TITLE: ARBITRARY JUSTICE: COURTS AND POLITICS
IN POST-STALIN RUSSIA. Report #1

AUTHOR: YURI FEOFANOV and DONALD BARRY

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NCSEER NOTE

This is the first in a series of Council Reports which, in all, will contain a book, by the same authors and probably with the same title, forthcoming, M. E. Sharpe. This Report contains: an Executive Summary of the book; its Table of Contents; the Preface; the Introduction by Donald Barry; Part VIII, the "Conclusion: Arbitrary Justice Waning?"; and a brief note "About the Authors." Subsequent Reports in the series will contain the remaining Parts I-VII, will be numbered serially, and will carry the same main title and the subtitle of the Part contained.

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CONTRACTOR:       Lehigh University

PRINCIPAL INVESTIGATOR:  Donald Barry

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Executive Summary

This is the collaboration of two writers on Russian law, one Russian and the other American. Yuri Feofanov has been a law correspondent for the Moscow newspaper Izvestia since 1956 and is the founding Editor-in-Chief of the legal journal Zakon. Donald Barry is University Professor of Government at Lehigh University, Bethlehem, Pennsylvania. He has been studying Soviet and Russian law for over thirty years.

The nature of the collaboration, and of this study, can be described as follows: Feofanov wrote chapters about political trials and regular cases having political implications that took place during the post-Stalin period and that he covered or observed as a legal journalist. Barry translated and annotated the whole of Feofanov's work and wrote introductory chapters ("Parts," as they are designated in the study) that described and analyzed the political and legal atmosphere in the Soviet Union/Russia at the time the cases examined by Feofanov took place.

The Nature of the Cases. The first case discussed is the trial of currency speculators Ian Rokotov and others. No other case captures so well the lawless side of the Khrushchev era. Two currency speculators who were sentenced to prison terms after a highly publicized trial were re-sentenced to death and executed, apparently at the personal behest of Nikita Khrushchev. The law allowing the death penalty for the crimes in question had not yet been adopted at the time of the trial of the defendants.

The second case is the trial of the Russian writers Siniavskii and Daniel, whose crime had been to publish their literary works abroad. This proceeding, which drew wide international attention, was a watershed event of the dissident movement during the Brezhnev era.

Not all of the cases covered in the study received such broad public notice. Many did share one characteristic, however, which has been referred to as "the deliberate manipulation of the judicial process." Those cases showed a "tamed" judiciary, one in which (to quote again from the study) "judges and others involved in the judicial process . . . develop patterns of behavior that anticipate the decisions desired by those seeking to control their actions, even when direct orders regarding a given case have not been issued." This, it is suggested, is the essence of "arbitrary justice," the title of the study.
Other Aspects of the Study

It is no wonder, then, that Feofanov asserts so strongly the central place of independent courts in genuine legal reform (and in democratic development, in their role of limiting arbitrary state action). A recurring theme of his commentary is the discussion of a catalog of mechanisms for strengthening judicial power and independence. In this connection he strongly endorses the re-institution of the jury system throughout Russia. He believes that in spite of limited experiments with juries recently, the judicial establishment does not favor their wide use.

A strong sub-theme of the study is the analysis of cases having to do with economic crimes and corruption. Some of these cases involve people caught up in "ideological transgressions" that were adjudged, at the time or, in some instances, years later, not to have been crimes at all (see, for instance, the Hint case). Others are cases of true corruption, committed by persons high in the political elite, such as Yuri Churbanov, Leonid Brezhnev's son-in-law.

One of the signal developments of the Gorbachev era was the large-scale rehabilitation of victims of the Stalinist terror. Since this rehabilitation, of important political actors and common victims alike, was carried out largely through the courts, several chapters are devoted to the subject.

The final case examined in the study is the 1992 Communist Party trial, heard by the Russian Federation Constitutional Court. Feofanov, although not disagreeing with the general result in the case, offers the novel view that the Constitutional Court should have deemed the Communist Party "legal but criminal."

Part VIII, "Conclusion: Arbitrary Justice Waning?", addresses two issues: the restrictions and compromises imposed upon those, like Feofanov, who sought to work within the system yet express their own views; and the present status of Russian law, examined against the background of the rest of the study.

