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CONTRACTOR: Professor Peter Maggs, University of Illinois

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CHANGES IN SOVIET ADMINISTRATIVE LAW UNDER GORBACHEV*

by Peter B. Maggs

Task 2 Report Under Contract 1724-720082

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Submitted by:

Peter B. Maggs

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CHANGES IN SOVIET ADMINISTRATIVE LAW UNDER GORBACHEV

EXECUTIVE SUMMARY

Since Gorbachev took office, a number of important changes have been made in administrative law. The most significant changes appear to be aimed at enhancing the power of the central authorities to carry out its restructuring ("perestroika") of the Soviet system. Less significant changes have followed a long-standing pattern of application of administrative law to deal with specific social problems.

Soviet legal scholars indicate that the administrative law system that developed from the 1930s through the early 1980s frustrated attempts at economic restructuring in a number of ways. They say that masses of detailed regulations issued by administrative bodies have made the managers of lower-level organizations unable to exert any initiative. They agree that new laws and decrees of the central government that purported to decentralize the economy in the 1960s were defeated by subsequently-enacted regulations of the ministries and state committees that administered the economy and by local government ordinances. Even though, in theory, USSR laws prevailed over all subordinate legislation, Soviet legal scholars argue that there was no effective channel through which state enterprises or individual citizens could seek review of the administrative regulations that frustrated the laws' intent.

The important changes in administrative law involve a repeal of masses of older administrative regulations that conflicted

with the legislation on restructuring of the economy, creation of new administrative law enforcement agencies, enhancing the power of existing enforcement agencies, creation of new "super-ministries," reduction in the powers of ordinary economic ministries, expansion in the areas of freedom of action of lower level agencies, granting lower level areas the right to sue superior and regulatory agencies to enforce administrative law rights, a limited enlargement of the right of private citizens to sue government officials, increasing the penalties for administrative violations, and the active use of the law of administrative violations against such problems as alcohol and narcotics.

All of the measures strengthen administrative law, in the sense that they make it a more powerful instrument for the enforcement of centrally-determined policy, not in the sense that they make it a power restricting the freedom of the policy-makers themselves. All of the measures increase the power of the top levels of Soviet authority. Some of the measures, those aimed at giving enterprises and cooperatives more rights and better legal channels for their enforcement, increase the power of the bottom level of the economy at the expense of the middle, a necessary step if "perestroika" is to work.

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I. Introduction

Administrative law, according to a standard American definition, is "the law concerning the power and procedures of administrative agencies, including especially the law governing judicial review of administrative action."[1] The following discussion will give attention both to the changes in the power and procedures of administrative agencies and to the degree to which new Soviet legislation has broadened the possibilities for judicial review of Soviet officials' and agencies' administrative actions. It will also consider another area that Soviet writers classify as part of administrative law. This is the system of administratively-imposed penalties against individuals for minor violations of the law too insignificant to constitute crimes.

Since Gorbachev took office, a number of important changes have been made in administrative law. The most significant changes appear to be aimed at enhancing the power of the central authorities to carry out its restructuring ("perestroika") of the Soviet system. Less significant changes have followed a long-standing pattern of application of administrative law to deal with specific social problems.

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II. Purging Outdated Administrative Legislation

A program to "clean up" administrative legislation began in 1987. This program combined a technical element and a policy element. The technical element involved the beginning of an effort to repeal obsolete administrative regulations and to organize and publish those regulations that are still in force. The policy element involved the reexamination of all administrative regulations, the immediate repeal of those in conflict with the principles of the restructuring of the economy, and the adoption of new regulations consistent with the new directions of the economy.

Under Brezhnev, the Soviet government began a long-term project to collect the laws (adopted by the Supreme Soviet) and the government decrees (adopted by the Council of Ministers), to repeal those that were obsolete, to arrange the remainder in logical order, and to publish them in a Collection of Laws (Svod zakonov) for the USSR and for each republic.[2] This project is

now nearing a successful conclusion. The Collection of Laws of the USSR has appeared in full and the republic Collections of Laws are nearly complete. Each Collection of Laws is in convenient loose-leaf form; supplements allow updating to reflect the current state of the law. An experimental computer system at the Institute of Soviet Legislation serves as the prototype for a future nationwide computer legal data base. While there have been a few problems in the codification process--updates have been slow and a great deal of legislation is still classified as secret--overall the project has been a major technical legal achievement.

Pleased with these results, Soviet scholars clamored for the logical next step--a similar codification project for the economic administrative regulations issued by the various ministries and state committees. The passage of the package of "perestroika" legislation in the summer of 1987 made the task more complex and more urgent. The mass of old administrative regulations, based on the theory of detailed management by economic ministries and government agencies, was in conflict with the letter and spirit of the new legislation. What previously was a relatively noncontroversial, but low priority proposal for better technical organization of legislation now became an essential element of "perestroika." If the new economic approach was to have a chance, the old administrative regulations absolutely had to be swept away and new regulations had to be drafted and adopted. Subsequent codification and publication of

the surviving and new regulations would be useful, but not as urgent.

The Council of Ministers organized a high level commission to supervise the repeal of the old regulations. The Commission chairman, Deputy Chairman of the USSR Council of Ministers, L.A. Voronin, explained the Commission's work in an interview in Ekonomicheskaia gazeta.[3] Under the supervision of the Commission, each government agency was responsible for putting its own house in order. As a result of the work of the commission, the USSR Council of Ministers repealed or amended over 1,200 decrees; republic council of ministers repealed or amended about 7,500 decrees. USSR ministries and departments repealed over 33,000 administrative regulations. Republic ministries and departments repealed over 80,000 administrative regulations.

The result has been a sharp reduction in the quantity of administrative regulations in force. The Ministry of Non-Ferrous Metallurgy, to take an extreme example, repealed around 4,000 regulations, leaving only 170 in force. Work is still continuing to eliminate regulations issued in the 1920s, 1930s, and 1940s that have long since become dead letters but have never formally been repealed. While, in an era of deregulation, no replacement is needed for many of the repealed regulations, in some cases new regulations are needed to replace those abolished. Particularly needed are new statutes on supply of producer and consumer goods that would take account of the promised increased role of

contract and corresponding decreased role of planning. Emphasis is being placed on expanding "horizontal" sanctions, such as damages for breach of contract, and reducing or eliminating "vertical" sanctions--penalties for failing to follow detailed orders from above.

The Chairman of the Commission sees as the next stage of the project the compilation of collections of legislation and regulations and the distribution of these collections to the affected enterprises. This approach would fall short of the full publication suggested by many legal scholars. Full publication is probably hindered by three factors, the Soviet penchant for secrecy, the ministries' fear of criticism of their regulations, and the perennial Soviet paper shortage.

The danger remains that as soon as the Commission finishes its work, the various ministries and state committees will slip back into their old ways, issuing a proliferation of decrees that deprive subordinate enterprises of all independence. To help prevent this, the Commission is proposing a new decree "On Improving the Procedure for Preparation and Promulgation of Departmental Regulations."[4] Serious consideration is being given to a procedure whereby regulations that affect organizations outside the issuing ministry would be have to receive the approval of the Ministry of Justice.

III. Changes in the Powers of the Agencies That Enforce Administrative Law

A. Introduction

Administrative law is enforced by a variety of agencies. With one notable exception, the powers of all of these agencies have been increased under Gorbachev. Efforts have been made to increase the independence of State Arbitration and the courts. The Procuracy has been given new powers to stop illegal activities. The police and health authorities have been given additional powers to fight narcotics traffic, AIDS, and prostitution. Only the psychiatric establishment has seen its powers cut back.

B. Strengthening State Arbitration

A Party-Government decree and legislation adopted in 1987 were designed to strengthen State Arbitration.[5] State Arbitration decides contract and other disputes where the parties are state agencies or cooperatives (other than collective farms). The Law on the State Enterprise,[6] which went into effect on January 1, 1988, provides a new role for State Arbitration in deciding disputes between enterprises and the ministries or agencies to which they are subordinate. This legislation (which will be discussed in detail below) requires State Arbitration to nullify actions of a ministry or other superior agency that interfere with the independence granted to the enterprise under the new Law on the State Enterprise and to grant money damages for harm caused by the illegal actions. Given the political power of ministries, raising the status of State Arbitration is essential if it is to play the role of watchdog over ministry

activities. The new legislation raises this status in a number of ways. First, the position of State Arbitration was raised from that of "attached to the Council of Ministers of the USSR" to the loftier status of "of the USSR," placing State Arbitration on the top level of government agencies whose importance is symbolized by the fact that they report directly to the Supreme Soviet. Second, the powers of State Arbitration were significantly reworded. The 1979 Law on State Arbitration in the USSR had provided that the tasks of State Arbitration included:[7]

> active influence in the decision of economic disputes at enterprises, institutions, and organizations for the purpose of ensuring their observance of socialist legality
>
> . . .

The new legislation provides:[8]

> active influence on enterprises, institutions, organizations, their superior agencies and officials for the purpose of ensuring their observance of socialist legality
>
> . . .

Thus the new version expressly gives State Arbitration the power to act against superior agencies, for instance ministries.

C. Strengthening the Courts

Other recent initiatives are likely to strengthen the courts. It will be important to have stronger courts, as well as stronger State Arbitration, because new and proposed legislation will give the courts broader jurisdiction over administrative law issues. In particular (as will be discussed below) courts will

be given power over complaints by citizens against illegal actions by officials, and by cooperatives against illegal action by government agencies and higher level cooperative organizations. While no new legislation has been passed on the courts, Supreme Court President Terebilov has exerted strong leadership in efforts to free judges from local political influence. Leading legal scholars are proposing a number of concrete measures to increase the status of the courts, the most important of which is the elimination of the role local Party authorities now play in the selection, retention, and promotion of judges. It is likely that at least some of these measures will be adopted.

D. Strengthening the Procuracy

New legislation has granted increased powers to the Procuracy to enforce administrative legality.[9] These new powers, if fully utilized, could substantially enhance the role of the Procuracy in ensuring that the policies decreed by central authorities are in fact carried out by local officials.

One new power gives the Procuracy a more direct way to exercise its responsibility of supervision of compliance with the law. Under previous legislation, the Procuracy could only "protest" a violation to the party involved. If that party did not accept the protest, the only remedy for the Procuracy was to protest to the next higher organization in the chain of command of the party the Procuracy claimed committed the violation. Meanwhile the violation could continue. The new legislation

gives the Procuracy the power to issue a demand for elimination of violations of the law, a demand that must be obeyed immediately. The following langauge implements this power: "Demands of Procurators for the elimination of law violations discovered by them, presented by the established procedure, are obligatory for fulfillment." The new legislation also specifies the procedure: "A written order for the elimination of the violation of a law shall be sent to the agency or official who has allowed the violation or to the agency or official superior in order of subordination who is authorized to eliminate the violation committed." Soviet procurators have made little use of this new power so far, according to one Soviet commentator.[10] One report of the use of the power has appeared in the official journal of the Procuracy.[11] In this case, the Procurator sent a written order for the correction of law violations to a housing cooperative after nonmembers were put on board in a fake election and the resulting board illegally allocated housing. The same report mentioned use of the power against a condition illegally favoring senior workers in a labor collective contract.

