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The History of Law and Judicial Proceeding of Pre-Petrine Russia in the Publications of Western European and American Historians (a review article)

Irina P. Pavlova*

Krasnoyarsk State Agrarian University
90 Mira, Krasnoyarsk, 660049 Russia ¹

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In the article in the way of common analysis they observe the works of European and American historians-lawyers, dedicated to the Old Russian (pre-Petrine) law (over 60 works). The process of recognition of the Old Russian (Russian) law features had already begun by the Europeans-travelers, and then was continued by scientists-foreigners, who worked in Russia in XVIII-XIX centuries. Author comes to conclusion that the process of scientific mastering of the law and legal procedure history, begun in XX century, was developing steadily, but depended on current political and historical situation, translations and publications of the Russian law relics. Important role of the calling interest to the problem was played by Russian historians-emigrants. The historiography development was going at the line of researching basic specific categories, particular plots of the marking common problems out. To begin with 1980s researching of the Russian law became rather intensive. The articles of those problems was regularly printed in the main journals about questions of the east-European history, appeared monographs. The most actively are used the problems of the state history, anticriminal legislation, court organization, possessions development, serfdom. Author expresses wish that the article materials will help Russian researchers to learn and use the experience of the foreign colleagues more actively.

Keywords: history of law, court, Pre-Petrine Russia, foreign historiography

Point. The law formation in Russia from medieval times until the last reforms of the legal system at the beginning of the 21st century attracted the attention of historians from the United States, Germany, Great Britain, France, Italy and other countries. Russian researchers of the law history of Russia too rarely take into consideration these foreign sources. However some outside viewpoints allow us to imagine some processes of our own law history development more fully. This requires a comparative approach.

This article attempts to define the main periods and directions in the western historian's researches on problems of Old Russian law regulation history (before 1700).

Example. The first foreign traveler's notes with first descriptions of Russian law regulation and thoughts of Russian judicial practice appeared in the 16th century. The most substantial notes on juridical matters were notes written by Sigismund von Herberstein, Gilles Fletcher, an unknown author signed by «J.F», Adam Olearius, Jacques

* Corresponding author E-mail address: iripa@inbox.ru

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Margeret and others. Some analyses of such notes and recollections were undertaken in the articles of William E. Butler, State University Professor Emeritus of Comparative Law in the University of London and Gabriele Scheidegger, a Swiss researcher (Butler, 1996; Scheidegger, 2003).

The authors of these articles judged contemporary witnesses of the Russian system of law and legal proceeding formation somewhat variably. The remarks of foreigners mostly showed their seemingly superior attitude to the barbarian character of the legal customs in Russia.

It were some historians from Western Europe working at Russian universities and the Russian Academy of Sciences in the 18th and 19th centuries who first got interested in the history of Russian legislation. In his «Discourse sur l'origine et les changements des lois russiennes» Strube de Piermont supposed the law of the Rus' was founded on Scandinavian law (ЮШКОВ, 2005: 356). Johann Philipp Gustav Ewers, a professor of Dorpat University asserted a common origin of the Russian and Scandinavian law by which he meant the German law (Ewers, 1826). These were the pioneering publications in the German language. In the mid-19th century (1843–1844) substantial materials on Old Russia judicatory were published under the editorship of E. von Tobien also at the Dorpat University (von Tobien, 1846).

First scientific publications on Russian law history in Germany appeared at the close of the 19th century. An article on Russian law history by M.F. Vladimirsky-Budanov was first published in 1900 followed by the articles on Old Russian law history and pre-Mongol Rus' church jurisdiction by Leopold Carl Goetz, a professor of Hamburg University (Goetz, 1912, 1913). The «Russkaya pravda» translated by Goetz himself became the main basis for his papers mentioned above. The medieval German-Russian trade agreements were attractive for Goetz as a researcher. He

detailed the dating of some of the agreements (Goetz, 1916). His last article was published just at the height of World War I.

