NCSEER NOTE

This is the twelfth and last in the series of Council Reports which, in all, contain a book, by the same authors and probably with the same title, forthcoming, M. E. Sharpe. This Report concludes Part VII: The End of the USSR and the Rise of Russia, and consists of an Introduction by Donald Barry; Chapter Nineteen, My Days as a Judge; and Chapter Twenty Will Russia Adopt the Jury System?, both by Yuri Feofanov.

Report #1 in this series (same main title and authors) distributed on September 29, 1995, contains the Executive Summary of the book, its Table of Contents, the Preface, and the Introduction, all by Donald Barry; Part VIII the Conclusion: Arbitrary Justice Waning?, by Yuri Feofanov; and a brief note About the Authors.

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CONTRACTOR: Lehigh University

PRINCIPAL INVESTIGATOR: Donald Barry

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VII. THE END OF THE USSR AND THE RISE OF RUSSIA

Donald D. Barry

Introduction

Feofanov's Chapter Nineteen (My Days as a Judge) can be read both as a companion to his Chapter Twenty on juries, and as a piece in its own right. He includes it in this part of the book in order to describe a contrast between two institutions that bring the lay element into the judicial process: the people's assessors and the jury. In Feofanov's opinion the latter is clearly the superior institution.

People's assessors were a fixture of the Soviet period and are still used in Russia today. Two assessors sit with a professional judge in all cases of original jurisdiction. Chosen by their work collectives for five year terms, assessors perform their duties for no more than ten days a year. They work with the professional judge in resolving all questions relevant to a case. The widespread view has long been that since assessors lack the training and experience of the professional judge, they tend to obediently follow the judge's lead. Thus, the independent function that a jury might provide is not present.

When Feofanov describes himself as a judge in Chapter Nineteen he means a judge from the people, a people's assessor. He was chosen by his colleagues at Izvestiia (but really through the intervention of the secretary of the newspaper's Communist Party committee) to serve in this capacity. He thereby learned firsthand what he had already observed as a reporter with long experience covering the courts: that people's assessors were expected to do little, and that they usually conformed to expectations.

His purpose in discussing the cases he participated in is not so much to recount details as it is to point to particular features, especially defects, in the system. He expresses doubts about the institution of volunteer people's guards, druzhinniki, who he thinks often brought to their volunteer work a presumption of guilt. He criticizes the arbitrariness of the accusatory forces, the investigators and prosecutors who, he thinks, possess far too much authority in judicial proceedings.

When courts were able to emerge from under this influence to some extent, in the late 1980s, and begin to render more independent opinions, a complaint familiar to judges in the United States began to be raised: that they were soft on crime. To this Feofanov gives a response in Chapter Nineteen that could serve as the coda for much of what he has written in this book: courts are not supposed to fight crime; that's not their business... judges have
just one job: to determine with as much precision as possible whether an accusation has been proven or not. But neither the authorities nor the people have become accustomed to this fact.

A new legal institution created during the post-Soviet period is the jury system, the subject of Feofanov’s final chapter. As Feofanov tells us, the idea of adopting the jury system was introduced during the euphoria of perestroika in the late 1980s, while the USSR was still in operation. The use of juries had been cautiously put forward even earlier by individual scholars. He believes, however, that the conditional way that the system was adopted in the USSR and the partial introduction of juries in Russia, only in certain regions of the country in the beginning, indicate that much of the judicial and legal establishment is interested in keeping the system essentially as it is.

Since Feofanov considers juries an important democratic element in the judicial process and more important, a potential contributor to truly independent courts, he would like to see Russia move more vigorously toward their wide use. He views the adoption of the jury system in Nineteenth Century Russia as one of the great achievements of the Judicial Reform of 1864.

It may be that in his enthusiasm for reform Feofanov overestimates the efficacy of juries and romanticizes somewhat about their democratic promise. Certainly many Western observers, even champions of the jury system, see them as often flawed institutions. Moreover, the difficulty of providing sufficient jurors to hear cases in Russia may become an obstacle to the use of juries. Reports in recent years of court cases not going forward because of an acute shortage of people’s assessors (two people’s assessors are required for a case, whereas the law on juries calls for twelve jurors) suggests a potential problem. To deal with this problem a law was adopted in 1992 permitting some cases to be decided by a single judge, without the participation of people’s assessors.

Still, considerable activity with regard to the jury system in Russia is under way. The scholarly literature on the subject is growing. The Russian Federation Supreme Court has recently written a decree on jury trial cases that indicates how complex the problems in this area have become. And the American Bar Association, among other organizations, has been conducting training programs on juries since 1993.

Feofanov says in Chapter Twenty that the jury system in Nineteenth Century Russia was introduced not ‘in small measured steps’, as the authorities at first wanted, but through a ‘leap’, which they had opposed. And it worked. It may be that a more gradual approach to the institutionalization of the jury system in Twentieth Century Russia will be needed.
NOTES


CHAPTER NINETEEN. MY DAYS AS A JUDGE

Yuri Feofanov

To begin with I'll talk about a case that I covered as a newspaper reporter. This was an unusual proceeding. Two gangs of youngsters had fought -- "West-Side Story" on Greasy Alley. One of the youths had been killed in the fight. A frail seventeen-year-old had confessed during the investigation and again in court:

"I stabbed him with a knife."

So everything was settled—confession is the queen of evidence! Confessions, of course, were supported with much other evidence and testimony . . .

And then the whole iron chain of proof collapsed. The clever defense lawyer found one contradiction after another; the procurator demonstrated courage in refusing to pursue the charge of murder against the youth in order that a penalty that might be given to an adult—capital punishment—could be avoided.

I did not commit to paper one part of the trial. It wasn't a very serious matter, but it still involved somewhat shocking behavior from the bench. This is what happened. When the main accused was giving his testimony about how he plunged in the knife, a people's assessor, a man already up in years, broke in with a remark that did not follow established procedures:

"You're lying about this, young man. How could you, a puny fellow, use a knife against a student that stood over six feet in height?"