Another power clarifies the power of the Procuracy to intervene in two important areas. A clause that included among the functions of the Procuracy, "the struggle with violations of the laws on the protection of socialist property" was amended to read "the struggle with violations of the laws on the protection of socialist property and other violations of the laws in the area of the national economy." A new clause has added the

function, "the struggle with violations of the laws directed at ensuring the rights and legal interests of citizens." These two clauses will make it clear that the Procuracy can intervene to protect both cooperatives and citizens engaged in individual labor activity and thus force the economic policies of the central authorities on often reluctant local officials.

Another new power is designed to bring the pressure of the Procuracy to bear on legislative authorities, to ensure that they comply with centrally-decreed policy. This provision allows officials at appropriate levels of the procuracy to participate in meetings of a wide variety of legislative and administrative agencies.

E. Strengthening the Administrative Structure for Environmental Protection

Starting well before Gorbachev took office, before the period of "glasnost'," Soviet scholars were complaining about the administrative structure for environmental and natural resource protection. This administrative structure gave individual ministries the conflicting tasks of both exploiting and protecting nature. The scholars suggested that the only solution would be to create a single, powerful, independent environmental protection agency. This longstanding demand was fulfilled by a Party-Government decrees of January 7, 1988.[12] This decree provided for the creation of the USSR State Committee of for the Protection of Nature and the transfer to it of the nature protection subdivisions of the USSR State Agro-Industrial

Committee, the USSR State Committee on Science and Technology, the USSR State Committee on Forestry, the USSR State Committee on Hydrometeorology and Environmental Monitoring, the Ministry of Melioration and Water Husbandry of the USSR, the USSR Ministry of the Forest, Cellulose-Paper, and Woodworking Industry, the USSR Ministry of Fisheries, and the USSR Ministry of Geology. The list of names of the ministries previously involved in environmental protection suggests the nature of the problem that led to the scholar's complaints. The ministry in charge of paper production could hardly be expected to be a vigilant monitor of effluent from pulp mills, for instance.

The organizational structure and legal powers of the Committee are designed to make it far more effective than were previous environmental protection bodies. The Committee will be organized as a union-republican committee with a structure consisting of republic committees for the protection of nature and local nature protection agencies. The Committee have the power to issue environmental regulations binding on all ministries, departments, associations, enterprises, and organizations. It will have the power to forbid construction and to stop operations violating natural resource or environmental protection rules. It will be empowered to sue Soviet and foreign enterprises, organizations, and private individuals who have caused damages to the state by pollution or by misuse of natural resources. It will have jurisdiction over administrative

offenses involving environmental pollution and misuse of natural resources.

The overall result of what the legislation calls "radical restructuring of nature protection" is to change the Soviet natural resource and environmental protection system to one much more similar to those in Western countries.

F. Strengthening the Administrative Structure in Nuclear Energy Regulation

The Chernobyl disaster led to new legislation strengthening the administrative structure for nuclear safety enforcement. A new statute granted extensive powers to the USSR State Committee on Supervision of Safe Conduct of Work in Atomic Energy (Gosatomenergonadzor).[13] The charter grants the power to conduct inspections of nuclear installations at any time, to issue obligatory orders to nuclear plants on correcting safety violations, to shut down plants that are in violation of safety regulations, and to recommend discharge or suspension of personnel responsible for safety violations.

Nuclear safety was also emphasized in two other 1987 decrees, one on the Ministry of Atomic Energy,[14] and the other on the discipline of those employed by the Ministry.[15]

As with environmental protection, in the area of nuclear safety, there has been a move toward creating a stronger independent regulatory agency. The move is hardly surprising given the large figures that Soviet economists have estimated as the cost of the Chernobyl mishap.

G. Strengthening the Administrative Structure in Flight Safety Regulation

Following the general trend toward making regulatory agencies independent of the ministries whose activities they regulate, the State Commission on Flight Safety was made independent of the Ministry of Civil Aviation.[16] The predecessor institution, governed by 1975 legislation, had been subordinate to the Ministry of Civil Aviation.[17] The new legislation, in addition to making the State Commission independent, considerably broadens its powers. It is to have more powers with respect to supervising aircraft production and more powers with respect to inspection of military passenger transport aircraft. The latter powers include the power to approve the use of military aircraft for civil air transport. The grant of this power raises the intriguing possibility that the Soviet Union will emulate the People's Republic of China, which has allowed its military air transport service to carry foreign tourists on charter flights, expanding the tourist trade capacity, earning substantial additional hard currency, and introducing an element of competition.

H. Strengthening the Police

Recent legislation has substantially expanded the power of police to deal with drug traffickers and prostitutes. This legislation show the readiness of the authorities to increase the use of administrative compulsion on the public to combat perceived social problems, without worrying excessively about the

civil rights of the antisocial elements who are the targets of the compulsion.

A 1987 edict authorized routine police drug searches without the formalities usually required for police searches:[18]

> . . . in localities where the [local government] has made a decision to introduce checking for the illegal transport of narcotics and plants containing narcotics, authorized officials of the agencies of internal affairs (the police) may conduct searches of transportation, of the person of drivers and passengers, and also of pedestrians, of their possessions and freight, may seize any discovered narcotics, plants containing narcotics, and documents.

A May 1987 edict gave the police more powers to deal with prostitution.[19] The edict gave police the power to round up "persons with respect to whom there are sufficient bases to suppose that they are engaging in prostitution," search them and their possessions, and send them for compulsory examinations for sexually-transmitted diseases. This aspect of the legislation could the dual purpose of urban beautification by getting the prostitutes off the streets and out of hotels and of submitting a high-risk group to compulsory AIDS testing. Since this portion of the legislation did not impose any criminal or administrative penalty, it could rest on "sufficient bases to suppose" rather than on the proof of actually engaging in prostitution. The police and medical authorities will probably warn prostitutes

found to be infected with venereal disease or the AIDS virus of their potential criminal liability, if they continue in their profession, under legislation such as Article 115 of the RSFSR Criminal Code, which punishes placing a person in danger of infection with venereal disease or of the new criminal legislation providing long terms of incarceration for exposing others to the AIDS virus.[20]

I. Strengthening the Power of the Health Authorities to Deal With Narcotics and AIDS

New legislation broadened the power of health authorities to order testing of suspected drug addicts and AIDS carriers, to order compulsory treatment of addicts regardless of their age or health, and to separate addicts who were carriers of the AIDS virus from other addicts undergoing compulsory treatment.

Legislation adopted in 1987 provided for compulsory testing for both narcotics[21] and AIDS.[22] The following provisions were adopted for compulsory drug testing:

> Persons with respect to whom there are sufficient data to suppose that they use narcotic means for nonmedicinal purposes are obligated to undergo medical testing in accordance with the established procedure. If such persons refuse medical testing they may be compulsorily hospitalized for a period of not more than ten days for testing by a procedure to be determined by the USSR Ministry of Health, the USSR Ministry of Internal Affairs, and the USSR Procuracy.

The AIDS testing regulations were largely aimed at foreigners:

> 1. Citizens of the USSR and also foreign citizens and stateless persons living or sojourning on the territory of the USSR may be obligated to undergo medical testing for discovery of infection with the AIDS virus. The rules for testing established by the USSR Ministry of Health in accordance with the provisions of the present Edict shall be subject to publication and should be open for consultation.
>
> Persons with respect to whom there are bases to suppose that they are infected with the AIDS virus, in case of refusal to be tested voluntarily, may be brought to medical institutions by health-care agencies with the aid, in necessary cases of the agencies of internal affairs.
>
> Foreigners and stateless persons, in case of refusal of testing, may be expelled from the boundaries of the USSR in accordance with Paragraph 2 of Part 1 of Article 31 of the USSR Law of June 24, 1981, "On the Legal Status of Foreign Citizens in the USSR" (Ved. SSSR, 1981, No. 26, item 836).

Laws on compulsory treatment for drug abuse have been broadened to cover minors, the elderly, and the ill, as well as those able to work. Legislation in the 1970s had provided for compulsory treatment of drug addicts and for confining them in institutions where they would have to work while being treated.[23] New legislation provided for the creation of treatment-educational institutions for teen-age drug addicts.[24] Other

legislation provided for the compulsory assignment of adult drug addicts who could not work (the ill, the disabled, and the elderly) to special treatment centers. This legislation could provide a means of quarantine of intravenous drugs addicts carrying the AIDS virus. The relevant language is "Persons suffering from drug addiction who are afflicted with a serious accompanying illness that prevents their presence in treatment-labor sanatoria." [25]

J. Adjusting the Power of Health Authorities to Deal with Psychiatric Patients

Legislation adopted early in 1988 restricted the power of the psychiatric authorities in the area of involuntary commitment.[26] Why were these authorities' powers cut back, when the other administrative law enforcement agencies saw there authority enlarged? There appear to be a number of reasons. First, neither the Party leadership nor the public considers that there needs to be any increase in getting mentally ill persons into institutions. (Contrast the opinion of most of the public and some of the leadership that strong administrative action is needed against prostitutes, drug dealers, AIDS carriers, careless nuclear reactor operators, and environmental polluters.) Second, psychiatric commitment has been abused in the past against whistleblowers, dissidents, and to save criminals (who bribed psychiatrists to declare them insane) from labor camps or death penalties. Details of the abuses involving whistleblowers and criminals were discussed in a companion report on Soviet Criminal

Law; details of abuses involving dissidents will be discussed in a companion report on Soviet Civil Rights Law. Suffice it to say, the Soviet leadership is interested in protecting whistleblowers, punishing criminals, and having a good international image concerning its treatment of dissidents. Introducing more legality into the legislation on psychiatric commitment serves all three of these interests.

IV. Restructuring of the Administrative System

A. Introduction

What has happened in the restructuring of the administrative system can best be understood in terms of the underlying theories that appear to be driving the change. Soviet economists and, under their influence, at least some of the Soviet leadership, seem to be moving closer to accepting certain economic principles long embraced by their Western counterparts. These include the ideas that economic progress is faster where most economic activity is conducted by competitive enterprises, that competitive enterprises must be subjected to some government regulation because of the "externalities" (such as air pollution) that they would impose upon society if unchecked. Management science suggests that a single manager can effectively manage only a small number of subordinates.