Interest of western researchers to Russian law history during the 20th century was fluctuating. Judging from scientific publications chronology this interest was linked with the cardinal political changes in our country (e.g. the October revolution, perestroika), with a more active role of the USSR in the international sphere (post-World War II period) and others. Evidently the publications of the Russian legal documents in foreign languages had significant influence on the research intensity of western historians too.

For example, Karl Fritzier's publications on Old Russian law appeared after World War I. The first part of his studies was dedicated to the Church Statutes issued by Kievan Prince Yaroslav known as Yaroslav Mudryi (the Wise). Fritzier identified them as the Russian-German law documents. The second part of Fritzier's studies was dedicated to the princely succession (*knyazheskoe pravo*) in Old Russia (Fritzier, 1923). His papers are interesting by comparing the law of medieval Rus' with German, Byzantine and Scandinavian law. Some acts of legislation were included in the appendixes to the papers.

After World War II the studies of Russian emigré historians who worked at West-European and American Universities were influential to attract western historians to the field of Russian law formation. An article in German by Victor Leontovitsch was published in 1947. It was dedicated to the law and ideology of the period of Ivan the Terrible. Leontovitsch suggested the idea of a law upheaval which happened at the times of the first Russian Tsar. This upheaval was the appearance of the subjective law beginning from the times of Ivan the Terrible instead of the common law and old customs of pre-Ivan IV law basis. The Tsar himself became the legal authority of this law (Leontovitsch, 1947: 8–9,

22). The same year Georgy Vernadsky in the USA attracted significant interest to the matter of Russian juridical legal documents (Vernadsky, 1947). Studies of the emigré historians continued the research guidelines of the famous pre-revolution Russian juridical historians. These authors explained their point of view at some important events in medieval Russian history so their studies were also an intermediary basis for the analysis of the law development in Russia. The intention of the historians to present the law history of their motherland vividly was occasionally the reason of some critical concept appearance, e.g., the term of «the law revolution», etc.

Intense interest of the western historians to the USSR had given new publications on Russian law history. Lothar Schulz, a professor of the University of Goettingen had published a review of the full Russian law history from the very beginning to the present (Schulz, 1951). Schulz specified Russian law history as a young science. He had written his book in a traditional neutral reference approach. His estimations of Russian justice did not differ substantially from those of the text-books for the Soviet Higher School level. At the 1950s and into the 1970s the law historians had given attention to the process of the development of the concrete and specific for Russia legal notions and events. These analyses of literature and legal documents may be considered as attempts of abstraction of the development tendencies of the legal customs and the legal changing in the Russian law. The publications of V.I. Sergeevich, a Russian law classic historian, were reprinted in Holland in 1967: «Lectures to the Russian Law History» (1883) and «Russian Law Antiquity». The digest of the papers on medieval Russian law translated into English by G.V. Vernadsky (Vernadsky, 1965) was published in New York. The «Russkaya pravda» code was also translated into English. In 1963 it was

translated into French by M. Sheftel. The western historians studied other Russian historical legal documents too. P.L. Žužek had published his article of the «Kormchaya kniga» and the text of the document (Žužek, 1964). Ann Kleimola from the University of Nebraska used Russian legal documents of 15th–16th centuries and the «Zakon Sudnyj Lyudem» for her researches (Kleimola, 1975, 1976). William Butler edited the Catalog on Russian and Soviet law (Butler, 1976).

Since that the articles on matters of the law history were published in magazines and periodicals regularly. These were: «Canadian-American Slavic Studies», «The Russian Review», «Russian History», «Oxford Slavonic Papers», «Readings in Russian History», «Zeitschrift für osteuropäische Geschichte», «Jahrbücher für Geschichte Osteuropas» and others.

