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The battlefield of the precautionary principle: 2009 in retrospect

The precautionary principle burst into the media and the judicial world right after the incorporation of the Environmental Charter – in which this principle is mentioned – into the French Constitution in 2005.

Environmental groups and associations have since then successively targeted several industries that are of vital importance for our economy.

2005, 2006 and 2007 were the pesticide and GMO years. During 2008 and 2009, an exponential number of proceedings were initiated in order to obtain the ban of mobile phone relay base stations that were accused of promoting cancers and causing male infertility, just like pesticides or GMOs.

Regarding the precautionary principle, 2009 was the year in which our firm had been marked by two major achievements, the second one still to be confirmed by the Investigating Chamber of the Toulouse Court of Appeals.

The first achievement was the confirmation by the Chambery Court of Appeals of the order issued in the so-called “dioxin case” by the investigating judge of the Albertville First Instance Court that dismissed all charges against the mayor of Albertville and the President of the intermunicipal syndicate owning the household waste incinerator in Gilly-sur-Isère.

Judicial expertise reports and studies by the *Institut de Veille Sanitaire* (French National Public Health Agency or “InVS”) concluded that there was no link between the incinerator and the cancers detected among the population. The InVS even specified that there were less cancers around the incinerator than anywhere else in France!

The second achievement was the full dismissal order obtained in favor of BASF Agro and its former President in the publicized “bee case”.

Here again, five long years of investigations led the investigating judge of the Saint-Gaudens First Instance Court to conclude that the seed coating product claimed to be a bee killer by apiculturists and the *Confederation Paysanne* had nothing to do with the abnormally high death rate observed among the bee population, with, in the background of this case, a virulent attack against pesticides in general, also accused – by those who continually spread "medieval fears", to borrow Professor Tubiana's expression – of causing cancers, endangering fetuses and provoking the infertility of farmers.

Civil parties have lodged an appeal against the full dismissal order and we are now waiting for the decision of the Toulouse Court of Appeals.

In the face of the successive setbacks they suffered since 2005, pressure groups, that urge for a broad application of the precautionary principle and constantly brandish new fears, have found a new battlefield with the mobile phone relay base stations that are now accused of seriously damaging people's health.

The legal saga of relay base stations

The debate over the interpretation and application of the precautionary principle was marked in 2009 by an unexpected surge in the number of legal proceedings seeking the ban or the dismantling of mobile phone relay base stations.

This phenomenon started with a judgment of the Nanterre First Instance Court dated September 18, 2008, confirmed by the Versailles Court of Appeals on February 4, 2009. We commented on these decisions in our February 2009 and March 2009 e-newsletters.

Other court decisions have been rendered since then, some of which ordered the ban or the dismantling of relay base stations, others which rejected the plaintiffs' claims for antagonistic and contradictory reasons.

At one point, the detractors of relay base stations seemed to have won the battle on the strength of a particularly fallacious argumentation: although the existence of a risk is not established, mobile phone operators also fail to establish the absence of risk in light of the general public's concerns…

The Versailles Court of Appeals even considered that the "*anxiety caused to and suffered*" by nearby families "*as a result of the presence of the relay base station on the adjacent property*" justified the decision to order the dismantling of the installation.

In an order dated August 11, 2009, the Summary Judge of the Créteil First Instance Court justified the ban of a relay base station, concluding that there was a risk… but acknowledging at the same time that the existence of such risk was uncertain:

"*Even if the current scientific knowledge does not enable to determine with certainty the precise impact of electromagnetic waves crossing the building common areas, there is a risk – that should not be neglected – that such waves will have an impact on the health of building residents*".

On September 15, 2009, the Lyon First Instance Court rendered a decision, the nature and motives of which conflicted with the above:

"Neighborhood nuisances cannot be assessed solely through the perception of the plaintiff and, as such, the disturbance cannot result from a feared damage to health."

Having recalled the findings of the expertise reports filed by the parties, the Court noted:

"In the absence of certainty as to the harmlessness of electromagnetic fields, the precautionary principle should not apply automatically.

Doing so would result in the precautionary principle being likely to jeopardize any scientific progress and would impose on the mobile phone operators an impossible burden of proof.

As such, if, for implementing the precautionary principle, the uncertainty as to the harmlessness of an installation is a necessary condition, it remains, however, insufficient and it is up to the plaintiffs to demonstrate that there exists a proven – at least serious – risk of severe damage."

