

AT THE HARRIMAN INSTITUTE

Volume 2, Number 12

Toward a Civilized Legal System

Although reform in the field of Soviet law is accelerating, George Fletcher cautioned that there is "unstable cause for rejoicing." Fletcher, Beekman Professor of Law at Columbia University, recounted and interpreted experiences from his recent trip to the Soviet Union for students and faculty of the Harriman Institute February 21, 1989.

Personalized Justice

Arriving amidst panoramic change in the political and economic landscape in the USSR, Professor Fletcher decided to approach legal reform by "thinking small." He "set out to find out how ordinary criminals are tried for their crimes," and managed to observe a corruption trial in Kiev. The nature of the crime — embezzlement of state property — made this "the kind of case in which the Party has an interest in seeing its latest policies carried out."

The defendants in the case had been unable to meet a government production quota at the clothing manufacturing plant where they worked because the raw materials were not available. To solve the problem they took funds from their budget and bought materials from an outside supplier. This effort entailed bribing officials capable of furnishing the raw materials. To Fletcher, it just sounded like "good business judgment" until he found that the defendants had pocketed some of the money. To the Kiev court, any such financial misconduct was a grievous crime, subject to capital punishment.

The circumstances of the trial itself shed light on current Soviet legal practices. For example, one of the defense lawyers told Fletcher that his client had been held in preventive pre-trial confinement for a year. Fletcher noted that criminal procedure "explicitly limits pre-trial confinement without bail to nine months." Ad-hoc extensions, once applied only in special high-profile cases, have become routine. The lawyer claimed there was no breach of legality,

since the Supreme Soviet had extended the period of confinement "by a special decree."

This kind of "personalized justice" troubles some Soviets. Yuri Feofanov, a leading *glasnost'* journalist, attacked it as an abuse designed to wear down defendants and extract confessions. "It's clear that precise legal limits embarrass the regime," he wrote in *Znanie*.

Presumed Innocent?

Fletcher doubted that the defendants could have been acquitted. The acquittal rate in Soviet courts is about one percent, reflecting an "entrenched pattern of deference" to the procuracy, or prosecution. The office of the procuracy enjoys much higher prestige than the courts and the judges, and the prosecutor's accusation functions as an official condemnation. Liberal legal reformers, mainly in Moscow's Institute of State and Law, "are trying, in cryptic articles, to fashion a genuine, adversarial trial," in which judges listen impartially to evidence from both sides.

"The code word for this struggle has been the presumption of innocence," Fletcher said. Legal reformers in the 1950's tried to work the concept into Khrushchev's 1960 codes. Although they failed, the battle over this concept continued to rage and has at some times been explosive. When M. S. Strogovich, a liberal legal scholar, used the phrase in a textbook, the militia seized the book at press and ordered the offending page removed. Strogovich was vindicated at last summer's 19th Party Conference, where one of his former students, Mikhail Gorbachev, "expressly endorsed the presumption of innocence as a foundational principle of Soviet criminal justice."

Yet the adoption of the presumption of innocence will not affect the balance of power in criminal trials, because Soviet lawyers do not aggressively prepare independent cases for the defense. Lawyers have the right to investigate cases and interview witnesses, but officials have told



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Professor Fletcher that "privately interviewing witnesses would be a breach of professional ethics." This bodes ill for the establishment of adversarial trials. Soviet lawyers have little to offer their clients, for while they "stand in opposition to the procuracy at trials, they constitute a loyal opposition."

The only way to shift the balance of power away from the procuracy is to grant suspects the right to bail, and to give defense counsel the "authority and competence to conduct their own investigations. This is not likely to happen."

The Death Penalty

Although statistics are strictly secret, Fletcher learned that in recent years the death penalty has been imposed almost exclusively for homicide. Under the current code, sixteen crimes are punishable by death; the proposed new code restricts capital punishment to egregious offenses against the state and the most serious versions of homicide. Fletcher pointed out, though, that "treason is still defined broadly to include a variety of innocuous acts, such as illegally leaving the country with the intent to weaken Soviet power."

Reformers have been active and successful in cutting back the use of the death penalty. "In their zeal, however, they seem to have made some jurisprudentially reckless moves." The new code exempts from the death penalty minors under the age of eighteen, women as a class, and men aged sixty or older at the time of their sentencing. Fletcher found the exemption for women especially puzzling, and its justification troubling. Legal reformers argued that "women don't get the death penalty anyway," and "we

need to cut back on capital punishment — this way is politically acceptable." Fletcher suggested that the exemption for women "reflects a convergence of contrary sentiments: condescension toward women, and the realization that the lot of Soviet women is so awful that no one would dare deny them this symbolic humanitarian gesture."

The new emphasis on humanism has become "a standard part of Soviet legal rhetoric," to the detriment of the notion of justice. Soviet thinking on criminal justice is inconsistent; although courts are supposed to judge suspects on the basis of their criminal acts, they "use the sentencing scheme as a way of rewarding whole classes of people for their presumptive merits as citizens." This leads Fletcher to believe that the Soviet criminal justice system remains "an irrational and repressive machine."

A New Liberalism

"There now seems to be an almost coerced consensus in favor of liberal principles," Fletcher observed. The concept of anti-Soviet intent has changed radically, and "parasitism" as a crime is on the verge of being abolished. Fletcher doubts that legal scholars have been "closet liberals" all these years; he attributes the drastic turnaround in legal thinking to cues sent by the top leadership. The Party still defines which opinions are fashionable.

Even so, the legal reform movement seems to have taken on a life of its own, with reformers pushing their ideas as far as they can. "They, as well as Gorbachev, know what a civilized legal system looks like, and they are trying to bring one forth from the agony of their past."

Reported by Rachel Denber

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