Law Quadrangle (formerly Law Quad Notes)

Volume 15 | Number 2 Article 5

Winter 1970

Defending the Environment: The Court as Catalyst

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Defending The Environment: The Court As Catalyst

Based on a chapter of Professor Sax's new book, **Defending the Environment: A Strategy for Citizen Action,** published in the United States by Alfred A. Knopf, Inc., N. Y., and simultaneously in Canada by Random House of Canada Limited, Toronto.

by Professor Joseph L. Sax

If every state were to pass a law making clear that courts should consider the merits of citizen-initiated environmental cases, part of the problem considered in the preceding chapter would be mitigated—that is, judges and attorneys would not feel compelled to twist the questions that the litigants are actually trying to raise into such traditional issues as a claim of arbitrariness or a failure to comply with some explicit statutory command such as how a dike must be authorized or how wide a highway right-of-way may be.

Even if these constraints were to be removed, a serious problem would remain, for neither judges nor attorneys clearly see the nature of the governmental problem with which they are faced. . . . two questions particularly trouble them. First, courts fear that if they embark upon a consideration of the "merits" of environmental disputes, they will be taking upon themselves a primary role in public policy-making which they feel—with justification—should reside in the legislative branch of government. Second, judges are troubled about their competence to decide what seem to be highly technical issues—how much radiation can a nuclear plant safely emit, how fragile is the Alaskan tundra, how sensitive are fish to hot water discharges in a river?

Of these two concerns, the question of judicial competence is disposed of most easily. Courts are never asked to resolve technical questions—they are only asked to determine whether a party appearing before them has effectively borne the burden of proving that which he asserts. Thus the question is not one of substituting judicial knowledge for that of experts, but whether a judge is sufficiently capable of understanding the evidence put forward by expert witnesses to decide whether the party who has the burden of proof has adduced evidence adequate to support his conclusion.

Why this question has seemed particularly troublesome in this context of environmental litigation is rather perplexing—courts are called upon frequently to decide cases in which the evidence of technical experts is crucial. Medical malpractice, product safety, and industrial accident cases, to take only a few examples, are routine grist for the judicial mill. Indeed, the very issues that arise in environmental cases of the type discussed in this book are today subject to judicial inquiry if they arise in a slightly different context. For example, if an oil spill such as occurred at Santa Barbara gave rise to a suit for damages after the fact, courts would have to decide whether the oil drilling had been carried out in a reasonably safe fashion. Similarly, if an accident occurred at a power plant and suit were brought to recover damages, a court would have to decide whether the plant had been adequately constructed and operated.

The sort of environmental litigation proposed here simply shifts the questions involved forward in time. Rather than

deciding the issue of reasonable precautions against the risk of harm retrospectively, the courts will be asked to decide those questions prospectively. To be sure, we know less about risks before they occur, but that does not change the legal issues involved—in a damage case for harm done, the question is what precautions the defendant should have taken in advance to avoid risks of harm that might reasonably have been foreseen. The question is thus always what should have been known before action was taken—and this is exactly the issue in environmental crises.

In short, the question of judicial competence is a false issue, a red herring. The case studies presented in chapters 8-10 of *Defending the Environment* indicate specifically the ability of courts to cope with the merits of environmental litigation. . . .

Far more important is the issue of judicial infringement of legislative policy-making, for most environmental litigation turns not on technical issues, but on disputes over policy. . . .If there is any significant issue to be raised about environmental lawsuits, it is their impact on the legislative policy-making function. Here one reaches the central point about environmental litigation: the role of courts is not to make public policy, but to help assure that public policy is made by the appropriate entity, rationally and in accord with the aspirations of the democratic process.

The job of courts is to raise important policy questions in a context where they can be given the attention they deserve and to restrain essentially irrevocable decisions until those policy questions can be adequately resolved.

The New Jersey highway dispute, discussed in chapter 5 of *Defending the Environment*, neatly exemplifies this distinction. . . .the court should have considered the plaintiffs' testimony regarding an alternative plan to that of the highway department and should have enjoined the highway department if the court found that the weight of evidence established inconsistencies between the highway department proposal and an intelligent highway policy or found existing highway policy unmet by the highway department plan.

Nothing in such a case suggests that the court should usurp the legislative role in formulating highway policy. At most, it asks one of two things: (1) The court should test the existing official plan against policies already articulated (more or less specifically in the law) and withhold approval of a proposal that is at odds with the policy or raises serious doubts about its effectuation. Or (2), if the court finds the proposal at odds with an environmentally sound policy, though it may now be expressed in any legislation, and it finds no urgency for immediate construction, it withholds approval until and unless the policy question is returned to the legislative forum for open and decisive action. . . .the court can help to promote open and decisive action in the legislative forum in several ways. By enjoining conduct on the part of government or industry, it can thrust upon those interests with the best access to the legislature the burden of obtaining legislative action. Also, the very presence of a lawsuit and the information it reveals promote attention in the press, which serves to alert citizens that an issue is arising which deserves their attention. In this way, too, litigation helps to realize a truly democratic process.

Notably, nothing in a case like the Interstate 95 controversy in New Jersey suggests that the courts ought to displace legislative judgment. The court serves either to implement an existing legislative policy against administrative disregard or to withhold irrevocable action until a policy can be considered and adequately formulated for action. To be sure, judges must make some tentative judgment about what the policy is, or should be—but the important reservation is the word "tentative." It is a judgment that is subject to—indeed, that encourages—legislative consideration, not one which displaces legislative consideration. Rather than being at odds with legislative policy-making, the courts are promoting that process and—at most—prodding it to operate with open consideration of important issues, and with an alerted public.