A conclusion that touches both of these issues has to do with discarding dogmas: Feofanov and other influentials have been able to abandon the dogmas that limited them and to speak to the real problems of Russian law. This in itself is a powerful incentive to genuine reform. It certainly has helped the legal system (and, most important to Feofanov, the courts) to resist the forces that still seek to exercise arbitrary power over them. This is not to deny the problems that remain. These are also discussed in the conclusion. But put in context these problems should not obscure the undeniable progress toward a law-based state that has been made.
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About the Authors
The name Yuri Feofanov was well-known to me through his writings many years before I met him. My interest in his work was based on two considerations. First, Feofanov's beat was the law, particularly the work of Soviet courts, also my area of specialization. And second, it seemed to me that he always managed to say something interesting about his subject, often in a way that either expressed mild criticism or suggested that a better way could be found to handle a problem. In the 1960s, when I first began reading Izvestiia, this was no mean feat. The sterility of the legal discourse of that period, and the caution with which proposals for change were advanced, made any departure from the ordinary most welcome.

This is not to suggest that Feofanov was a dissenter (although, as we learn from him here, some of his writings were not well-received by higher-ups). He belonged to the Communist Party and was a reliable member of the Moscow journalistic fraternity. He performed the assignments given him, and only after he was well-established was it possible, at times, to decline an assignment or find another way to avoid an unpleasant journalistic task. And his writings followed the standard canons of Soviet journalism of the times. He understood the absolute prohibition on criticizing highly placed leaders or the system in general; he made the obligatory references to Lenin and other leaders, when called for; and he practiced the so-called "odnako" ("however") rule, wherein the system was first praised up to a certain point in an article, before the odnako launched the author on his within-the-system criticism.

Still, as suggested, Feofanov practiced his craft in an interesting and intelligent way. So for the scholar attempting to make sense of Soviet law and politics, for whom Izvestiia was required reading, an article by Feofanov often provided a respite from the standard, formulaic fare of the Soviet press.

The chance to meet Feofanov came at a conference on Soviet law at Lehigh University in 1991. The convergence of our interests soon was confirmed. By that time it had finally become possible for genuine cooperation between Russian and American scholars in our fields to take place, and our discussion soon moved to the idea of a collaborative work. This book is the product of that collaboration.

In his career of over forty years, Feofanov has written some ten books and an estimated one thousand "big" articles. His themes have tended to fall into one of the following categories:
1. The analysis of important issues of the law, e.g., the independence of the judiciary, the separation of powers, the operation of institutions such as the Russian Federation Constitutional Court.

2. Interviews with important legal personages. Feofanov has managed over the years to interview most of the leaders in the field of law, from Supreme Court and Constitutional Court judges to Procurators General and Ministers of Justice to leading legal scholars. The subjects of these interviews have consistently involved important issues of legal reform.

3. Court cases large and small. Often under the rubric “From the Courtroom” (Iz zala suda), Feofanov’s columns covered trials of all kinds, from the leading prosessy of the day, involving defendants of national or international renown, to those in which the parties were absolutely unknown to the general public. The latter type of case appeared to have a strong appeal to newspaper editors, and apparently to the general public as well. It helped perform the educational role that was demanded by Soviet socialism of both the law and the press during a large part of Feofanov’s career. His coverage of cases in which common people were vindicated by courts or received just penalties for their transgressions served as cautionary tales for the reader. A number of Feofanov’s books are based on case analyses of this kind.

Feofanov’s contributions to this book are largely comprised of this third category of writing, namely, court cases that he has covered. They include trials that have caught worldwide attention (beginning with the “currency smugglers” case during the time of Khrushchev and ending with the “Communist Party” case heard by the Russian Federation Constitutional Court over a period of five months in 1992). But also covered are cases that attracted less notice, either because the regime restricted information on them or because the principals involved were ordinary people whose trials attracted little attention within the Soviet Union and even less in the world at large. Even these cases provide some insight into the patterns of political involvement in the judicial process, however, and for that reason several have been included.