Horace W. Dewey, the University of Michigan, wrote the article series on the 1497 Sudebnik and the 1550 Sudebnik subjects. Dewey described the meaning of some important notions for the Muscovy: «pravezh» (collection of arrears), «yabenichestvo» («sneakage»), «beschestie» (dishonor) (Dewey, 1966-1967; 1968). On his point of view the analyzed items reflected two historical events: the growing of influence of the Russian State and the traditional legal conception of different groups of the Russian society. Horace W. Dewey and Ann Kleimola studied the «krestnoe celovanye» practice («Old Russian Cross-kissing») in the judicial proceedings and political life of Muscovy (Dewey and Kleimola, 1968). Osvald Backus, an American historian, (the University of Kansas) described the legal notions changes and the growing of the feudal departure into treachery persecuted by criminal law (Backus, 1962; 1970; 1972).

In the discussions on Muscovian administration activity or peasant exploitation some historians wrote about arbitrariness and despotic character of the rules in Muscovy. H.

Dewey and A. Kleimola inquired into a question of the financial supply guarantees from those persons, who didn't want to pay the taxes. The authors considered the «pravezh» as a one of the ways to get taxes. This method to wring taxes out was used actively by the bribable chiefs, petitioner innocents, lawyers and priests. In the authors' opinion the «pravezh» was a kind of a public theatre and at the same time it might often be an unlawful practice used by the State and the feudal lords (Dewey and Kleimola, 1975: 167). Scott Seregny (a professor of the Russian history of Indiana University), studied the practice of the court production in the terms of the rights and duties of a defaulter. He pointed out the rise of Muscovy needed in an effective lawful administration that could act on behalf of the monarch. The nedelschiks were the first representatives of the regime in the courts, as key figures of the Muscovite government. They had become the main clerks for political and social control of the Muscovy's central administration. And such a system was reliable enough (Seregny, 1975). Jack Culpepper (Columbia University) studied the forming of legislation of the serfage. It is one of the main themes of the law history of the Muscovite State social relations (Culpepper, 1969). Thus the historiography of Russian law history of the 1950s-and into the 1970s may be considered as a period of study of its terms and the most significant social and legal phenomena.

Then historians marked out the main questions and characteristics of significant periods in Rus' and Russia State history and law history. Thesaurus on the history of the political institutes of the Russian State in 11th – 13th centuries was published in France (Eeckaute, 1986). In the 1980s Daniel Kaiser actively studied Old Russian law (Grinnell-college, Iowa). He became the author of the first individual study on the Medieval Russian law (Kaiser, 1980). He viewed the problem of the development of the

concept of crimes and punishments in Kievan Rus'. D. Kaiser considered the Orthodox Church and the Prince attitude to the wergild collection and to the death penalty. He showed that the custom of revenge didn't concede for a long time (Kaiser, 1980: 285). The author also showed the wergild was applied until the 16th century as a kind of almost regular payment to the Prince. In 1992 under the editorship of Kaiser a pool of the early legal documents of Old Russia was published («Russkaya pravda», sudnye gramoty of Novgorod and Pskov, the charters of the Prince for the church, the agreement between Novgorod Republic and Tver' and other). Although the disputable translation of many concepts was a subject to criticism (Poppe, 1995: 565), the edition significance was large.

The origin and development of the concept of property as scientific problems are very interesting for the law historians. And it is relevant until now in connection with uncultivated feeling for law and order just in the property area of the Russians. Carsten Goehrke (the University of Zurich) described and analyzed the legal order of the organization of the land and landed property usage (Goehrke, 1987). Richard Pipes in his article «Was there Private Property in Muscovite Russia?» also in other his universal historical studies denied the concept of private property in Muscovy because of the right of the Tsar to confiscate all property of a person (Pipes, 1994). George Weickhardt (a professional lawyer, San Francisco, the author of many publications on Russian law history) didn't support this idea. He thinks the Tsar had the right on confiscation if the force of the law had arisen in consequence of charge of treason. But private property existed de facto. The court ruling showed its predictable character and constancy regarding the property aspects (Weickhardt, 1993). Nancy Kollmann, a professor of Stanford University noted this discussion in her translated into Russian book on

society and state in Russia of early modern time (the 16th – the 17th century) (Kollmann, 2001: 41). A researcher of the questions of ownership controversies between noblemen being in the neighborhood, Nancy Kollmann, studied the questions of honor and dishonor («chest' and beschestie») in Muscovite Russia (Kollmann, 1992). It is the author opinion that the contest «chest'» and its ensuring were the last means to achieve the social legal «uniformity». The contest of honor («cest'») was very complicated. Wounded honor could play its important role in admission of the crime behavior of a man.

