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THE COORDINATION OF LEGISLATIVE POLICY AND THE REGULATION OF PRIVATE INTERESTS: SOME SUGGESTED PRAGMATIC PRINCIPLES FOR ENVIRONMENTAL POLICY

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Man must conserve the world's natural resources, not only for their sake, but for his own. Conserving our environment requires rethinking the relationship between private interests and public needs. Adjusting the balance between them to correct the excesses and remedy the shortcomings will demand changes and sacrifices. Education is slow to persuade the majority of people that they must modify their traditional behavior and beliefs. Meanwhile, responsible governments must plan and execute policies which will prevent environmental crises. The appropriate philosophical basis for these policies is pragmatism, the circumspect employing of principles to produce desired consequences which will be compatible with other policies.

This article suggests a series of such principles, to be kept in mind in formulating environmental policies, divided roughly into a) the regulation of private interests; b) the coordination of legislative policy; and c) the participation of the public.

REGULATION OF PRIVATE INTERESTS

A. Objectively Reviewing Governmental and Commercial Projects, Processes and Products for Environmental Effects

Considering the expense and occasional impossibility of remedying environmental damage, an ounce of prevention may today require several pounds of "cure."

Prevention of environmental crises is the goal of the National Environmental Policy Act of 1969.[1] Broadly, this statute requires federal agencies to make a comprehensive study of environmental effects before action is taken on proposed legislation or programs. Whether or not the statute is effective is another and important issue. But the practices of consulting with others, comparing alternatives and considering potential environmental impacts should be more fully

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1. 42 U.S.C. §§ 4321-43 (Supp. V, 1970).

adopted by *all* governmental units. They are simply rational means of making decisions with sufficient information and perspective.

Currently private enterprise in introducing new products and processes is under public pressure to conform to standards which will conserve the world's natural resources and leave the earth a pleasant place. Just as drug and foodstuff producers must now test products carefully before marketing them,[2] all commercial enterprises should be required both to test new products and processes of production before introducing them and to consider environmental effects in plant location. Obviously, most manufacturers do some testing now. The need is to broaden the scope of questions asked beyond effectiveness and predicted profits to such matters as long-run environmental and health effects, alternatives, and possibilities for recycling. This testing should be followed by an objective check, either by an improved licensing procedure for trade products and processes, or by judicial examination of potential adverse environmental effects, as is possible in Michigan under Public Act 127 of 1970.[3]

B. Require Compulsory Insurance for Unusually Dangerous Enterprises

Compulsory insurance should be required for enterprises which currently engage in activities unusually dangerous to the environment, such as drilling and transportation of oil. Up to a certain limit, the insurance would cover the damage these enterprises might cause. Whether liability should be based on negligence,[4] or whether the enterprises should be liable up to the established limit without fault, might be determined according to the nature of the activity and its potential for damage. Strict liability is not a radical proposal; in 1970 the members of both the U.S. Congress and the Intergovernmental Maritime Consultative Organization adopted such an approach for damages caused by oil spills at sea.[5] Nor is the problem of measuring environmental damages any longer insuperable.

Above the limit of liability, the government might assume responsibility for sharing the burden of costs and losses.[6] If it is unwilling to undertake this risk, it should refuse to license the enterprise.

2. 21 U.S.C. § 355(b) (1964).

3. Mich. Compiled Laws § § 691.1201–691.1207 (Supp. 1970).

4. Or its variant, *res ipsa loquitur,* which creates a rebuttable presumption of defendant's negligence if he is in exclusive control of the instrumentality of damage and the event would not normally occur in the absence of negligence.

5. 33 U.S.C. § 1161(f) (Supp. 1970-71); *Int'l Convention on Civil Liability For Oil Pollution Damage,* Art. III, 2, 1 I.E.L.R. 40307 (1971). There are exceptions to liability, so that it is not absolutely strict, but they are quite narrow. *See* Goldie, *Int'l Principles of Responsibility for Pollution,* 9 Colum. J. Transnat'l L. 283 (1970).

6. *Cf.* 42 U.S.C. § 2210(c) (1964).

Holding the government jointly liable might have the beneficial side effect of improving the care and integrity of its licensing procedures.[7]

Compulsory insurance can serve as an effective device to promote self-enforcement of safety standards. Instead of relying on (and paying for) maritime officials to enforce safety standards for oil tankers, for example—which allows all sorts of possibilities for abuse—requiring insurance would impel ship-owners to provide the necessary precautions in order to pass the insurance companies' inspection, and procure the lowest possible premium. This approach would require government regulation of insurance companies but such is already common practice.

