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BOSTON HARBOR: A CASE STUDY

*Charles M. Haar**

I. INTRODUCTION

The list of severe problems facing the republics of the former Soviet Union appears endless, ranging from political disintegration to control of nuclear weapons to economic catastrophe. These conditions have made it harder than ever to develop and implement solutions for the widespread environmental degradation that is one of the most enduring legacies of the Soviet state. In seeking to address their pressing environmental problems, the citizens of the former Soviet Union must confront such issues as whether and how to make trade-offs between environmental protection and economic development, and how to allocate power among governmental branches and regional and central authorities. The current crisis greatly reduces the newly sovereign republics' room to maneuver and their margin of error in balancing competing interests. Here, as in many other areas, the republics can learn valuable lessons from the experience of the United States, which has faced similarly complex environmental problems and sought not only "correct" solutions but also effective means of implementing those solutions through the political and judicial processes.

The environmental program of any nation must adjust to, as well as take advantage of, existing political and economic institutions. The twin ideas of the separation of powers and checks and balances are the essence of the United States constitutional system, with the executive branch carrying out the environmental laws that the leg-

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islative branch passes. In a democracy the people, acting through their legislature and other elected officials, are to set their own priorities and make the hard choices in allocating monies. Because of failure of will, the power of vested interests, and fear of political reprisal, however, it is often the judicial branch that has proven the driving force in bringing environmental policies into being, providing the backbone for the difficult task of enforcing environmental laws.

A case study of the Boston Harbor litigation is a striking example of how courts can circumvent the usual political processes that paralyze enunciated policies of environmental control. The Boston Harbor litigation was unusual even in the United States and is of interest chiefly for its innovative use of a special master.¹ The case nonetheless illustrates how a nation may employ its judicial system to deal with environmental problems that the legislative and executive branches are hesitant to face.

II. THE POLLUTION OF BOSTON HARBOR: HISTORY AND LITIGATION

Boston Harbor is the vital nerve for commercial and recreational activity in Massachusetts and for much of New England. The largest seaport in New England, encompassing an area of forty-seven square miles, the harbor provides a base for the region's important shipping and shipbuilding industries. It also serves as home to a large shellfish industry and offers numerous recreational activities including swimming, boating, fishing, and exploration and use of the harbor's thirty islands. Moreover, in recent years, the Boston waterfront has attracted numerous commercial and residential investors and developers, whose interest reflects the enormous economic potential of the area.

Despite its economic and recreational importance, Boston Harbor is seriously polluted from discharges of human and industrial wastes into its waters. Boston is representative of the older cities along the United States's coasts whose major waterways are the sites of severe contamination resulting from the discharge of raw and partially treated sewage. Each and every day for years, some 450 million gallons of wastewater and 100,000 pounds of sludge entered Boston Harbor through discharges from the metropolitan sewerage system

¹ See, e.g., W.D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 414-19 (1986); see also Stuart P. Feldman, Comment, *Curbing the Recalcitrant Polluter: Post-Decree Judicial Agents in Environmental Litigation*, 18 B.C. ENVTL. AFF. L. REV. 809, 818 n.66 (1991).

and the municipal systems joined to it. These discharges led to eutrophication and the accumulation of toxic substances and dangerous concentrations of disease-producing bacteria.

A change for the better began only after a protracted lawsuit over the condition of Boston Harbor. The harbor has been polluted almost throughout its history, and there is a longstanding consensus about the danger that it poses to the human and economic health of the metropolitan Boston area. Nonetheless, for years the agencies responsible for environmental protection in Massachusetts failed to take effective action to address this pollution. Similarly, the state legislature consistently failed to properly fund the few efforts that these agencies did make.

After negotiations over a cleanup of the harbor broke down, the city of Quincy filed suit in the Massachusetts Superior Court against the Metropolitan District Commission (MDC): the agency, controlled by the state Executive Office of Environmental Affairs, that was responsible for sewage disposal and water supply in the metropolitan Boston area. The suit alleged that the MDC had violated several state environmental protection statutes as well as committed common law nuisance.² Under the prodding of the court, and after many appeals, the case ended not in a traditional judgment of liability and penalty, but with the enactment of a law establishing and funding a new state agency, the Massachusetts Water Resources Authority (MWRA), to build the necessary facilities for cleaning up the harbor.³ Thus, the outcome of the lawsuit was in essence a legislative solution, but one that would not have occurred in the absence of extensive judicial involvement.

III. LESSONS LEARNED FROM THE BOSTON HARBOR LITIGATION

A. Initiating the Action

The city of Quincy, a municipality and thus in theory a creature of state government, brought a lawsuit against that very state government, suing the departments entrusted with controlling the qual-

² Complaint, *City of Quincy v. Metropolitan Dist. Comm'n*, Civ. No. 138,477 (Mass. Super. Ct., Norfolk County, filed Dec. 17, 1982).