For good reason the historians placed high emphasis on the Sobornoe Ulozhenie. In his monograph devoted to the Ulozhenie, Arkady G. Mankoff says about differences in accentuation at analyses of the legal document in the end of the 1960s and into the beginning of the 1970s. On his opinion Danuta Cherskaya (Poland) being guided by the Soviet sources gave attention to the feudal landed property and social-economic processes of that time, while V. Glotzner (FRG) depended on pre-Soviet historiography had performed a «formal juridical» examination of the criminal terminology (Man'kov: 2003, 16). In our opinion, however, the «class» alternative versions were only the aspects in the law history selected by the historians. We suppose both of these aspects were important.

The Ulozhenie was translated into German and published in 1985 (Das Sobornoe Uloženie, 1985). There were elaborated some legal subjects in terms on this document. Hans Hecker depending on the «war» chapters of the Ulozhenie described the legal basis of ransom of the prisoners of war. There was no real war law in the Ulozhenie as he thought, but some single assets reflected the interests of the definite population groups including the prisoners of war. (Hecker, 1986: 156. In the 1988–1989s Richard Halley translated the Ulozhenie into English. The version of the

Ulozhenie from the Complete Code of laws was published as a paginal translation with some short comments¹. The choice of such a variant of the text from the Complete Code of laws by Halley was put in doubt by historians (Schmidt, 1995: 567). But Halley had prepared detailed comments to the Ulozhenie and they were edited in different magazines («Russian History», «Canadian-American Slavic Studies»). Defining the law and government in Russia in the mid – 17th century the editor says of the slavery of people and the hypertrophied government. However he notes the high level of legality in Muscovy. The rules of the laws were clear and non-contradictory, the laws had been published and widely available.

In Post-Perestroika times western historians have been active participant of scientific conferences together with Russian historians. The papers of the western scientists have been translated into Russian and published in joint collections. Since the 1990s Russian law history study has been bringing up to a new level. Bibliographic papers, detailed articles of conceptual character, and above all, monographs are edited against a background of more availability of foreign researcher's publications. So, it means a new cycle of law history science development. Foreign scientists study problems of fundamental character and the issues that can deeply characterize the government-law-society relations.

Daniel Kaiser considers some aspects of meddling of the government into private lives and the treaties of marriage of pre-Petrine period (Kaiser, 2001; Kaiser, 2003). He shows the government counteractions in cases of a patriarchal family cruelty in the courts ruling in the 16th – 17th centuries. He notes the Russian family of the early modern period wasn't an exception at the overview of a European family. A historian from Birmingham University Morin Patricia Perrie explores corruption and the

ways of struggle with corruption in the light of people monarchism in the Muscovite reign. By the concrete examples of cases she reveals that the faith in an equitable Tsar was founded on different and sometimes cruel methods of the fight with bribes (Perrie, 2000).

George Weickhardt raised a problem of correlation of two different events of the Sobornoe Ulozhenie and in other laws of Muscovy. He meant a tendency to develop the research formal process and its usage not only in the crime process but also in the civil process as well as the declaration of the principle of equality of law for everybody. He concluded that the western and the Soviet historians were mistaken on especial authoritarianity and the class nature of the Ulozhenie. In many respects their estimates were founded on the descriptions of travelers and diplomats mentioned above. He supported the opinion of the pre-revolutionary Russian historians that the law in Russia since the Sudebnik of 1497 had been developing as a variant of realization of the principle *nullum crimen sine lege* (no crime exists without a corresponding asset in the Code of laws). He believed the Ulozhenie had become the conceptual basis of the modern system of the legislation inclusive the Juridical Reform of 1864 since it developed the idea of equal and regular justice (Weickhardt, 1992: 465, 480).