The court was thrown into confusion. I assumed later that the chain of evidence was broken not by this "tactlessness" but thanks to the wise work of all of the participants in the proceeding. One could assume anything, of course, but I blame myself for not thinking this point through: it may be that this unprofessional doubt on the part of the people's assessor turned everything around. Up until this point there had been a long professional investigation, eyewitness accounts, expert testimony. And then—just one doubt. And we all know that a young child was the only one who saw that the king was naked.

All of us also remember the remarkable American film "Twelve Angry Men". The whole movie took place in the jury room. There was virtually complete agreement as to the guilt of the accused. Just one juror expressed a doubt about an insignificant episode in the chain of events. And this was only a doubt. But the verdict, in the end, was to acquit. Not because they believed in his innocence. But because they were unsure of his guilt.

Through all times judicial errors have riveted the attention of the public. And this is understandable: even one case of convicting the innocent is cause for concern. How do these
nightmarish cases arise? There are a number of causes. The criminal dishonesty of those performing a search or other aspects of the investigation; the negligence of judicial officials, including judges; the indifference of appeal courts. There are numerous opinions as to how to increase responsibility, prevent negligence, and reorganize the chain of judicial command. These suggestions may be intelligent, informed, and constructive. But I have never heard a serious criticism of particular people’s assessors when they have participated in the handing down of a clearly unjust sentence. It is generally said of them, though, that they go along automatically with the judge, easily giving their assent to professional opinion.

We remember well the so-called "Vitebsk Case." In Vitebsk (Belarus) a sexual maniac had been at large for some time and had killed fifteen women. The situation became so serious that the Communist Party Central Committee of Belarus issued strict instructions to find the criminal at all costs, or otherwise the top police officials could forget about their jobs. But for a long time the real criminal could not be found. A number of suspects, mostly drunks, were brought in. And 13 of these innocent people were convicted and sentenced—one to death. Not one of the people’s assessors ever expressed any open doubt, voted against, or wrote a special opinion. But when the real criminal was finally caught and the 13 sentences were analyzed, it became clear that the doubts that had existed in these cases should have prevented the courts from making these terrible errors.

Another point. Sometimes sentences are so clearly out of line with the gravity of the act that one doesn’t know what to say. Why such judicial cruelty? Even after the judicial reforms of the Khrushchev period had already taken place, and the paralyzing fear of authority that characterized the public in the past had largely disappeared, some terrible sentences were handed down. And I am talking here not about political trials, but about regular criminal cases. Three collective farmers traded two bags of cattle feed for two bottles of vodka. They were required to compensate for the feed, and a month later the procurator brought a criminal case against them and the court sentenced them to eight years in prison for stealing kolkhoz property. Why? The judge explained to me that a campaign aimed at protecting socialist property had been started and that a show trial was needed. After I wrote an article about the matter the sentence was reviewed and the farmers were given conditional sentences, thus avoiding prison.

The judge’s position was explainable—he had to answer to higher-ups who give him orders. If he didn’t listen he could say goodbye to his job. But people’s assessors? How could they vote for such a harsh and clearly unjust sentence?

The answer to this question involves a problem with Soviet democracy, which the communist authorities described as being incomparably higher than bourgeois "false-
democracy. " The secrets of the communist regime, which made the people unanimous, with a oneness of mind, may be found in the duality of potential actions on the one hand and practical reality on the other. Under the law you have a certain right, but in fact there is no way to realize that right. To explain this phenomenon, it is necessary to return to the years of terror, to the inculcation of communist dogmas in the consciousness of people, to the harsh stamping out of any and every heresy. In religious countries and in religious ages one believed voluntarily in God. But try in the circumstances that I am describing to not believe.

The Soviet writer Aleksandr Yashin wrote a story called "Levers" years ago, at about the time of Khrushchev's secret speech in 1956. Although it was published through official channels, it was condemned by higher-ups. Its essence was extremely simple but revealing. In a certain kolkhoz there was a party cell made up of five or six persons. These rural communists (a milkmaid, a tractor-driver, etc.) had to discuss the condition of the kolkhoz at their meeting. Before the start of the meeting they were exchanging opinions: this was poor, that didn’t make any sense, the regional committee was issuing stupid directives, and so forth. But the meeting of the party committee started and these same people said altogether different things: they discussed the successes of the farm system, the fulfillment of the plans and the tasks of the day. It was as if the later discussion had completely replaced what was said earlier. And there wasn’t even a higher-up from the regional committee present. They were just fully programmed to observe the rules of the game.

Something similar happens with people's assessors. A personal opinion is one thing, but fulfilling one's duty is quite another. And in addition they consider themselves under the supervision of the judge. They can render the decision that they consider just. But what they normally do is go along with the decision made by the judge. What compels them to submit to this stereotype of amoral behavior? To be indifferent to the fate of persons by going along with the judge?

To answer this question I decided to arrange to occupy the judge’s bench myself. To view the system from the inside. When it became Izvestiia's turn to put forward candidates for people's assessor, I talked with the secretary of our party committee and was chosen at the first meeting.

I want to discuss several episodes involving my judicial activity.

The first case that I got to hear as an assessor was quite simple. All of the accusations were confirmed during the course of the trial, the defendant admitted everything, and indisputable evidence against him was sufficient. Vladimir Varezhkin had taken some valuable goods from a rental store, sold the goods and pocketed the money.

"Do you admit your guilt?" the judge asked him.
I do."
Then tell us of your criminal acts in more detail."

What is there to say? I had a fight with my wife, left home, got hungry but had no
money. I saw a rental store, walked in, and the idea came to me . . ."

Why didn't you have any money?"
I hadn't worked in six months."

Why?"
My boss and I swore at each other, and so I stopped going to work. I . . ."

And they fired you for being absent?"
Probably . . . I never went back."

When and how did you begin to steal?"

I rented a backpack because I wanted to get away from my wife and live in the woods.
Then I rented a camera. I wanted to take some pictures. Of nature. And then a guy I know
asked me to sell him the camera. I got 40 rubles for it. I was tempted into doing it."

So the sale took place in the woods?"

No, right by the store."

