The Enforcement of the Precautionary Principle by German, French and Belgian Courts

Nicolas de Sadeleer

INTRODUCTION

With the precautionary principle having growing access in the international legal order, several national legislators in Europe have followed its success by increasingly setting it out in the excludes of environmental codes of law or in framework laws. In German law, the principle has for some time now implicitly followed on from sectoral laws relating to listed installations, biotechnology, nuclear energy and water management. In France and in Belgium, it has been introduced more recently by framework laws which initiated the codification of environmental law.

When looking for substantive indications of its existence, one finds that the principle is now clearly present in national legal regimes than one might think. By giving increasing importance to uncertainty, several legislative systems have already brought the principle into play, without expressly referring to it. The doctrine acknowledges that national biotechnology law represents one of the most important advances to date, despite, at the level of its institutionalization, that the principle has been most successful. As will be demonstrated by discussing case law in Germany, in France and in Belgium, some legal regimes have already made a breakthrough by integrating uncertainty into their reasoning, thus applying the precautionary principle without necessarily being aware of it. Since the objective of the principle is to govern decision making under conditions of uncertainty, all-encompassing nuances, the principle is also advancing, in a perhaps more striking manner, in other fields of law, such as health law.

FEDERAL REPUBLIC OF GERMANY

Environmental law principles play an extremely important role in German environmental law. 1 In Germany, the concepts of precaution and prevention are to be understood clearly present in national legal regimes than one might think. It is a matter of increasing the importance to uncertainty, several legislative systems have already brought the principle into play, without expressly referring to it. The doctrine acknowledges that national biotechnology law represents one of the most important advances to date, despite, at the level of its institutionalization, that the principle has been most successful. As will be demonstrated by discussing case law in Germany, in France and in Belgium, some legal regimes have already made a breakthrough by integrating uncertainty into their reasoning, thus applying the precautionary principle without necessarily being aware of it. Since the objective of the principle is to govern decision making under conditions of uncertainty, all-encompassing nuances, the principle is also advancing, in a perhaps more striking manner, in other fields of law, such as health law.

From a perspective of precaution, the German Federal Administrative Tribunal (Bundesverwaltungsgericht) accepts the use of administratively measures which limit freedom of action and which are taken without clear proof of a causal link between the activity being regulated and the environmental damage. This case law is particularly interesting in that it draws a rather fine distinction between dangers, risks and residual risks, which will be considered later in this section.

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The current state of science and technology. Based on this case law, the Federal Administrative Tribunal expressed the opinion that it was not up to administrative tribunals to substitute their assessment of scientific controversies for the evaluation carried out by administrative authorities.

The Tribunal rejected the appeal, based on the fact that the competent authority had studied differing scientific opinions in the case of the Wyls power plant.

Now recently, litigation concerning the implementation of the precautionary principle in German environmental law has also taken place in the field of biotechnology, based on the provisions of the law of 16 December 1993 (Genehteksgesetz). Article 62(2) of this law states that:

"In conformity with the current level of science and technology, the operator must take all measures to protect the rights set out in Article 16 and to anticipate the creation of dangers..."

In a judgment of 27 January 1995, the Administrative Appeals Tribunal of Hamburg specified the scope of the precautionary principle set out in Article 62(2) of the Biotechnology Law, which requires an operator to take steps to prevent against and prevent the occurrence of potential dangers. After recalling that the concept of the current level of science and technology could be subject to judicial review, the Tribunal stressed that this concept comprises both the prevention of danger (Gefahranhebung) and precaution against risks (Vorsorgeprinzip).

The Tribunal then recalled the case law of the Federal Administrative Tribunal in the Kaliek case, wherein a precautionary principle set the court's assessment was based on sufficient information and non-arbitrary assumptions. German administrative courts will thus exercise their precautionary only in order to control the potential aspects of risk assessment, and will have the administrative

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FRANCE

The Conseil d'État, the highest French administrative court, used a precautionary approach for the first time in a case where had nothing to do with the environment — that of AIDS-contaminated blood. One of the recitals of the judgment of 15 October 1989 reads: "The Conseil d'État declared that the concept of danger did not allow the public authority to take refuge behind a 'dominant theory', since science is no longer able to pose hypotheses that have not been invalidated. The Tribunal declared the administration for not having implemented the precautionary principle in the sense of the standard in question does not mean that measures of protection may only be taken if there are 'suspicion of danger' or if the precautionary principle applies in the case of an accident and the consequences of certain acts and can therefore not say whether or not those effects represent a danger."

It is necessary to take into consideration the uncertainties of danger or of 'reasons for concern'. (Gefahranhebungprinzip). Precautionary principle must also be assessed by weighing the probabilities of continuing statements, reference to practical technical knowledge is insufficient; security measures should also be considered according to 'general theoretical' risks and policies, so as to adequately exclude risks arising from uncertainties and inaccuracies in scientific understanding.

In order to take the precautions required according to Article 7(2)(b) of the Atomic Energy Law, dangers and risks must be practically excluded. The evaluation needed for this task should reflect the 'current level of science and technology'. Uncertainties relating to research and risk assessment must be considered according to the reasons for concern associated with them under sufficiently conservative hypotheses. In this process, the administrative authority charged with granting the authorisation should not simply take account of all available scientific knowledge.

Following on from these considerations, the German Federal Administrative Tribunal defined the concept of residual risk in the strictest possible manner. It imposed an obligation on the public administration to rule out the occurrence of sources of exposure to residual risks even for a 'dominant theory', since 'evidence remains even in its present state and is not capable of producing with certainty the consequences of certain acts and can therefore not say whether or not these effects represent a danger'. The Tribunal also recognized the plurality of truth.