These ideas suggest a lesser role for the ministries. The principle of competition suggests that it is inappropriate to let a single ministry dominate a particular area of the economy. The

problem of "externalities" suggests that a ministry should not be self-regulating on matters such as environmental pollution. Management science suggests that the number of units at the level just be low the top be reduced to a manageable number. Changes in administrative law can be explained as an apparent attempt to apply these principles. Attempted solutions to the economic domination of the ministry include: (1) a reduction in the power of the ministry, with a corresponding increase in the power of subordinate enterprises, so that may exercise initiative in competition among themselves; and (2) the creation of new forms of economic organizations engaged in the supply of goods and service to the economy, but not subordinate to any administrative hierarchy--the new cooperatives. As already mentioned above, the attempted solution to the problem of externalities has been to turn self-regulation in such areas as environmental protection into external regulation by an independent agency. Finally, the creation of a limited number of super-ministries, which will be discussed below, complies with the suggestion of management science that no manager should try to manage more than a small number of subordinates.

Even though, on the surface, much of the new legislation appears to be an implementation of these Western economic theories, it is very difficult to know how the legislation will work in practice. The foreign observer of Soviet administrative law always faces a basic problem in determining the real, as opposed to the theoretical administrative chain of command. In

many Soviet hierarchies, the literal text of the law calls for power to be exercised from the bottom up, but in fact it is exercised from the top down. Examples include the Party, elected government bodies, and the agricultural cooperative systems. Changes in Soviet legislation in recent years on the surface alter this system. In some cases, for instance in the creation of the "agro-industrial system" and of "super-ministries" the legislation has appeared to impose a more "top down" form of administrative organizations. Other legislation, such as the law on the State Enterprise, the Decree on the State Production Association, and the Draft Law on the Cooperative, have appeared to impose a bottom-up organization, with each higher level elected by a lower level. Because this "bottom-up" legislation is very new, it remains to be seen if it will actually change the administrative hierarchy in practice.

B. Revising the Powers of Top Level Organizations

1. Introduction

The top level organizations in the Soviet economy are called "ministries" or "state committees." Some of these organizations manage a relatively narrow area of the economy. Others manage a very broad area, supervising the work of a number of subordinate ministries, committees, or organizations. Soviet terminology does not distinguish between the two types of organizations. For the purposes of this report I will distinguish ordinary ministries (some of which bear the formal name of "state

committees") and "super-ministries" (which usually bear the formal name of "state committee").

2. Super-Ministries

An important trend in administrative restructuring has been the combining of ministries into new "super-ministries." The new super-ministries should be easier for the Politburo to manage because there are fewer of them. Such super-ministries are often called "State Committees," but are distinguished from other state committees by the size, number, and importance of subordinate organizations. In recent years super-ministries have been created, or have had their powers increased in the areas of agriculture, construction, computers, metallurgy, foreign trade, education, and also science and technology.

a. The State Agroindustrial Committee

The most notable example of a super-ministry is the State Agroindustrial Committee of the USSR, which was formed in 1985 by combining six organizations that had previously existed independently: The Ministry of Agriculture, the Ministry of Fruit and Vegetable Raising, the Ministry of the Meat and Milk Industry, the Ministry of the Food Industry, the Ministry of Rural Construction, and the State Committee on Production-Technical Support for Agriculture.[27] This committee is at the head of a powerful network of organizations extending in a hierarchy down to the rural district level and responsible for trying to solve the perennial Soviet food production and distribution problem.

b. Construction

The organization of construction was changed from an industry basis to a regional basis in 1986.[28]. The country was divided into four main regions. Construction of industrial facilities in each region (with the exception of transportation construction) was concentrated under a single regional super-ministry.[29] Construction of housing and public service facilities was made largely the responsibility of republic and local governments.[30] Previously, construction had been more on an industry by industry basis, with ministries doing their own construction or specializing in a particular type of construction. A companion decree called for more use of wholesale trade in construction materials and for an increased role for construction contracts.[31] The Decree on Improving the Administration of the Construction Industry called for a significant reduction in the staff of the ministries engaged in construction. Presumably less staff would be necessary as a result of elimination of parallelism in the old system and as a result of more reliance on contract and less on planning. The whole reorganizations is highly reminiscent of Khrushchev's scheme of regional economic councils, which many foreign analysts saw as having less of an economic than a political purpose--to destroy the power of the existing Moscow-based ministries.

Under Khrushchev, central power reasserted itself in the form of "state committees," whose coordinating role gradually grew until they became indistinguishable from the abolished

ministries. An important step in the 1986 economic reforms was the adoption of a new statue on the State Construction Committee (Gosstroi)[32]

The broad definition of powers of the new committee and the concurrent weakening or abolition of the old branch construction ministries would appear to give the new committee greater power than its predecessor, the State Committee on Matters of Construction (also called "Gosstroi") and to make it almost a USSR super-ministry above the regional super-ministries.[33]

c. Heavy Industry and Geological Exploration

As another step in the centralization of the management of industry, 1987 legislation calls for the restructuring of heavy industry and geological exploration to remove republic jurisdiction.[34] Until 1987, key ministries in heavy industry had been organized as "union-republican" ministries. The 1987 decree called for reorganization of these ministries as "all-union" ministries. Ministries and organizations affected were those responsible for energy and electrification, coal, ferrous metallurgy, nonferrous metallurgy, the oil refining and petrochemical industry, and geology. One can only speculate on the purpose of this change in the administrative structure. It may well be that some of the more obsolete "smokestack industry" plants cannot survive under the promised system of full economic accountability and self-financing. Under announced policies, these inefficient plants should be closed and their workers should be laid off. Republic authorities would be extremely

likely to use their powers to resist plant closings in their republics, regardless of the inefficiency of the plants slated for closing. As another example, the exhaustion of the oil fields in Azerbaidzhan might suggest spending new oil exploration funds on more promising areas, such as Siberia, from the point of view of the national interest. But such a shift might meet with heavy resistance from the republic government in Baku.

d. Computers

Computers also got their super-ministry under Gorbachev.[35] The Statute on the new State Committee on Computer Technology and Informatics gave the Committee extensive powers to carry out its purpose of speeding computerization in the Soviet Union. The new "super-ministry" has broad ruling making powers, "to adopted decrees and orders, to approve instructions, rules, and methodological guides on questions within the competence of the Committee, which shall be obligatory for all ministries, departments, enterprises, and organizations." The decree also granted the power to consider disputes between government agencies on matters connected with computers.

The State Committee will be responsible for developing and enforcing a "uniform technical policy" in the computer industry, a policy applicable both to enterprises under its jurisdiction and those under the jurisdiction of other organizations.

The creation of the new State Committee recognizes the importance of standardization to the advancement of the computer industry. The experience of countries more advanced in computers

than the Soviet Union, and the Soviet experience with its copies of IBM and Digital Equipment Company computers shows that standardization of computer hardware is absolutely essential to provide a basis for software development. Standardization is also of great importance in computer communications, since computers using different communications systems cannot "talk" to one another.

The dispute settlement function of the Committee is reminiscent of a similar power given to the new State Construction Committee in the area of construction. This power is ill-defined by the legislation and its relationship to the more formal dispute settlement power of State Arbitration is unclear.

e. Foreign Trade

By a January 1988 decree, the two major foreign trade bodies, the Ministry of Foreign Trade and the State Committee on Foreign Economic Relations were merged into a single organization, thus creating another "super-ministry." The decision to make this merger was apparently reached at some time during 1987, for on December 22, 1986, new Statutes were adopted on the Ministry of Foreign Trade[36] and the State Committee on Foreign Economic Relations.[37] The function of the new foreign trade body is likely to be quite different because of the change in the structure of international trade taking place as a result of the authorization of foreign trade operations by individual enterprises and associations. While the Statute on the new body

is not yet available, it is likely to put more emphasis on information and coordination functions and less on direct management of foreign trade.

f. Education

The two education ministries, the Ministry of Higher and Specialized Secondary Education and the Ministry of Education, were merged in 1988. Details on the merger will be added to a later revision of this report.

g. Science and Technology

A new decree has enhanced the powers of the State Committee on Science and Technology.[38] The decree strengthens the horizontal coordinating function of the Committee by the formal inclusion of officials of other agencies as ex-officio members of the Committee. These are the President of the USSR Academy of Sciences, the President of the All-Union Academy of Agricultural Sciences, the President of the USSR Academy of Medical Sciences, the Minister of Higher and Specialized Secondary Education of the USSR, the Chairman of the USSR State Committee on Standards, the Chairman of the Committee on Matters of Inventions and Discoveries, the Deputy Chairman of each of the permanent bodies of the Council of Ministers and the Deputy Chairman of the State Planning Committee. Like the old statute, the new decree provides for the inclusion of outstanding scholars and leaders of industry.

The State Committee has participated regularly in goal-oriented programs for application of science and technology to

particular areas of the economy. Formal provision for its coordinating role with the Academy of Sciences and the State Planning Commission in such programs is provided in the 1987 Decree. In addition to this program development, the Committee is to manage "interbranch scientific and technical systems" and, together with the State Planning Committee to provide them with the necessary research facilities.

Under both the old statute and the new decree, the Committee had the obligation to audit the technological level of production and the quality of research work in the various branches of the economy. The new decree adds an additional important quality control function, that of consideration of proposals of ministries, departments, and republic councils of ministers for the creation of new research and development organizations.

The provisions on financing of research work are also left unfinished. The State Committee on Science and Technology, together with the State Planning Committee and the USSR Ministry of Finance are given six months to issue financial regulations implementing the principles of the decree. These principles include: transfer of research organizations to full economic accountability and self-financing, replacement of budget financing with contract financing by interested customers; continued use of budget financing for important projects and technological breakthroughs. Proposals for budgetary allocations are to be made by the State Committee to the Council of Ministers.

The provisions on information reflect the already-planned transition to a centralized, computerized scientific information system. The State Committee is to exercise "methodological guidance and supervision of the work of agencies of scientific-technical information, regardless of their departmental subordination. Its instructions on access to information systems and distribution of information resources are to be obligatory for all information organizations. These extensive powers are clearly designed to allow development of an integrated information system for the whole country instead of a fragmented, organization-by-organization system.

The new decree transfers major responsibilities to the State Committee in the area of inventions and innovations. This transfer is symbolized by the transformation of the USSR State Committee for Matters of Inventions and Discoveries into the Committee for Matters of Inventions and Discoveries Attached to the State Committee of the USSR on Science and Technology. In another example of the hastiness with which the decree was drafted, the Committee is called upon to conduct a radical restructuring in the area of invention, but no guidelines are given on how this is to be done. In the new Decree, as in the 1966 Statute, the Committee is given the responsibility to involve scientific and technical societies and the All-Union Society of Inventors and Innovators in the development of technology. The new decree adds a duty for the Committee to involve members of these societies in planning, perhaps

reflecting the greater attention given to the All-Union Society in recent legislation.