He was short and slightly built, looked shriveled up and depressed. He worked at the
First Ball-Bearing Plant as an adjustor of grinding machines. He had intermediate education.
This fellow's life had not gone well. After the army he returned to Moscow, but the girl he
had written to while away had married someone else. He then met the girl who would become
his wife. But his mother and stepfather were against their marriage. Vladimir ignored their
advice and married her anyway.

"They didn't love me," complained Vladimir, explaining his refusal to listen to his
parents. Especially against it was his stepfather: "First get on your feet and then get married.
How are you ever going to support a family?"

"But look," I said to the defendant, "maybe your stepfather wasn't so wrong. A family
does have to be fed."

What do you mean fed? Lenka has a mother.""What does a mother have to do with it? You're the head of the family. Your stepfather
told you right."

Ah," he said . . . "They didn't even provide enough to drink at the wedding."

Truly, the fact that I was occupying a responsible position is the only thing that
prevented me from saying to this young man, on a man-to-man basis, what I really wanted to
say. The pity that I originally felt for Varezhkin disappeared. It was almost impossible to
contain my exasperation at such a weak and dependent person.
We established all of his criminal activities. Varezhkin sold a television set, a tape recorder, and a camera; all cheaply, for a quarter of their value, to the first people he met. At first he used the money for food, and then for vodka. This dejected-looking fellow became a kind of specialist at his crimes, and was very inventive in carrying them out. In one rental store he said that he was going on a trip with a student group, and they gave him travel equipment. In another he got a television set, claiming that he was recently married and didn’t have the money to buy expensive things. In a third he explained that he was an animal lover and wanted to take pictures of animals at the zoo, and he got a camera.

All the charges against Vladimir Varezhkin were proven, and his character traits were fully exposed in the courtroom proceedings. When we left the courtroom and settled in the deliberation room to decide on the sentence, several differences of opinion arose regarding punishment.

"This is a circuit session, so we should make the punishment a bit more severe," one of us suggested.

Fortunately, this argument didn’t have any influence. But it was expressed. And it shouldn’t even have been in our thoughts, since it is both illegal and amoral. Wherever the court session is taking place, whatever the statements aimed at educating the public that might have been expressed, and however strong the anger of the public might have been--none of this should influence the principal consideration, that is, the sentence. The circumstances of the case may have an influence. But they should in no way confuse the court into thinking that since this is a circuit session, the court is expected to render unusual decisions, with particular kinds of sentences. It’s just wrong, no matter what noble educational objectives might be involved, to have them take precedence over a particular individual’s fate. If we, the judges, start to think about how our sentence will look and not about whether it is just, then we depart from the very idea of justice.

The American reader probably does not have a very clear conception of what a circuit session was. This was a normal court session, with all of the rules and procedures, and with the regular participants, just as provided for by law. But the sessions themselves took place not in the regular courtroom, but on other premises, such as a factory, a collective farm, or an institute. The law permitted the participation in the proceedings of a public accuser and a public defender, who were chosen by an appropriate peer group of the defendant or kollektiv. These accusers and defenders could also participate in court proceedings held in regular courtrooms. The objective of these circuit sessions was to impart a particular educational, preventative element to the proceedings. This was based on general communist ideals and the direct views of Lenin, who saw the court as a kind of educational or training institution. He
wrote that the court is a weapon for training and discipline, that from court proceedings it was important to learn lessons of public morality and practical politics. And so this was the basis for the idea of circuit sessions. Decisions in these cases were to be reached in secret. And sentences were to be according to the strictest provisions of the law.

Of course this practice was, in its essence, anti-law, contrary to the ideal of justice. Its origins can be traced to revolutionary times, when show trials against the enemies of the regime were being arranged. Such trials continued through the time of the three open trials of 1936-1938 against Zinoviev, Kamenev, Bukharin and others. During the time of the Brezhnev stagnation all of these revolutionary innovations were transformed into regular bureaucratic routine, and judicial measures of this kind were applied in order to fulfill quotas. Plans for circuit sessions were given to courts by the ministry of justice, with the approval, of course, of the party leadership.

But let me return again to my previous thought, that a lot depends upon the stand taken by people’s assessors. Although we heard the case of the unfortunate Varezhkin in a circuit session, we did not give him a jail sentence but merely required him to compensate for the costs of what he stole. And nobody reproached the judge because she upset the educational significance of the circuit session. In simple criminal cases the party leadership normally did not interfere.

I want to discuss one other case from my own experience. This involved a trial of currency speculators. The case against them was easily proved and the picture was clear. Among the accused was a young man who worked as a taxi driver. He drove for the currency speculators and in the course of this work made three transactions himself amounting to a total of 50 dollars. This is an extremely insignificant amount, of course. But he had done it more than once, and under part 2 of article 88 of the RSFSR Criminal Code this could carry a penalty of from eight to fifteen years in prison, or even the death penalty.

"He should be given a conditional sentence and put on probation," I said, when we were in the deliberation room. "He confessed to everything, didn’t attempt to hide anything, and he seems to be a decent fellow. Let’s give him three years on probation and let him off."

"What are you saying?" exclaimed the judge, almost as if he’d received a blow to the head. "Three on probation, when the law provides eight in prison as a minimum!" But my colleague supported me. We decided to apply a norm below the statutory minimum to this chap. He was set free right in the courtroom. And nobody struck down the sentence.

What, then, is the point? Does it really take courage to take a stand? This is the great puzzle of the Soviet man. Once two people’s assessors came to Izvestiia with a letter, with a request that it be published. The reason? "We handed down an unjust sentence." After they
had explained what had happened I asked them, "Why did you sign the sentence when you
didn't agree with it? Together you could have achieved a completely different result and
acquitted the man." There was silence. They didn't understand. And then one finally said, "We
did what the judge said to do."

But it isn't always so simple as this. I'll talk about one case that was so mixed up that
the court and assessors found it hard to render a verdict, even though the worst that would
have befallen the principal in the case was the loss of his job.

His name was Aleksei Shutov. He was a doctor with advanced training in medicine. He
was a handsome young man who stood well over six feet tall. He had been fired for an
immoral act and had filed a suit to overturn this order. Before the hearing I had a look at the
case.