C. *Implementing the Principle That He Who Generates Wastes Should Pay For Disposing of Them*

Instead of employing already insufficient public revenues to pay for the disposal of abandoned waste, e.g., beer cans, old tires, used oil, dead cars—all too often simply deposited at the first convenient spot—the principle should be that he who is responsible for creating wastes should pay the costs of their disposal or delivery for recycling.

Germany has put this concept of charging the originator of the waste into practice in a unique system for the disposal of used lubricating oils.[8] Prior to the new law, the government tried making subsidy payments to refineries which collected and reprocessed waste oil into lubricating oils, but this proved ineffective, since the refineries collected only from profitable areas and accepted only those waste oils which could be easily regenerated. As of 1969, all producers and importers of oil were required to pay the government a fee for every ton of fresh oil.[9] They pass along this extra expense in the form of higher prices (about 1½ cents per quart) to their customers. The government uses the collected fees to fund payments to contractors obligated to pick up any waste oil free of charge from anyone in Germany. These payments are to cover the contractors' costs of collection and harmless disposal. The contractors may either reprocess the waste oils (and sell their end products) or burn them. The Waste Oil Law establishing this system provides several means

7. *Cf.* Cavers, *Improving Financial Protection of the Public Against the Hazards of Nuclear Power,* 77 Harv. L. Rev. 644 (1964); Katz, *The Function of Tort Liability in Technology Assessment,* 38 U. Cin. L. Rev. 587, 653-55 (1969).

8. Gesetz Über Massnahmen Zur Sicherung der Altoelbeseitigung (Law Concerning Measures To Assure The Disposal Of Waste Oil), I Bundesgesetzblatt (BGBl.) 1419 (1968).

9. *Id.*, § 4(2). The fee is approximately $20/ton.

for close checking to assure that disposal does not contribute to air, water, or soil pollution.[10]

How the system of making the originator of an environmental problem bear the cost of its solution is set up depends largely on the government's administrative organization. Ideally, the system should be self-supporting and offer comprehensive collection, assured safe disposal or recycling, and careful supervision. New York City, for example, where an average of 200 cars are abandoned every day and 50,000 summonses were issued last year as a result, has requested the legislature to enact a bill requiring the purchaser of any new car to deposit one hundred dollars with the state.[11] If the car is resold during its lifetime, the certificate of deposit would figure in the price and pass to the new owner. The final owner would be refunded the sum upon providing he had disposed of the car "in an environmentally acceptable manner." One acceptable manner might be delivery to a scrap metal dealer. In Maryland these dealers are paid ten dollars per disposed car and are fined for every one they keep over 18 months. This program is funded by a one dollar fee imposed on every car title transaction in the state.

D. Redefine the Scope of Private Land Ownership Rights

The inviolability of all privately owned land on our crowded planet is no longer either realistic or consonant with this century's democratic social values. No man is an island in our society, and neither should his property be. We are beyond the time when the principle of *sic utero tuo ut alienum non laedus*–use your property only thus as will not harm another's–is alone an adequate basis for public policy. Environmental planning and policy administration responsive to evolving needs are only possible where the definitions of private property are flexible and permit the implementation of different policies suitable to the special requirements of particular areas. We pay the price of our unwillingness to limit our continually expanding populations and economies in many ways. Perhaps tol-

10. *See* Irwin and Burhenne, *A Model Waste Oil Disposal Program in the Federal Republic of Germany*, forthcoming in 1 Ecology L.Q.

11. London Daily Telegraph, Jan. 21, 1971, at 1, col. 6. The Council on Environmental Quality has concluded that such a "bounty system . . . is not practicable." Its arguments are listed in *Environmental Quality*, First Annual Rep. of the Council on Environmental Quality 116 (1970). They include: "The resulting fund of payments would divert billions of dollars from other investments in the private economy. Administration and enforcement of the system would require excessive increases in government personnel and expenditures." Such arguments might be made against almost every proposal to do something on behalf of the environment. Perhaps judgment might be withheld until after some state had given such a system a fair trial.

erating increased public regulation of land use is preferable to suffering increased trespass, vandalism, or worse.

Redefining the scope of private ownership rights to reflect the increasing needs of society must be accomplished with the utmost circumspection. Regulating what the owner must endure and what the public may do should be based on a thorough and continual assessment of the interests and requirements peculiar to defined areas of settlement. In return for his sacrifices, the owner must be assured that public access to his forest land, for example, will be adequately controlled so that his land will not be overrun or its value to him destroyed. There must be specific and enforceable minimum standards to protect his personal property.

