

# Michigan Journal of International Law

---

Volume 15 | Issue 3

---

1994

## The Role of Law in the Soviet System: Looking Back and Moving Forward

Sarah J. Reynolds  
*Harvard Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Comparative and Foreign Law Commons](#), and the [Rule of Law Commons](#)

---

### Recommended Citation

Sarah J. Reynolds, *The Role of Law in the Soviet System: Looking Back and Moving Forward*, 15 MICH. J. INT'L L. 797 (1994).

Available at: <https://repository.law.umich.edu/mjil/vol15/iss3/6>

This Book Review is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mjil@umich.edu](mailto:mjil@umich.edu).

# THE ROLE OF LAW IN THE SOVIET SYSTEM: LOOKING BACK AND MOVING FORWARD

F.J.M. FELDBRUGGE, *RUSSIAN LAW: THE END OF THE SOVIET SYSTEM AND THE ROLE OF LAW*. Dordrecht: Martinus Nijhoff, 1993. xii + 486 pp.

*Reviewed by Sarah J. Reynolds\**

*Russian Law: The End of the Soviet System and the Role of Law* is one of only a few book-length works on Soviet/Russian law to be published in the last year or more and the only one to attempt as broad a treatment of the subject as Professor Feldbrugge attempts here. The speed and depth of change in the subject area have discouraged potential authors, and thus the field has remained, at a critical period, without an up-to-date general text and without the broad, systemic analyses that are so important to an understanding of the nature of the change. Professor Feldbrugge deserves great praise for producing an ambitious work to fill this gap in the literature. The book provides a wealth of information and will be especially valuable to those new to the subject. The very breadth of the work, however, requires a sweeping, often simplified, analysis that occasionally appears somewhat one-dimensional. Moreover, since the book's perspective is, in large part, historical, the analysis is primarily backward-looking. Readers, especially those who may want to use Professor Feldbrugge's analysis of the system's development and flaws as a guide for the evaluation, or even the design of Russian reform efforts, should not mistake his broad historical analysis for prescription.

Professor Feldbrugge describes his approach to his task as one of "concentric circles,"<sup>1</sup> but the book more closely resembles three separate and nearly distinct pieces. Part I, "The Soviet System," is primarily analytical, presenting a broad and wide-ranging discussion of Professor Feldbrugge's views on the history and development of Soviet society and the totalitarian nature of Soviet society and Soviet law. The middle part, by far the lengthiest, is primarily descriptive, discussing Soviet era law and *perestroika* era changes in a wide variety of legal fields, with special emphasis on constitutional law and state structure. The last part is a

---

\* Director for Eastern Europe and the Newly Independent States of the Harvard Law School Program on International Financial Systems.

1. F.J.M. FELDBRUGGE, *RUSSIAN LAW: THE END OF THE SOVIET SYSTEM AND THE ROLE OF LAW* xi (1993).

documents supplement for the text, containing a translation of the Russian Constitution as amended to publication date, and of the Federation Treaty, along with a list of major *perestroika* era legislation and executive acts in the Soviet Union and Russia and a bibliographical note on further sources.

Perhaps because of the dearth of publications, Professor Feldbrugge has attempted to use this format not only to cover an extremely broad subject area, but also to do so in a fashion that serves the needs of all audiences. As he describes his aim, it is to produce a book suitable not exclusively for "law students, or sovietologists, or practitioners, or comparative lawyers."<sup>2</sup> The task Professor Feldbrugge thus sets himself is Herculean and, in the final balance, probably impossible. His need to provide a great deal of basic information to students and others who have little knowledge of the subject overshadows the work's more sophisticated and complex themes. Part I's discussion ranges from the historical and political origins of the Bolshevik revolution and the Soviet system, to the theories and personal styles of Marx and Lenin, to the nature of a totalitarian system, to the causes of that system's collapse. The role and meaning of law itself receive only a fraction of part I's attention, and while the author presents his thoughts clearly, he does not expound them in detail. Although in part I he indicates that he will extend his analysis into the discussion of specific areas of law in part II, the references in part II are often brief and point to illustrations rather than developing the broad points made in part I.