The court papers stated: Kandidat of medicine A.G. Shutov was dismissed under point 3
of article 254 of the RSFSR Labor Code—for an immoral act that does not comport with his
educational functions. The dismissal order was issued after the publication in the oblast
newspaper Labor Banner of a story carrying the headline "The Doctor’s Prank." A.G. Shutov
did not bring to the court any information to refute the charges made against him. The local
trade union committee has given it's consent to the dismissal of A.G. Shutov.

So the publication served as the direct source of Shutov’s dismissal. I found the clipping
from the newspaper in the materials on the case that the court had assembled.

<<BEGINTEXT>>

In a private room in the restaurant Golden Corn they were celebrating in high style.
Science was celebrating. The dissertation of the newly-named kandidat S. was awash in
carousing. [That is how the article entitle "The Doctor’s Prank" began. There followed a
detailed description of toasts mixed with moralistic statements such as: The medical people
took the same ‘green serpent’ that they have, and will continue to condemn in their lectures
and conversations. And they took it not without pleasure . . .

Toward the end of the festivities, as the story put it, Shutov appeared. He knocked back
three penalty drinks (for having arrived late) without eating anything.]

Are you driving, Shutov?" asked a garishly made-up young woman, who just a few
hours ago had changed from the sterile white smock of a medic into a dress with a boldly low
neckline.

I always drive, Galochka," answered Shutov, emptying his fourth glass. And he invited
her to go with him. After having one more for the road, they were wished a happy trip,
But the trip didn't turn out to be so happy for some people. And for one man, who was guilty of nothing at all, it nearly ended tragically.

On that day as always, veteran worker Sergei Ivanovich Zinoviev had put in an honest and hard day's work. After his shift he was walking along a quiet street not far from the market. Suddenly behind him the roar of a car could be heard. He didn't have time to look before being struck in the ribs. The force of the blow picked him up and threw him against a building. The scoundrel is going to get away," he thought, and then lost consciousness.

But the scoundrel didn't leave. He was already being chased furiously. Druzhinniki\(^6\) from the local unit, led by activist Nikolai Zubtsov, a leader in socialist competition with the oblast motor depot, were after him. When the car went down a dead-end street and the drunken driver was dragged from the car, the druzhinniki were extremely surprised. The man had been run down... by a physician! Candidate of Medical Sciences Shutov. The doctor had shown contempt for his duty and his honor and had besmirched the gown of the healer.

That's how the news story ended. I didn't find any inaccuracies in it, but part of the story jarred me. And that was where the author reproaches Galochka because she changed her white medical gown for a low-cut dress. But why should she go to the restaurant in her hospital uniform? I recall that when I read the article prior to the court proceedings this part amused me.

Further on in the case record were various required papers: summonses, certificates, receipts. And also a protocol for the questioning by the chief accuser—the senior patrol official named Nikolai Zubtsov, who held Shutov after the man had been knocked down (I will cite from the protocols which contain statements later repeated in the courtroom by witnesses).

Zubtsov: That evening I was the senior patrol officer. At about 11 p.m. we were travelling near the restaurant Golden Corn. A wet snow was falling. I was sitting beside the driver. Suddenly I see a Zhiguli automobile pull away from the restaurant. It seemed to be moving erratically. I gave a signal with my lighted baton for it to stop. It didn’t in the least.

Investigator: Maybe the driver didn’t see your signal.

Zubtsov: Then why did it begin to move away from us? We went after him like they chase spies in the movies. We caught up with him near the market—he was letting out his passengers. And I went up to him. He slammed the doors shut and gave it the gas. My God, and there was a figure walking along the sidewalk. He was struck and flew into the street. I
thought to myself, should I run to the victim or catch the lawbreaker? Somebody was going to
the injured party. And the driver’s caution lights were blinking a bit up the road. We chased
him, however, and I and my partner, Vasya Khazin, went up to his car. All of the doors were
locked. The driver had put his head on the wheel. We knocked, but he didn’t react. I banged
on the side glass, and only then did he open the door.
Investigator: Was he intoxicated?
Zubtsov: Completely drunk! We put him in our car and took him to the station.

I familiarized myself with these materials before the start of the trial. All of it was
confirmed in court. But at that point a defense lawyer was participating, and all procedural
norms were followed. Zubtsov was summoned to court as a witness.

Shutov asked the witness whether he, Shutov, had broken any traffic rules. The witness
shrugged. The lawyer asked the witness whether he had clearly seen Shutov hit the pedestrian.
Zubtsov affirmed by saying, “Just as I see you.” At this the defense lawyer objected, saying
that he could not have seen “as I see you,” pointing out that it was nighttime, the distance was
not the same, and that you, one must assume, were excited since you were involved in a chase.
“And so what?” replied the witness.

Lawyer: “You said here that Shutov’s car ‘hit the pedestrian on the side.’ That is, he
received a blow. From the materials of the case it is clear that the injured party did not receive
any trauma at all. Could that be, given the circumstances of the collision?”

Zubtsov: “What I don’t know, I don’t know.”

I reasoned, and, therefore, correct. But I did ask just one question: “How did things go
at the police station?” “I don’t know,” for some reason Zubtsov answered with annoyance. “I
don’t know, do you understand? That’s not any of my business. Our duty is to bring in the
violators, and then . . . .”

The testimony of injured party Zinoviev was strange. After the accident he did not
appear at the hospital, and did not write any kind of statement. Only two weeks later did he
tell the police that on November 23 around midnight he had been hit by a Zhiguli. He also
wrote that his suit had been ruined, but that since the suit was old he made no claims against
the driver.

In our trial he appeared as a witness. He seemed to be around fifty. His face had a
weather-beaten, ruddy look of someone who spent a lot of time outside. His appearance was
frail and rumpled, as if he had just been pulled from under the car. But he also seemed nice. It
is the kind of niceness that weak and good people have, who wouldn’t hurt a fly and humbly take the insults of others. At least that’s how he seemed to me.