3. Ministries

With the creation of super-ministries on the one hand and the granting of new powers to subordinate enterprises on the other, the administrative powers of the economic ministries are to be correspondingly reduced, according to a 1987 decree.[39] A new Statute on the USSR Ministry is to be issued reflecting the new role of the ministry. Ministries are no longer to set annual plans for subordinate enterprises, but rather are to set long term, stable norms. They are to develop wholesale trade as substitute for some of the previous area of planned supply.

At the same time, in connection with the introduction of greater freedom for lower level enterprises, the ministries are given a new task, to prevent abuse of this freedom, by counteracting monopolistic tendencies and practices.

4. Republic Organizations

The 1987 economic reform legislation ordered republics to concentrate their production efforts on consumer goods and services to meet the needs of the local population.[40] Enterprises in these areas are to be transferred from USSR to republic jurisdiction, or in some cases to local jurisdiction.

C. Creation of New Intermediate Level Organizations

1. Introduction

New legislation deals with the legal status of three types of intermediate level organizations between the ministry and

operating organization levels: branch councils, state production associations, and cooperative bodies. The branch councils are new, but probably insignificant. The state production associations, on paper at least, represent a major new development. The cooperative bodies are old in some cases, new in others.

2. Branch Councils

A decree dated July 17, 1987,[41] ordered the creation of "branch councils" (sovety otraslei) within ministries and departments. The decree calls for the drafting of a Statute on the Branch Council. The branch council would be made of enterprise directors, outstanding workers, trade union representatives, scholars, and specialists. It would meet at least twice a year. However, it would have no power other than to make recommendations, thus it is unlikely that the new institution will have any significant effect.

3. State Production Associations

A decree dated July 17, 1987,[42] called for the creation of a new type of organization, the State Production Association (Gosudarstvennoe proizvodsvennoe ob"edinenie), to act as an intermediate level between enterprises and associations on the one hand and ministries or governmental bodies on the other. The Central Committee and the Council of Ministers adopted a statute on the State Production Association on September 23, 1987.[43] Ever since the 1930s, there have been intermediate organizations between the ministries and the operating enterprises. In the

past, the executives of these organizations have been appointed by the top officials of the ministry, who have had the power to hire and fire them at will. The new legislation preserves many of the functions of the old intermediate economic administrative organizations, but provides for a very different organizational structure. It provides that a "Council of Directors" is the highest administrative body. This Council consists of the heads of all the independent organizations that are included in the State Production Organization. The State Production Organization has a general director, chosen in a manner parallel to that of the head of a state enterprise. The general director is elected for five years by the Council of Directors, subject to confirmation by the superior organization. The general director may be discharged before his term is up by the superior agency on the basis of a decision of the Council of Directors.

To the author of the present report, the administrative structure of the State Production Associations raises serious economic issues. The Decree calls for wide usage of these Associations as intermediate administrative links both on an industry and a regional basis. It is too early to know how widely this institution will be used or if the Council of Directors will really have the powers given to it on paper. The administrative structure of the Associations would appear to be incompatible with either a planned or a market economy. The history of state planning shows that enterprises have always sought "easy to fulfill" plans and that a main function of

intermediate administrative organizations below the ministry level and above the enterprise level has been to know the real capacities of enterprises and to set plans that would force enterprises to produce up to their maximum potential. Presumably a Council of Directors would set themselves plans that were easy to fulfill. In a market economy, to quote Adam Smith, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." Since a typical production association is supposed to unite the manufacturers in a particular industry, from the market economy viewpoint the Council of Directors looks like the ideal administrative structure for a cartel.

Soviet history tends to contradict economic theory and suggest that the change in administrative structure may have no effect whatsoever. Essentially what has been done is to apply to industry a structure something like what has existed since the 1920s for the "consumer cooperative" ("potrebitel'skaia kooperatsia") that handles various administrative functions in trade in rural areas. This system has always been organized, in theory, from the bottom up and has always been run in practice from the top down.

4. Cooperative Structures

The legal concept of a cooperative allows practical flexibility while preserving ideological consistency. According to orthodox Soviet Marxism, the Soviet Union has reached the

stage of where all basic means of production are socially owned. There are two major categories of socialist ownership in Soviet law: state ownership and cooperative ownership. The later category is wonderfully flexible in practice, allowing the authorities to shift between de facto private control and de facto government control while maintaining a myth that they are (or are not) moving toward socialism. This use of cooperatives started in the 1920s, when "Tsentrosoiuz," purportedly a union of agricultural cooperatives, was formed to allow what was in fact state trading in grain in foreign countries that were resistant to trading with official Soviet state agencies. The collective farm as a form of cooperative allowed Stalin to maintain an official myth that farmers were voluntarily cooperating, when in fact their farms were being seized and they were being forced into organizations under full state control. "Housing cooperatives" and "garage cooperatives" allowed a shift from public to private housing in urban areas while maintaining a myth of socialized housing. Most recently, the "cooperative" restaurants and other business allowed under Gorbachev have made possible a de facto restoration of capitalist business in some areas while pretending that it is still socialist. As a result of this history, the category of cooperative ownership includes some very different types of organizations, with very different administrative structures. The new Draft Law on the Cooperative[44] is an attempt to combine these cooperatives under a

single legal umbrella, with a standardized administrative structure.

As its model, the law takes two existing administrative structures, that of the consumer cooperative ("potrebitel'skaia kooperatsia") network and that of the system of collective farm councils. The consumer cooperative network is theoretically, as mentioned above, organized from the bottom up, with each higher level chosen by the lower levels. In fact it is operated as a top-down state agency, with the top organization, "Tsentrosoiuz," giving orders down the chain of command as in an ordinary economic ministry. [45] The system of collective farm councils, with an all-union collective farm council at the top was approved by a 1971 decree (Ob utverzhdenii polozheniia o soiuznom sovete kolkhozov i primernykh polozhenii o sovetakh kolkhozov soiuznoi respubliki, avtonomnoi respubliki, kraia, oblasti i raiona, SP SSSR, 1971, No. 12, item 90; Svod zakonov SSSR, 7.287.} Unlike the consumer cooperative structure, the collective farm council structure does not appear to do anything. Instead, collective farms are run, top down, by a system with the USSR State Agro-Industry (Gosagroprom) Committee at the top, through the local agro-industry administrative organizations. There is no national structure at all for housing cooperatives or the new small-business cooperatives--both are subject to supervision by local governments.

The Draft Law on the Cooperative envisions a pattern of cooperative hierarchy similar to that of the consumer

cooperatives and the collective farm council structure, but run from the bottom up. Article 14 of the Draft Law provides that cooperatives may form "unions" (soiuzy) or "associations" (ob"edineniia) on "strictly voluntary bases." These unions or associations may be organized by type of activity or on a territorial basis. They would be formed at congresses or meetings of delegates or agents of cooperatives. The law specifies the basic purposes of these unions or associations in extremely vague language, such as "the development of recommendations on the fullest use of reserves and possibilities," "the study of the state and prospects for the development of the market," "representing the interests [of the cooperatives] before the appropriate state and other agencies," "rendering necessary support in the improvement of production, the introduction of the achievements of scientific and technical progress . . ."

These unions of cooperatives would be, according to the law, remarkably free of legal controls. Their charters would not have to be registered with any government agency. They could own the property necessary for their activities. Their sources of support would be payments from the income of their members and income from their own economic activity.

The Draft Law raises many questions but provides few answers about the role of these unions. Will there be any change in the current arrangements for the administration of consumer cooperatives and collective farms, both of which in theory are

already in accordance with the new law, but in practice are completely contrary to its spirit? Is there really any need to form a hierarchy above the housing cooperatives? What would be the function of a hierarchy above the business cooperatives?

It is this last question that creates the greatest possibility for struggle between proponents of different directions for the administration of the Soviet economy. One possibility could be to continue the present policy under which the business cooperatives are small and lack any organizational structure. Another would be to allow the business cooperatives to unite in an organization that would do what the Draft Statute suggests, namely coordinate their operations and protect their interests. The problem with this approach is that it could allow the businesses to engage in coordinated monopolistic practices. A third approach would be to force the formation of the hierarchical structure provided by the Draft Law and then to follow the example of the consumer cooperative system by using this organization to exert power from the top and thus "tame" the cooperatives. Although the draft law says that membership in organizations of cooperatives is voluntary, it could prove in practice to be no more voluntary than membership in collective farms, which is also theoretically voluntary. A simple means to compel membership would be for state authorities to sell supplies to cooperatives only through the hierarchy.

A major difference between the status of business cooperatives and collective farms under the draft law is found in

their relation to the state planning system. Collective farms are required by current law and would be required by the Draft Law to obey planning tasks assigned to them by agricultural planning agencies. Cooperatives, under the Draft Law, may seek, but are not required, to seek plan assignments in the form of state orders. Cooperatives that accept state orders would get the right to purchase necessary raw materials through the state planning system.

D. Increasing the Powers of Bottom Level Organizations

1. Introduction

A major theme of the legislation of recent years has been in increasing the area of discretionary authority of the economic operating units at the bottom level of the economy, while concomitantly reducing the administrative authority of superior agencies. This is reflected in the new Law on the State Enterprise. The Draft Law on the Cooperative provides the legal basis for a new type of organization that would start out its existence free from the detailed administrative controls that have constrained enterprise initiative.

2. Enterprises

The new law on the Enterprise transfers many decisions on planning and employee compensation from superior agencies to the enterprise itself. Superior agencies will only be able to plan part of the production of an enterprise, by the issuance of "state orders" instead of the former planned tasks. Annual plans are supposed to be drawn up by the enterprise, rather than

dictated from above. The rules for sharing profits with superior agencies are supposed to be set on a long term stable basis, to prevent superior enterprises from confiscating unexpected profits and thereby discouraging initiatives. No limits are to be set on the maximum pay of employees. If enterprises really obtain all these powers, the administrative authority of superior bodies will be substantially reduced, with a corresponding increase in enterprise discretion. The basic problem is the doubt of many Soviet officials that an appropriate set of incentives is in place which would lead the newly freed enterprises to act in the public interest.

