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Law Reform in Soviet Environmental Law

W. E. Butler*

Environmental Law has been and continues to be one of the most fruitful areas of intergovernmental and scholarly collaboration in Soviet-American relations for several important reasons. The United States and the Soviet Union share an analogous northern hemisphere geographic location and similar problems in resource control. Some of those resources require joint regulation or management — polar bears, migrating birds, fish, air, ice, and oil amongst them. Functional agreements, modest in size, enjoy some success in promoting joint regulation as well as furthering the development of environmental law generally and of Soviet-American relations in particular.

In comparison with many concerns whose international topicality is transitory, environmental law has fared rather well. The subject generates funding in ways that are the envy of many other fields. It also is an area of concern where there is evidence of pluralism at work in both American and Soviet society; competing interests emerge within each social system as environmental policies and developmental priorities compete for support. From a comparative perspective these matters are resolved under very different regulatory policies and systems. In the Soviet Union, it is principally techniques of planning, control, supervision, and resource allocation that are utilized, although public opinion and pressure groups also have a role. In the Anglo-American legal system the emphasis is upon remedies, injunctive powers, and environmental im-

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pact statements — in other words, upon contentious proceedings to initiate environmental policies and preventive measures.

The United States and the Soviet Union, alas, also have a common experience with ineffective and inadequate measures. Fines, efficacious in certain instances, have proved to be nonsensical in others, constituting merely an appearance of enforcement when in reality the polluter is simply absorbing the cost of his illegal activities.

Finally, environmental law has developed a peculiar relationship to comparative legal studies. As an international and comparative lawyer specializing in socialist legal systems, it has been fascinating to observe the rising generation of environmental law specialists, particularly in the United States, who find themselves confronting the classic issues of comparative concern that general comparatists have grappled with for generations. This is partly reflected in the dilemma of how one engages in valid legal comparison, except that in environmental law the exercise is undertaken chiefly for policy purposes. Meaningful generalizations have been sought from the objects of comparison in order to translate them into legislative policy or into valid assessments or interpretations of existing legislation.

New conceptual approaches have likewise been generated in the field of environmental law which have general comparative application or implications. Especially noteworthy in Soviet legal science, for example, has been the monograph by V.A. Chichvarin that postulates the emergence of an international environmental law as a branch of public international law.¹

I. Environmental Law and Law Reform

Soviet environmental law, while it has been the subject of intensive substantive modification since at least the late 1950s, has also figured in a much larger law reform program.

1. See V. Chichvarin, *Okhrana Prirody i Mezhdunarodnye Otnoshenia* (1970), reviewed in W. Butler, *Res Naturae Internationalis: A Review*, 1 *Earth Law* 78-81 (1975).

That larger program came to fruition in December 1986 for the USSR and nears completion in the fifteen constituent union republics of the Soviet Union. The statute book, which Professor Kolbasov has called the "literature of the law," was consolidated with respect to environmental law, chiefly in Volume 4 of the Digest of Laws of the USSR (the "Digest," *Svod zakonov SSSR*), and was published in eleven looseleaf volumes with periodic supplements. Some six hundred pages devoted to legislation regulating nature protection and the rational use of natural resources were reprinted in Volume 4, with the status of an official text. Many enactments were unified or consolidated and can be found in that version only in the Digest.

However, to truly appreciate the amount of Soviet environmental legislation, the six hundred pages of Volume 4 must be multiplied by fifteen because each union republic Digest of Laws contains a similar volume of comparable size. To the staggering total of nine to ten thousand pages of "major" environmental legislative acts, countless thousands of ministerial or departmental normative acts which elaborate on the "major" enactments must be added.

The achievement of the Digest is not merely that it brings together the enactments of the respective jurisdiction. Those enactments are "systematized," that is, laid out in a conceptual format reflecting not only the basic principles but also the major sections of environmental law. The general scheme of each Digest is virtually the same and looks something like this:

Legislation on Nature Protection and the Rational Use of
Natural Resources

	<u>Pg.</u>
I. General Questions [decrees relating to other branches of law ("inter-branch decrees") and to issues of jurisdiction]	000
II. Land Legislation	000
1. General Questions	000