Eighty percent of the land in West German nature preserves established by public authority is under private ownership. An owner whose property is taken into a preserve may not be prevented, without compensation, from continuing his previous use of the land, but he is prohibited from changing or expanding its existing use without special permission.[12] Being deprived of the chance to take advantage of increases in the land's speculative value is not a compensable taking of private property—it is a sacrifice the owner must make as a member of society.

If society must expropriate private property to serve public needs, the owner should not be allowed unlimited compensation. It is unfair for one who happens to be located where a waste water treatment plant is required to get rich on public tax revenues. This can be remedied by placing a legal limit on the percentage increase over the land's previous value which one may collect. If the limit were exceeded, the excess could be taxed as the luxury it is. Similarly, if the value of land of those living near a new public highway or recreation project increases by more than a certain percentage, the excess could be collected and redistributed to those whose land was taken.

The legislature of the densely populated industrial state of North Rhine-Westphalia in Germany recently enacted an unusual approach to balancing public and private land use. To provide sorely needed additional recreational opportunities, privately owned forest lands were opened to use by the public, which enters at its own risk, without compensation to the owners.[13] The results of this law are still uncertain. Some forests near large cities are so heavily used by walkers and picnickers as to constitute an arguable partial ex-

12. Reichsnaturschutzgesetz § 16(2), of June 26, 1935, Reichsgesetzblatt I 821.

13. Forstgesetz fur das Land NordrheinWestfalen (Forest Law of the State of North Rhine-Westphalia) of July 29, 1969, GVB1.588, *as amended* Dec. 16, 1969, [1970] GVB1.

propriation. In other areas where owners' fire insurance premiums or refuse collection costs have increased significantly as a result of the law, the State may need to help defray these expenses.

COORDINATION OF LEGISLATIVE POLICY

A. Use Both Sugarbread and the Whip

Many countries have learned that prohibitions alone are not enough to effectuate environmental conservation policies. The problem is that the prohibitions cannot be adequately enforced. What is needed is the coordinated use of both prohibitions and incentives. Begin by setting air pollution emission limits, for example, necessitating the purchase of control equipment. In conjunction, offer reduced property or sales tax on the equipment, accelerated depreciation for tax write-offs of its purchase price, or less expensive government-supported loans to finance the investment. These are rational, if not always stunningly successful, economic incentives.

Outright grants to private enterprise, on the other hand, are rarely, if ever, justified. They conflict with the principle, discussed above, that those who cause environmental hazards should pay for disposing of them. And—if supported from tax revenues—they unfairly subsidize, at the public's expense, marginal or inefficient enterprises which probably should be reorganized, absorbed, or dismantled.

The critical element in an effective tax incentive policy is thorough and ready enforcement of the legal standards. Since the amount of incentive given (unless it is an outright grant) will always be less than the expense of control, a person or enterprise will always be tempted to keep expenses down by doing as little as possible. Penalties if one is caught violating the standards must be severe enough, and the publicity given the infraction by the media unpleasant enough, that it is less expensive to take advantage of the incentive and carry out the necessary measures.

B. Avoid Public Finance Policies With Negative Environmental Side-Effects

Incentives offered via tax or fee provisions are conscious legislative decisions. Unfortunately, not all taxes and fees are free from inadvertent negative consequences for the environment. In Germany, for example, where yearly automobile license fees are based on the volume of the car's cylinders (the larger the volume, the higher the fee), auto manufacturers have, as a result, developed and are producing cars with very small cylinders but remarkably high power. To achieve this power the engine must work much faster, causing less

efficient combustion proportionally than in larger cylinders—hence more air pollutants, and incidentally, more noise.

In many countries, the community where an industry locates receives both property and business taxes from it. Understandably, to increase their tax base and job opportunities for their citizens, many communities strive to attract industries. Sometimes they offer them a special concession which disadvantages the environment—zoning variances, or *sotto voce* assurances that pollution control standards will not be "unreasonably" enforced. To alleviate this problem, and to equalize the distribution of revenues, Germany recently revised its tax laws so that communities can receive only a certain percentage of all taxes paid by local businesses. The remaining revenues are passed to the individual states for redistribution among their communities on a per capita basis.

Another common problem is unrealistically low municipal charges for supplying residents or commercial establishments with water, or accepting their wastewaters or garbage, reflecting political expediency rather than actual costs. As a result, supply systems are often poorly maintained and treatment plants are insufficient and inadequate. Countless cities the world over simply unload raw sewage and industrial effluents directly into already polluted rivers. The answer is not to look to the nation's capital for more and more central support, for however much aid is promised it invariably falls short of the needs. Rather the answer is to form more regional waste disposal districts and to pay the actual cost of operating them. The former requires overcoming local pride to gain the economic efficiencies of regionalization; the latter requires having the political courage to vote for new garbage and sewage treatment plants rather than new stadiums and swimming pools.