The cases described in this book (other than several of those in Chapter Nineteen, “My Days as a Judge”) were previously analyzed by Feofanov in his capacity as a journalist. Although his present work is based on these original essays, and sometimes quotes directly from them, Feofanov’s commentary here sometimes differs from that found in his earlier writings. Such differences may be based on new developments since he wrote or on passages removed by editors from the original text, the essence of which can now be restored. In some instances they derive from Feofanov’s reconsideration and change of mind. Sometimes this process has been an agonizing one for the author (see, for instance, the Siniavskii-Daniel case).
wherein he expresses regret for his earlier writings and seeks now to provide a more balanced analysis. The writer who sought to publish through official channels at almost any time during the Soviet period faced the problem of compromises of this kind. Feofanov was no exception. His writings here speak to this problem in various ways. The matter of the restrictions and compromises imposed by the system on those in analogous positions will be addressed in a more general way at the end of the book.

As a political scientist working with a journalist, I found that my interests and purposes with regard to this project diverged from Feofanov’s in several small ways. By its nature, the function of the newspaper journalist is to do newswriting and commentary on contemporary events, rather than aiming at some longer-term objective. Some political scientists, by contrast, myself included, see utility in finding a broader context in which the news and commentary of the day can be fit. Thus, a major objective of my effort in this joint endeavor has been to describe and analyze the political and legal atmosphere in which the cases examined by Feofanov took place.

Further, Feofanov was writing originally for a domestic audience, who could be assumed to possess a basic knowledge of political and social life in the Soviet Union/Russia. Since this is not necessarily the case with regard to the reader not residing in Russia, I have provided commentaries introducing the cases or sets of cases examined by Feofanov.

And finally, consistent with the ephemeral nature of newspaper journalism, in which providing documentation for the aid of the reader is generally eschewed, Feofanov typically does not cite the sources he uses. Both because of the scholarly habits of the political scientist and because I believe that the reader might be interested in examining some of Feofanov’s references, I have supplied source citations where it seemed to me that they would be useful. All such documentation is mine.

Feofanov’s work was written in Russian and translated into English by me. In addition to supplying the documentation mentioned above, Feofanov’s text was edited slightly to eliminate repetition and to make the narrative more accessible to the English-speaking reader. Feofanov is aware of what he calls “a certain moralizing” that characterizes some of the passages in his writing. This is a style, as he puts it, that “has a long tradition in Russia.”

Transliterations follow a modified version of the Library of Congress system. A few words (e.g., Yuri) retain more traditional spelling. The word glasnost has become so common that it is rendered in its English form rather than as a transliterated term.

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INTRODUCTION: ARBITRARY JUSTICE AND THE LEGAL PROCESS

by Donald Barry

"In a sense all trials are political," one scholar asserts. Another contends that "judges do and should rest their judgments in controversial cases on arguments of political principle but not on arguments of political policy." Both authors cited are talking about the role of courts in discharging their day-to-day functions. They are suggesting that court decisions can and do have policy implications, and that they will sometimes reflect the political predispositions of judges. In this sense, a proscription on a court’s reviewing "political questions" (such as the one contained in the 1991 law on the Russian Federation Constitutional Court) makes little sense. Of course courts are going to be involved in political issues.

But the present inquiry involves something different. It can be taken as given that judges, like all thinking people, develop views about politics; and that some judicial decisions have policy implications beyond the bounds of a given case. Our area of concern involves the more deliberate manipulation of the judicial process from the outside, and the fallout from that manipulation: for once the judicial function has been tainted by inappropriate outside influence, judges and others involved in judicial proceedings may develop patterns of behavior that anticipate the decisions desired by those seeking to control their actions, even when direct orders regarding a given case have not been issued. Thus our concern is with "arbitrary" justice, not merely with cases that have political implications.

A campaign against corruption is commenced and goes much further than before, without any changes in the criminal law. But officials above a certain level remain beyond the law. Officials from the ruling party are more secure from corruption charges than officials of the state apparatus. A newspaper reporter is even prohibited from reporting that a state official convicted of corruption once held a responsible party post. Penalties far in excess of normal are imposed, in order to protect high-level officials or because the political authorities have intervened and ordered them. A new edict of the state, this one allowing the death penalty, is applied retroactively to a pair of currency speculators because of the wish of the top leader that it be so. The political center, seeking to preserve its waning influence, inserts itself into legal processes normally under the jurisdiction of the regional courts. These are among the examples of the arbitrary exercise of judicial power discussed in this book.

Judicial behavior of this kind has been found in many countries and has ranged over a number of periods in history. Our analysis will be limited to the Soviet Union and Russia.
however, and will be defined by the period of professional journalistic activity of my co-author, Yuri Feofanov, from shortly after the death of Stalin to the present.