	<u>Pg.</u>
2. Land Use	000
3. Geodesy and Cartography [called Land Tenure in the Russian Soviet Federated Socialist Republic (RSFSR) Digest of Laws]	000
III. Legislation on Minerals	000
1. General Questions	000
2. Geological Study of Minerals	000
3. Use of Subsoil to Work Mineral Deposits and for Purposes Not Connected with Mineral Extraction	000
4. State Registration of Mineral Reserves and Deposits	000
IV. Water Legislation	000
1. General Questions	000
2. Water Use	000
3. Water Protection	000
4. State Registration and Planning of Water Use	000
V. Forestry Legislation	000
1. General Questions	000
2. Forest Use	000
3. Protection of Forests	000
VI. Protection of the Atmosphere	000
VII. Protection and Use of Flora and Fauna	000
1. General Questions	000
2. Hunting	000
3. Protection of Fish Stocks and Marine Algae	000
VIII. Protection and Use of the Natural Wealth of the USSR Continental Shelf	000

Volume 4 of the USSR Digest of Laws contains no enactment prior to 1947, being confined only to legislation in force, only ten of which were adopted before 1958. Between 1958 and 1982, there were 159 USSR enactments relating to this subject area. The equivalent volume for the Russian Soviet Federated Socialist Republic (RSFSR) — the largest of the

fifteen union republics — discloses a similar pattern. There is no act prior to 1940, only nine antedate 1958, but from 1958 and 1982 there were 141. The relative recency of the material reflects not merely new legislation, but also the substantial consolidation, harmonization, and unification of earlier material accomplished during preparation of the Digest. A veritable revolution in Soviet legislation, this unification affects all branches and fields of law, and provides an opportune base for the restructuring of Soviet life presently underway.

Each major area of environmental legislation revolves about a legislative act called "Fundamental Principles" (*osnovy*), for example, the Fundamental Principles of Water Legislation of the USSR and Union Republics (FPWL).² Each set of Fundamental Principles, incorporated within the Digest, possesses an internal structure that takes environmental legal concepts down to the next level of particularism. The FPWL begins with so-called general provisions that pertain to the ownership of waters and the competence of bodies to exercise jurisdiction over them. They next define the principles for water use and protection, and for the State registration and planning of water use. Then they address the issue of criminal, civil, and administrative responsibility for the violation of water legislation and conclude with provisions for determining the relationship of international treaties to water legislation.

Pursuant to the Fundamental Principles, each union republic enacts its own codes of law. Thus, each union republic has its own Water Code incorporating and elaborating the FPWL. Conceptually, the Digest, the Fundamental Principles, the codes, and all collateral and subsidiary legislation are intended to approximate a symmetrical comprehensive cohesive structure regulating environmental legal relationships in their entirety. It looks imposing on paper and, when one undertakes to evaluate the implementation of legislation, the contribution of the sundry Soviet law reform bodies in making this legislation more accessible in a systematized format ought not to be underestimated.

2. W. Butler, *The Soviet Legal System* 483 (1978); see also W. Butler, *Collected Legislation of the USSR and Constituent Union Republics* (1979).

II. The Effectiveness of Environmental Legislation

Measuring the effectiveness of legislation is an issue that has especially engaged Soviet legal research since 1976, although much pioneering work began in the early 1960s. In the spirit of both constructive scholarly criticism and *Glasnost* (openness) the quest has become more searching and demanding, as some studies of environmental law illustrate.

A. *Concept of Ecological Offense*

Soviet environmental lawyers have been exploring the concept of an "ecological offense" that is defined in ecological terms, such as the "appropriation" (for which many definitions are advanced), or the "use of objects of the environment" as an operational basis for an activity, or a significant social value, or the propensity for such use of environmental objects as may be prohibited by law. This notion can be approached at various levels and in various ways. Whatever definition is agreed upon, the next issue is whether the legislation, whatever branch of law, actually corresponds to the concept of an ecological offense in two senses. First, has the legislator truly accepted and assimilated what is meant by an ecological offense, and second, has the legislator satisfactorily translated into written legislation what the originators of the concept of an environmental offense had in mind.

The notion of an ecological offense is well worth the serious attention of Anglo-American lawyers. Whether the disturbance of the environment is avoidable or unavoidable, the process of reasoning from the fact of a disturbance and translating that occurrence into meaningful legal regulation may lead to more desirable results than simply accepting how history has dealt with other facets of human behavior. Implicit in this proposition is the possibility that environmentally related behavior may not be motivated by the same forces or considerations as other unlawful actions and consequently may require a different approach if an ecological disturbance is to be avoided. We consider two facets of such behavior below. The first, administrative responsibility — being quite novel to the Anglo-American lawyer, and the second, criminal responsibil-

ity — being very familiar but nonetheless taking on a different character in socialist legal systems.