On October 15, 2009, the *Agence française de sécurité sanitaire de l'environnement et du travail* (French Agency for Environmental and Occupational Health Safety or "Afsset") made public the report commissioned by the Prime Minister after the roundtable on phone relay antenna. This report concluded notably that no health risk associated with mobile phone relay base stations had been established.

On December 17, 2009 the French National Academies of Medicine, Sciences and Technologies issued a joint clarification specifying that "*reducing exposure to waves is not scientifically justified"* and condemning "*allegations that groundlessly worry the public opinion by making people believe that there are health risks whereas (...) such risks are not proven*".

These findings are in line with the conclusions of the fact sheet issued by the WHO in May 2006, the Opinion of the European Commission published in September 2008 and the communiqué released by the French National Academy of Medicine on March 4, 2009.

In this context, why and how did such a controversy erupt and why were so many lawsuits initiated?

It seems that for some judges official standards and evaluation reports authored by French, European and global control agencies no longer outweigh unofficial studies produced by plaintiffs and whose scientific value is – to say the least – highly questionable.

We have in fact entered into an era of suspicion and distrust vis-à-vis public authorities and independent agencies responsible for fixing standards and controlling the application thereof. The arguments and theories put forth by radical environmentalists, echoed everyday in the media, have obviously gained ground, including in the eyes of some magistrates.

In its communiqué of March 4, 2009, the French National Academy of Medicine explained that this

phenomenon resulted from a "*subjective interpretation of the precautionary principle*".

The GMOs issue

We all remember that on December 9, 2005 the Orleans Criminal Court acquitted 49 persons who destroyed a field of genetically modified corn on the grounds that "*the defendants have shown proof that they committed an offense of voluntary vandalism in response to a situation of necessity*" in order to "*remedy a situation of danger*" that GMO cultures allegedly create for the environment. It was the first time that a court referred to the precautionary principle to justify a gross violation of law insofar as the owner of the corn field had duly received the required official authorizations.

Fortunately, the judgment rendered by the Orleans Criminal Court remains an isolated decision as the *Cour de Cassation* (French Supreme Court) put an end to this round of the fight in two judgments dated February 7 and May 31, 2007, the second one confirming the judgment of the Orléans Court of Appeals dated June 27, 2006 reversing the lower court's aforementioned judgment.

The Law of June 25, 2008 created an authorization regulation for GMOs and laid down evaluation, monitoring and control procedures governing the cultivation and sale of GMOs. It also created a specific offense of destruction or degradation of authorized GMO crops. Destroying or degrading GMOs crops was previously punishable pursuant to legal provisions applicable in case of destruction of the property of others.

The only important event that occurred in 2009 in relation to GMOs was the appointment of the High Council of Biotechnologies in April.

The High Council of Biotechnologies comprises two distinct committees: a scientific committee that includes experts with known competence in the field of biotechnologies and an ethics, economic and social committee which includes representatives from the general public.

The mission of this High Council is to inform the government on all issues relating to genetically modified organisms and any other biotechnology, and to give opinions relating to the assessment of risks for the environment and public health and the biological monitoring of the national territory.

Mrs. Corinne Lepage, co-founder with Mr. Gilles Eric Séralini (a researcher who actively calls for the ban of GMOs), from the *Comité de Recherche et d'Information Indépendant sur le Génie Génétique* (Committee for Independent Research and Information on Genetic Engineering or "CRII-GEN") announced in May 2009 that the CRII-GEN had decided to challenge the composition of the High Council because none of the CRII-GEN members had been appointed to sit in either committee and because the "*ethics, economic and social committee will not work with the appointed scientific committee on an equal footing*".

GMO detractors have obviously no intent to give up the fight.

In a report submitted to the Prime Minister in the spring 2008, Mrs. Corinne Lepage called for the creation of

a High Council, 1/3 of whose members would come from the general public. This independent body would be vested with the power to investigate and sanction and could launch an investigation at the request of whistleblowers, who would be protected, and non-governmental organizations. It could also issue opinions on the pursuit of research programs launched in corporations or public research laboratories.

The risk is that scientific research would be de facto placed under the thumb of representatives of the general public having ideological – rather than scientific – motivations. There is a thin line between environmental democracy and the people's democracy.