3. Cooperatives

A series of decrees in 1987 authorized the creation of a number of new types of cooperative organizations: food service and preparation,[46], consumer goods production,[47], consumer services,[48] and recycling.[49] Further legislation provided avenues for sale of goods produced by cooperatives.[50] and for some minor changes in the "consumer cooperative" system that markets agricultural productions and sells consumer goods in farm areas.[51]

These statutes granted a great deal of discretion to the new types of cooperatives, in particular freeing them from any obligation to perform planned tasks or state orders and from any limit on employee compensation. The new Draft Law on the Cooperative generalizes from the statutes, authorizing cooperatives to be formed in all areas of the economy. It cuts

back on effective powers in the area of employee compensation by indicating that there will be a progressive income tax on earnings.[52]

V. Strengthening Judicial Review of Administrative Action

A. Introduction

Opportunities for judicial review of administrative action have always been weak in the USSR. The result has been that intermediate administrative organizations have often been able to frustrate the policies of higher levels of the system, since the operative agencies and individuals on the bottom of the pyramid had no effective way to challenge illegal decisions of the intermediate organizations. Major changes in the scope of judicial review law under Gorbachev are designed curb the power of intermediate agencies to frustrate centrally-decreed policies, by allowing those on the bottom level of the system to secure judicial review of the legality of the actions of these agencies. There are three types of potential plaintiffs in these court actions: state enterprises (or associations), cooperatives, and individual citizens. There are two types of potential relationships between the plaintiffs and the defendants. The plaintiff may be subordinate to the defendant, as in the case of an enterprise dissatisfied with orders issued by its ministry or an employee with a grievance against his employer. The plaintiff may be subject by law to the regulatory power of the defendant, as in the case of a cooperative or private business-owner needing

a license from local government authorities, or an enterprise subject to regulations issued by an environmental protection agency. Recent changes in administrative legislation have promised increased judicial review in a number, but far from all of the possible relationships that can arise in Soviet administrative law. Because the changes in legislation are so new (in the case of cooperatives, they are still just in draft form), it is too early to know exactly how they will work in practice.

B. Judicial Review of Actions of Superior Agencies

1. Introduction

State enterprises always are subordinate to some superior agency; low level government administrative agencies and institutions are subordinate to higher government administrative agencies, only cooperatives some cooperatives are formally subordinate to a superior agency; individual citizens are subordinate to their employers in their labor relationship. The discussion below will concentrate on the rights of enterprises and cooperatives against their superiors, the main area in which change has taken place. Institutions, such as universities, have not yet been granted power to sue their administrative superiors. Cooperatives cannot sue administrative superiors because they do not have any. Issues between employer and employee are generally the subject of labor law, and which will be the topic of a separate report to follow this report on Soviet Administrative Law. Therefore they will not be discussed in detail here.

2. Rights of Enterprises to Sue Their Superiors

The new legislation provides new enforcement mechanisms designed to let lower level organizations enforce their increased powers against the decreased authority of superior agencies. Past "reforms" have failed because reallocations of power on paper did not work in practice due to the lack of enforcement regulations. This lack allowed the ministries to raise themselves by their own bootstraps by issuing regulations giving back to themselves the powers that the reform legislation had taken away. Soviet legal scholars have suggested that the problem can be avoided this time by giving the lower level organizations the right to sue to enforce their rights. Generally, under Soviet law, an organization can only appeal adverse administrative decisions up through the administrative chain of command. Thus, for instance, if a branch administration of a ministry issued a regulation or order injurious to an enterprise subordinate to the ministry, the director of the enterprise could go to the minister and, if dissatisfied, to the Council of Ministers. The director could also appeal informally to the Party Secretariat. What the director could not do was to bring the issue before a court or arbitration tribunal. Several factors undoubtedly made these channels of appeal ineffective: the tendency of superiors to back up subordinates, the limits on the time available to top officials for consideration of appeals, and the enterprise director's fear of retribution by an angered superior.

The new legislation provides broad rights for lower level organizations to sue superior agencies. The key questions, which can only be answered by practice, are if the existence of the right to sue will deter superior agencies from acting illegally with respect to subordinates and if the subordinate agencies will dare to use this right. While the new procedures for adjudication of disputes can lesson the problems of superiors' lack of time and tendency to back up subordinates, they will stiff face the problems of the danger of retribution and of the shortage of lawyers. Any enterprise manager who regularly sues his superiors is likely to wonder about the effect on his future career. The Soviet Union does not have a surplus of lawyers. Large Soviet organizations in urban areas have capable staff legal counsel. Smaller enterprises and enterprises in rural areas often have no staff legal counsel and no easy access to outside counsel experienced in economic litigation.

Since state enterprises have only enjoyed the new rights to sue since January 1, it is too early to tell how effective the right will be. It is, however, instructive to look at the published report of one of the first such cases.[53] An enterprise in Tyumen received new facilities to expand its capacity to manufacture batteries. The enterprise estimated that it could make 400,000 batteries during 1988; the Ministry of the Electrical Engineering Industry issued a state order for the production of 600,000 batteries. The enterprise would be subject to penalties of six million rubles if it fell 200,000 batteries,

short of the amount decreed by the state order. On January 19, 1988, the enterprise filed a complaint in State Arbitration seeking a reduction in its state order to 400,000 batteries.

It is evident from this case that "perestroika" has not reached the battery industry. The output of the enterprise appears to be 100% planned, under the new name of a "state order" rather than the old name of a "production plan." Thus the enterprise is trying to use the new right to sue, not to enforce its rights under the "perestroika," but rather to deal with a problem long typical of Soviet planning, the tension between enterprise managers who understate their production potential to secure low plans that will be easy to fulfill and ministerial authorities who seek high plans to increase the production of their branch of the economy. The newspaper report states that "a commission from Moscow--including Ministry experts and research scientists" had examined the situation and supported the enterprise's position. The newspaper report did not make clear whether this commission was sent on the initiative of the Ministry or of State Arbitration. Since State Arbitration lacks real fact-finding ability it must rely on the opinion of experts such as this commission. Yet this is the same sort of commission that a minister might appoint to advise him on a problem of this type. What this case suggests is that as long as the old planning procedures remain in effect, the new right to sue really means just an improvement of the bargaining position of lower level enterprises in receiving easier plans. This situation is

not compatible with the principle announced by Gorbachev of "uskorenie" or "speed-up" of the economy.

It is not clear where the lawyers or adjudicators could be found to support a massive use of the remedy of suits against subordinates by superior. The number of new lawyers for the next five years is already determined by the low existing law school enrollments. These new additions to the bar will be largely offset by the death and retirement of senior attorneys.

The 1987 Law on the State Enterprise[54] defines a new right for the enterprise, the right to sue a superior agency. The right as expressed in the enterprise law is considerably stronger than it was in the discussion draft of the law. Article 9 of the new law provides:

> A ministry, department, or other superior agency may give an enterprise orders only in accordance with its competence as established by legislation. If a ministry, department, or other superior agency issues an act not in accord with its competence, or in violation of the requirements of legislation, the enterprise shall have the right to bring suit in State Arbitration to have the act declared invalid in whole or in part.
>
> Damages caused to the enterprise as a result of the fulfillment of the order of a superior agency that violates the rights of the enterprise or as the result of the improper fulfillment by the superior agency of its obligations with respect to the enterprise are subject to

compensation by the agency. Disputes on compensation shall be decided by State Arbitration.

In the published discussion draft of the enterprise statute, this language was considerably weaker:[55]

> The ministry, department, or other superior agency may give an enterprise orders only in accordance with its competence established by legislation.
>
> Damages caused to the enterprise as the result of fulfilling the order of a superior agency violating the rights of the enterprise are subject to compensation by the agency which gave the order. Disputes on the question of compensation for damage shall be decided by State Arbitration.

It is important that the new legislation gives jurisdiction over disputes between an enterprise and its superior ministry to State Arbitration rather than departmental arbitration. Under Soviet law, State Arbitration has had jurisdiction over disputes between enterprises subordinate to different ministries, while each ministry has had its own arbitration system for deciding disputes between enterprises subordinate to itself.[56] If the arbitration system of a ministry, whose personnel are appointed by the ministry, were to have jurisdiction over disputes between an enterprise and the ministry, the enterprise could not expect an independent decision. Therefore the enterprise law provides,

for the decision to be made by State Arbitration, which is an organization completely independent of the ministries.

The legislation gives two basic powers to State Arbitration: to declare an administrative act invalid and to award damages. From the language of the new legislation, it would appear that an act of the superior agency declared invalid by State Arbitration in a dispute involving a particular enterprise would thereafter be unenforceable against any subordinate enterprise. Damages could be huge, indeed so huge it is not clear how the a ministry could pay them. Ministries as such do not have significant physical or cash assets even if they manage huge subordinate enterprises. The ministry is a collection of bureaucrats in an office building in Moscow. Under Soviet finance law, payment of salaries takes precedence over all other claims. The office building belongs to the state and cannot be attached under Soviet law. Various other funds of the Ministry, such as those for encouragement of innovation, are not subject to attachment. A major claim, such as the six million rubles mentioned in the Tyumen battery case, could hardly be paid out of the Ministry's petty cash fund that it uses to buy paper clips and similar office supplies.

The fear of retribution by superior agencies will undoubtedly dampen the enthusiasm of enterprise executives for suing those agencies. Under the law as it stood before the new Law on the State Enterprise went into effect, superior agencies could discharge enterprise managers virtually at will. While

Soviet labor law provided ordinary workers with the right to go to court to appeal arbitrary discharge, it denied this right to executives. This law has been modified by the new Law on the State Enterprise, but the threat of retribution by the superior agency has by no means been eliminated. Under the new law[57], the "labor collective" of the enterprise elects the head of the enterprise, subject to confirmation by the superior agency, for a term of five years. The superior agency has the power to remove the head of the enterprise "on the basis of a representation of the labor collective." Even if the head of an enterprise assumed that his "labor collective" would resist pressure from the superior agency to ask that he be fired, the head would still have to face the danger that the superior agency would refuse to consent to his reappointment.

3. Rights of Cooperatives to Sue Superior Agencies

The right of a cooperative to sue superior cooperative agencies in case of an illegal order are weaker than those of a state enterprise. The Draft Law on the Cooperative provides:[58]

> Interference in the economic or other activity of the cooperative on the part of state and superior cooperative agencies is not allowed with the exception of cases provided by the present Law.
>
> Damages caused to a cooperative as the result of fulfillment of the orders of state and superior cooperative agencies violating the rights of the cooperative, and also,

> as the result of the improper fulfillment by superior cooperative agencies of their obligations with respect to the cooperative shall be subject to compensation by these agencies. Disputes over compensation for damages shall be decided by a court or arbitration.

For no clear reason, this language reverts back to the somewhat weaker language of the draft enterprise law, leaving out the power to declare an administrative act invalid that the Law on the State Enterprise granted to State Arbitration. The jurisdictional provision is also weaker, "arbitration" rather than "State Arbitration" as found in the Enterprise Law. This would mean that disputes between cooperatives and a higher level agency in a cooperative system could be decided by an arbitration tribunal subordinate to that higher level agency, and in fact subject to the influence of that agency. The weak features of this Article of the Draft Law on the Cooperative seem out of harmony with the general trend of changes in administrative law. It is quite possible that the weakness will be recognized and corrected in the final version of the Law on the Cooperative.

C. Judicial Review of Acts of Regulatory Agencies

1. Introduction

All types of entities in the economy--enterprises, cooperatives, and individual citizens are subject to the jurisdiction of regulatory agencies--they must obey environmental control regulations, for instance. The law as it is developing

Gorbachev differs, for no clear reason, in the way in treats with the question of judicial review of acts of regulatory agencies. State enterprises have no clear right to sue regulatory agencies or their officials. Cooperatives have broad powers to secure judicial review of the action of regulatory agencies. Citizens can sue officials who take illegal action, but have no remedy for illegal action of collegiate bodies, except in certain situations covered by specific legislation.