“So . . . they told me that this was the citizen who knocked me down,” Zinoviev inclined his head in the direction of Shutov. “A doctor? No, I didn’t call a doctor. My hands and legs seemed to be okay, so I thought why should I bother the doctors for nothing.”

“Still, would you explain,” I asked, “how the car picked you up and threw you, so that you flew into a wall, and yet you have no bruises on your body.”

“There was a bruise,” said Zinoviev, with a wrinkled smile.

Then during a break I tried to engage the judge in a conversation about the strange injured party. “Of course he’s no longer a victim,” answered the judge. “The criminal case was dismissed, and we’re examining the civil case. You keep trying to get back to details, but we’re not dealing with the car accident. The case is about Shutov’s suit to get his job back.”

But we couldn’t get away from the criminal case. Confusion was introduced into our deliberations by the testimony of two medical personnel who appeared as witnesses. One, a young and gaudy nurse, was summoned to the police when Shutov was brought there. Because he had a cut on his forehead, she wrote out an admission slip for a first-aid station. It said, “Cut wound on the face above the eyebrow.” There was nothing about Shutov being intoxicated. But in the file there was a piece of paper, written by the same hand, and this paper (actually a second copy of the admission slip, written on the back of some kind of official form, where everything was repeated, but with one addition) said, “Cut wound . . . alcohol intoxication.”

“But why did you not mention intoxication on the original admission slip?” asked the lawyer.

“It was just forgetfulness,” answered the sister of mercy in a haughty manner.

An even greater confusion was created by a doctor in the trauma unit, when he stated categorically that he remembered Shutov well and he assured the court that Shutov was sober—the doctor said that he could not have failed to notice, since he worked on Shutov’s face.

There was no doubt in my mind that if this were a criminal case, Shutov would be acquitted. But, as the judge said, the criminal case was dismissed. But how I wish it hadn’t been. I tried to convince the judge and my colleague that Shutov had been fired because he had been driving while drunk. But it wasn’t clear that he was drunk.

“Then why did he try to get away from the patrol?” said the judge, looking at me over his glasses. Yes, why did he? But try to answer this question. Perhaps he drank a glass, but I thought, we’re not trying to put him in prison, it’s just the question of his job that we’re trying to decide. Whether the chase had taken place or not, why didn’t Zinoviev file his petition
immediately, and which of the medical personnel is right, isn’t that the main thing? We know that Shutov tried to drive away. That’s a fact!

I want to jump ahead a bit. After the case was over, and we had rejected Shutov’s plea for reinstatement, I decided as a journalist to meet with Zubtsov. Little came of it, however. He was polite, dry, and precise. But still my impression grew stronger that in court he had not been completely truthful. He had somehow colored the truth in small ways. But I couldn’t refute Zubtsov’s story. However, I did succeed in developing my version not only of the accident but also of—if I can put it this way—Zubtsov himself.

Stocky and broad-shouldered, but unusually ascetic-looking, with bright and somewhat protruding eyes, Nikolai was liked by everyone. He went to work at the motor pool after demobilization from the army. He was on good terms with the bosses and the drivers. When others tried to get out of working an unprofitable route, the boss knew that Zubtsov wouldn’t refuse.

During his first days on the job Zubtsov signed up for the unit’s volunteer people’s guards (druzhinniki). The people’s guards were a public organization that helped the police. At the time units of druzhinniki patrolled the streets. The Communist Party Central Committee had adopted a special decree on the organizations and they were even sanctified by law: the Criminal Code was amended by an article that provided for liability for attacking a druzhinnik. The management of each enterprise and institution was required to provide three extra days of vacation to volunteers. And time on patrol was considered work time and was paid.

The people’s guards did considerable for preserving public order, but as to what the law was and how to preserve it, they were not particularly concerned about this matter. They were given the task of fighting against evil, lawbreakers, and hooligans. Many druzhinniki were ready to turn the slogan “let the ground burn under the feet of hooligans” into reality. And some of the people who joined the druzhinniki were the kind who shouldn’t be trusted with the least bit of power. The problem was that on the streets their power was considerable: they could detain and haul into the police station virtually any citizen. It wasn’t long before some volunteer guard units became hotbeds of lawlessness. In many towns the units were combined with komsomol operational units.

Nikolai Zubtsov was a shining representative of this movement. He sincerely wanted to get rid of hooliganism and drunkenness, but he was convinced that this could be done by any and all means available. The presumption of guilt was his ideology. He had not been told about the presumption of innocence. And he was convinced that on this lively Saturday night everybody must have been drinking. The more so since there had just begun in the city a
month-long campaign for safe driving. A newspaper correspondent had called him that very morning and Nikolai had promised a "hot time."

I met with the injured party Zinoviev, and even bought him a beer. I asked him why he had waited a month to write his petition. He said that he was told to write it, and what to write. I ask who made this request and he said a correspondent.

I quoted above almost the complete article "The Prank of the Doctor." The paper had, through its authority, given the air of fact to a dubious or, at least not legally established, set of circumstances. And everybody went along with it.

During the trial the doctor’s lawyer put the following question to the defendant, the deputy director of the institute, who had signed the order dismissing Shutov: "Don’t you think that a newspaper could be mistaken?"

"Mistaken?" replied the institute representative in surprise. "We are used to believing our newspapers."

So everything began with the newspaper story. But now I knew that the injured party, first of all, was acquainted with the druzhinniki and, second, that he submitted his petition long after the accident and practically at the insistence of the author of the newspaper story. So I decided to talk with the author. I expressed my doubts to him, and he replied that his was a city in which the number of car accidents involving drunken drivers had doubled in the third quarter of the year. "Do you think that Shutov was drinking milk in the restaurant? And besides, comrade people’s assessor, you already had the chance in the deliberation room to insist on your opinion."

In the deliberation room we argued, of course. The judge said:

"Let’s say that Shutov was reinstated. The management and staff of the institute would be annoyed at us for that. We would cast doubt on the story of the oblast newspaper. How would our decision be received there? No, think through what would happen if we came out in favor of Shutov. And if I end up in the minority, I’ll write a special ruling. And if you end up in the minority you have the same right. If you do so you should read through Shutov’s references and work record."