Some several law development guidelines of pre-Petrine period are described in monographs elaborated upon the subject. Aer Anneli, Finnish historian, had analyzed the history of the Russian patent legislation origin since the Muscovite reign when the first trade privilege appeared (Aer, 1995). Martin Aust (the University of Kiel) examined the judicial contest practice on the medieval civil cases between noblemen landowners. He had come to the conclusion that until the end of the 17th century the government couldn't propose a lawful basis for such legal precedents (Aust, 2003: 193). Peter Braun published a very

important work on the forming of administrative law in Russia. He marked out six categories of the institutionalization of the administrative regulations in the Ulozhenie of 1649 (Brown, 2002: 5-6) and made a conclusion on existence of a quite mature and law ensured administrative system in pre-Petrine Russia.

Christoph Schmidt (Cologne University) studied historical aspects of criminality, justice and law for many years. He choused an unusual chronological interval for his researches: since Ivan the Terrible reign until Catherine II period. The Russian historians don't consider it as indivisible period of time. His study was devoted to the split of the legal culture in Russian history and to the new foundations in Russian law history of the 16th – 18th centuries. The conclusions of this work moved into the level of conceptual generalization. Schmidt wrote about five main ways of the Russian law development in this interval of time. Firstly, the Tsar Reign and autocracy were legalized; secondly, the administrative bureaucracy was formed and relations of the center and periphery had been regulated on the law levels; thirdly, the first Code of law, the Sobornoe Ulozhenie was created. As the author wrote, the Ulozhenie had become the basis of the Code of Law of the Russian Empire. Also it was rated highly as the «Zakon Dvenadsaty Tablits» (the Law of Twelve Tables»). In the fourth place there was government regulation of private life of its citizens in gradually steps; fifthly, the serfdom law formation t was the reason of failure of the public law development undoubtedly. That is why the Russian positive law could develop only in a bounded lawful area for a long time (Schmidt, 1995: 483). As the historian thinks, the legal split in Russia meant deep divergence of opinions of the State and the society.

Christoph Schmidt wrote a monograph on the social control in Moscow of 1649 –1785. In this case the «social control» means matters

linked with justice formation on the basis of the Sobornoe Ulozhenie, an analysis of the criminal situation in Moscow and the serfdom system functioning. Ch. Schmidt supposes the Soviet historiography didn't consider the crime situation of that time practically.

The popular uprisings were considered in the view of class struggle: highway robbers were compared to social «partisans» (Schmidt, 1996: 11). The first chapter on law and the juridical control system before 1700, Ch. Schmidt viewed some important aspects: the origin of the Sobornoe Ulozhenie, authority activity (Boyarskaya Duma, prikazy (boards), voevody, gubnye starosty) and others.

In Vienne Angela Rustemeyer defended a doctoral (professorial) thesis

(Rustemeyer, 2006) on crimes against the monarch and the reign in Russia, 1600-1800. In 2006 her thesis was published as a monograph (Rustemeyer, 2006). A. Rustemeyer analyzed legal basis documents of the Roman-Germanic laws by the subject. She used some materials on the history of monarchy of France, England, Poland, Lithuania and Russia. In the monograph there is a system of the crimes against monarchs, the forming of the concept of treachery and the sacral monarch idea were analyzed. Also the legal delimitation of the monarch court and the church jurisdiction were considered by the author. The second part of the monograph describes protest movements against monarchs and different verbal insults. Problem of antimonarchical crimes includes such important subjects as behavior of a person at wars, a throne seizure, boundary aspects, etc. Escapes of noblemen into Poland and Lithuania and back were studied separately. On the whole the monograph was decided interestingly with statement of the problems in reasoned and adjusted pen.