The largest part of Feofanov’s contribution to this book is comprised of court cases that he observed and wrote about for the newspaper Izvestia and other publications. The selection of cases was his. The reader will note a certain unevenness in terms of distribution of cases over the period. For instance, there is only one case from the time of Khrushchev, and one from the Brezhnev era, although several others had their beginnings in these times. In the early years of Feofanov’s career, he had less choice regarding the cases he would cover. Moreover, given the relatively greater restrictions on open expression during these years, Feofanov no doubt felt that the later cases better represented a demonstration of his journalistic skills.

Nevertheless, the early cases selected by Feofanov are not lacking in significance. One could hardly find a more important trial from the Khrushchev era than the Rokotov case, or from the early Brezhnev period than the Siniavskii-Daniel proceeding. The first was emblematic of Khrushchev’s intention to root out influences he saw as impeding “the comprehensive building of communism,” a major ideological tenet of the early 1960s; and the second was the leading “show trial” in the fight against the dissident movement in a later part of the decade, and a salient feature of the early Brezhnev era.

The maturing of the Brezhnev period saw the onset of what was later referred to as zastoi—stagnation. Hallmarks of the regime during this period, which had significance for law and the courts, were:

1. A campaign against housing built with so-called “unearned income.”
2. An effort by the regime to stifle economic initiatives that might threaten centralized control over the economy, even as central control was leading to economic stagnation.
3. The development of rampant corruption within the political elite, symbolized by the Brezhnev family but reaching down through lower levels of the nomenklatura in virtually every corner of the country.

The first of these is discussed in Chapter Four, “A House with a Mezzanine.” The second finds expression in two cases covered by Feofanov in Chapter Five, entitled “Politics Guards the Socialist Economy.” The third, because it was a defining feature of Brezhnev’s stagnation, could not be addressed until Brezhnev had passed from the scene. Two cases from the Andropov period (in Chapter Six, “The Transition Year of Yuri Andropov”) demonstrate the readiness of Brezhnev’s successors to use the courts against stagnation-era corruption. But because Andropov’s tenure was so short (about fifteen months) and Chernenko’s even shorter, it was not until the period of Gorbachev’s leadership that corruption cases came to trial in
greater numbers. The most important of these was the prosecution of Brezhnev's son-in-law, Yuri Churbanov, but Feofanov covered a number of related trials of the period that are also discussed in this section of the book.

The fight against corruption was not, of course, the only politically significant matter that received the attention of Soviet courts during the Gorbachev years. A number of other cases in which the regime sought to use the legal process to its own ends—with varying success—are discussed by Feofanov in Chapters Ten through Thirteen. Certainly one of the signal developments of the Gorbachev era—in which the courts played a central role—was the broad extension of rehabilitations to those repressed during the Stalin era. The most widely publicized of the rehabilitations—of former top political leaders like Bukharin, Zinoviev, Kamenev, and others—are well-known to most readers. Although Feofanov has something to say about these, he draws attention to the breadth and depth of the repressions by discussing several little-known examples of purge and rehabilitation.

The most important judicial proceeding of the post-USSR period has been the Communist Party case, decided by the Russian Federation Constitutional Court in 1992. Feofanov attended most of the sessions of this long proceeding, and offers an interesting, original analysis of what he calls "Russia's Nuremberg." The cases discussed by Feofanov in his penultimate chapter, "My Days as a Judge," were ones that he participated in as a people's assessor, sitting alongside a professional judge in deciding cases. He offers this discussion as background for his final chapter, where he advocates wide use of the jury system in Russia. He views this institution, perhaps too optimistically, as the answer to some of the ills of the present judicial system. But he believes, for reasons explained in the chapter, that a variety of entrenched interests will seek to block the wide use of juries.

As the reader will see in proceeding through the book, some of the more overt forms of outside pressure on courts have diminished in the later cases discussed by Feofanov. As will also be clear, Feofanov believes that further reform is required before it can be said that truly independent courts exist in Russia.

Feofanov's analysis begins with his own Introduction, an overview of the period from Stalin to Yeltsin, seen from his vantage point as a member of the press. He ascribes to the press, particularly during the Khrushchev period, a significant role in checking and second-guessing the courts and law-enforcement organs, at least in those areas not declared off-limits by the political authorities.

