

## Session 25

*"[The precautionary principle] generates legal uncertainties and establishes an environment detrimental to innovation and growth."* The report of the commission chaired by Jacques Attali for the liberation of French growth (2008) already expressed reservations on the effects of the precautionary principle. This principle is now omnipresent in various spheres, whether environmental (France's recent move against glyphosate in the European Union, chemical products with European REACH regulations, high-voltage lines, base stations, etc.), health-related (the mad cow affair had led to an embargo on purchases of British beef) or geopolitical: in May 2018, the Swedish government, in application of this principle, distributed a manual to all its citizens entitled *"In the event of a crisis or war"*. The aim was to prepare the population more effectively for various eventualities (conflicts, natural disasters, etc.).

At first glance, the precautionary principle seems to be a philosophical issue. One of the most speaking illustrations can still undeniably be found in the output of the philosopher Hans Jonas, who in *The Imperative of Responsibility* (1979), in the face of a "Prometheus unbound", called for an "ethic" in science, which through "constraints freely consented, would prevent mankind's power from becoming a malediction to itself." But remarkably, the last thirty years have also seen this principle emerging in the political and legal sphere. Making its appearance in Germany in the 1970s, the precautionary principle was in fact adopted with the 1992 Rio Declaration.<sup>1</sup> This declaration was given shape in France by the Act of 2 February 1995, though it indicated that the prevention of irreversible damage to the environment should be made at an "economically acceptable" cost. The Environmental Charter (2004), which took up the precautionary principle in article 5,<sup>2</sup> went further in two respects. Firstly, it was integrated into the Constitutionality Corpus, thus at the top of the national legal system. Secondly, it became an essential principle for the action of the public authorities: the charter entrusted its implementation explicitly to them, under the control of the administrative jurisdiction. This edifice was completed at Community level by article 191 of the Treaty on the Functioning of the European Union (TFEU), which stipulates that "if there is the possibility that a given policy or action might cause harm to the public or the environment and if there is still no scientific consensus on the issue, the policy or action in question should not be pursued." Once more scientific information becomes available, the situation should be reviewed.

Two main criticisms, legal and economic, are generally levelled against the precautionary principle.

In the first place, despite considerable attempts at clarification by the judges, the legal interpretation of the precautionary principle remains controversial, leading to situations of

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<sup>1</sup> *"If there is risk of serious or irreversible damage, the absence of absolute scientific certainty should not serve as a pretext to delay the adoption of effective measures designed to prevent the degradation of the environment."*

<sup>2</sup> *"When the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, may seriously and irreversibly harm the environment, public authorities shall, with due respect for the principle of precaution and the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of temporary measures commensurate with the risk involved in order to preclude the occurrence of such damage."*

legal uncertainty. In 2013, the French Council of State indicated that lack of knowledge of this principle prevented a project from being declared of public interest.<sup>3</sup> The administrative judge also agreed that the precautionary principle could be invoked against an administrative act taken in application of legislation on other subjects than the environment, like urban planning or expropriation. However, he also indicated that the precautionary principle only covered risks having (1) an impact on human health and (2) a serious, irreversible impact on the environment.<sup>4</sup> Lastly, it cannot deprive the public authorities of their margin of appreciation.

The precautionary principle attracts the most criticism from the economic point of view. The cost of the precautionary principle should, in theory, be related to the potential externalities it is supposed to prevent. But carrying out such a cost/benefit analysis seems to be difficult and extremely subjective. Yet some consider that the precautionary principle is now an impediment to risk-taking and constrains innovative efforts in developed countries, which have integrated it into their legal corpus despite being at the cutting edge of technology. "Being Western means being trained for risk, and adapting to it" as we are told by François Eswald and David Kessler.<sup>5</sup> While the drive to innovate is a necessary condition for growth in our economy, and the application of the precautionary principle remains asymmetrical between our developed economies and emerging economies, is this principle a comparative disadvantage? For example, the closure of almost the entire airspace of north-west Europe in 2010 after the eruption of the Eyjafjöll volcano in Iceland was considered an excessive application of the precautionary principle. Above all, it is science itself that will provide the answers to various challenges, first and foremost climate change. By hindering efforts to innovate, we could thus go against the very objectives proclaimed by the precautionary principle.

And yet questioning the application of the precautionary principle goes directly against citizens' rising expectations, particularly in terms of environmental protection and sustainable growth. More fundamentally, our modern societies have an ambiguous relationship with risk. While it is collectively valued and seen as indispensable to economic development, citizens are also on the lookout for greater security: a mission that has fallen to the State, which rationalises the introduction of the precautionary principle. Such necessities and aspirations justify the relevance of this principle. Paradoxically, the resonance of ecological and health scandals demonstrates that this legal system in its current form is not enough to prevent risks. Lastly, recent innovations, while leaving room to hope for improved living conditions and a rise in the potential growth of industrialised countries, simultaneously raise major ethical questions, as was demonstrated in March this year by the very title of French *député* Cédric Villani's report on the subject: "Giving meaning to artificial intelligence".

In response to these issues, a constructive debate needs to be relaunched on the nature of a precautionary principle compatible with future innovation. Should the principle of invention take precedence? Should the precautionary principle be strengthened, or in contrast become more flexible? Should other approaches be preferred to it, such as prevention (which also features in the Environmental Charter, in article 3), prudence or responsibility?

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<sup>3</sup> CE, 12 April 2013, Interregional Coordination Association Stop THT and others

<sup>4</sup> CE, 2012, municipality of Lunel

<sup>5</sup> "Les noces du risque", *Le Débat* periodical – April 2002, no.109, page 55

Beyond these crucial issues, which mainly concern collective choices, lies the central matter of the authorities responsible for implementing the precautionary principle – for this is built of the supposition of a solid link between political power and the expertise of regulators and the scientific community.