

The Precautionary Principle in the European Union

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Three Developments

- The Dramatic and Controversial Rise of the Precautionary Principle
- The Increasing Identification of Principles of Environmental Law (de Sadeleer)
- The Increasing Overlap between Legal Cultures

Overview

- Contextualising the Precautionary Principle
- The Precautionary Principle in the EC
- The Three Developments Revisited

1. Contextualising the Precautionary Principle

'Where there is a threat to human health or environmental protection a lack of full scientific certainty should not be used as a reason to postpone measures that would prevent or minimize such a threat '

The Precautionary Principle

A legal principle

- Not directing a particular outcome to occur (Dworkin)
- Vary on context and legal culture (not just instrumental)

Dealing with a common dilemma

- Scientific uncertainty
- Authority of public decision-making

Contexts

- Internal Exercise of State Sovereignty
 - regulating what is understood as legitimate **administrative** action
 - Role of law and administrative constitutionalism (Fisher, forthcoming)
- External Exercise of State Sovereignty
 - Creating the basis for regimes
 - A reason to derogate from regimes
- Relationship Between the Two
 - same institutions
 - role of administrative constitutionalism in determining what is an appropriate exercise of external state authority (Fisher, 2006)

2. The PP in the EC

Six Contexts

1. The application by Community institutions in carrying out their international obligations or making decisions which have cross-jurisdictional impacts
 - Cartagena Biosafety Protocol 1999
 - Appellate Body Report, European Communities - Measures Concerning Meat and Meat Products (Hormones), 16 January 1998, WT/DS26/AB.
2. The application by Community institutions in exercising their power pursuant to a Community regulatory regime or competence
 - Case T-13/99 Pfizer Animal Health SA v. Council [2002] ECR II-3305
 - Article 7 of Regulation No 178/2002

3. The application of the principle by Member States when operating pursuant to Community regulatory regimes
 - C127/02 - Landelijke Vereniging tot Behoud van de Waddenzee [2004] ECR I-7405
 - C-132/03 Ministero Della Salute v. Codacons [2006] Env LR 5
4. The application of the principle by Member States where there is a Community regulatory regime but a Member State wishes to rely on the principle in derogating from the obligations of that regime
 - Case C-236/01 Monsanto Agricoltura Italia SpA v. Presidenza del Consiglio dei Ministri [2003] ECR I-8105
 - Case C-3/00 Denmark v Commission [2003] ECR I-2643

5. The application of the principle by Member States where there is no Community regulatory regime but application prima facie infringes other Community obligations

- Case C-24/00 Commission v. France [2004] ECR I-1277
- Case C-192/01 Commission v. Denmark [2003] ECR I-9693

6. The application of the principle by Member States in matters with no relationship to EU law

- R(On the Application of Thomas Bates & Son Ltd) v. Secretary of State for Transport, Local Government and The Regions [2004] EWHC 1818 (Admin), [2005] 2 P&CR 11- flood risk
- Independent Expert Group on Mobile Phones, Report of the Group (The Stewart Report) (1999)

Issues

- A range of 'administrative' institutions
 - A range of different contextual debates about administrative constitutionalism
 - Overlap between these different contexts
 - Interdependence between these contexts
- BUT

The tendency towards uniformity – COM (2000) 1 final.

A Tension

- Engaging with diversity
 - Not just variation
 - A 'hard look' at administrative institutions in an era of globalisation
 - Knowledge production and culture (Jasanoff & Long Martello)
- How much diversity can we have in an era of globalisation?
 - The economic constitution (Maduro)
 - Interdependence

3. The Three Developments Revisited

- The Dramatic and Controversial Rise of the Precautionary Principle
 - Scientific uncertainty and state authority
 - Administrative constitutionalism
- Principles of Environmental Law
 - The need to contextualise
 - Reflecting common challenges BUT different solutions
- The Increasing Overlap between Legal Cultures
 - The tension between uniformity v. diversity

References

- N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, (Oxford, Oxford University Press, 2002)
- E. Fisher, 'Opening Pandora's Box: Contextualising the Precautionary Principle in the EU' In Ellen Vos, Michelle Everson and Joanne Scott (eds) *Uncertain Risks Regulated: National, EU and International Regulatory Models Compared* (UCL Press, in press 2007)
- E. Fisher, 'Beyond the Science/Democracy Dichotomy: The World Trade Organisation Sanitary and Phytosanitary Agreement and Administrative Constitutionalism', in C. Joerges and E.-U. Petersmann, (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, (Oxford, Hart Publishing, in press 2006).
- E. Fisher (forthcoming), *Risk Regulation and Administrative Constitutionalism*, (Oxford, Hart Publishing).
- S. Jasanoff, Sheila, and M. Long Martello (eds.) *Earthly Politics: Local and Global in Environmental Governance*. (Cambridge, MIT Press, 2004).
- M. Maduro (1998), *We, The Court: The European Court of Justice and the European Economic Constitution*, (Oxford, Hart Publishing, 2006)