B. *Effectiveness of Administrative Responsibility*

The data available regarding administrative responsibility for environmental offenses are of a mixed nature assembled over the years by a variety of Soviet research teams, both legal and sociological. Although they cannot convey an exhaustive picture, these studies illustrate the kinds of difficulties encountered in the enforcement of administrative penalties and possible antidotes for coping with them.

In the Anglo-American legal tradition we are accustomed to thinking of acts as either criminal or non-criminal. If an act is prohibited by law, in nearly all instances the performance of that act will engage criminal liability of one kind or another, whereas socialist legal systems and some Western European continental systems have something in between called administrative responsibility. Although administrative offenses are punished, sometimes severely, they are not regarded as a crime unless committed several times or in a prescribed sequence. There are a variety of sanctions that may be applicable to specific offenses as laid down in the union republic codes on administrative violations. They range from a public warning, or a reprimand, to administrative arrest and confinement for a period of up to fifteen days. Precisely which sanction may be invoked for which offense is stipulated in the relevant article of the codes.

Administrative penalties have been widely used to punish environmental violations in the Soviet Union. In the late 1970s some sixty thousand individuals were fined for hunting violations, and of those, about five thousand were deprived of their hunting license for a year. It was estimated that during the same period about three hundred thousand fishing violations occurred.³ With respect to land law, the data suggested uneven enforcement from one union republic to another. In

3. *Effektivnost' Iuridicheskoy Otvetstvennosti v Okhrane Okruzhaiushchei Sredy* [Effectiveness of Legal Liability in the Preservation of the Environment] 53-54 (O. Kolbasov and N. Krashov ed. 1985) [hereinafter *Effektivnost'*].

the RSFSR, for example, more than seventeen thousand violations of land legislation were recorded, whereas in the Kirgiz SSR there were seventy-seven and in the Kazakh SSR there were 113. Whether the figures are precise is irrelevant. The pattern of incidence and/or enforcement seems evident, and there is a strong suspicion in academic circles that the RSFSR inspectorates are much more vigilant than in the Kazakh Union Republic.⁴

In 1982 there were more than twelve thousand fines imposed for water pollution by the various water supervision agencies of the RSFSR Ministry of Water Conservancy on the directors of State enterprises. This was regarded as a positive figure and probably compared favorably with earlier statistics on the subject. The improvement was attributed to a change in policy; previously such fines had been imposed not on the enterprise director personally but on the enterprise itself. Just as in the United States and Europe, it was discovered that the Soviet enterprise would pay the fine and continue to engage in environmentally adverse activity. The fine was treated simply as part of the cost of doing business.⁵

In the case of minerals legislation there were serious discrepancies between the requirements of environmental protection and the actual powers of the control agencies to impose fines for the violation. There were actually instances where the law defined an offense but omitted, for one reason or another, to confer on the relevant inspectorate the right to fine the culprits.⁶

There is also some general concern that excessive reliance may be placed on fines in certain areas of environmental regulation. Although the fine may act as a deterrent to future activity in some instances, in others there may not be sufficient scope for enforcement agencies to individualize punishment and take into account the peculiar aspects of the offense, the personality of the offender, and the overall situation. Consequently, the fine is either a Draconian measure or woefully

4. *Id.* at 60.

5. *Id.* at 64.

6. *Id.* at 66.

inadequate in light of the character of the offender or of the offense itself.

A study of forestry violations disclosed a marked unevenness. Some aspects of forestry legislation were effectively enforced whereas others were almost wholly neglected. For example, forestry inspectorates concentrated primarily upon trees and timber with respect to forestry offenses and gave little attention to the unauthorized use of forest land for cultivation or for the erection of structures. In fact, more often than not the forestry agencies themselves were the culprits and not individual citizens.⁷ Nonetheless, even under these circumstances the jurist concerned recommended a State forestry inspectorate be utilized to police the forestry agencies.

Analogous data is available with respect to flora and fauna. In the 1960s the number of hunting offenses generally is estimated to be about 250,000 per year, rising in the early 1980s to 350,000 - 450,000 per year. To be sure, some of the increase may represent better enforcement rather than an increased incidence of offense.⁸ Latent poaching offenses are a major concern. The difficulty is whether the number of poachers actually apprehended represent the majority of all such offenses committed or are merely the "tip of the iceberg."