The limits placed on the book's analytical position do not detract from its value as a unique source of information on the process by which the law, in the early period of *perestroika*, began to move away from old Soviet models toward a new Russian system. More knowledgeable readers, however, may sometimes find themselves wishing that the author had pursued in more depth and detail the analytical treatment of the role of law which is promised in the title and hinted at early in the book. Professor Feldbrugge presents a rather sweeping dismissal of the role of law in relation to other aspects of the system, but gives little time to the discussion of the role of law outside this comparison or to the way in which the law and the legal system may (or could, or must) change as Russia undertakes sweeping social transformation.

Professor Feldbrugge's view of Soviet law, and the analysis presented in the book, are grounded in his conception of the Soviet state as totalitarian. By totalitarian, he means a state which "tends to monopolize

---

2. *Id.* at ix-x.

power in the sphere of politics, economics, and the life of society.”<sup>3</sup> The totalitarian state attempts to control all aspects of the life and function of its society and to destroy that which it cannot control. Despite an insistence on an all-encompassing ideology, the totalitarian state eventually comes to be concerned exclusively with its own preservation rather than any social good and seeks that preservation at any cost to individuals or society. Inevitably, according to Professor Feldbrugge, the majority of the Soviet state’s citizens came to recognize the nature of the situation, but most were unable to speak publicly for fear of reprisals. This situation led to a “schizophrenic” society in which what was said publicly and what was said privately were unrelated, or even direct opposites.

As the description suggests, the degree of power and of central control achieved by such a state must be extreme, or it could not prevent the disillusioned populace from changing the arrangement. Although Professor Feldbrugge’s initial definition of the totalitarian state notes specifically that it is not possible for any state to control everything, he believes that the Soviet state achieved an unusual and very extreme degree of both control and centralization, not only of political power and institutions, but also of the economy, of the law, and of all of the institutions of civil society. Moreover, although some statements would seem to indicate a clear sense that the motives of the state, and those of individuals, are always complex, much of the discussion seems to assume that the state made policy and exercised state power with a singularity of purpose approaching, or exceeding, the anthropomorphic. No state action taken or policy made by the totalitarian state has any goal other than increasing or maintaining state control, and the appearance of other rationales is simply a façade erected by the state to fool its citizens or the rest of the world. The author is quite clear about his own opinion of this system-persona. He refers to it as repulsive and strongly suggests that he would characterize it as “a wholly negative phenomenon in which the darkest forces of European and Russian history combined to produce the most vicious regime in world history.”<sup>4</sup>

This overarching understanding of the nature and function of the Soviet state through much of its history — an understanding long shared in its basic elements by many scholars, commentators, and policymakers, joined now by some reformers — is the lens through which Feldbrugge views each of the institutions of that society individually, including the law. Ironically, while the view provided by that lens is likely to make those peering through it most desirous of change, its single issue focus

---

3. *Id.* at 3.

4. *Id.*

and occasional overbreadth may lead to approaches which make well-crafted, lasting reform more difficult.

### I. THE ROLE OF LAW IN THE SOVIET SYSTEM

Although the book's title seems to promise an extensive treatment of the role of law in the Soviet system and in the remaking of post-Soviet Russian society, the proportion of the book spent in direct discussion of the role of law as such is quite small. This is in great measure a result of the combination of the author's definition of law with his understanding of the system.

In beginning to approach the question of the role of law in a totalitarian society, Feldbrugge offers two definitions of law. One of these characterizes law as one of a number of complex methods used by a society for the resolution of conflicts.<sup>5</sup> The law method of conflict resolution refers primarily to the formal legal system of conflict resolution (i.e. courts) and to the institutions that usually accompany such a formal system, such as a professional class of actors (judges, lawyers, law enforcement officers) and professionalized legal education. For Feldbrugge, however, the list of institutions essential to a system of law includes a great deal more than the standard building blocks of a system for the legal resolution of disputes, it also includes such social and political attributes as separation of powers and *Rechtsstaat* or rule of law. Since it is clear that the Soviet legal system and Soviet social and political structure lacked these other attributes for most of their history,<sup>6</sup> the inescapable conclusion would seem to be that the Soviet Union had no law in the sense of Feldbrugge's conflicts-resolution definition of law. Although the author does not explicitly state this conclusion, it may explain why he does not employ the definition further in his analysis.

