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INSTITUTE OF LEGISLATION AND COMPARATIVE LAW
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JUSTICE

IN THE MODERN WORLD

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This monograph is devoted to the subject of justice. Principal attention is given in the work to the organization of judicial power, procedure, the judiciary, procedural guarantees, and rights of the individual.

The evolution of justice is analyzed against the background of various historical civilizations and epochs, making it possible to more fully examine the tasks and functions of courts in the modern world. The basic national and international models of justice are described with special reference to the Russian model of justice, its principles, its institutional and procedural fundamentals, and its future development, including the development of judicial procedure.

This publication is intended for lawyers, scholars, teachers, postgraduate students and students of higher education, as well as for all those interested in questions surrounding justice.

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INTRODUCTION

The theme of justice rarely is the subject of specialized scientific research. In general, both Russian and foreign scholars focus on questions of organization of judicial power, judicial procedure, the judiciary, and procedural guarantees and rights. However, the consideration of justice provides a great opportunity for allowing not only the identification of the purposes, tasks and internal content of judicial power and procedure, but possibly the re-examination of many ingrained traditional notions in this field.

The unceasing discussion in Russia and other countries concerning the tasks of judicial reforms, the necessity of adjustments in legislation, and the means for the improvement of the application of law confirms the necessity for expanding doctrinal studies of the notion of justice. Critical analysis is often not sufficiently substantiated. Nevertheless, taking into account the present problems this is useful in so far as we are compelled to seek and find new ways to overcome the gap which exists between the ideals of justice and practice of effectuating it.

Notions of justice were formed long before the modern system of judicial power. They found expression in the pages of holy scripture, scholarly works of philosophers and jurists of the ancient east, the Roman Empire and the States of western and eastern Europe during the Middle Ages. The ideals of justice were extolled in folk legends and songs and reflected in works of the great writers of the past. They all, to some degree, were developed in modern concepts of justice. And, by tracing their influence, it is possible to reveal not only the general but also the particular features of the existing models of justice, including the Russian model.

There exist many approaches to the definition of justice.

Thus, in the social consciousness of pre-revolutionary Russia, justice was understood as “a just court, decision according to the law, according to conscience ... truth”¹. Just such a perception of justice was reflected in the Edict of Alexander II to the Ruling Senate of 20 January 1864 concerning judicial reform established the goal of introducing in Russia “a court expeditious,

¹ V. I. Dal', Толковый словарь живого великорусского языка [Interpretative Dictionary of the Living Great Russian Language] (1863).

fair, compassionate, and equal for all”¹. Many works of pre-revolutionary jurists – N. S. Tagantsev, G. A. Dzhanshiev, I. A. Foinitskii, and others – were devoted to identifying these criteria.

The 1917 October Revolution broke this tradition, subordinating judicial procedure to the requirements of the revolutionary struggle and political expediency. Nevertheless, there was never a complete rejection of the traditional ideas of justice even in the most dismal years of Soviet repression. The criteria of justice operated, although to a limited extent, in the sphere of civil procedure (in particular during examination of labor and many property disputes)² and during the consideration of individual categories of criminal cases. Gradually, a Soviet doctrine of justice emerged, part of the ideas and principles of which survive in our time.

In the social consciousness of Great Britain at the beginning of the twentieth century the idea of justice was understood “[insert original English text]”³.

Modern understanding of justice in common law countries in general is reduced to the “balanced and just application of laws” or to “the maintenance or administration of what is just, especially by the impartial adjustment of conflicting claims or the assignment of merited awards or punishments”⁴.

The notion of justice is treated in much the same way in the States of the continental tradition of law (France, Germany, Spain and others)⁵.

Another understanding of justice is inherent in the States of Islam, Buddhism and certain other religious traditions of law where the judicial resolution of cases is considered to be the performance of Divine will⁶.

On the whole, for legal communities of the modern world the absence of a formalized approach to the definition of justice is typical. A desire for the consolidation of its separate parameters prevails. In particular, legislation of practically all States indicates that justice can be effectuated only by a court in accordance with established systemic jurisdiction within the periods and in compliance with legislatively consolidated rules; that judicial cases must be examined by independent and impartial judges; that a court must strive

¹ Quoted from Хрестоматия по истории Отечества и права [Anthology on the History of Fatherland State and Law] (2003), p. 299.

² See, for example, A. G. Goikhbarg, Курс гражданского процесса [Course of Civil Procedure] (1928).