2. Right of Enterprises to Sue Regulatory Agencies

The New Law on the State Enterprise gives the enterprise a clear right to judicial review of action by "superior" agencies, but is silent on its right to review of action of other agencies. This silence would seem to suggest that an enterprise, would, for instance, have no right to judicial review of actions of environmental, financial, and other regulatory agencies.

3. Right of Cooperatives to Sue Regulatory Agencies

The Draft Law on the Cooperative[59] like the Law the State Enterprise, provides the right to sue state agencies. Like a state enterprise, a cooperative has the right to sue in case of an illegal order of a superior agency, though the remedies of the cooperative are significantly more limited. Would-be founders of cooperatives are given the right to sue authorities to force them to approve its charter and cooperatives may sue to block their dissolution. These rights have no parallel for state enterprises, whose creation and dissolution is at the full discretion of administrative authorities. Because the state

agencies that regulate cooperatives lack the legal power to remove a cooperative's management and are limited in their power to dissolve a cooperative, a cooperative's management may be more willing to sue in practice than the management of a state enterprise.

a. Suit in Case of Illegal Order by a State Agency

Cooperatives are never subordinated to state agencies; therefore any suit by a cooperative against a state agency is a suit by the cooperative against an outside regulatory agency, not against a superior agency. While, as mentioned above, the Draft Law on the Cooperative gives less rights to the cooperative than the Law on the State Enterprise grants to the state enterprise with respect to orders of superior agencies, the Draft Law on the Cooperative gives more clearly defined rights to the cooperative with respect to orders of state agencies outside the chain of command than the Law on the State Enterprise does for enterprises. The difference may well reflect the haste in which the Draft Law on the Cooperative was prepared more than any fundamental policy decision. Therefore the difference may not survive in the final version of the Law on the Cooperative.

The Draft Law on the Cooperative provides:[60]

> Interference in the economic or other activity of the cooperative on the part of state and superior cooperative agencies is not allowed with the exception of cases provided by the present Law.

> Damages caused to a cooperative as the result of fulfillment of the orders of state and superior cooperative agencies violating the rights of the cooperative, and also as the result of the improper fulfillment by superior cooperative agencies of their obligations with respect to the cooperative shall be subject to compensation by these agencies. Disputes over compensation for damages shall be decided by a court or arbitration.

Note the phrase "state and superior cooperative agencies" with the adjective "superior" modifying only "cooperative" and not state. This terminology appears to give cooperatives what the Law on the State Enterprise did not give to state enterprises, namely the clear general right to sue state agencies outside the chain of command.

b. Suit to Block Dissolution

The cooperative also has the right to go to court in case the government tries to dissolve it.[61]

> The activity of the cooperative may also be terminated by decision of the executive committee of the Soviet of people's deputies in cases when it contradicts the law or the charter or in case of the cooperative is operating at a loss or is unable to pay its debts. A decision to terminate the activity of a cooperative may be appealed to the executive committee of the superior Soviet of people's deputies, the Council of Ministers of an autonomous

republic, or the Council of Ministers of a union republic not divided into provinces or to a court.

4. Right of Citizens to Sue

a. Right to Sue Where Decisions are Made by Individual Administrators

The most-publicized item of legislation in the area of administrative law in recent years was the 1987 law on the rights of citizens to sue administrative officials who had infringed upon their rights.[62] The law as passed was highly disappointing to many Soviet and foreign observers, because it was narrowly drawn so as provide relatively little expansion of the rights of Soviet citizens to sue for their rights. However, the edict on psychiatric commitment adopted early in 1987[63] suggests that the law on the right to sue officials may gradually be given more significance by future legislation.

The principle of the right of citizens to sue officials must be credited to Brezhnev, for it was introduced in his 1977 Constitution, which provided:

> Article 58. Citizens of the USSR have the right to appeal the actions of officials and of state and social organizations. The appeals shall be considered by the procedure and within the periods established by law.
>
> Actions of officials done in violation of law, exceeding authority, or infringing upon the rights of citizens may be appealed to court by the procedure established by law.

> Citizens of the USSR have the right to compensation for damages caused by the illegal acts of state and social organizations and also officials in the fulfillment of their service obligations.

Almost a decade passed from the time the Constitution was adopted without the enactment of the law called for by Paragraph 2 of Article 58 to establish the procedure for appealing illegal actions of officials to court. Soviet legal scholars wrote extensively about the new law, debating the form it should take.[64] The situation became increasingly embarrassing for the Soviet authorities. Finally, in the summer of 1986, First Secretary Gorbachev promised in a speech that the law would be passed.[65] Preparation of the law was included in the legislative drafting plan adopted in the fall of 1986.[66]. A draft law was prepared by the Ministry of Justice, the Supreme Court, and the Ministry of Internal Affairs. By a decree of May 15, 1987, the Supreme Soviet ordered that the Commissions on Legislative Proposals of the Soviet of the Union and the Soviet of Nationalities consider the draft and report it out to the Supreme Soviet[67] The Supreme Soviet adopted the law in June 1987,[68] but in a manner that suggests some policy disarray. The deputies were unusually sharp in their criticism of the draft law. The accompanying decree on the provision for putting the law in force contained the following unusual provision:[69]

2. The Presidium of the Supreme Soviet of the USSR and the Commissions on Legislative Proposals of the Council of the Union and the Council of Nationalities shall consider the proposals made by deputies in the course of consideration of the draft of the USSR Law on the Procedure for Appealing to Court Unlawful Actions of Officials Infringing on the Rights of Citizens, and shall report on the results to the next session of the Supreme Soviet.

Breaking the pre-glasnost' Soviet practice of showing respect for newly enacted legislation, a leading legal commentator published an extremely critical article about the new law in the press only two months after the law had been adopted.[70]

At the next session of the Supreme Soviet, the law was amended, but the amendments did not go very far in improving the position of the aggrieved citizen.[71] Even as amended, however, the law grants only rather limited new rights to citizens. Consider some of the key sections of the law.

Art. 1. The Right to Bring an Appeal in Court

A citizen shall have the right to bring an appeal in court if he considers that the actions of an official have infringed upon his rights.

Actions may be appealed to court that are done individually ("edinolichno") by officials in their own name or in the name of the organization represented.

This Article of the law was promptly criticized for the fact that it denied citizens the chance to get court review of actions of

collective bodies. The restriction to acts of individual officials is arguably in accordance with the language of Article 58 of the Constitution quoted above. Note the difference between the language in the first paragraph of Article 58, "the actions of officials and of state and social organizations" and the language of the second paragraph, "Actions of officials." A Soviet critic pointed out that the most common areas of citizen complaint were unfairness in housing and pension matters, and that such complaints would not be subject to judicial review, because it was made by a collective body.[72] The same author pointed out that the status of denial of residence permits was left unclear by the law, since such denials were sometimes made by individual officials and sometimes by collective bodies. This observation raises the possibility that some agencies may try to insulate the decisions of their officials from suit by changing their internal procedures so that decisions adversely affecting citizens, instead of being made by officials are formally made by collective bodies on the recommendation of officials.

On the other hand, the new law provides a convenient technique for areas in which the leadership decides it is expedient to expand judicial review of administrative action. An example is provided by the 1988 Statute on the Conditions and Procedures for the Provision of Psychiatric Assistance. This legislation provides for compulsory commitment to a mental institution not by the decision of a commission of psychiatrists, but by decision of a "chief psychiatrist" on the advice of a

commission. Thus the formal basis for commitment will be the decision of a single official. The new legislation explicitly provides that the decision of the chief psychiatrist may be contested in court under the procedure established by the 1987 Law on Contesting the Action of Officials. This legislation on psychiatry provides a prototype that could be used in other areas to expand the right of citizens to contest government decisions, without taking the more daring step of amending the 1987 law to cover collegial as well as individual action.

Further criticism[73] was aimed at the explicit exemptions provided by Article 3 of the law:

> The following actions of officials may not be contested in court in accordance with the present law: those actions for which a different procedure for appeal has been provided by criminal procedure or civil procedure legislation, by legislation on the procedure for considering labor disputes, on discoveries, inventions, and innovation proposals, on administrative violations, on individual labor activity, and by other legislation of the USSR and the union republics; and also legislation connected with ensuring the defense capability of the country and state security.

Consider each of these.

Criminal and civil procedure legislation already provides carefully defined channels for appeal of criminal and civil court cases. Thus the new law is entirely justified in creating an

exemption for these two areas, where there are already adequate appeal procedures in place. The Law on Administrative Violations (discussed below) allows review by a judge, but without the full possibilities of, for instance, the criminal appellate system. However, given the minor nature of most administrative violations, the limited review available would probably seem adequate to most Soviet critics.

The legislation on discoveries, inventions, and innovation proposals limits the possibility of appeal to the courts because of the courts' lack of expertise on the technical issues involved. Some issues, such as whether or not a claimant was in fact a co-inventor can be considered by the court. Other, more technical issues, such as whether or not the claimed invention is really a significant advance over preexisting technology, are decided by a highly specialized and skilled administrative agency with no appeal to the courts. This exception is likely to be accepted without much complaint by Soviet commentators.

In the discussion preceding the law, all Soviet commentators had agreed that it should contain exclusions for national defense and state security. Thus these exceptions are no surprise. They do eliminate, however, any hope that a would-be emigrant could attack in court a finding that he should be barred from emigration because of exposure to state secrets.

The exception relating to individual labor activity conflicts with current economic policy. This exception could be eliminated by future legislation if the current favorable

attitude toward individual labor activity persists. The areas allowed for "individual labor activity" (i.e., private business activity) were expanded by 1986 legislation.[74] Most types of individual labor activity require a license. According to press reports, local authorities in many areas have blocked individuals from engaging in perfectly legal types of individual labor activity by denying them licenses. The current legislation allows an appeal only through political rather than judicial channels:[75]

> A decision to refuse to issue permission to engage in individual labor activity may be appealed to the executive committee of the superior Soviet of people's deputies, Autonomous Republic Council of Ministers, or Union Republic Council of Ministers (for a republic not divided into provinces).

Since the higher political agencies are probably more likely to back up their subordinate organizations than courts would be, this limitation on appeals makes it possible for local authorities to frustrate the national economic policy of liberal allowance of licenses for small private business operations. Thus it would not be surprising to see the law amended in such a way as to allow judicial review.