These documents had played a decisive role in the fact that I decided not to write a special opinion, of course. He was really a trouble-maker. And clearly his colleagues jumped at the chance when it looked like they could rid themselves of Shutov.

But this is a different question. It appears that the man was dismissed for a particular immoral act that may not have happened. And we legitimated the whole thing with our decision.
To tell the truth, I don’t feel particularly at fault for this decision, at least from the moral standpoint. Because at work Shutov committed even worse acts than what he was unjustly fired for. I have related this whole story in order to affirm what is fairly well-known: that achieving justice is complicated and difficult. Particularly when moral considerations influence legal consciousness. And this is true with regard to justice anywhere.

But Soviet courts were never neutral arbiters in the full sense. They followed a "revolutionary" tradition and then "socialist" legality, which proceeded from class objectives rather than legal principles. Courts have never overcome this, even after almost a decade of efforts to create a law-governed state. Real change is hard to achieve even though in a formal sense much has been done to establish independent courts.

The local party committees and their influence disappeared. But dependency on the local authorities, the procuracy, and the police remained. Once a case was initiated, a charge was necessary. If a person was arrested, then a prison sentence was expected. Accusations were simply translated into sentences, regardless of what the court proceedings demonstrated. Defense lawyers knew that at the first level they could do little. Their opportunity came at the appeal level.

Acquittals basically were not handed down. Not long ago I discovered a stunning fact: during the period of terror, over 30-40 years, there were acquittals in about 10 percent of cases. But in the period just prior to 1985 the figure was 0.1 percent. Not all people were sent to prison in cases where evidence was insufficient. Often a case was sent back for further investigation and then the procurator would quietly dismiss the charges. In normal judicial procedure there is no practice known as "further investigation." In essence, this was a continuous compromise between the judicial and the accusatory forces, in order not to expose the arbitrariness of the latter.

During the perestroika years all of these arrangements broke down. And the investigators howled that the court was interfering in the fight against crime. In the famous Churbanov trial the court threw out a number of charges, acquitted one defendant, and sent the case of another back for further investigation. This cost the jobs of presiding judge Marov and of the Chairman of the USSR Supreme Court, Terebilov.

Not long ago our criminal statistics began to be published. We learned about the catastrophic growth in crime. The numbers were alarming, but this wasn’t the only thing that people thought about. Naturally, the classic questions of "Whose fault is it?" and "What can be done?" were raised. And "What will the crime rate be tomorrow?" The most frightening conclusion is to say that an "emergency" situation has been created, which demands "emergency" measures. But this is exactly what we hear. Immediately after the publication of
these alarming statistics it began to be said that judges were being too critical in their assessment of charges brought by prosecutors, that they were handing down too many acquittals, sending back poorly-investigated cases, in a word, becoming too "liberal." Even at meetings of officials one hears that courts must "strengthen the struggle against crime." The authorities don't want to face the obvious fact that courts are not supposed to fight crime; that's not their business. No matter how much lawbreaking grows, or how upset the public gets, judges have just one job: to determine with as much precision as possible whether a charge has been proven or not proven. But neither the authorities nor the people have become accustomed to this fact.

NOTES


2. As Feofanov explains below, a circuit session is a court proceeding held not in the regular court building but on the premises of an enterprise, educational institution or other site where a crime has taken place. Use of this kind of proceeding was part of the campaign for popularization of and public participation in legal proceedings. On circuit sessions see Peter H. Juviler, Revolutionary Law and Order: Politics and Social Change in the USSR (New York: The Free Press, 1976), pp. 75-76.


4. Ibid., vol. 4, pp. 407-408.

5. To "take the green serpent" means to drink heavily.


8. On special rulings see above, III. note 1.
The Russian public associates the independence of the courts with the introduction of the jury system. And for good reason. It is more difficult to influence a jury. It decides the main question, the guilt or innocence of the accused, independently from the judge. A positive attitude toward juries has been expressed for a long time, as early as during the Khrushchev period. I said earlier that the presently-constituted court, with two people's assessors, could be an instrument for rendering justice. But the public has no faith in this arrangement; as an institution it was too compromised in the past. Therefore, when perestroika began, even though democratization was proceeding within the framework of the one-party regime, the jury system began to be discussed openly and urgently, not only in the newspapers and at legal meetings but also in parliament, at the first Congresses of People's Deputies of the USSR. The jury system of pre-Revolutionary Russia was discussed, along with a number of other important aspects of pre-Revolutionary law: some of the brilliant defense lawyers of the 19th Century; judgments of acquittal, such as the acquittal of Vera Zasulich, a young revolutionary who shot the Governor-General of Petersburg in protest against arbitrary action; the "Beilis Case," involving a Jew who was accused of committing a ritual murder—a case that shook Russia as the Dreyfus case had France.

The jury system in tsarist Russia became a truly democratic institution, but it didn't fit in well with the authoritarian state and the general lawlessness of the people. A truly new court was instituted on the order of Tsar Aleksandr II, whose name was associated with the great reforms of the 1860s in Russia such as the liberation of the peasants from serfdom, the introduction of zemstvo self-government, the reformation of the army, the liberalization of the press, and the establishment of a civilized court system.

All of these reforms were brought to mind when the more or less democratic Congress of People's Deputies was first elected and the elected representatives began discussing the absolute necessity of ending party control by legal means and moving toward the creation of a law-based state, with an independent court occupying an important place. And, naturally, this would be a court that would provide popular participation in the form of a jury.

This was a time of democratic euphoria. And under its influence changes in the court system were introduced. Or, to be more precise, the idea of such change was introduced. But what happened cast doubt on whether anything would come of it.
What did happen, one may say, was long-awaited but still completely unexpected. At the second session of the USSR Supreme Soviet the jury system was introduced into law. In the 'Principles of Law of the USSR and the Union Republics on Court Structure' an article was included that stated: "According to procedures established by union republic legislation, in cases of crimes where the law allows the death penalty or deprivation of freedom for a term longer than ten years, the question of the guilt of the defendant may be decided by a jury (a broadened collegium of people's assessors)." As can be seen, it was stated very cautiously and indefinitely, so as to seem to introduce democratic court procedure without actually doing it. And what was put in parentheses—"broadened collegium of people's assessors"—ruled out the idea of a real jury. Or did it?