³ *Webster's New International Dictionary* (1909).

⁴ Free Dictionary by Farlex. URL: <http://www.thefreedictionary.com/justice>; Merriam-Webster Free Dictionary. URL: <http://www.merriam-webster.com/dictionary/justice>.

⁵ See *Dictionnaire étymologique de la langue française* (Paris, 2008); W. Kymlicka, *Les théories de la justice: une introduction* (Paris, 2007); *Teoría general del Derecho* (Madrid, 1991).

⁶ For more detail, see V. I. Lafitskii, Сравнительное правоведение в образах права [Comparative Law in the Images of Law] (2011), II.

towards establishment of the truth and observe general principles of justness, defense of rights and freedom of the individual, equality of all before the law, glasnost and adversariality of the judicial proceedings; that judicial decisions must be based on norms of the constitution, laws and judicial precedents.

The approaches of authors of the present monograph recognize as an initial position that justice is a product of many centuries of State and legal development reflecting the peculiarities of that development, the prevailing ideological tenets and spiritual traditions of society. In the most generalized form, justice is reflected in the basic principles of court organization and judicial procedure.

The authors of this monograph analyze the development of justice in various civilizations and historical periods. Such an investigation makes it possible to more fully identify those tasks and functions which are placed on courts in the modern world.

One section of this work is dedicated to basic national and international models of justice. The peculiarities of the continental model of justice which has developed in large part in the European States within the framework of codified law is analyzed in detail. Also rather extensively discussed is the model of justice of common law, or the law of precedent, which was originally formed in England and later was taken up by many countries, on the whole its former colonial possessions (the United States, Canada, Australia, New Zealand and a number of other States). Great attention is paid to the Islamic model of justice, the source for which became the Koran and the Sunna. At present, it operates in one or another form in approximately forty States in the world, including Saudi Arabia, Iran, Iraq, Jordan, United Arab Emirates, and Egypt.

The study of universal and regional international models of justice adds to this picture.

Against this historical, theoretical, and comparative legal background, a variegated analysis of the Russian model of justice is given, exposing its inherent principles and institutional and procedural foundations and modeling its future development, including in the sphere of non-judicial resolution of disputes.

Many questions which are the subject-matter of consideration in this book are of a tentative and controversial character and reflect the scholarly positions of the authors of the respective sections. Debate on certain questions has occurred even among the authors of this book irrespective of whether they are part of the scholarly or judicial community. This is natural because science cannot develop without discussion and disputes in which truth is born.

Part One

JUSTICE: EVOLUTION, SIGNIFICANCE AND FUNCTIONS

Chapter 1. Development of Doctrinal and Legislative Basic Principles of Justice

The concept of justice as a requirement for the just and equitable resolution of disputes by competent courts within a framework of established procedures arose many centuries ago.

Sources of this concept can be found in the Rigveda, in the sacred text of the Indo-Aryan peoples, and in the Avesta, a book of prophecies and teachings of the ancient Persian prophet Zarathustra, in the Bible, the Koran and other sacred writings¹.

The great philosophers of the past laid the foundations for concepts of justice: Confucius, Plato and Aristotle, the Blessed Saint Augustine, Thomas Aquinas, Ibn Khaldun, Al-Marghinani, N. Machiavelli, Erasmus of Rotterdam, Thomas Hobbes, J. Locke, C. Montesquieu, Voltaire, Kant, G. Hegel, Ivan Pososhkov.

The dreams and supplications for justice resound in many ancient works of literature: in the *Book of Songs* of Confucius, the ancient epic *Ramayana* and *Mahabharata*, in the canonical collection of the ancient Japanese poetry *Manyoshu*, in the immortal verses of the Islamic poet A. Ferdowsi and A. M. Sanai, M. Jami, and A. Navoi, in the collection of Scandinavian sagas “Orb of the World”, and in other great ancient literature.

Many ancient rulers tried to embody these requirements, ideas, and aspirations.

§ 1. Justice in Legislation of Earlier Periods

According to legend, the legendary ruler of ancient China, Shun (some scholars believe he lived in the twenty-second century B.C.) is regarded as

¹ For more detail, see V. I. Lafitskii, Суд в борьбе за собственность и власть [Court in the Struggle for Ownership and Power] in E. V. Novikova (ed.), Верховенство права и проблемы его обеспечения в правоприменительной практике [Supremacy of Law and Problems of the Ensuring Thereof in Law-Application Practice] (2009).