³ For a detailed account of the background of the Boston Harbor litigation and the role that the special master played in it, see Timothy G. Little, *Court-Appointed Special Masters in Complex Environmental Litigation: City of Quincy v. Metropolitan District Commission*, 8 HARV. ENVTL. L. REV. 435 (1984). See also Report of the Special Master Regarding Findings of Fact and Proposed Remedies, *City of Quincy v. Metropolitan Dist. Comm'n*, Civ. No. 138,477 (Mass. Super. Ct., Norfolk County, filed Dec. 17, 1982).

ity of the environment. The city claimed that these departments were breaking the state environmental protection statutes they were supposed to enforce. In the former Soviet Union, a municipality that brought suit against a state executive agency would have been a startling anomaly.

Moreover, the actions that the court took in resolving the suit it equally well could have taken in a case involving private plaintiffs. Environmental statutes in the former Soviet Union do not include specific citizen suit provisions. This lack of citizen access to the courts, combined with the courts' general weakness in relation to state executive agencies, has limited the ability of citizens' groups to use the courts both to enforce environmental statutes and to control the activities of those executive agencies. Some Soviet environmental law experts have recognized that the introduction of citizen suit provisions and a judicial system capable of responding meaningfully to such suits is a necessity for the continued development of environmental protection in the new republics. One of the priorities for legal reform in Russia today is the creation of an independent judiciary.⁴

The case of Boston Harbor shows that the availability of the courts, both to local communities and to groups of concerned citizens, is vital in circumventing inertia in the political process. Much of the environmental progress made in the Soviet Union in the last few years with respect, for example, to shutting down ecologically dangerous industrial facilities has come as a result of political and social pressure by unofficial environmental groups.⁵ Success in these areas, however, all too often has been limited to drastic and expensive measures such as forcing the cessation of plant operations altogether or not opening facilities in the first place—measures that will become both more costly and less likely to occur as the region's economic crisis deepens.

The more subtle and complex tasks of regulating the day-to-day activities of polluting facilities without closing them down and controlling the executive agencies charged with enforcing environmental laws are not so easily effected through ordinary political pressure. Although it is the legislatures that must pass the laws on which

⁴ See, e.g., Tatiana Zaharchenko, *The Environmental Movement and Ecological Law in the Soviet Union: The Process of Transformation*, 17 *ECOLOGY L.Q.* 455, 470-71 (1990).

⁵ H. FRENCH, GREEN REVOLUTIONS: ENVIRONMENTAL RECONSTRUCTION IN EASTERN EUROPE AND THE SOVIET UNION 28-33 (Worldwatch Paper no. 99, 1990); Zaharchenko, *supra* note 4, at 462-64.

litigants can rely, and that ultimately have to provide funding for any structural changes, the ability to enlist the judicial machinery is invaluable where, as in the case of Boston Harbor, ordinary political remedies have failed.

B. The Range of Remedies

Under both statutory authority and traditional equity jurisdiction, the court in the Boston Harbor litigation employed and threatened to employ a wide range of remedies.

1. Receivership for the MDC

The possibility of receivership for the MDC, the agency in charge of keeping the harbor clean, always loomed in the background, though the court never ordered it. Judge Paul Garrity, who heard the case, was the same judge who had taken control of the Boston Housing Authority because of its unsafe and degraded public housing facilities and invoked the extraordinary remedy of appointing a receiver to run that agency's operations. The possibility of receivership in the Boston Harbor case thus was more than an empty threat.

The idea of a court managing an executive agency must seem particularly odd to the Soviet observer—neither is it a favored remedy in the United States. In this case, the threat of receivership was probably more effective in addressing the problems of Boston Harbor than actual receivership would have been. Merely placing the MDC in the hands of a receiver would not have solved the problem of extracting money for necessary changes from the state legislature. In any event, a court is not institutionally suited to oversee the day-to-day operation of an executive agency. Nonetheless, the credible threat of receivership in the end was an important factor in motivating the MDC and other state agencies to cooperate in the search for solutions.

2. The Injunction Against Sewer Hookups

The court actually did deploy another drastic remedy: an injunction against new sewer hookups. While the injunction in itself could not constitute a meaningful long-term solution to the problems of pollution in the harbor, it played a significant role in the eventual outcome of the litigation by enlisting politically powerful real estate developers to put pressure on the legislature to remedy the harbor situation. The court made it in the developers' interest to support a

restructuring of the sewage and water systems by imposing a remedy that would prevent new sewer hookups and thereby bring land development to a halt.

Learning how to employ the private market to jump-start the political process will be especially crucial for the states of the former Soviet Union, which just now are beginning to experiment with a free market and experience its shortcomings as well as its strengths.

3. Fines and Damages

The court concluded that fines and damages—more typical forms of judicial relief—were inadequate responses to the long-standing problem of the harbor's pollution. It decided that deploying an injunction against new sewer hookups and thinking out loud about receivership for the MDC were more effective tools for forcing compliance. After all, one created an incentive for specific interest groups to come forward, while the other was a credible threat that was within the court's authority, and that would have been binding had the court carried it out.

C. Use of a Special Master

The court charged a special master with the tasks of resolving disputed issues of fact, hearing evidence, making findings of fact, and formulating remedies. The special master grew into a type of quasi agency, transformed from its customary role of judicial time-saver into a body capable of assembling the expertise necessary to resolve the multidimensional issues of complex environmental litigation.