Feldbrugge's alternate definition, and the one that he appears to rely on in most of his book, is law as "a system of rules, emanating from certain authoritative agencies in society."<sup>7</sup> These agencies are, of course, the same central organs which exercised the central control and self-preservation

---

5. *Id.* at 27.

6. Soviet legal and political theory rejected entirely the notion of separation of powers until 1988-90. At that point the concept began to be publicly discussed and reconsidered as a part of *perestroika*, and a number of fundamental changes were introduced to create a separation of powers in the Soviet state structure. Thus, there was no separation of powers until that time and, arguably, there continued to be none after several steps had been taken attempting to create it. It is equally clear that *Rechtsstaat*, in the sense of a strict adherence by the state to its own laws, and rule of law, in the traditional sense which encompasses both adherence to law and to a concept of right or justice which may extend beyond the letter of the law, was not an overarching attribute of the Soviet system of law.

7. *Id.* at 26.

around which Feldbrugge's understanding of the Soviet system revolves. Having already defined the goals of the system and its elite, Feldbrugge's conclusions about the role of law during the Soviet period follow logically:

It would be unrealistic therefore to look upon law as a foreign body within the totalitarian system, to cherish expectations that such a system would gradually become more civilized, liberal and humane, if it could only be persuaded to observe its own laws. Soviet law, and its begetter, the Soviet state, were entirely part of the Soviet system and did not have any potential to develop into independent constraints upon this system. It was only when the system itself began to disintegrate that law could acquire a role for itself and become a catalyst in the disintegration process.<sup>8</sup>

This definition of the role of law is tellingly focused on the ability of law to serve as a counterweight to "the system" or a catalyst for change from the inside. Yet there are many other questions which could be asked: Given that the law supported the existing political structure, did it also serve other functions, such as the protection of public order or the expression of public values? Why did the "system" move in the directions of increasing "legality" — in the sense of increasing formalization of goals and values through laws, regulation, and procedural requirements? Was this simply a more efficient way to exercise central control, or did it express other preferences as well? How did/do the citizens regard the law? What portions of it would they change, and in what ways, if offered the chance to decide individually? How was/is the law in Feldbrugge's definition — i.e., the issued rules — related to the actual behavior of citizens and institutions?

Feldbrugge does not address any of these questions directly. This omission is clearly, in part, a matter of space limitations. However, viewing the role of law through the lens of Feldbrugge's description of totalitarianism, they may simply not be questions worth asking.

When the degree of abuse involved in a political arrangement — or in another form of human social relationship — is perceived as extreme and unacceptable under any circumstances, it is difficult to view discussions of the positive points of the system or the ways in which its parts work together as useful — except where this is related to condemning and ending the abuse. Take as an analogy an extremely abusive domestic relationship or a system of personal bondage. For those concerned to end the system, discussions of other aspects of the relationship — control of household funds, the "rules" by which the system of bondage operates, the views of

---

8. *Id.* at 29.

the victims of the abuse — are only interesting to the extent that they contribute to stopping the abuse. Where it has been concluded, as Feldbrugge concludes about the totalitarian system, that the essence of the relationship (system) is itself the abuse (control), then claims that other purposes or values are also served by some elements of the system are irrelevant, or even repugnant and callous. A victim's perception that the relationship is worthwhile and should be preserved cannot be understood as anything other than self-deception. By definition, that which supports the system is bad, and as Feldbrugge believes that (again, by definition) all law in the Soviet totalitarian state supported the system, there is little room for discussion.