The German Federal Administrative Tribunal thus applied a greatly widened concept of precaution, which went much further than that originally envisaged by the developers of the national legislation and allowed at the time by most legal analyses. This case law demonstrated that judges are likely to draw from this principle to those elements that prevent them from exercising control over administrative decisions or hypotheses. "The Tribunal then recalled the case law of the Federal Administrative Tribunal in the Kaliek case, wherein a precautionary principle is only in order to control the potential aspects of risk assessment, and will have the administrative

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The Council of State, the highest French administrative court, used a precautionary approach for the first time in a case where had nothing to do with the environment — that of AIDS-contaminated blood. One of the recitals of the judgment of 9 April 1993 reads: "The Council of State declared that the concept of danger did not allow the public authority to take refuge behind a 'dominant theory', since science is no longer able to pose hypotheses that have not been invalidated. The Tribunal declared the administration for not having implemented the precautionary principle in the sense of the standard in question does not mean that measures of protection may only be taken if there are 'suspicion of danger' or if the precautionary principle applies in the case of an accident and the consequences of certain acts and can therefore not say whether or not those effects represent a danger."

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concerning the foreseeable future effect of bore hole exploi-
tation. In other words, uncertainty is no excuse for incomplete investigations.

The Conseil d'Etat also took a precautionary stance in the case of Com. De Quissillan, where it ruled that modification of a land-use plan (Plan d'occupation des sols) in order to set apart agricultural lands for the development of dripping seepage wells were not allowed, even though the lands were eventually to be restored to their original use. This could be gathered from the risk of human exposure to surplus, in particular, the final restoration to agricultural use of lands used for dripping seepage wells, of which toxicological effects are not guaranteed to be harmless.

Moreover, we do not consider it possible that the other principles established by this Article - the principle of preventive action and of prevention at source, the polluter pays principle, the principle of participation - can be directly applied to the absence of legislative provisions which form the basis of a complete form to demonstrate that the deposited material would not give rise to toxicological effects.

Article 200-1 of the Rural Code was recently discovered by French environmental lawyers. This article, introduced by the law of 2 February 1995, which initiated the codification of environmental law in France, defines the precautionary principle as:

the principle according to which the absence of certainty, taking account of current scientific and technical knowledge, ought not to delay the adoption of effective and proportionate measures aimed at avoiding a risk of serious and irreversible damage to the environment, at an economically acceptable cost.

Administrative case law did not really reflect this new legal principle, however, until the application in the case of Transazur maize. In this case, an appeal had been made to the Conseil d'Etat, by Groupes France among others, to suspend the execution of an Agriculture Ministry order, which would have registered three varieties of genetically modified maize in the catalogue of species and varieties of plants grown in France. In his judgment of 23 August 1998, Commissaire, who examined the question of what the Government's J. Stahl east doubt on whether the precautionary principle could be said to have a direct effect: the principle could not be appealed to directly because of the provision in the Standard law of 2 February 1995 which states that the principles set out in the law 'inspired' environmental policies in those laws which define its range.

In any event, the concept of the precautionary principle is another way to compare an administrative decision of the Seminaire du Gouvernement, which had not yet been established, decisions on the point could not be made with any certainty. The Conseil d'Etat concluded that '[with regard to the precautionary measures that are indispensable when dealing with public health, the Prime Minister has not committed an error of appraisal.]

The combination of legislative provisions should thus rather be considered by the law of 2 February 1995, which initiated the codification of environmental law in France, defines the precautionary principle as:

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health and of a healthy environment. Even when the complaining could not present supporting evidence for his claim that electricity cables passing above his home posed a risk to health, the Conseil d'Etat decided that there were sufficient grounds for reasonable suspicion of a health risk, even if existing standards were being respected. Since it was not its role to settle this scientific controversy, the Conseil d'Etat decided that while a risk to health could not be proved, neither could it be excluded. To the extent that the risk threatened basic constitutional rights to health and environmental protection, the injury could be considered sufficiently serious to warrant suspending the contentious administrative act.

The precautionary principle was first introduced in Belgian legislation in a decree of the Flemish Region of 5 April 1995, which stated that:

Environmental policy shall seek to achieve a high level of protection ... It shall be based on, inter alia: the precautionary principle.25

Recently, however, in its judgment of 25 January 1999 suspending a licence for the construction of a new incineration plant close to Brussels, the Conseil d'Etat dismissed as not serious the violation of the precautionary principle found in the Flemish Decree:26

That a first reading of the provision that were invoked prompts the conclusion that these provisions do not contain any enforceable rules, merely general principles in the area of general environmental policy, principles that need to be worked out further and translated into enforceable regulations; that consequently, leaving aside the question whether or not these principles have been ignored, as the current state of the proceedings there is nothing to indicate that a possible violation of the principles should, or even could, lead to the annulment of the disputed licence.

In another case concerning an incineration plant close to Antwerp, the President of the Tribunal of First Instance of Antwerp judged that the precaution and precautionary principles had been ignored by the new licence to operate the plant. In his judgment of 2 February 1999 he ordered the plant to be shut down and concluded that "with regard to public health no compromises should be made, precisely because it is the future of residents and their quality of life that are at stake."27 However, on the 11 October 1999, the Court of Appeal of Antwerp reversed the First Instance decision:

CONCLUSION

In environmental matters, everything has become a matter of time; we must not lose any more time, we can’t make up for lost time, we can’t predict the future. But a change in thinking about time should translate into a change of attitude, and the precautionary principle symbolically marks just such a change. It transforms duty of care into an essential element of any policy; in other words, ‘a policy for action in the face of uncertainty’.

The road that remains to be travelled before we see the precautionary principle begin to take root in posi-