A number of the cases discussed in this book are from days long gone. It is not just that the Soviet Union no longer exists. In addition, some of the problems that courts were asked to
resolve (e.g., the legality of confiscating houses in the countryside that did not conform to certain size limitations and other restrictions) exist today only in the consciousness of the population of a certain age. These cases certainly demonstrate, in any event, how arbitrary the machinery of justice could be. On the other hand, a number of cases deal with subjects that have great relevance for present-day Russia. Few issues are more in the news in the 1990s than corruption, to which several chapters in Parts III and IV are devoted. And Russia is still haunted by the nightmare of the Stalinist repressions, the subject of Chapters Fourteen through Seventeen.

One of the areas where enormous change has taken place in recent years is in the value of the Russian currency, the ruble, and some readers may be misled by this. Yuri Churbanov, Leonid Brezhnev's son-in-law, was finally convicted of accepting bribes totalling 90,000 rubles in his 1988 trial, although he was originally charged with having received over one-half million rubles. Even the smaller of these sums was an enormous amount at the time (about twenty-five years' wages for a well-paid worker or university professor, and some $130,000 at the artificially pegged exchange rate with the U.S. dollar). But with the tremendous inflation of the 1990s the value of the ruble has shrunk drastically. The author has made reference to this fact on a couple of occasions in explanatory notes to Feofanov's analysis.

The division of labor between Feofanov and me is as follows: Feofanov is the author of the chapters and I have written the "parts" (I, II, etc.), which introduce chapters or sets of chapters. In my commentaries I have tried to provide a broad picture of law and politics in each period of post-Stalin Russia as a frame for Feofanov's discussion of cases. In the end, however, it is Feofanov's work that serves as the focus for the book. This will be particularly evident in Part VIII, the Conclusion, where I address the question of whether arbitrary justice is waning largely through a commentary on Feofanov's recent writings.

NOTES

4. I use arbitrary here in the sense expressed by several dictionaries: "not limited by law": "without cause based upon the law": "not governed by any fixed rules or standard."
VIII. CONCLUSION: ARBITRARY JUSTICE WANING?

Donald D. Barry

Two tasks remain. The first is to return to a matter touched on in the Preface, the restrictions and compromises imposed by the Soviet system on those who sought to speak or write publicly, through politics or intellectual endeavors. The second is to offer some summary statements about Russian law, based in large part on the foregoing analysis.

One of the common elements of recent memoir literature from the former Soviet Union is the expression of regret by authors for not having spoken up more strongly in support of one's conscience or principles. Television personality Vladimir Pozner says that of the compromises he made over the years, the one that stood out for him had to do with the 1968 Soviet invasion of Czechoslovakia. Since he supported the ideals of socialism and thought that the West was taking advantage of the situation in Czechoslovakia, he faced a dilemma. His "to be or not to be" question, as he put it, was: "How can I openly criticize the Soviet Union if that strengthens the hand of its greatest detractors? Another thought, a much less noble one is 'What will happen to me if I speak out?' Not 'will something happen?' because there was no doubt about that, but 'how bad will it be?' " He developed a rationale based on his view that Dubcek had sold out to the West and that therefore some kind of Soviet response was in order. This rationale would have satisfied him "if I had . . . added only one final line -- that nevertheless there is no justification for invading Czechoslovakia, there is no justification for Soviet tanks to be in the streets of Prague; . . . had I added that one line, I would have had nothing to reproach myself for today. But I did not."

For many others, their personal response to the putsch of August 1991 is a matter of concern. The playwright Alexander Ghelman described a period of personal torpor and ambivalence after hearing about the coup attempt. He expressed uneasiness "about my inadequate reaction" and sought to keep it secret for a considerable period of time.²

Former USSR Foreign Minister Eduard Shevardnadze's conscience was bothered by his failure to protest the 1985 anti-alcohol campaign, which he saw as a threat to both the Georgian wine industry and the national economy: "I must confess that I did nothing to prevent this. All I did was look for ways to soften the blow to our vineyards and winemakers. I should say outright that I voted for these decisions, although inwardly I disagreed.