The master's investigation crystallized the case's major issues and laid a foundation for the court's eventual findings of fact and proposed remedies. The problem of Boston Harbor was not one that the unilateral action of any one agency or municipality could solve, and the special master's investigation provided a vehicle for soliciting the views of the parties on both sides—especially those views that could not be paraded forth in open court—and enlisting the parties' support. Moreover, the detailed recommendations of the special master's report provided a much more specific standard for measuring compliance with any settlement or court order than the typical result of an adversary proceeding would have.

D. Marshalling Public Opinion and Support

In addition to involving pressure groups like the developers, the judicial process in the Boston Harbor litigation helped to mobilize

public opinion on a broad scale. A legal proceeding, with its attendant public fact-finding, proves to be a good way to put information before the public. Even if the information is openly available, the court process—especially if it includes a special master's report—provides a mechanism for consolidating a mass of information from disparate sources and molding it into a coherent story that can catch the attention of the public and the media. In this case in particular, the special master's on-site visits to sewage plants with representatives of the press and television drew widespread attention to the needs of the harbor.

E. The Use of Experts

An adversarial process, litigation in the United States is not usually conducive to the objective marshalling of scientific evidence or the fashioning of the kinds of complex remedies necessary in a case like this. A special master, however, can perform these functions and enjoy the benefit of unbiased counsel. Furthermore, because the court is likely to accept a master's findings, they are more binding than, for example, the report of a scientific commission. On the other hand, with a master, the statements and opinions of experts are not subject to the traditional sifting of cross-examination.

In determining the causes of the pollution in Boston Harbor and the measures necessary to alleviate it and then preparing his report, the special master consulted many scientific and other experts. His findings appeared to have met the approval of all the parties.⁶ This, however, will not always happen, and the danger of judges relying too much on special masters to frame issues and find facts in an *ex parte* fashion in contested cases is evident.⁷

F. Federal-State Relations

There is always a choice of judicial forums in the complicated federalist system of the United States. The city of Quincy did not allege any violation of federal law nor name the United States Environmental Protection Agency as an additional defendant because it wanted to avoid giving the state defendants a means to remove the case to federal court. The plaintiffs knew that Judge Garrity, who would hear the case if it remained in state court, was not afraid to make use of the court's oversight powers or require structural

⁶ Little, *supra* note 3, at 467–68.

⁷ See generally Brazil, *supra* note 1.

remedies. After Judge Garrity retired to private practice, and the Massachusetts legislature created the MWRA, the case moved to federal district court.

The extent to which such choice of forum questions will arise in the former Soviet Union is among the many things that remain to be seen, but certainly as long as some federated structure exists—whether on the level of the Commonwealth of Independent States or the federal system of Russia itself—there will be decisions to make about which courts can provide the relief requested and which can and will enforce the relief granted.

G. The Remedy of an Independent Regional Agency

The use of quasi-independent, single-purpose public agencies like the MWRA is common in the United States and unheard of in the Soviet Union. While the legal and financial conditions for an entity like the MWRA do not exist now in the Commonwealth of Independent States, the idea of creating a flexible regional authority with broad powers over a single problem area may be worth studying. One of the principal obstacles to a political solution for Boston Harbor's pollution had been that there was not a single agency that had the power—even if it had the will—to implement pollution control measures for the whole harbor.

Another major obstacle was financial: quite simply, the tremendous amount of money required for the maintenance and expansion of the Boston area's sewer system and water treatment facilities. The MDC had depended on annual legislative appropriations and thus was at the mercy of the state legislature's political priorities, among which such matters did not rank very highly. The creation of the MWRA, which can finance capital projects by issuing bonds and its regular operations by imposing user fees, moved control over the cleanup and protection of the harbor out of the day-to-day political arena and shielded it from such volatile issues as general tax increases.

This transfer of authority is not entirely good from the perspective of democratic control over the operation of government. It may diminish agency accountability to the public as well as prevent the regular consideration of public priorities that the annual legislative appropriations system encourages. The pollution of Boston Harbor, however, provides a prime example of how the annual appropriations system can give insufficient weight to long-term considerations.

IV. CONCLUSION

In the Boston Harbor litigation, recourse to the courts provided the possibilities of injunction and receivership and helped to mobilize public opinion, thus cutting through a deadlocked political process. The case demonstrates that the courts cannot replace the legislature in dealing with environmental protection, nor should they, but that problems such as the Boston Harbor, which require complex and long-term solutions, can benefit from the courts and the legislature working together.

The continued involvement of the special master—who was in constant touch with the judge—enabled the parties to come to terms with their obligations and mustered public support. The final result was to induce the creation of a new public authority and at long last begin the process of cleaning up the harbor. Of special interest to the Soviet Union should be how the radical transformation of an ongoing system is dependent on a judicial system that looks to the “right” answer and not to its own popularity.

Even now, the problems of the pollution of Boston Harbor are far from solved. There are still funding problems, particularly now that Massachusetts is in the grip of a severe budget crisis. This illustrates what the Soviet Union is learning all too well—that to solve environmental problems, not only a commitment to action but also a strong economy is necessary.