That this was not a real attempt to address a serious matter of state structure, namely, the independence of the judiciary, is evident from how this law was adopted. To illustrate this we will go back to the second session of the USSR Supreme Soviet.

Deputy Aleksandr Yakovlev, a doctor of legal sciences, reported on the draft of the Principles of Law on Court Structure. When deputy Feodor Burlatskii began to ask questions he put forward the idea of introducing juries. Deputy Yakovlev was somewhat upset. The fact was that he was a strong supporter of juries. In private conversations he encouraged me to write about the jury system because it was necessary to push the idea through. But now he was faced with this proposal, expressed on the floor of the meeting, without prior planning, a change that would turn the whole legal system around. I am still surprised at how this lawyer, whom I greatly respect, answered: "that's impossible, but in the interest of getting the issue through . . . [we will allow the watered-down version subsequently adopted]." And parliament voted it in. So the jury system existed for a period of time only on paper. With the demise of the USSR, legislation on trial by jury for serious crimes was introduced in Russia in 1993. It provided that initially jury trials would be used only in certain regions of the country.

I have the impression that like their predecessors at the USSR level, the present leaders in Russia are dubious about this form of independent judicial operation. How did all of this take place after August 1991, when Russia emerged from under the wing of Gorbachev and Lukianov and began to legislate independently? A conception of "judicial reform" was developed, the president presented it to parliament, which adopted a decree approving it. Further, at the Congress of People's Deputies an amendment was made to the Russian Constitution. And again matters were left in a confused state. Article 166 of the Constitution was changed to read: "Civil and criminal cases shall be heard in court on both a collegial basis and by individual judges; in the court of original jurisdiction with the participation of a jury or people's assessors or by a collegium of three professional judges or a single judge." So all
possible forms of procedure were included, which left the courts to operate according to their old practices—which they were accustomed to, and comfortable with. The 1993 Russian Federation Constitution made the matter simpler, but still stopped short of any firm commitment to jury trial. Article 123.4 states: "In cases provided for by federal law, judicial proceedings shall be conducted with the participation of a jury."

I concluded from all of this that few people are really seriously concerned about putting a law on juries into practice. Instituting a jury system in a country that has gone long decades basically without a system of justice, but merely with "socialist legality," involves some considerations of which Western democrats may be unaware. In England, where the jury system was born, it was not created by an edict of the monarch or an act of parliament, but arose "of itself," through custom and practice. It has a history of nearly one thousand years, and as a result has become in the public mind an integral part of the English or Anglo-American (as opposed to the continental) system.

In post-Communist Russia it was necessary to establish the market, democratic power, and a system of court procedure on the basis of decrees from above, to impose them, if you will, by force, although without violence. On these matters I cannot make reference to the experience of Western democracies. But Russia has had its own particular experience, and I want to make brief reference to how the jury system was established by the will of the monarch in the mid-19th Century. And, as I mentioned earlier, it became an important institution and the pride of the democratic segment of society.

Briefly, this is what took place. Then, as now, Russia was faced with a choice: to proceed on its own unique path or to turn in the direction of Western civilization.

On June 6, 1857 Alexander II ordered the drafting of a statute on civil judicial procedure. The Chief of the Second Section of His Majesty's chancellery, Count Bludov, wrote to the tsar: "Our present judicial procedure falls far short of the requirements of justice, and a number of decrees seemingly intended to bring it about not only do not, but actually prevent the speedy and correct processing of cases. But," Bludov continued, "efforts aimed at improving the situation, whatever the circumstances, will be successful only when one proceeds not by leaps but by small, measured steps." To which Alexander II appended the resolution: "I completely agree that we are not yet sufficiently mature to introduce openness with regard to courts and the work of lawyers." 3

But Great Prince Konstantin (the brother of the tsar) held a very different view: "If a shortage of good roads and means of communication have been the main stumbling block in the development of the material power of Russia, then the absence of courts has been and is an insurmountable obstacle which has made fruitless all attempts of the government to improve
the internal arrangements of the Russian state, the improvement of administration, and the
development of trade and industry. . . . And finally, the peasant issue will remain unresolved
in practice until an intermediary force between the estates, that is, a court system, is organized
properly.4

The conservatives did not agree with this. "To adopt in whole the conceptions of any
foreign legislation, whatever its source, would be to disavow the distinctiveness of our people,
our daily conditions of life, and to subordinate ourselves to another people in judicial matters,
to create ignorant new arrangements on the basis of theory; that is to reject the historical
development of our people and to replace the experience of the centuries with the dreams of a
philosopher, which reject the distinctive development of our law. . . . In order to achieve basic
judicial reform a certain level of education, a deep legal consciousness by the people of their
rights, and a broad respect for law and contempt for arbitrariness are required." Moreover,
radical reform is impossible, since one cannot find in Russia people who have the competence
to become lawyers.5

To this the democratically-inclined Prince D.A. Obolenskii replied: "The absence of a
certain level of education, which supposedly would prevent the introduction of a literate
judicial procedure and openness, not only is not a barrier but on the contrary is one of the
persuasive reasons for introducing such concepts into practice."6

Public officials of the time saw a direct connection between judicial reform and the most
important reform—elimination of serfdom and freeing of the peasants. Today we have a similar
problem, but what we’re talking about, to put it bluntly, is freeing the land. But the necessity
for judicial reform in Russia in the middle of the last century grew out of not just moral
demands for defending human rights, but also from internal problems. I cite this episode.
Petersburg Governor-General Ignatiev illegally arrested an entrepreneur named Malkin, who
had brought suit in court in 1859 against the authorities. The publicist V. Odoevskii described
the situation as follows: "This story became known abroad and created a bad impression.
Capitalists of other countries said: ‘How could we want to invest our money in Russia, when
there is no legality, property and rights are in no sense guaranteed, and the commercial affairs
of a person can be wrecked, while he is arrested without legal guarantees?’"7

Well-known individuals and public officials of the period could be cited endlessly on this
matter. I will limit myself to a reference to one interesting fact. A close associate of Count
Bludov was sent abroad to investigate "their" law. This jurist examined the codes of judicial
procedure of Sardinia and Hungary. Alexander II ordered the translation and publication of
these laws. And prior to this the monarch had not wanted to hear about any divergence from
the distinctive path of his country.8
So, in the end, democratic judicial procedure was introduced in Russia not "in small measured steps," as the authorities wanted at first, but through a "leap," which they had opposed. And it worked. Too much has been written already about the Russian jury system and the brilliant group of defense lawyers of the period to bother repeating it here.