C. Set Flexible Legal Standards to be Administered According to the State of the Art

In a young and swiftly moving field such as environmental control and technology, laws need to be written so that they can be administered according to the latest knowledge. Legal definitions are rarely flexible enough to cover the many new developments and discoveries in this field, and, as a result, many serious problems are inadequately handled because they do not fit the scope of the legislature's previous formulations. Likewise, if specific technical details are written into a law it is often necessary to change them to reflect continuing advances.

One way of dealing with this problem is to provide the maximum and minimum standards acceptable to the legislature in the law and

to include a provision that the law be administered within these limits according to the current state of the art. If this is done there must be ways to insure that administrators do not abuse their discretion, and to incorporate recent advances in scientific or technological understanding into the daily execution of the law.

In Germany, the minister responsible for supervising the administration of a law according to the state of technology publishes directives which bind administrators to exercise their discretion within the limits set by the minister, which in turn must be within those established by the law. If an administrator exceeds these guidelines by granting permission to a factory to discharge over the maximum allowed in the limits, for example, he may be relieved of his post or subject to lesser disciplines provided by the laws governing the civil service.

It is largely left to private enterprise, research centers, and individuals to provide the input which causes the minister to modify the administration of the law according to current knowledge. Suppose permissible automobile exhaust emissions were so regulated. If a Mr. Acme developed a device in his basement which if built into all cars would reduce their emissions by 95%, he could present it to the supervising ministry for complete testing in state laboratories. On the basis of the tests, the minister would decide whether it was technically feasible and economically reasonable to require the device. If so, he would promulgate regulations requiring all future manufactured cars to have it. If not, Mr. Acme would be so informed. Either decision by the minister would constitute an administrative act in German law, subject to administrative court review.

Legislative deadlines for achieving such standards as a 95% reduction in auto emissions may be a necessary spur, if they are realistic. The U.S. Congress has set 1975 for this goal, with the possibility of a one-year extension if absolutely necessary.[14] In 1961 the German parliament similarly required detergents to be manufactured with less permanent sudsing agents within three years.[15] But care should be taken not to simply build castles in the air in setting such deadlines. Then they merely serve to arouse public expectations which in turn tend politically to lock legislators into what may have been a mis-

14. Pub. L. No. 91-604, § 6(a), 84 Stat. 1690, *amending* 42 U.S.C. § 1857(f) (1963).

15. Gesetz Über Detergentien In Wasch- und Reinigungsmitteln (Law Concerning Detergents in Washing and Cleaning Agents) of Sep. 5, 1961, [1961] BGBl. I 1653, *as amended* May 24, 1968, BGBl. I 503. The applicable regulations are contained in the Verordnung Über Die Abbaubarkeit von Detergentien In Wasch- und Reinigungsmitteln (Regulations Concerning the Degradability of Detergents in Washing and Cleaning Agents) of Dec. 1, 1962, BGBl. I 698.

take. This could result either in the law not being enforced when the deadline comes or in unnecessary hardships if violations are in fact prosecuted. Even if such deadlines are included, provisions should be made for adopting technical advancements as they develop, so that attainable progress is not unnecessarily postponed.

D. Work Toward the Equalization of Burdens on Industry in All Countries

The burdens placed on business and industry by environmental policies need to be coordinated, both intra- and internationally, to avoid giving unwarranted economic advantages to any particular area or country. The Treaty of Rome creating the European Economic Community provides that no member country's government may offer industry special advantages which undermine the common commercial basis within the community.[16]

A similar principle needs to be extended to world commercial activity, so that no country can gain a larger share of the markets simply by allowing its enterprises to cut costs and keep their prices lower by abusing the environment. Some state governments in the United States are familiar with industry's threats to move to or locate in other states with less stringent standards for environmental protection. The result has often been reluctance to move ahead of the lowest common denominator. In Europe some industries, notably steel and chemicals, have either located new plants in or moved to permissive countries with long coastlines in order to avoid internalizing their externalities. Elsewhere in the world, some nations have benefited economically at nature's expense by condoning the dumping of millions of tons of waste and poison into the ocean.

This situation is both economically unfair and environmentally unwise. The world's natural resources can be conserved only if the major export-producing countries, both developed and developing, agree to enforce policies which prohibit gaining competitive advantage by ignoring external costs. Just as such inequities are avoided within a country by adopting national standards, joint economic action on a worldwide basis is necessary so that no country's commerce is unfairly disadvantaged. Perhaps a framework treaty, with standards regulated in detail by more limited agreements under it, would be an appropriate vehicle to achieve this needed equalization.