It is precisely the questions which seem least relevant in this perspective, however, which become most relevant when the system is ready for change. It is not possible to develop new social structures — including new law — without building upon the old. This assertion does not imply that the old structures must be retained in some form, but rather that careful choices must be made to allow new structures to be developed which meet the needs and interests of the people and allow them to change at a human pace. An approach that sees only the system-maintaining functions of Soviet era legal rules will have difficulty with citizen demands that some of the old rights and powers be made real and enforceable rather than entirely replaced. Without respect for the way in which the publicly announced rationales for the law were, in part, a reflection of the public's values, the analyst and the reformer may be unable to give credibility to expressions of doubt about change. The result may be both a recommendation of extreme remedies featuring the rapid abandonment of all that is associated with the prior system and a patronizing treatment of dissenting views. Those previously victimized by a sometimes violent regime which failed to observe its own laws may find themselves once again denied the ability to take a responsible role in determining their social, economic, legal, and political structures and to produce arrangements which truly reflect their values and decisions.

## II. LAW, CHAOS, AND THE COLLAPSE OF TOTALITARIANISM

The vision of the Soviet state as one which achieved an almost unparalleled control of politics, economics, and the institutions of civil society is also, of necessity, a view of a state that is extremely dependent upon the institutions and channels of centralized control. Deterioration of communication along these channels, or of other functions key to centralization, would seriously threaten the continuation of the system. Moreover, even without a deterioration in its functioning, such a centralized mechanism might well be unstable due to the absence of diffused social supports and sources of social strength:

In such a constellation, all structure, order, organization, emanates from the centre. The moment central control fades, chaos emerges, because there are no regulatory factors left. In pluralistic, genuinely democratic societies there normally is a vast reservoir of such forces. They can survive serious upsets in the sphere of politics and economics because there are alternative mechanisms which can take over without too much trouble. Curiously, the principle force which holds a disintegrating totalitarian system together is the universal and very realistic fear of chaos.<sup>9</sup>

The perception of a realistic threat of chaos is an important insight. Expressions of such fears have been routinely dismissed as disingenuous scare tactics employed by those who will lose power or privilege as a result of change.<sup>10</sup> This attitude was certainly prevalent with regard to the Soviet Union and remains common with regard to Russia and the other former Soviet republics. Commentators and advisors, especially those from Europe and the United States, consistently attribute the "too slow" pace of change to the desire of the existing elite to remain in power and discount the fears of disorder which are regularly expressed. As Russia has encountered increasing political difficulty, the discounting of fears of political chaos has somewhat decreased, but the practice continues unabated with regard to fears of economic chaos.

Many of those who discount these possibilities believe that any genuine fear of chaos is caused by a failure of those expressing it to understand the ways in which the new political, economic, or social arrangements will regulate behavior and to perceive that these new arrangements will be superior to the old. According to their analysis, the real threat of chaos is the possibility that those in positions of authority will block beneficial change before it has a chance to be completed and before the new, better system can begin to function. In part as a result of this kind of reaction to "chaos fears," Russia has been continuously pressed to increase the speed of political, social, and economic change despite a clear lack of consensus and increasing social tension and economic pain.

Feldbrugge's analysis seems to suggest nearly the opposite approach. For Feldbrugge, the reality of the threat of chaos from systemic change is a natural result of the extreme dependence of everything in the Soviet

---

9. *Id.* at 17.

10. The argument that change threatens to produce "chaos" — or at least a serious breakdown of public order — is not unique to the Soviet context. The need to maintain public order is commonly offered by political leaders as the reason for delaying, or avoiding altogether, reforms in political, social, and economic structures which are urged on them by others. This occurs not only in regimes regarded as totalitarian, but also in those regarded as authoritarian and in those which are not regarded as either.

Union on the *apparat* and its central power. Indeed, although he does not say so explicitly, Feldbrugge's description of this dependence and the absence of alternative institutions makes the threat appear to be not only very realistic, but also a near certainty should significant portions of central control be lost. This may explain in part the absence of prognoses or recommendations on the path for change. Moreover, because Feldbrugge's view of the Soviet system is one of a system both reprehensible and ultimately unsustainable, it would not appear to support a resistance of chaos by any means which would maintain the power of the center.

Although the two views appear to be near opposites in their analyses of the possibility of chaos or the collapse of public order, both may encourage an attitude toward change that fosters irresponsible suggestions and a lack of concern for the reduction of the painful consequences of change. Those who believe that the fears of chaos are the exaggerated or wholly fictional claims of elites with vested interests may fail to listen carefully to the reasoning behind the "scare tactics." Even when giving the speaker the benefit of the doubt as to motive, such persons will often discount the fears expressed as stemming from ignorance of the workings of the proposed institutions and a resultant failure to perceive their own best interest. They may not investigate the basis for these fears with any care and are likely to urge change forward without attempting to address the possible problem.