What was the matter with me? Was it just the discipline of a dedicated 'soldier of the party'? Yes, but not entirely." Shevardnadze goes on to explain that part of his reluctance to speak out was borne of an innate caution in his approach to all problems.³
Georgi Arbatov, prominent political scientist and advisor to several Soviet leaders, sees his caution as having been engendered by the nature of the system. He writes of "adopting appropriate patterns of behavior and political instincts" in order to be able to work successfully. His explanation for this is that otherwise he would not have been able to make the contributions that he did: "If you felt that you had an opportunity to make an important contribution to foreign policy or regarding internal political or economic problems, you had to comply with the rules of the game and be ready to compromise on some other issues... The final judgment can be made only when you weigh the achievement against the compromises you had to make." Like the other writers cited, however, Arbatov acknowledges some guilt: "This does not mean that even if the balance was generally positive you can escape responsibility for your mistakes and wrongdoings. No, I for one am ready to bear this responsibility. Though I was not altogether silent I bear a particular responsibility for not having been resolute enough in protesting the wrongs and defending the rights." 4

The statements of these individuals, who can be counted among the democratically-oriented elite of the late-Soviet and post-Soviet periods, contain several common themes: the understanding, express or implied, of unpleasant consequences for violating the rules of the game; the importance of working within the system; and regret for not having done more.

What awaited the writer who tried to go too far? The record on that matter is clear, as shown by the fate of any number of dissident intellectuals, i.e., those who decided step beyond the established limits. For those who did not take that step, but thought of flirting with acceptable limits on occasion, the prospect of not having one's works published was ever present. Here are the words of the eminent jurist and democrat Sergei Alekseev about the recently-published selected works of another prominent legal scholar, the late Mikhail Strogovich (a friend of Feofanov's mentioned several times in earlier chapters): "To some extent all of them [earlier writings in the first of three volumes] are a reflection of our difficult and dramatic history. In them the reader will feel, perhaps painfully, the stifling ideological atmosphere in which legal scholars were required to work and publish, when it was demanded that the party cliches be repeated, that there be not one millimeter of deviation from the stalinist dogmas, and that any and every thought be supported by quotations from the 'classics'. Otherwise... otherwise not one line of the scholar would see the light of day." Alekseev asks the reader to treat these aspects of Strogovich's writing as "historical fact" and not judge the scholar harshly, "particularly when these characteristics of the past are not what is important in his work." 5

Every political system imposes some kind of ideological orthodoxy on its members, and punishments of various kinds may be imposed on those who don't conform. The apologia by
those who regret their past activities is not unknown outside of Russia. What so distinguishes
the late-Soviet period in these regards is the magnitude of the break with the past: at a certain
point, some time in the late 1980s, the writers cited above had the opportunity, for the first
time in their lives, to express regrets about their compromises with the system and still remain
within it.

So in questioning whether arbitrary justice is waning, without doubt the most important
prerequisite has been achieved. Not only can the compromises and regrets be discussed, but the
larger dogmas of the past can be cast aside as well. In the field of law these included the need
to see the world only within the framework of "socialist legality," as interpreted by the
political leadership, and the unacceptability of the idea of a "law-based state" (pravovoe
gosudarstvo) because it was seen as a "bourgeois" concept. Once these shibboleths had been
abandoned, the particulars of legal development could be looked at with a fresh eye.

Yuri Feofanov is of the generation of the authors quoted above. He held an important
position in his field during the Soviet period, as they did in theirs. And, as shown in Chapters
One and Two, he has expressed his regrets about compromises pressed upon him by the
system.

As important as Feofanov's chapters are for their intrinsic content, they also show
something about the process of discarding dogmas. Most of the cases he chose for inclusion
here are from the post-Brezhnev era, when he could write most openly. In reviewing them,
and looking at some of his other recent work, a picture of Feofanov's views on the state of
arbitrary justice in Russia can be sketched.

At the heart of Feofanov's conception of justice is a truly independent court system.
Above all other considerations, this is the matter that he returns to again and again. For a law-
based state to be created, courts protected from improper influences are basic, an absolute
must. From this much else will develop automatically, eventually even a genuine democratic
system. Without it, little is possible, not even a well-ordered state.

After having been a member of the CPSU for forty years, Feofanov left the party in the
early 1990s. Whatever sympathy he had for the party had long since evaporated, as Chapter
Eighteen and other writings make clear. While a number of considerations may have brought
him to this attitude toward the party, certainly a major one was that the party had put itself
above the law, and that the party elite was often inclined to appeal to it, rather than the courts,
to resolve legal problems.