The most controversial exception is that for labor disputes. The controversy arises because of the fact that Soviet labor law provides two different procedures for contesting dismissal, one for ordinary employees and the other for executives. Ordinary

employees may contest their dismissal in court, and the courts have been strict in requiring the reinstatement of illegally-dismissed employees. Many executives, on the other hand, may only appeal their dismissal to higher administrative agencies in the chain of command. Appeals of dismissals are governed by the Statute on the Procedure for Consideration of Labor Disputes [76] Art. 41 of this Statute, provides that those employees whose jobs are listed in List No. 1 in Appendix 1 to the Statute, may not appeal dismissals to the courts. List No. 1 includes such executives as directors and deputy directors of enterprises, chief engineers, legal counsel, and chief accountants, heads of shops, divisions, and departments, and their deputies.

This difference in the position of ordinary employees and executives is neither surprising nor unique to the Soviet Union. In unionized industries in the United States for instance, ordinary workers are given elaborate protection against unjustified discharge by collective bargaining contracts, while executives may often be fired much more freely. The difference fits in well with the Soviet "nomenklatura" system which gives the Party a major role in the hiring and firing of executives. On the other hand there is a major distinction. The Secretary of Transportation in the United States cannot fire the head of an airline or trucking company even if that company makes a nuisance of itself by repeatedly suing the Department of Transportation. In the Soviet Union, the minister of an economic ministry has long had effective power to fire subordinate officials and the

head of an enterprise has had the power to fire other enterprise executives (except the chief accountant and legal counsel, who perform watchdog functions and so can be fired only by higher authorities.) As discussed above, some of this power of arbitrary discharge may be limited by the new enterprise legislation, which provides for the election of certain management officials and for their removal only with the consent of the relevant electorate.

The need for the exception to the law on suing officials really reflects the fact that the Soviet legislation has used procedural law to implement a substantive policy. The substantive policy--that higher level executives can dismiss lower level executives if dissatisfied with their performance--may well be necessary to efficient operation of any modern economic organizations. However, instead of implementing this policy as a substantive one, Soviet law has purported to grant executives very broad substantive rights to job tenure, but then has defeated them by denying effective means of enforcement. A change in the appeals procedures, allowing executives to go to court over discharge could only realistically be made if accompanied by a significant broadening of the grounds upon which superior executives could legally discharge their subordinates.

Article 4 of the law as originally drafted required that an administrative appeal be made before application to a court.

> An appeal may be made in court only after the filing by the citizen of an appeal against the actions of the official

with the agency or official superior in the chain of command.

A similar requirement of "exhaustion of administrative remedies" is found in the administrative law of many countries of the world. However, such a requirement does present an obvious bureaucratic obstacle to the complainant. This requirement of administrative appeal before going to court was eliminated by the October 1987 amendments to the law. As amended, Article 4 provides:

> An appeal against actions of an official, at the discretion of the citizen, may be made in court after appealing these actions to he higher official or agency in the chain of command or directly to the court.

In some instances, it may still be to the advantage of the citizen to go to the higher official or higher agency rather than to a court. A court can only reverse illegal actions of officials. A higher official or agency might be persuaded to reverse not only illegal actions, but also actions that were legal, but which were unduly burdensome on the citizen involved or were contrary to the spirit of government policies.

Article 9 of the law was also eventually amended. The original version of Article 9 provided:

> The decision of a court on a complaint is not subject to appeal, but may be protested by way of supervision by a procurator.

The filing of a protest shall suspend the execution of the decision.

The amendment changed Article 9 to read as follows:

The decision of the court on a complaint may be appealed and protested in accordance with the rules of civil court procedure.

The filing of a protest shall suspend the execution of the decision.

The amendment to Article 9 broadens the rights of the citizen, but also increases the rights of the official whose decision the citizen is contending. Under the original Article 9, if a citizen won in the trial court, his victory was final, unless the Procuracy decided to intervene. Under the new law, the citizen gains the right to appeal an unfavorable decision in the trial court, but now runs the risk that a favorable decision in trial court will be appealed by the official sued or will be reversed on protest of a higher court officer. (Civil procedure legislation allows officers of higher courts to "protest" decisions of lower courts and thus to bring the decisions before the higher court for review, even if the decision has not been appealed by either of the parties or protested by the Procuracy.[77]) Overall this change is highly advantageous to the citizen, because the higher the court that considers the case, the less likely it will be to be subject to the political influence of the local official being sued.

b. Right to Sue Administrative Agencies

(1) Introduction

As already mentioned, some Soviet commentators were disappointed by the fact that the law on the right to sue for illegal acts of officials did not extend to illegal acts of administrative agencies. Legislation has long given the right to sue administrative agencies but only in certain specified areas. One important additional area would be added if the Draft Law on the Cooperative is adopted--the right to sue to force registration of a cooperative.

(2) Suit to Force Registration of a Cooperative

As mentioned above, under the draft statute, any group of three or more citizens has the right to form a cooperative. The group must present the draft charter of the cooperative to the local Soviet for registration. (The would-be founders would not have to look far to find legal help in preparing a charter. An advertisement has been appearing regularly in the advertising pages of Vecherniaia Moskva: "ADVICE BY A LAWYER: At Law Office No. 6 of the Moscow City Organization of Lawyers a special group of qualified lawyers has been created for rendering citizens and organizations legal assistance on questions of individual, cooperative, and contract labor activity. Office hours: Tuesday and Thursday from 3:00 p.m. to 7:00 p.m. at 5 Prospekt Mira.") Problems under the 1987 legislation on cooperatives typically occurred at this point. The local Soviets would often reject

charters for no good reason. At this point the founders faced a double legal problem. There was no legislation stating that the local authorities had to approve every lawful proposal presented to them. There was no way to test the rejection in court. The new draft legislation attempts to solve both these problems:[78]

> The charter of the cooperative shall be considered by the executive committee of the corresponding Soviet of people's deputies within a one month period from the day of its presentation for registration.
>
> The executive committee of the district, city, or urban district Soviet of people's deputies has the right to refuse the cooperative registration of its charter only in case the charter contradicts legislation in force.
>
> A refusal to register the of the cooperative may be appealed to the executive committee of the superior Soviet of people's deputies, the Council of Ministers of the autonomous republic, the Council of Minsters of a union republic not divided into provinces, or to court.

Unlike an enterprise director, who might lose his job or future good relations if he sued his ministry, would-be founders of a cooperative have little to lose by suing. Newspaper reports of the 1987 experience suggest that the local authorities would often not mind losing such a lawsuit. They may be afraid to take responsibility for approving an innovative or daring cooperative venture even though they have no real substantive objection to it.

c. Judicial Review of Administrative Agency Regulations in Criminal Proceedings Against Citizens

Under Soviet law, only humans (and not enterprises or organizations) can commit crimes. Therefore the defendant in a criminal case is often a private citizen. However, in a number of instances, issues of the powers of enterprise officials are tried under the guise of criminal prosecutions of individual citizens. Given the delays in the courts, it may take a very long time until the plaintiff's position is vindicated and the illegal administrative action is overturned. Thus the temptation may be for an official to go ahead and disobey an administrative regulation that appears to be illegal or impossible to obey in real economic life. The problem is that by doing so, the official faces possible criminal prosecution for serious crimes. In particular, if in disobeying superior orders the official disposes of state property, he may be guilty of theft of state property, a capital offense if over 10,000 rubles worth of property is taken. Past judicial practice has been clear that an official may be guilty of theft of state property even if he took his actions solely for the public benefit as he saw it and not to line his own pocket. The result of this practice is that more cautious officials will not lightly disobey even apparently illegal orders from superior agencies. In December, 1986, the USSR Supreme Court freed officials from a charge of theft of state property in a case where they had really tried to overcome

bureaucratic regulations which were preventing a job from getting done by forbidding payment of the going rate for the necessary work.[79] A leading Soviet criminal law specialist published a comment on this case in Izvestia, indicating that he hoped that the decision would mark the start of a trend toward removing good faith violations of administrative regulations from the criminal courts.[80]

VI. Legislation on Administrative Violations

A. Introduction

Administrative law has played an important role for decades in the control of conduct that is antisocial (for example, minor traffic offenses), but is not so serious as to warrant the complexities of criminal sanctions. Recent legislation has extended the application of such administrative sanctions in such problem areas as alcohol, drugs, prostitution, blackmarketeering, and environmental protection. However, the new legislation is really just a continuation of a decades-old policy of applying administrative measures against perceived social problems.[81]

A major technical legislative achievement of the early 1980s was the codification of Soviet legislation on administrative violations. Fundamental Principles of Legislation of the USSR and the Union Republics on Administrative Violations were adopted in 1980.[82] On the basis of the Fundamental Principles, each republic adopted a Code on Administrative Violations.[83] The

final step in this law revision process occurred in 1986 under Gorbachev, with the repeal and amendment of legislation inconsistent with the new Code.[84] Note that the old law was repealed two years after the new law was passed. Soviet practice in the case of major legislation has been to pass the new law, appoint a study committee to study which old laws should be repealed or amended as a result of the new law, and then repeal the old laws when the committee has done its work. During the interim period, the courts and administrators have to figure out which parts of the old laws remain valid.} This legislation organized an area that had previously been chaotic. Rules providing for administrative fines and penalties had previously been scattered throughout Soviet legislation. There was no statement of general principles or procedures for dealing with administrative violations. The codification provided a statement of general principles applicable to all violations, standard procedures for dealing with the violations, and gathered and organized the definition of various administrative offenses. Since this major overhaul of the administrative violations legislation has been accomplished successfully, there is now no pressure any further general reform of the law of administrative violations. Only one general change has been made, perhaps reflecting the effects of inflation; the maximum limits on fines have been raised were raised. Most of the changes to the administrative violations laws during the period 1985-1988, however, have been additions to the codes made as part of

campaigns against specific social problems. There have been quite a few such additions, and no deletions from the list of administrative offenses, suggesting an increased use of the law on administrative violations for social control.

B. Higher Fines

May 1987 legislation raised the maximum schedule of fines for administrative violations.[85] The old provision had read as follows:

> Where it is necessary to increase the responsibility for individual types of administrative violations, RSFSR legislation may establish a fine for citizens of up to 50 rubles and for officials of up to 100 rubles; USSR legislation may establish a fine for citizens of up to 100 rubles and for officials of up to 200 rubles.

The new legislation changed this to read:

> Where it is necessary to increase the responsibility for individual types of administrative violations, RSFSR legislation may establish a fine for citizens of up to 50 rubles and for officials of up to 100 rubles and for mercenary administrative violations--up to 200 rubles; USSR legislation may establish a fine for citizens of up to 100 rubles and for officials of up to 200 rubles and for mercenary violations and violations of the legislation on the struggle with drunkenness--a fine of up to 300 rubles.

As will appear below, not only were the limits for fines raised; fines were raised for a number of common types of administrative

offenses. There were probably two reasons for the increase in fines. First, inflation may have rendered the earlier maximum fines unrealistic. Second, plans for decriminalization of certain alcohol-related offenses may have required that fairly stiff non-criminal penalties be available for them.