Feldbrugge's analysis, if read too broadly, may support precisely the same outcome for exactly the opposite reason. If chaos is nearly inevitable, then there is little point in assiduously seeking to avoid it, and the attempt to craft less painful strategies for change appears to be a rather futile effort. Moreover, since the regime to be disposed of was extremely undesirable, and the law and other institutions simply served the regime, the legislation left over from that period will have been produced solely to advance the cause of the totalitarian government. This suggests little reason to show respect for those laws or the reliance they may have produced and much cause to seek their immediate and wholesale replacement with laws which will protect individuals, democracy, and markets.

Another view on the fear of chaos might be provided by a more "technical" analysis of the means by which the Soviet system — and Soviet law in particular — regulated behavior. In many areas of legal regulation, the Soviet legal approach simply did not follow the common Western pattern in which the law defines the boundaries beyond which behavior may not cross, but leaves a substantial area within the boundaries essentially unregulated and does not interfere in behavior which falls within the established parameters. In contrast to this *proscriptive* regulatory pattern, Soviet law in many important areas was directly *prescriptive* — it

established specific and positive obligations in the area of regulation and required that these obligations be met. The difference is not simply one of the content of the law or the degree of regulation but is rather a fundamental difference in approach to legal and social regulation. Movement away from one system and toward the other requires a clear understanding of this difference, and attempts at change which are blind to the degree of dissimilarity may indeed promote a breakdown of public order. By the same token, fears of chaos expressed by those within the Soviet system may, at least in some instances, be reasonably understood as expressions of awareness of the differences between the systems and a signal that reform methods need to be reexamined.

Perhaps the easiest and best known example of the differences in Soviet and Western patterns of legal regulation is the regulation of the economy. With very limited exceptions, Soviet legal regulation of the economy was accomplished by the establishment of specific, positive obligations on the part of economic actors. An entity subject to this legal regulation would be obligated to conclude contracts for specific goods or tasks with specific contracting partners and then to perform those obligations properly. The legal competence of the entity was extended only to those actions and functions necessary for the entity to carry out its required tasks. Systems for arranging the delivery of goods, for authorizing and processing payment, and for carrying out other necessary functions in the economy were all organized around the prescriptive principle — allowing an entity to take only those actions which were consistent with its required tasks. Enforcement mechanisms and practices were geared toward early identifications and preventions of failure to perform, and remedies were directed toward the maintenance of the prescriptive order by reversal of inappropriate transactions and legal enforcement of specific performance of required tasks.

Because failure to fulfill legally imposed obligations was the primary violation of the law, it was unnecessary for the law to define more general limits on behavior. No general principles were required to define acceptable business conduct among entities, as acceptable business conduct was proscriptively defined. No limits needed to be placed by the law on the authority of managers or on management self-dealing, as the system's structure defined management's tasks specifically and prohibited any actions outside them. Because of the prescriptive nature of the system, there was no need for a wide variety of rules which are designed to set boundaries on the independent exercise of authority or to prevent abuse of discretion, and there was no need for the state to develop the institutions, practices, and enforcement mechanisms that would permit it to police such boundaries. Recognition of the absence of such "proscriptive" norms explains

another portion of the confusing debate over the concept that "everything not prohibited is permitted." If there are few generalized prohibitions, this principle appears, indeed, to be a recipe for chaos.

As Feldbrugge accurately describes, these systems were designed for and functioned around a system of central control. As central control is reduced, the old systems and mechanisms will work increasingly less well. The most careful study of the technology, patterns, and effects of this centralized legal regulation will not eliminate this problem nor is it likely to yield perfectly painless strategies for change. However, it is important that a generalized assumption that disorder must follow a reduction in central political control not be permitted to blind analysts to the possibilities for minimizing the problem that are offered by an understanding of the existing structures and a respect for the desires, opinions, and instincts of those operating within them.