What makes courts "dependent?" A number of factors are involved: the nature of judicial
institutions themselves, and the laws that set forth the basic operations of courts are certainly
important. But more significant, to Feofanov, are the attitudes toward courts that exist, within
the political leadership, the public at large, and in the courts themselves. Let us take a look at these factors.

1. **Institutional and legal considerations.** With a number of others, Feofanov was not comfortable with the Constitutional Supervision Committee created in the late USSR period. It was a creature of parliament and therefore not fully independent. Only a completely separate constitutional court, in his view, would do. On paper, at least, the regular court system was separate from the other branches. But its subordination to the party and organs of state was without question. Although much of this involved the assumption by the political and law enforcement authorities that courts should be subordinate, the law itself also contributed to the inferior position of the judiciary. Soviet constitutions and statutes had long maintained, for instance, that “judges are independent and subject only to the law.” But this assertion was undermined by all manner of other provisions. Feofanov had long advocated the removal of all statements in the law that contributed to this sense of subordination, such as the statutory language of the late 1980s assigning the ministry of justice “management” (rukovodstvo) of the court system.

One of the recurrent themes of Feofanov’s earlier chapters involved laws that allowed investigators to keep suspects in jail almost without limit while denying access to defense attorneys. Although the worst of these abuses have been removed from the law, suspects may still remain in jail beyond statutory limits because of the overcrowding of court dockets and for other reasons. Restriction on court review over a wide variety of civil law and administrative law cases was long one of the characteristics of the Soviet period. As Feofanov has documented, the expansion of judicial review in the late 1980s led to increase in the effectiveness of judicial control of administrative abuses.

One of the problems that still plagues legal acts having to do with law enforcement, in Feofanov’s opinion, is that they often take on the attributes of a campaign, and thereby bring pressure on the courts to join the campaign. These are his words about a 1994 law draft “On the struggle against corruption” that was then being discussed in parliament: “It can’t be a law if it has the words ‘On the struggle . . . ’ in its title. These words place the document beyond the realm of law, because a statute (and, by the way, the same applies to a court) can’t struggle with anything; it can only establish the rules of behavior of citizens and of those authorities that guarantee the observance of these rules -- which are legal norms. All statutes with titles such as ‘On the struggle against corruption,’ ‘On the struggle against organized crime,’ etc. are more political and declarative in nature than they are legal. They include specific norms and sanctions, of course. But why are [such norms] here, if they are already
found in the Criminal Code? It would be better to supplement the criminal law by amending it by the age-old practice rather than building a political addition to it."

2. Attitudinal factors. When Feofanov wrote in 1995 about a State Duma leader who was seeking to bring pressure on Constitutional Court judges, he was returning to a theme that has occupied his attention for a number of years, as this 1990 quotation shows: "In the final analysis what difference does it make whether it is a party functionary or a democratic deputy who has a right to order the court around?" It is his view that the authorities, back to and including Lenin, "never had much respect for law." And as judges have begun to develop more independent outlooks in recent years, the open disdain with which they are treated may be increasing. Viktor Yerin, at that time Minister of Interior, prepared a list in 1993 of 111 "unreliable" judges, those "whose verdicts raise a good many doubts, frequently conclusive ones." It is no wonder, therefore, that threats and assaults on judges are made not just by the criminal element, but even, as Feofanov documented in 1995, by the police.

One of the problems, it seems, is that judges are seen as contributing to the crime situation in the country through their "acquittal bias," a complaint made even by the Russian president. "We catch them, and you let them go"; "we're fighting crime and you don't want to be among the fighters" are, according to Feofanov, common charges. His response, that courts are not supposed to fight crime, has already been cited above, in Part VII.

Regarding the charge of acquittal bias, a 1995 statement by Viacheslav Lebedev, Russian Federation Supreme Court Chairman, is revealing: "Here are the statistics: over the last ten years, the number of acquittals grew from 0.3 percent to 0.7 percent. Incidentally, in 1994, out of all the verdicts handed down by Russian judges, only 0.5 percent were acquittals. In other words, if the former 99.7 percent was considered a tendency toward conviction, then what is today's 99.5? A tendency toward acquittal?" Still, as Chairman Lebedev acknowledged, "everybody is criticizing us today."