The prevailing available data was construed to suggest that only a tiny minority of offenders were being caught. The estimates were varied under each study carried out. Some believe that only about forty percent of the poachers were being arrested. A group of students from Moscow University estimated in the mid-1970s, on the basis of a study conducted in the Moscow Region, that about 150,000-200,000 poaching offenses were committed annually in that Region alone, of which only five percent were actually detected. If the study was a valid one, it postulated an extraordinarily high incidence of offense and, presumably, virtually nominal enforcement efforts.

Soviet legal scholars have actually conducted question-

7. *Id.* at 70-71.

8. *Id.* at 72.

naire surveys of enforcement inspectors and offenders. Amongst other things the poachers were asked: "Did you encounter the fishing inspectorate very often?" The answer was usually "very rarely." Those who conducted the study felt that the inspectorates charged with preventing poaching were woefully understaffed and not really capable of enforcing the law as they were expected to do. There also were inquiries into the qualities of the inspectors themselves. According to this study, inspectors were poorly trained and equipped: sixty percent had received no training as inspectors whatsoever; thirty percent lacked the equivalent of a high school degree — yet they were engaged in what was a dangerous and arduous profession. Every year several dozen inspectors have been killed by poachers; few inspectors were trained to deal with armed resistance and in some localities were not receiving the full support of law enforcement agencies. A few inspectors reported antagonism on the part of the local populace.

In the case of furs and pelts, the vast discrepancy between State procurement prices paid to trappers or hunters and the black market value of those items in the Soviet Union has led to a large "second economy" at inflated prices. Some estimate that perhaps only fifty percent of the furs and skins taken by trappers are sold to the State. Economic restructuring policies may lead to a reduction of that price differential, and in 1987 there was an intensified public campaign against the pernicious influence of poaching.

A severe shortage of inspectorates and inspectors is blamed for the failure to reduce atmospheric pollution significantly. When inspectors do detect violations, they complain that all too often their reports to the administrative commissions are lost or delayed until the period of limitations lapses. Usually the period of limitations is one or two months. Either an unwillingness to enforce the legislation or a preoccupation on the part of the enforcement authorities with other concerns can lead to a breakdown in the enforcement mechanism. Since enterprises are the principle polluters of the atmosphere,

many inspectors feel the fines are too small.⁹ The officials who are fined pay an average of ten rubles per offense, which compared with their salary seems nominal, albeit uncomfortable.

Since September 1987 the Moscow evening newspaper *Vecherniaia Moskva* began to publish daily and weekly notices of pollution levels. When the guilty enterprise can be identified, the newspaper names it, the director, and the secretary of the Party committee, together with telephone numbers. As part of a campaign to bring public pressure to bear, it has enjoyed initial success and may be emulated in other Soviet cities.

C. *Effectiveness of Criminal Responsibility*

Those Soviet scholars who have investigated the enforcement of environmental standards under the criminal law are distressed by what they regard as an unacceptably low level of priority accorded to detection and prosecution. Figures for the Belorussian Republic (BSSR) in 1976 show that of all convictions for crimes, thirteen percent concerned economic crimes. Of those thirteen percent, only 2.3 percent concerned illegal hunting, 0.6 percent with illegal fishing, and an even smaller fraction dealt with the illegal felling of timber.

There were complaints that more often than not the materials for a possible prosecution were not properly transferred to the preliminary investigation unit or, if there was an investigation, the procuracy did not take proper action at a later stage. During a study which involved interviews with poachers to ascertain whether inspectors were active or not, examples were given of the Buriat Autonomous Soviet Socialist Republic in the RSFSR, where forty-eight cases of alleged crimes of illegal hunting, fishing or felling of timber were not referred for preliminary investigation.¹⁰

Other data of varying quality but of similar range and type is available but need not concern us here. The key issue is what reasons are deduced by Soviet jurists for some of the

9. *Id.* at 76-79.

10. *Id.* at 116.

problems that arise and how might they be remedied at law. Some feel the provisions of the 1960 RSFSR Criminal Code are too ambiguous. Attention is drawn especially to Article 163 of the Code, "Illegally Engaging in Fishing and Other Water Extractive Trades," which is said to contain gaps.¹¹ Certain types of behavior proscribed by environmental legislation is not incorporated in Article 163 and therefore go unpunished. Another example of a gap in the law is the absence of a provision in the criminal code punishing the polluting of the sea by coastal enterprises, although there is criminal responsibility for such pollution from a ship (Article 223-1).¹²

While there are general enforcement inadequacies, it is also considered that judicial and investigative personnel have, in a marvelously expressive Russian characterization, "low ecological culture," and fail to appreciate the social danger posed by environmental offenses. This observation, of course, relates back to earlier reflections on an "ecological offense." As attractive as the concept may be in abstract terms, can the general public be persuaded that such behavior truly represents a great social danger and deserves the level of penalty prescribed?