Last years some new scientific centers were opened in Germany. Among their main

subjects to study were aspects of the Russian law history. For the book series on the legal history («Rechtshistorische Reihe») Gunter Baranowski (Frankfurt-on-Main), composed and prepared the first full commented volumes of the main law history documents of Old Russia: «Russkaya Pravda» («The Russian True») and «Pskovskaja sudnaja gramota» (a document of the Pskov Court Office) in German (Baranowski, 2005, 2008). These considerable volumes include commented clause-by-clause translations, the review of the publications on the subject and glossaries. Russian law has been studied in Cologne for many years. Russian historians knows the monograph by Martin Avenarius «Римское право в России» («Roman Law in Russia»), (Avenarius, 2008, in Russian) with analyses of the Roman legal traditions penetrated into Russia during the 1800 – the 1922nd, the Roman law reception through Byzantium, Old Russian law and others. The «Jahrbücher für Geschichte Osteuropas» scientific magazine («Yearbooks of Eastern Europe history») publishes some discussion articles on the content and evolution of the concept of the «spravedlivost». By the way the meaning of the concept in translation into Russian is «justice». The beginning of the discussion belongs to N. Pecherskaya (St. Petersburg). She described the evolution of this concept within self-consciousness of the Russian population since antiquity (Pecherskaya, 2005). Continuing the discussion Ch. Schmidt showed some variants of the concept realization of the 11th – 14th centuries: through the «pole» («a field»), «krestnoe celovanie» («cross-kissing»), ordalii (Schmidt, 2005: 568).

Resume. The adduced characteristics of the legal development in Rus'-Russia are evidence of no difference in principle between the conclusions of western historians specialized in Russian history and that of the Russian historical legal science. It may be

noted western estimates are more critically and the western notions are not so stable and unambiguous. In prevailing view of the cited authors the development of the legal area is closely linked with the idea of predominant role of the authoritarian Russian State. But for all that the State functioning was at the stage of «not-prescribing» with breakdowns. Legal situation of the population wasn't secured legislatively. The split between «de jure» and «de facto in Russia was especially deep in the cited author's opinions. Leaving out the split the government created a central law (unilateral or monological) and suppressed other conceptions of laws (non-Moscovian) (Schmidt, 1995: 491).

For many years the Russian criminal-penalty law had been studying more thoroughly than the Russian civil law. This tendency was typical for 20th century not only for Russian historiography (USSR) but for western historiography too.

The analysis of publications of western historians shows the increasing interest to the Russian law history. Starting with the law and nation development reviews law historians had come to comprehending of some specific Russian conceptions, some peculiar legal notions, social and economic phenomena. As for the source basis and historiography basis it may be noticed the western historians are good at thoroughness of the pre-revolutionary studies in Russia (the treatises of F.M. Dmitriev, M.F. Vladimirsky-Budanov, V.I. Sergievich, B.N. Chicherin and others), studies of Russian Soviet historians and the notes of travelers. In our opinion text reception in western schools of thought is more augmented

because of better knowledge of foreign and old languages in the Western Countries. We found one more advantage of the executed tendency of these studies. These are not only analyses of the law texts but also analyses of the law enforcement and realizable practice of judicial proceedings. Principal subjects to study for western historians include the State and law aspects, procedural law and others. The formation of the Russian civil law and canon law development are studied less. Our foreign colleagues follow the works of the Russian law historians attentively. They regularly publish their comments on the monograph editions as well as publications of old law document texts and transactions. Russian researchers need to study their colleagues experience more actively and, as I hope, the researchers will notice the problem.

The most new special literature edited last year shows rising interest to the Russian law history. Some conferences on the Russian law history are conducted even in Japan (the Slavic Research Center in Sapporo, Hokkaido University) (Law and Society, 2008). Such a conference on the Russian law history of 2008 was devoted to the 1200s – 1500s period. The papers of the conference were edited in Japanese. An article of Ferdinand Feldbrügge «Law in Medieval Russia» was published in Holland. These articles are subjects to the next analytical historiography study.

The next development of law historical science expects from Russian historians insistently ongoing studies of foreign colleague's researches, regular experience exchanges and other kinds of scientific activity coordination.

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