Various forms of pressure may be asserted on judges by the authorities. Judges may be dependent, for instance, on local governments for various amenities such as housing. "Hand down the sentence and you'll get an apartment" is the way Feofanov described the problem several years ago. Conditions of this sort, combined with low pay, have led many judges to abandon the profession, leaving hundreds of judicial position vacant. Nor is the situation helped by the squalid condition of many court buildings and courtrooms, which Feofanov has called "a shame and a disgrace."

The lack of respect for courts by the authorities has been paralleled, to some extent, by the attitudes of the public. Feofanov's discussion of "megaphone law" in Chapter Twelve speaks to this point.
Judges themselves, in Feofanov's view, have contributed to the problem in various ways. By placing excessive reliance on investigatory reports and on confessions obtained during the investigatory phase, about which Feofanov wrote several times in earlier chapters, they created the assumption that they were little more than members of a law-enforcement team. But they have committed other transgressions as well. When former Constitutional Court Chairman Valerii Zorkin was being widely praised in 1992 for negotiating an agreement (with the support of his fellow-judges, incidentally) between the president and the speaker of parliament, Feofanov asserted that Zorkin had exceeded the authority of his office. Nothing but acting strictly in accordance with the law would do, he said. When Zorkin later acted in even more overtly political ways, Feofanov was with others in condemning him and suggesting that the Constitutional Court take action.

As Feofanov sees it, judges need to divorce themselves completely from the political arena and to have as little contact with the other branches as possible. He even recommends that judges abandon the practice of accepting honors and medals awarded by the executive or parliament.

The picture regarding judicial independence as Russia enters the last half of the 1990s is decidedly mixed. Courts face great problems. And they are pressured, it seems, from all sides. But that is in part because in abandoning their traditional subordinate role, they are at last exercising the important independent authority that was denied them in the past. In assuming that authority, they are limiting the power of others to act arbitrarily. And, as the Russian Supreme Court Chairman says regarding some of those attacking the court, "people don't give up power that easily."

A headline in a Russian newspaper jumped out at the author in 1995. It read: "Sooner or later society will get used to the idea that any case may be heard by a court." This does not make Russia the litigious society that the United States is widely seen as being. But it does suggest that the time may have arrived when courts have the potential of becoming the important independent institutions that a truly law-governed state requires.

Feofanov has made a number of trips to the United States, where he has visited courts, sat in police cars on their rounds, and attended seminars and conferences on law. Although he has a high regard for the American legal system, he by no means sees all of our practices as appropriate for Russia. One of the things he does admire, however, is that American judges have the authority to require public officials to conform strictly to procedural law. "They understand that the essence of justice is procedure," he has said. Given everything that Feofanov has said in this book about the need to achieve strict conformity with the law, it is not surprising that procedural fairness would be of paramount importance. What Feofanov may
not know is that in offering this view he is echoing the opinion of three of the most prominent jurists in the history of American law. I close with short citations on this matter by each of them.

Mr. Justice Douglas: "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice."

Mr. Justice Jackson: "Procedural fairness and regularity are of the indispensable essence of liberty."

Mr. Justice Frankfurter: "The history of liberty has largely been the history of procedural safeguards."

NOTES

8. On this point see his discussion of party leader Yegor Ligachev’s complaints about corruption allegations made against him by Gdlian and Ivanov. Ligachev turned to the CPSU Central Committee, among other agencies, for vindication. As Feofanov put it, "the simplest and most dependable means of defending his honor would have been to bring suit in the regional court." "U nas, okazyvatsia, est' sud . . . .," Izvestiia, February 4, 1991, p. 1.
29. All three of these statements are from U.S. Supreme Court opinions. They were collected by Kenneth Culp Davis in Administrative Law: Cases -- Text -- Problems (St. Paul, Minn.: West Publishing Company, sixth edition, 1977), p. 311.

ABOUT THE AUTHORS

Yuri Feofanov was born in 1925 and served in the Soviet Army during World War II. He began his career in journalism in 1952 with the military newspaper Red Star and has been employed by Izvestiia since 1956. Since its founding in 1992 Feofanov has been editor-in-chief of the journal Zakon, an Izvestiia supplement. Comment from Feofanov's autobiographical note: "I have never been sued for anything and yet I have spent about half of my working time sitting in courtrooms."

Donald Barry spent a year living in Russia in 1961-2 and has returned to that country many times since. He joined the faculty of Lehigh University in 1963, where he became University Professor of Government in 1985. His main areas of scholarly interest are Russian law and American administrative law.