (agreements) with foreign authorities, with foreign merchants.

He notes in this regard the peculiar nature of the medieval Russian polity, specifically the plurality of an ever changing number of semi-states, as well as their intriguing relationships with the Golden Horde. He raises unusual questions and lends to the topic a special scholarly appeal.

He recalls that the earliest known Russian treaties date from the 10th century, but he focuses primarily on the 14th and 15th century, the period which corresponds to the West European middle ages. Based on the analysis of a large array of primary sources F. Feldbrugge presents his classification of ancient treaties as the most important sources for the study of the political history of medieval Russia.[14]

The author reminds us that the current concept of an international treaty is closely allied to the concept of the sovereign state. Treaties are agreements between

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[13] *Рязановский В.А.* К вопросу о влиянии монгольской культуры и монгольского права на русскую культуру и право // Вопросы истории. 1993. № 7. С. 152–163 [Ryazanovsky V.A. *K voprosu o vliyanii mongol'skoi kul'tury i mongol'skogo prava na russkuyu kul'turu i pravo // Voprosy istorii*. 1993. No. 7. S. 152–163 [Valentin Ryazanovsky, *On the Issue of the Influence of Mongolian Culture and Mongolian Law on Russian Culture and Law*, 1993(7) Questions of History 152–163]].

[14] Feldbrugge, *supra* n. 1, at 343.

sovereign states; nowadays sovereign states may unite in setting up international organizations and such organizations may also appear as subjects of public international law and as parties to treaties.

From this he comes to the conclusion that this framework is not fully applicable in a medieval setting. If modern concepts are employed, one could say that sovereignty was usually fragmented in the middle ages and parceled out among several authorities. Applying another modern concept anachronistically, one could define a medieval treaty as an agreement between public law parties.

But at the same time in medieval Russia, agreements in the form of treaties between 'governments' (generally ruling princes) and groups of foreign merchants are quite common and are clearly regarded as something very close to agreements between governments.

The author offers pragmatic (some would say opportunistic) and the most convenient solution to the dilemma: if it looks like a treaty, if then and now it was and is regarded as a treaty, it should be included in this survey.

He suggests an unexpected but exact parallel: parenthetically, one might add that this approach is probably more acceptable now than it would have been a generation ago. We have become accustomed to certain dissolution of an absolute sovereignty. It has not only been eroded by the ever increasing role of international and even supranational organizations, but we also observe a growing independence and assertiveness of lower range public law corporations. National states make agreements with their own provinces or even cities.[15]

There are examples in the current Russian Federation: dozens of agreements on separation of powers between the Federation itself and its entities (republics, kraies, oblasts, autonomous areas, *etc.*) were concluded in the 1990th and then ended within a decade after the 2000.

F. Feldbrugge draws our attention to another interesting aspect: usually, a treaty is a bilateral or multilateral legal act almost always in written form, by which the parties create mutual rights and duties. The history of medieval Russia gives us examples by which the concept is extended by more than one act, e.g. an exchange of letters.

The author finally makes interesting conclusions that the treaty network of medieval Russia is a source of information about political and constitutional structure and considering the treaties themselves, their content and form, certain inferences can be made about the legal system they reflect.

In Russia, as a part of the Roman-Germanic legal family, the main source of law is traditionally a legal (internal) act. F. Feldbrugge demonstrates an important

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[15] *See, e.g., Лукашук И.И.* Международное право. Общая часть [Lukashuk I.I. *Mezhdunarodnoe pravo. Obshchaya chast'* [Igor Lukashuk, International Law. General Part]] (3rd ed., Wolters Kluwer 2005); Sergei Marochkin, *On the Recent Development of International Law: Some Russian Perspectives*, 8(3) Chinese Journal of International Law (2009).

role of treaties for our country in those times. First, in this sense, Russian medieval treaties are of great interest for the general history of Russian law, because they offer important information on numerous aspects of medieval Russian law. Then, the treaties of the Moscow princes constitute one of the chief sources in the study of the political history of medieval Russia. And finally, medieval Russian treaties inevitably reflect the political ideologies of those times.

It seems surprising to find in a book devoted to law of medieval Russia, a chapter on Human Rights (Ch. 8). This topic is difficult to compare with the Russian history of that period. Among the issues of the chapter it seems even stranger to find a paragraph about the core document on human rights of contemporary international law – the Universal Declaration of Human Rights 1948.

The author's idea becomes understandable as soon as he poses the questions: is there also something in Russian legal history that could be regarded as building material for a modern concept of human rights? In what form have these ideas been present and active in Russian legal history?

One should note that the author takes a very specific way to answer these questions showing on the examples of Western countries the birth and development of several key rights: the equality of human beings, the separation of powers, due process, freedom of conscience, original democracy (popular assemblies). It was hardly reasonable, because the origins of these rights and their development are known and described repeatedly, and such a description again is beyond the scope of the book and the question delivered in this chapter. But anyway, only then he comes to answer them.

Having evaluated the same rights with regard to Russia, the author comes to the conclusion that, obviously, was self-evident for Russian researchers: the historical background of human rights is significantly different in Russia. In particular, the separation of powers never got off the ground in Russia.

F. Feldbrugge states at the same time, that 'notwithstanding the unsatisfactory state of affairs during the last decades of the Empire and the total collapse of human rights under the Soviet regime, the idea itself of human rights was more alive in Russia during those times than it was in the Western world.'[16] But reality is different: 'It would be unrealistic to assume that . . . everything is well now in Russia that has proclaimed itself to be a democratic and law-governed (pravovoe) state (Article 1 of the 1993 Constitution of the Russian Federation) and that has explicitly embraced the universal principles in the field of human rights and freedoms (Article 17 of the same).'

One should admit that '[t]he heritage of many centuries of autocracy, dictatorship and enforced orthodoxy and unity is a heavy burden which has a strong psychological impact on the Russian polity.'

[16] Feldbrugge, *supra* n. 1, at 287.

To summarize, we shall mention quite a high professionalism of F. Feldbrugge, his respect to the historical past of Russia, a large amount of the used and analyzed primary sources which in fact formed the basis of the monograph. Some shortcomings found in his work might be explained by a limited access to Russian doctrinal literature and to archive materials. In general, the book is of major interest as an external modern western view on medieval law of Russia and therefore is important for further research.

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