C. Specific Offenses

1. Miscellaneous Transport, Health and Safety Offenses

A 1986 Decree recodified the rules providing administrative fines for a number of minor offenses in the area of transport, health, and safety, defining offenses in more detail, adding some offenses, increasing the fines for most offenses. The decree appears to be utterly devoid of political significance. It continues the anti-smoking campaign, which had already led to banning smoking on airplanes, by providing a five ruble fine for smoking on subways and suburban trains and also for smoking in no-smoking areas on other trains. Fines for riding without tickets were increased, but still remain low--five rubles on suburban trains and ten rubles on other trains.

2. Alcohol

1987 legislation added an Article 160-2, "Making or Storing Strong Homebrewed Distilled Spirits Beverages Without the Purpose of Sale."[86] This was part of a package of legislation that removed criminal liability for first offenses involving making or storing hard liquor for personal use. Before this legislation, home production of beer or wine was an administrative offense,

while production of hard liquor was a criminal offense. The legislation kept commercial production of hard liquor as a criminal offense, created a new criminal offense of repeated non-commercial production of hard liquor, and decriminalized the production of hard liquor for personal use. Published statistics of the Soviet anti-alcohol campaign and listed extraordinarily large numbers of criminal convictions, numbers so large that the prosecution of the cases must have taxed the resources of the criminal justice system. Since the courts were in practice sentencing the first offenders to fines rather than imprisonment, the shifting of these violations from the criminal courts to the much simpler administrative violation procedure must have seemed the expedient thing to do.

3. Drugs

1987 Legislation added a number of new drug-related offenses to both the criminal code and the administrative violation code.[87] The legislation appears to have had a threefold purpose: first, to fill some gaps or loopholes in the narcotics legislation, second, to provide a graded series of offenses so that the punishment would better fit the violation, and third, to encourage voluntary cooperation by drug-users with the authorities. Added to the Criminal Code were articles on involving minors in the non-medicinal use of medicines and other stupefying substances, repeated offenses of the illegal obtaining or possession of narcotics in small quantities or the use of narcotic substances without doctor's orders, and the repeated

illegal planting or growing of oil poppies and less dangerous varieties of hemp (Severe criminal penalties were already on the books for growing opium poppies or marijuana/hashish hemp.). A new Article 99-1 of the Code on Administrative violations, provided a fine of up to 100 rubles for "Failure to take measures for ensuring the established system of security for plantings of hemp and oil poppies, of places of storage and processing of these crops, and also failure to take measures for the destruction of stubble and production waste containing narcotic substances." A new Article 99-2 provided a fine of 20 to 100 rubles for the illegal planting or cultivation of oil poppies or of the less dangerous varieties of hemp. Article 44 of the Code, which had read "Use of narcotic substances without a physician's prescription shall entail the imposition of a fine in an amount of up to 50 rubles," was amended substantially, to read as follows:

Article 44. Illegal Obtaining or Use of Narcotic Preparations in Small Quantities or the Use of Narcotic Preparations without a Physician's Prescription

The illegal obtaining or storage without the intention of distribution of narcotic preparations in small amounts and also the use of narcotic preparations without a physician's prescription --

shall entail the imposition of a fine in the amount of up to 100 rubles or corrective work for a period of one to

two months with the confiscation of twenty percent of earnings and in exceptional cases, if by the circumstances of the case and considering the personality of the violator, these measures shall be considered as insufficient, by administrative detention for a period of up to 15 days.

Note. A person who has voluntarily surrendered a narcotic preparation he possessed in small amounts, which he obtained or stored without the purpose of distribution, and also a person who voluntarily applied to a medical institution for the rendering of medical aid in connection with the use of narcotic substances without a physician's prescription, shall be freed from administrative responsibility for the actions proscribed by the present article.

The combined effect of the new criminal legislation and the new administrative legislation is to created a graded series of drug offenses, and to divert the less serious offenses from criminal to administrative punishment. Under the prior law, there was only, on the one hand, a serious criminal offense, and on the other hand a very minor administrative offense. In addition to creating two levels of criminal offenses, the new law creates a much wider gradation of potential punishments for the administrative drug offenses. The maximum fine is doubled from 50 to 100 rubles. "Corrective work" is a punishment with a number of elements: the person sentenced to corrective work,

cannot quit his job or take a vacation; a portion of his salary is taken as a fine; time spent in "corrective work" is not counted toward earning vacation time; certain social security benefits based upon "uninterrupted" and "general" working time may be reduced. The 15 day administrative detention allows the police to get minor drug offenders off the streets without going through the complexities of the criminal process.

The use of "campaigns" against various types of antisocial activity has been a feature of Soviet law for decades. One very typical feature of such a "campaign" is the rewriting of criminal and administrative legislation to provide a more finely graded series of responses to the offenses involved. Often, before the start of a campaign in a particular area, the criminal law was used in that area only for most serious offenses, while administrative law was used to levy small fines for lesser offenses, and really minor offenses were ignored altogether. Once a campaign was started, the Criminal Code would be amended to provided more detailed definitions and gradations of offenses, with the more serious administrative offenses, perhaps being criminalized. The administrative legislation would likewise be amended to provide a gradation of penalties for different levels of conduct not serious enough for criminal prosecution. Thus the 1987 amendments to the anti-narcotic legislation followed a pattern very typical of campaigns in Soviet law.

4. Prostitution

Until 1987 prostitution as such was not illegal under Soviet law. Prostitutes who did not hold regular jobs could be prosecuted as parasites under Article 209 of the RSFSR Criminal Code. Those who accepted payment in foreign currency could be prosecuted for violating currency regulations. One result of "glasnost'" was the appearance of articles in the Soviet press sharply critical of the existence of widespread prostitution.[88] While an occasional liberal jurist argued that prostitution should not be punished because of the difficulty of distinguishing it from normal dating practices (such as inviting a woman for dinner and giving her a present) and because of the unfairness of prosecuting prostitutes but not their clients, the overwhelming majority of articles and letters to the editors favored making prostitution illegal. A May 1987 edict provided a fine of up to 100 rubles for the first offense of "engaging in prostitution" and up to 200 rubles for the second offense within a year. This edict came in for prompt criticism on the ground that the penalties it provided were far to low, amounting to just a minor cost of doing business for the professional prostitute.[89] However, a sociological study has indicated that the lowest half of prostitutes were receiving under 20 rubles per client and that this was the group that solicited clients most openly.[90]

5. Hard Currency and Equivalents

Legislation made some changes in the rules governing hard currency, and its equivalents (gemstones, precious medals, coupons for use in special stores). A 1985 USSR edict and

subsequent legislation in the republics provided administrative sanctions for violation of rules regulating the handling of gems and precious metals in state enterprises and other organizations and granted the power to impose fines granted to Ministry of Finance inspectors.[91] Officials responsible for receiving, dispensing, accounting for, or storing gems and precious metals and for dealing with scrap containing precious metals were made subject to fines of up to 100 rubles by the heads of state inspection of the USSR Ministry of Finances Assay Supervision, and of up to 200 rubles by the head and deputy heads of the USSR Ministry of Finances Administration of Precious Metals. Edicts adopted in 1987 raised the fines and simplified the enforcement of penalties for illegal operations with foreign currency and payment documents.[92] They raised fines from 50 rubles for each offense to 100 rubles for the first offense and 200 rubles for subsequent offenses. Probably inflation had made 50 rubles fines totally ineffective. The new edicts turned enforcement over to lower level police officials, an appropriate step considering the widespread nature of the offense. Apparently the higher fines were also ineffective in stopping black market operations in foreign currency equivalent coupons; in January 1988, the Council of Ministers adopted a decree providing for phasing out the use of the coupons by July 1, 1988.[93]

The edicts also created a new offense of approaching foreigners with the purpose of obtaining things from them (thus allowing arrest of blackmarketeers without the need to show that

a blackmarket transaction had actually occurred). This legislation, along with the anti-prostitution edict, appears to have been part of a cleanup campaign, designed to make it easier for the police to deal with undesireables.

6. Natural Resource Protection

While the most important change in natural resource protection was the creation of an independent regulatory agency, already discussed above, a few miscellaneous additions were made to the rules on administrative violations of natural resource protection legislation. A 1986 edict gave forestry officials jurisdiction to enforce penalties for violation of forest fire safety rules.[94] A 1987 edict added a new violation, "Harming Gas Mains While Doing Work."[95]

7. Draft Registration

Legislation adopted in the summer of 1985, presumably in connection with the war in Afghanistan, somewhat strengthened administrative liability for violation of the rules for military draft registration and also made some technical changes in the terminology of the legislation.[96]

Soviet draft registration is the responsibility of military commissariats in urban areas and local Soviets in rural areas. Housing administrators and homeowners are required to report information on eligible young men to these authorities. They also are supposed to deliver notices from the military registration authorities to the young men. As a double check, employers and educational institutions are supposed to keep track

of their draft status of their employees and students. As a third check, local police are supposed, in the course of issuing and cancelling residence permits, to verify the draft status of these young men.

The 1985 legislation was designed to strengthen this system. The legislation provided fines for: (1) housing administrators and homeowners who failed to provide information to the military authorities on young men subject to the draft; (2) for employer officials and school administrators who hired or admitted draft-eligible young men who were not registered for the draft; (3) housing administrators, homeowners, employer officials and school administrators who failed to deliver notices from the draft authorities to draftees; (4) employer officials who hindered the appearance of draftees who were called to active duty. In each case the fines were 10 to 20 rubles for the first offense and 20 to 50 rubles for subsequent offenses within a year.

Fines were also provided for officials of two organizations responsible for providing information that would allow the draft authorities to know the physical and personal status of young men under their jurisdiction. Officials of medical-labor expert commissions, were made subject to fines for failure to report findings of disability. Officials of the agencies of registration of civil status (ZAGS) were made subject to administrative liability for failure to report name changes, birth date corrections, and deaths involving young men eligible for the drafts.

The new legislation also strengthened the administrative responsibility of prospective draftees who violated registration regulations. It retained the previous 10 ruble fine for first offenses, but added a new fine of 10 to 50 rubles for repeated offenses within the course of a year.

The new legislation also made some minor terminological changes, eliminating references to "military registration desks" of local executive committees, and replacing outdated designations of housing administration authorities with references to current Soviet legal titles for such officials.

While this draft legislation was a natural reaction to the pressures upon the registration system created by the war in Afghanistan, it also was significant as the first in what was to become a pattern of actions under Gorbachev involving the strengthening of administrative law as a means of problem-solving.

NOTES

1 Kenneth C. Davis, Administrative Law Treatise, 2nd ed. (San Diego: 1978), p. 1.

2 Stephen D. Steinmetz, "The U.S.S.R. Digest of Laws: Legal Reform a la russe," New York University Journal of International Law and Politics, 17 (1985) 949.

3 "Priznany utrativshimi silu," Ekonomicheskaia gazeta, 1987, No. 12, p. 4.

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