The stability of a regime depends on the interaction of three fundamentals: the economy, political power, and law (most notably, the court system). The fathers of the great reforms of the mid-Nineteenth Century created a court system equal to others of its time in furthering humanitarian legal values. The economy was only partly reformed, since private ownership of land was not legalized but was left, as before, as common property. And political power was not touched, but remained autocratic, meaning despotistic in principle. The disjunction of these components of the state contributed to its collapse a half-century later in 1917.

Having declared a dictatorship of the proletariat at the time of the October Revolution with no limits on their power, the founders of the Soviet state and its system of justice adopted authoritarian methods of rule behind a democratic-looking facade. Of course the educated people who comprised the early leaders of the country could not help but know the history and theory of state operations and had no illusions with regard to humanitarian legal and moral values. "Under communism," Lenin stated, "people will gradually become accustomed to observing elementary rules of community life that have been known for centuries." In principle, then, these rules were not rejected. But the path to reaching the cherished goal was chosen without reference to these rules, without searching for democratic mechanisms. Class consciousness changed everything.

The class approach introduced into the system of justice practices that were fraught, as later became clear, with tragic consequences. An extremely complex state of affairs ensued: the desperate situation of the new leaders required the most extreme measures against their enemies, and these extreme measures had the unavoidable effect of undermining the law.

It is a fact that major social disruptions are not contained within a predictable framework, as history testifies. A revolution inevitably affects the old regime and its law, and in the 1917 revolution this took place in the most radical way: extra-judicial punishment of the enemies of the new regime was immediately introduced, administered by the VChK. But one must answer the question: was this simply one of the costs of revolution, or was it a principle of state operation? In the beginning, possibly, it was a natural consequence of revolution and civil war. In his writings Lenin felt this way, by the way, and one sees there a vacillation between law and arbitrariness. The founders of the Soviet state, unrestrained by anything and relying exclusively on force, seemed to try to restrain their power by bringing it within the framework of legality. In February 1922 the VChK was abolished. A Civil Code, based on the
German model, was introduced. The idea of constructing a "law-based socialist state" was pronounced. But at the same time the lawlessness of the not-too-distant future was growing in strength. In other areas such as the economy, in spite of a variety of problems, the regime had been able to begin building an industrial base. But in the area of the law completely negative results were achieved. The idea of law as a social, cultural, humanitarian value was completely lost. Just the same as religion for believers and culture and language for the people. That is no doubt the main explanation as to why the establishment of Stalinist lawlessness succeeded and why law did not become a potent force in society.

To many Bolshevik leaders the concept of a law-based state (pravovoe gosudarstvo) was contrary to marxist-leninist teachings. However, the founders of the Soviet state were cautious at the beginning regarding the legacy of the "cursed past," not completely rejecting the law that had been created in the preceding periods. Decree No. 1, adopted in November 1917, abolished district courts, courts of appeal, and the governing Senate with all of its departments, military and naval courts of all grades, as well as commercial courts, replacing all of these institutions with courts established on the basis of "democratic elections."Soon thereafter decree No. 2 on courts established that judicial proceedings were to be carried out "according to the statutes on the judiciary of 1864 to the extent that they have not been abolished by decrees of the Central Executive Committee and the Council of People's Commissars and do not contradict the legal consciousness of the working classes." In place of the first two a decree "On the Court" No. 3 was adopted, which actually rejected decree No. 2, that is, prohibited the use of the old laws and proposed that judges be guided only by decrees of the Workers' and Peasant's Government and by their socialist conscience.

The first trials of the Soviet period were mild, even with regard to enemies. Countess Panina, found guilty of acts against Soviet authority, received only a public "censure." But this policy didn't last long. The court was soon replaced by the VChK. Dzerzhinskii, the creator of this organization, carried out a relentless fight against all presumed enemies of the revolution. Although he spoke on occasion about the need to observe revolutionary justice, in the exercise of power the first principle was class terror. Unfortunately, the establishment of bolshevik arbitrariness based on class was founded on fundamental Russian traditions. The jury system of pre-revolutionary Russia was democratic. That is a fact. But it was not capable of changing the fabric of autocratic rule. There were democratic movements in Russia, but the state structures were not endowed with democratic principles. Civil order was not founded on law, but on the police, not on democracy but on autocracy. All liberation movements took on the character of rebellions. Either full liberty or complete subjugation. (And the perestroika period of the Gorbachev years was no exception).
When the trial commenced against the participants in the August 1991 coup attempt on April 14, 1993, the State Committee for the Emergency Situation (the defendants and their lawyers) petitioned for the removal of all members of the court. In particular they raised the question of having this complex and legally controversial case heard by a jury. The petition referred directly to the constitutional provision. It was rejected.

Yes, the Constitution provided for jury trials. But the Criminal Procedural Code did not contain any relevant provisions. Which means that we don’t have the kind of court yet that democracy in Russia is awaiting.\(^{14}\)

NOTES

3. M.G. Korotkikh, Samoderzhavie i sudeschnaia reforma 1964 goda v Rossii (Voronezh: Voronezh University, 1989). All quotations are from p. 47.
4. Ibid., p. 49.
5. Ibid., pp. 52-53.
6. Ibid., p. 54.
7. Ibid., p. 63.
8. Ibid., pp. 66-67.
10. All-Russian Ordinary Commission for Combatting Counterrevolution and Sabotage.
12. Ibid., p. 468.