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The gradual drift of the precautionary principle

The Judgment rendered on February 4, 2009 by the Versailles Court of Appeals ordering Bouygues Telecom to remove a relay base station following a claim lodged by neighbors has been extensively commented in the media and widely acknowledged as a legitimate application of the precautionary principle. It is in fact a highly criticizable decision. Let's take a closer look and consider the facts.

A criticizable decision

The judgment firstly notes that *"the installation in question operates in compliance with the standards"* laid down by law. It, however, immediately specifies that *"an exceptional nuisance to a neighbor having been alleged, the compliance with official standards, the legality of the activity, and its usefulness to the public are not in themselves grounds for denying the existence of a nuisance"*.

What type of nuisance is this all about? In its argumentation, the Versailles Court of Appeals tries to find a justification in a decision rendered by the *Conseil d'Etat*: *"Considering that, according to the judgment rendered on June 11, 2004 by the Conseil d'Etat, it appears from a report submitted to the government in 2001 that in the current state of scientific knowledge it is not established that electromagnetic radiations have non-thermic effects that are dangerous for public health"*.

What conclusions does the Court of Appeals draw from this element? Well, if it is not established that radiations have dangerous effects for public health, it is equally not established that such radiations do not have dangerous effects! It is all the more so - explains the Court of Appeals - as a certain number of scientific studies challenged the conclusions of the official experts of the French Agency for Environmental Health Protection and World Health Organization. It acknowledges that *"some of these studies can be criticized, if not*

ignored, due to a lack of rigor in their research or the taking of measurements". But there is nothing to do about it, doubt has been cast and doubt imposes the application of the precautionary principle.

The Court of Appeals considered that the *"anxiety caused and suffered"* by the resident 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 addition, each resident couple will be paid a sum of 7,000 Euros as a compensation for the *"distress"* caused to them, should such distress just be based on an imaginary risk.

Absurd consequences

The consequences of this decision can be disastrous, if not absurd. In practice, any person living near a relay base station could be tempted to request the dismantling thereof in accordance with the reasoning of the Court of Appeals. We might then become the only country in the world without cellular network...

By relying on unofficial studies, the scientific rigor of which is much debated, this decision - probably unintentionally - casts suspicion on official control bodies and their independent experts.

Lastly, it also fuels the argumentation of those who spread irrational fears for reasons that most often have nothing to do with science: between those who urge us to turn to a radically different model of society like José Bové, a eulogist of the de-growth concept, and those for whom any genetic manipulation - even with corn plantations (!) - is an intolerable attack on God's creation. The demonization of the chemical, agrochemical, nuclear and telecommunications industries has started. A new Electricity Fairy would obviously not be welcome in our time.

Towards a public opinion-led case law

If this decision is to become a judicial precedent, judges who are more receptive than others to the background noise of public opinion might feel the duty to dismantle an industry or prohibit the sale of a product on the strength of unreliable studies or unsubstantiated assertions. The fact that this industry or this product may be duly authorized and fully comply with applicable laws and regulations would no longer carry any weight.

It is worth recalling that in December 2005 the Orleans Criminal Court discharged 49 persons who destroyed a field of genetically modified corn on ground that *"the defendants have shown proof that they committed an offense of voluntary vandalism in response to a situation of necessity"*. This judgment invoked the precautionary principle *"having constitutional value"* to justify the perpetration of a criminal offense to *"remedy to a situation of danger"* that GMO cultures - even though duly authorized - allegedly create for the environment.

Fortunately, the judgments rendered by the Versailles Court of Appeals and the Orleans Criminal Court remain isolated decisions. But who knows if such judgments are not precursors to a new case law that will justify the violation of laws and regulations according to criteria based rather on ideological and religious beliefs than on

scientific facts?

A time of distrust

How and why did we end up in this situation? This is, in fact, a gradual drift of the precautionary principle from a mere provision of the French Environmental Code towards a constitutional principle set forth in the Environmental Charter. Article L. 110-1 of the French Environmental Code defined the precautionary principle as follows: *“the absence of certainty, based on current scientific and technical knowledge, must not delay the adoption of effective and proportionate measures aiming to prevent a risk of serious and irreversible damage to the environment at an economically acceptable cost”*.

The notion of *“economically acceptable cost”* is not referred to in the Environmental Charter which marks a swing between an era where people still believed in science but wanted to correct its potentially adverse effects and a time of mistrust of new technologies and control authorities.

This climate of suspicion is not likely to favor the development of research activities on our territory. We might become tomorrow the only country in the world without GMO... and R&D. The sky would then have really fallen on our heads.

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