

4-1-1951

Justice in Russia. By Harold J. Berman.

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Recommended Citation

Richard Arens, *Justice in Russia. By Harold J. Berman.*, 1 Buff. L. Rev. 95 (1951).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol1/iss1/31>

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BOOK REVIEWS

In the spirit of the author's own introductory comment, it should be borne in mind that the study of procedural jurisprudence strives for a higher goal than the imparting of a working knowledge of procedural devices and their functions. A presentation of the subject in dogmatic fashion which highlights the hard and fast statutory rules rather than the problems would paralyze the imagination and deaden the interest of the student in the material to be taught. It would operate directly contrary to the educational purpose of the teacher unless the stimulus for a deeper understanding of the subject is provided in some other manner. Instruction in procedural law must go beyond the intricate mesh of statutory details to the theoretical and philosophical basis of the rules of operation which compose the system of procedure. The understanding of this basis is indispensable to a comprehension not only of the adjective law, but also of the substantive law. By familiarizing the student with the background and history of procedure and by illustrating different approaches to the solution of procedural problems under various systems of procedure of our days and of the past, he will acquire a foundation for appraising, criticizing and evaluating the existing rules, rather than accepting them as dogmas. This will accomplish one of the primary objects of all legal teaching, namely, the sharpening of the student's sense of justice through a critical and rational approach to the law in all its aspects.

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Adolf Homburger

JUSTICE IN RUSSIA. By Harold J. Berman. Cambridge: Harvard University Press. 1950. Pp. 322. \$4.75.

JUSTICE IN RUSSIA, the latest in a long series of writings on the subject of Russian law and politics, attempts to cut to the heart of Russian legal thinking in three swift, bold strokes.

Covering each important field of Soviet law, it presents an incisive and well written study with an appeal alike to specialists and laymen. The approach, as stated by the author, is three dimensional. The development of Soviet law is to be sought in the requirements of a Socialist planned economy, the operation of the Soviet "parental" concept of a man as a child to be guided and molded as a ward of the state, and in the influence of Russian history.

The reviewer is not altogether convinced of the validity of the three dimensional outline as the most useful basis of a thorough study. Stratification of legal and social phenomena under these headings may well prove unwieldy in the absence of more carefully selected operational indices. It is difficult to see, for example, that the arbitrary character of the notorious secret adminis-

trative tribunals of the M. V. D. emerges from the element of socialism in Soviet society as one might infer as the author's conclusion from the discussion of these tribunals under that heading. It appears much more probable that the use of secret tribunals of this type is symptomatic of the general psychology of totalitarianism without definite relevancy to its ideological underpinnings. Evidence that socialistic planning in and of itself tends toward such evil is not altogether persuasive at this stage. The reviewer finds it difficult moreover to accept with complete conviction the analysis of Soviet legal manifestations from the perspective of "parentalism." The "parental" notion which to the author appears to be endowed with a peculiarly Russian flavor appears to be little more than a characteristic element of most totalitarian judicial approaches. Despite the fact that the author seems to admit that other perspectives might have relevancy, insufficient consideration is given to a contemplation of Soviet official action from the standpoint of the psychological perspective of the totalitarian regime of the type, for example, suggested by Harold Lasswell in his developmental projection of the garrison — prison state. No flaw, of course, can be found in a survey of the history of legal development for purposes of general orientation. One is startled, however, to discover an attempt at the description of "the spirit of Russian law" in thirty-six pages.

A major flaw emerges from what seems to be a misplaced emphasis on the alleged uniqueness or originality of facets of the Soviet legal system.

Unique characteristics are attributed to the imprint of Byzantine thought. The linkage of Byzantine inspiration to Russian legal development, however, seems occasionally tenuous. The assumption is made by the author that reliance upon positive legislation and the enhancement of the subjective elements of legal doctrine were owed predominantly to Byzantium.

No evidence exists to bear out the author's assertion that "the whole concept of legislation as a primary source of lasting law emerged in Byzantium." No evidence exists to sustain the contention that the subjective elements of intent have been the result of Byzantine as distinct from earlier Roman legislation or judicial interpretation. No evidence warrants the inference that it was the concept of unjust enrichment that was primarily derived from the Byzantine law. Fundamental changes had been produced early in Roman Republican times by way of legislation. One need only point to the role played by the Senate and the Comitia Tributa in Republican legislation, the subsequent legislation by what became virtually the right of imperial rescript as a result of the *lex de imperio*. It may serve to recall that a wholesale codification of the marriage law had taken place under the early Empire and that legislation by the Emperor himself had become fully recognized by the time of Hadrian (117-138 A. D.). So pronounced was the interdependence of

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Western Roman and Byzantine legislative systems that it became necessary as late as 439 A.D. through the *Codex Theodosianus* to provide that Western Roman legislation was no longer to be binding on the Empire in the East and conversely that Byzantine legislation was not to be binding upon the Western Empire. Identical inaccuracies mar the author's conclusions concerning the uniqueness of the Byzantine contribution in the requirement of the mental elements of intent. The concept of *Dolus*, a conscious infringement of the law, was known in early Roman Republican times and was supplemented in imperial days, initially by the concept of *Culpa Levis*, a negligent wrongdoing, and, later, by *Culpa Lata*, a wilful wrongdoing. It is similarly clear that the concept of unjust enrichment was known long before the Byzantine legislation which the author assumes to have had the unique influence on Russian law which he claims.

A further example of similar overemphasis is provided by the suggested inference that invocation of the doctrine of analogy in Soviet criminal law constituted "revolutionary innovation." While the author is clearly aware of the multiplicity of historical precedents, the reader may all too easily be misled into assuming that the doctrine of analogy represents an original Soviet contribution to criminal law. It would have served to point out that the doctrine of analogy has been an almost inevitable part of authoritarian criminal legislation since medieval times. Thus, for instance, the doctrine had been officially incorporated into the so-called "Carolina" criminal code of the German *Reich* as early as 1532.

Despite these shortcomings, the reviewer believes that the author has performed a pioneering task in the scholarly and illuminating appraisal of the Soviet legal system. The accounts furnished of aspects of the Soviet legal framework such as labor law, family law, criminal law and legal psychiatry are uniformly excellent and provide a wealth of vital factual detail which cannot be found in any single available volume. While some of the conclusions are controversial, they are stimulating and as a rule adequately supported by the material adduced.

The defects, of course, are many. None the less *JUSTICE IN RUSSIA* is probably the best book in English on its subject matter.

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