16. *See* Treaty of the Inter-governmental Conference on The Common Market and Euratom, Mar. 25, 1957, arts. 92 and 95, [1957] Europaeische Gemeinschaften 2(G), 296 U.N.T.S. 2.

PARTICIPATION OF THE PUBLIC

A. Expand the Citizens' Role in Public Planning, But Provide a Cut-Off

Proposed public projects in many countries are subject to scrutiny both from within the government and without. A German water association's draft plans for building a large sewage treatment plant must be approved by a state minister with authority over water, agriculture, and natural resources.[17] Before he gives his approval, his professional staff, as well as the staffs of other interested ministers (i.e., public health, transportation) discuss the plan, considering how the proposed plant will fit into their own overall plans. The minister thereby assures that developments in his field will be internally coordinated, and harmonized with those in other fields. This is essential to environmental planning policy and execution.

Many governments also provide an opportunity for their citizens to register their opinions. However, often there is no apparent possibility that objections or suggestions will be seriously considered. On the other hand, sometimes there seems to be no way to put an end to considerations and to proceed with executing a plan. Consolidated Edison's efforts to provide for increasing electricity demands in New York City are an illustration of the delays which can result if no cut-off date for registering objections exists. Because no opportunity for public input into the development of plans was ever given, endless litigation has resulted from each successive announcement of intentions.

To solve this dilemma, German administrative law provides a system which has proved fair and effective. After the minister gives his general approval—often conditional—he forwards the plan to the state's chief regional administrator for the area where the project is to be carried out. This administrator holds a Plan Determination Proceeding, which may take several years. It is not unlike many similar procedures in the U.S.: notice is given the public in newspapers, the plan is displayed in public before an open hearing, written objections and oral testimony are accepted, conferences between the administrator and all concerned parties take place, expert opinions are sometimes sought, etc. Quite frequently, the plan is modified in response to legitimate individual objections. Ultimately it is promulgated by the administrator, an act which may be challenged in an administrative court by anyone burdened by it. The

17. Kneese & Bower, *Managing Water Quality*, Economics, Technology, Institutions 262, n.4 (1968). *E.g.*, Ruhrreinhaltungsgesetz § 2(3) of June 5, 1913, PrGSNW 210.

court may not simply replace the administrator's exercise of discretion with its own opinion.

A citizen, or a group representing citizen interests, has a complementary obligation of prompt participation. If objections are not raised within the period allowed by the Plan Determination Proceeding—usually within two weeks after public display and discussion—they are foreclosed from being entered. This prevents playing dog in the manger and continually delaying a plan's execution. Once the approved plan has been adjusted and promulgated by the administrator in its final form, it is fixed. If an affected party files a complaint with the administrative court the plan's implementation is delayed, unless special permission to proceed is sought and gained from the court because of an overriding public interest. He who proceeds does so at the risk of having to modify what he has done according to the court decision. Only unforeseen eventualities, e.g., odors from a sewage treatment plant due to unexpected wastes it must process, arising from the plan may be challenged after it has been undertaken. Both meaningful public participation with opportunity for appeal to the courts and a firm cut-off are necessary to efficient planning to meet the expanding demands on our environment.

B. Exert Public Pressure for Adequate Funding and Enforcement

Too often, public response to the discovery of another environmental crisis is a demand for new legislation. Sometimes, if the problem is novel, there may be no applicable legal provisions, and if this is the case, a law should then be drafted carefully and with the minimum of procedural hurdles impeding the realization of its purposes. But this need exists in only a few areas of the world. The real needs now increasingly recognized are adapting existing laws to current conditions, amending them for easier administration and enforcement, and assuring that adequate means are provided for their conscientious execution by qualified and dedicated personnel.

A law is only as effective as public consciousness allows it to be and a sufficient number of concerned people insists that it be. Politicians must be pressured to allocate and appropriate much more money for comprehensive environmental programs—research, planning, enforcement, and reform. Public speeches about rearranging priorities are not enough. Our representatives must be shown that if they do not represent us, they will lose their seats. Once the money is voted, the administrative programs it supports must be carefully monitored. Bureaucrats respond to complaints and reminders from

the public, and if they do not, they can be prodded to do so by politicians.

In the environmental field, at least, the democratic political system seems to be responsive to the people it was designed to serve. But environmentally oriented constituencies must work for the results they want. It is a proven proposition that they will succeed in direct proportion to the extent that they are organized, informed, reasonable, persuasive, and persistent. Maintaining a healthy balance between public needs and private interests can be frustrating, time-consuming, even exhausting; but settling for less is an abdication of responsibility to ourselves and our heirs.