. . . .this is a most important point, for the decisions which comprise the great bulk of environmental lawsuits are *not* decisions articulated by legislatures, but almost always decisions by administrators, usually at a rather low level in the hierarchy, employing their own discretion from their perspectives in the presence of vague and sometimes contradictory statutory policies. For this reason, paradoxical though it may seem, judicial intervention, rather than posing the threat of undermining the legislative function, actually operates to enhance it.

A most instructive example of this problem is noted in chapter 8 of *Defending the Environment.* There a state highway department took parkland for a proposed highway right-of-way. Citizens sued and the highway department defense was that it was enforcing legislative policy to build highways. The citizen plaintiffs said the highway department was undermining other legislative policies in favor of saving parks. The dispute—an important issue of policy choice, which no statute clearly resolved as to a given highway condemnation case—was brought to court. The court found that a serious question was raised about the balance between roads and parks, found that the highway department was deciding the policy question for itself in favor of roads, and sent the case back to the legislature for action and clarification.

To understand that the principal role of courts is to raise important policy questions is to understand as well the fear that judicial intervention will interfere with large-scale long-term planning. As noted earlier, environmental litigation does not ask of a judge that he devise national policy nor that he repeal any settled statutory policy in contravention of explicit legislative desires. Rather, by inquiring into the effects of such policies in individual instances, it asks the court to help promote the sort of continuous review and re-evaluation that any large-scale program needs—and that legislatures often find themselves without time or adequate initiatives to undertake on a regular basis.

Again, the federal highway program provides a useful example. Plainly, there is a large federal transportation policy embodied in the highway program. It is, however, a policy that is necessarily implemented over a long period of time and hence eminently deserving of periodic reconsideration. Presumably, as the program goes forward, we learn some things and want to rethink some of our earlier assumptions about the program. The courts help Congress and state legislatures to do this, both in the large and the small sense.

In the smaller sense, courts can call attention to the impact of the highway program on parklands or on housing and can send highway agencies back to the legislatures both to get more detailed policy statements about the costs they are willing to incur to promote the program and to educate the legislatures from time to time on what those costs are. In this respect the courts serve to gather and feed useful information back into the legislative policy process, which, it must be emphasized, must be continuous if it is to be at all rational.

In the larger sense, judicial injunctions

against various elements of the highway program, on the ground that they infringe other national policies or do unseemly harm, promote a search for better alternatives or new technologies.

One only understands this if he begins to see planning as something more than a legislative commitment once made to spend a lot of money, which is never to be reexamined or requestioned over the years and decades that follow. Only if we could be persuaded that every large project—whether governmental or private—was perfectly conceived at the outset, impregnable to new facts or new public concerns, and perfectly executed, could we view litigation as an infringement of planning and large-scale social policy activities. That, of course, is the posture that challenged administrators and enterprisers take, but. . .if we take them not on their assertions, but on the demonstrable facts, it is a position of the greatest possible dubiety. There may be no more needed public function today than a forum that can send some of our Big Planners back to the drawing boards.

One final comment should be made on the problem of judicial interference with established legislative policies. There is a pervasive notion that every statute on the books is to be treated as a pure and thoroughly considered embodiment of the legislative will. This is the way in which lawyers always talk, for example, when they are defending a statute as stating the "intent of Congress."

Not to put too fine a point on it, this is bunk. There are all kinds of laws, and any effort to deal intelligently with environmental or other serious problems must begin by moving away from this preposterous concept. Some laws do indeed represent the conclusion of a carefully considered, hard and openly fought legislative enterprise. The federal Wilderness Act. . .is an example of such a statute. This is not to say that it is a perfect law or one that does not reflect some considerable horse-trading, but only that the various interests had their say, fought it out, and got the most they could get, including a rather clear statement of national policy.

Many other laws cannot with any degree of honesty be so described. The state bill authorizing the conveyance of the lands at Hunting Creek in Virginia did not meet this test. It was essentially a one-man bill, enacted without hearings or publicity by a busy legislature unaware of the competing interests that would have defined the issues if the bill had been adequately considered. Indeed, once the issues had been defined, the legislature repealed the law; fortunately, other forces kept the project in abeyance until this happened.

The dike law in the 1899 Rivers and Harbors Act represents still another sort of flawed legislation. Though it was used in the Hudson River Expressway case in support of a good environmental cause, it would be fatuous to claim that its congressional assent provisions for dikes reflected any meaningful 1970's policy of the Congress of the United States. It is certainly not a Wilderness Act nor a National Labor Relations Act.

Plainly courts cannot, and should not, be asked to declare laws now on the books to be dead letters or to engage in judicial repeal. But courts can, and should, use their powers to forestall projects lacking a demonstrated imminency of need, which are justified on the basis of dubious legislation, in order to encourage the legislature to take another look, and perhaps a more careful and open one, at the policy problems resulting from the way in which such laws are being implemented.

Courts have many devices available that enable them to act in a discriminating fashion without taking on overtly the function of weighing the quality of various kinds of legislation. The courts may read a law very narrowly if they have doubt about the propriety of the policy it embodies, or about the manner in which it was passed. Or the courts may hold that some readings of a dubious law would raise constitutional questions, and they may interpret the law restrictively to avoid such issues. In each instance, the courts thrust upon the legislature the obligation to affirm openly its true intent. These devices are well established and have been used in various settings. They deserve particular attention in the environmental area, where some bureaucrat may seize upon some provision in a statute in the name of the solemn intent and desire of the legislature.

In sum, the court serves as a catalyst, not a usurper, of the legislative process.