Soviet jurists are widely persuaded that the courts are simply too liberal when assigning punishment for malicious environmental violations. Although many punishments can involve deprivation of freedom, this is rarely assigned. In the Kazakh SSR, for example, about seventy percent of the punishments assigned for environmental offenses were not connected with deprivation of freedom, thirty percent resulted in the imposition of correctional tasks,¹³ sixteen percent were connected with "conditional deprivation of freedom," which means the offender is normally released on some kind of surety subject to not committing unacceptable behavior in the future, and the balance were linked to other types of

11. Criminal Code of the RSFSR, art. 163 (confirmed by Law of the RSFSR Supreme Soviet on Oct. 27, 1960, amended, Aug. 1, 1983, *Vedomosti RSFSR* no. 40, item 591 (1960). For a translation of the Code, see W. Butler, *Basic Documents of the Soviet Legal System* 356 (1983).

12. Butler, *supra* note 11, at 378.

13. See W. Butler, *Soviet Law* 287-88 (1983).

punishment.¹⁴

While it is difficult to generalize from the Kazakh example, it is not surprising that courts should feel other punishments may be more appropriate than a custodial sentence with a view to educating the offender and the general public not to commit such offenses. Much depends on the value judgments of the environmentalists, on one hand, and of the criminologists, on the other, as to what forms of pressure and social influence are likely to induce appropriate conduct. It should be added that the fifteen union republic criminal codes do differ significantly in how environmental offenses are defined, in the types and range of punishments, and in the extent to which administrative responsibility may be used before having recourse to criminal punishments.

III. Conclusion

Although we have by no means exhausted the various legal devices available for preventing or punishing environmental violations, criminal and administrative responsibility are the principal methods employed. Civil recourse is also available, but while State Arbitrazh¹⁵ is authorized by its constitutive enactment to have regard to environmental matters, there is in reality little incentive for it to initiate a suit. Two new measures introduced in June 1987 may be more promising.

The first originates in Article 58, paragraph 2, of the 1977 USSR Constitution: "The actions of officials committed in violation of law, in excess of their powers, and impinging upon the rights of citizens may be appealed to a court in the procedure established by law."¹⁶ Nearly ten years later, on June 30, 1987, the procedure finally was established by the law "On the Procedure for Appealing to a Court the Unlawful Actions of Officials which Infringe the Rights of Citizens."¹⁷ The legisla-

14. *Effektivnost*, *supra* note 3, at 117.

15. State Arbitrazh is a constitutionally mandated agency created to resolve disputes between state-owned enterprises. See generally W. Butler, *Soviet Law* 114-18 (1983).

16. Butler, *supra* note 11, at 14.

17. *Vedomosti SSSR*, no. 26, item 388 (1987). The Law was amended at the next

tion would seem to considerably enlarge the opportunities for Soviet citizens to secure redress for unlawful actions affecting the environment.

The second measure relates to an amendment of the 1979 Law on the Procuracy of the USSR.¹⁸ Article 24-1, added to the Law in 1987,¹⁹ authorizes a procurator to issue a written instruction (*predpisanie*) to an agency or official committing a violation or to the agency superior of the offending official or agency which directs that the violation cease. The instruction is to be issued when the violation is "clear" and may cause "material harm to the rights and legal interests of the State, an enterprise, institution, or organization, or a citizen, unless eliminated at once." The instruction must cite the legal provision which is being violated and suggest a means for restoring legality. It is subject to immediate execution and, though subject to appeal to the superior procurator, must be observed pending the appeal. While it is still unclear what sanctions are applicable for a failure to conform to the procurator's instruction, the device more closely approximates an injunctive type of relief than anything else in the Soviet legal system.

sitting of the USSR Supreme Soviet in Oct. 1987 and entered into force on Jan. 1, 1988. See W. Butler, *Soviet Legislation on Judicial Review of Unlawful Actions by Officials*, 25 *Coexistence* 120-28 (1988).

18. Butler, *supra* note 11, at 173-90.

19. *Vedomosti SSSR*, no. 25, item 349 (1987).