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Human Rights in the Market Place

The Exploitation of Rights Protection by Economic Actors

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Introduction

The purpose of this study is to examine the way in which different economic actors employ argument relating to basic legal rights to protect their interests. The ideology of human rights protection has gained considerable momentum during the second half of the twentieth century at both national and international levels. As both a legal and a political strategy, **framing argument as a matter of basic human rights protection increasingly appears as an effective lever for effecting legal change**. This is especially evident in a context such as that of penal reform – for instance, in relation to the removal or stricter control of capital punishment through the use of such argument. But **it is also a strategy which may be employed in other contexts, such as those involving environmental or commercial policy**. **Thus economic or commercial actors may invoke basic rights argument as a means of 'trumping' opposing interests and claims. In this way, the language and logic of fundamental human rights has infiltrated the economic and commercial sphere**, so making this a study of how the 'public law' discourse of basic rights protection has been transported and used in the 'commercial law' context of economic policy, business activity and corporate behaviour. **Inevitably, the discussion of this subject tends to centre upon two significant different and largely opposing interests: those of the suppliers and consumers of economic commodities.** The present intention is to compare the deployment of argument in these two main interests, not only in order to identify the range of basic legal rights which are exploited by these principal economic actors, but also to investigate their respective success in using such legal argument, at different levels of the legal system and across jurisdictions. In this way, the discussion may be seen as an analysis of the **'rights talk' which is now emerging in the economic domain of supply and demand**.

…**At the beginning of the twenty-first century, a major issue…is the global movement towards market liberalisation and the impact of the goal of market freedom within the legal domain. Especially with the emergence of the EU and WTO regimes, it is pertinent to consider the extent to which dominating single and global market objectives are the motor of legal programmes such as free movement and consumer or environmental protection**. Another crucial, though different, theme is the increasing global commitment to protecting rights, Human Rights in the Market Place enunciated through the growing international human rights protection systems, which are in turn linked to the broadening commitment to democratic governance.

…Much of the legal development referred to here has taken place in international and transnational contexts, particularly those of the EC /EU regime over the last forty years and that of the WTO more

recently, as sites within which different and competing economic interests have been balanced through the formation of policy and law. None the less, some national legal orders remain significant, in so far as they contribute through their own example and heritage to the process of law development at the international level, or play a role in the subsequent implementation and enforcement of international norms. Moreover, new issues and novel dimensions of the subject may well make their first appearance at the national level, so that national courts and legislatures may be the initial venue for new conflicts. Although therefore a comparison between EU and WTO approaches provides a useful focus for much of the discussion, it is still necessary and useful to refer to developments at the national level: the subject is by its nature multi-layered.

…[I[t may be helpful to identify **the main arenas within which economic actors deploy argument relating to basic rights. There would appear to be two main sites for this legal activity. First, attempts may be made to influence the formation of the increasing amount of policy and law concerning the regulation of industry and commerce. Thus a range of actors may present their arguments, often competitively, to policy makers and law makers at different levels and in different jurisdictions, through lobbying, taking advantage of consultation processes and by exploiting a variety of media**. Secondly, and in a more characteristically legal form, **the conflict of economic interest is likely to give rise to more specific disputes and argument which may then be taken forward to litigation of some kind for its resolution**. This provides the opportunity in particular for courts to translate the conflict of interests into a conflict of rights which may then be amenable to legal resolution. Courts of law provide the classic venue for rights-argument and so inevitably have a high profile in the working-out of legal solutions.

…[I]t is of course also necessary to identify **the main types of actor occupying the economic, political and legal stage** which is the subject of discussion here. In the first place, there are **the main protagonists asserting a range of rights, and these actors may perhaps be most usefully viewed along an economic continuum of supply and demand, ranging through stages of supply and consumption of economic commodities, from the producer to the ultimate end-consumer**. This continuum includes the more obvious players on the stage of supply and demand (such as manufacturers, wholesalers, retailers and end-purchasers), but also some market participants who may fit less neatly within that spectrum (such as lenders, shareholders and other investors). Alongside these principal protagonists, **there are other types of actor who may in some sense be seen as secondary, although their role is increasingly significant. In particular, reference should be made to interest groups who may be used by collectively by producers, retailers or consumers, to represent more collectively their respective interests, and to the public (or wider) interest regulators who are entrusted with the implementation or enforcement of broader economic policy, at both the national and international levels (for instance, competition and fair trading authorities).** Both of these latter types of actor may be regarded as playing a representative role in relation to the primary interests of the main economic actors, but this representative and managing function has of itself acquired increasing significance and, it may be argued, some autonomy within the economic and legal orders.

This leads finally to some consideration of **the role and process of legal regulation of economic activity and more specifically the identity and role of those agencies entrusted with the enforcement of such regulation**. **The activity of such regulators symbolises the 'public' intervention in the market place and as such these enforcement agents provide the most evident presence of a broader public interest in the commercial field**…Finally, it is interesting to speculate on the increasingly *protective* role of such regulators – especially in the context of rights-argument – as these agencies acquire more initiative in the management of policy and law enforcement.

…**PART II: Testing Grounds**

…6 The European Laboratory: The Construction of Consumer Rights in Europe 126-166.

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> When an activity raises threats to the environment or human health, precautionary measures should be taken, even if some cause and effect relationships are not fully established scientifically. In this context, the proponent of the activity, rather than the public, should bear the burden of proof [of the safety of the activity]. The process of applying the precautionary principle must be open, informed and democratic and must include potentially affected parties. It must also involve an examination of the full range of alternatives, including no action. [FN 102]
>
> [FN 102] – Commonly, formulations of the precautionary principle advocated by environmental and consumer NGOs will be akin to that adopted at the Wingspread Conference 1998 – the formulation provided in the text above. The Conference was organized by the Science and Environmental Health Network and brought together academic scientists, grass-roots environmentalists, government researchers and labour representatives from the US, Canada and Europe for the purpose of discussing how the principle could be formalized and brought to the forefront of environmental and public health decision making…

By requiring that any recourse to precaution within the EU must be tempered by reference to the legitimizing benchmarks of sound science and economic expediency [Article 174(2) of the EC Treaty, the market-oriented Community formulation of precaution seeks to be both reassuring and accommodating; a risky balancing act indeed.

Since its incorporation into the EC Treaty, the precautionary principle has gained ground across a number of other fields of Community competence. As its profile has been raised, its essentially pro-trade premise has been variously confirmed and to some extent clarified by the Community institutions. Early in 2000, seeking to define the meaning, scope and appropriate role of precaution with EU law, the Commission published a highly influential *Communication on the Precautionary Principle*. Here, the Commission expressly acknowledged the wider utility and relevance of precaution beyond the implied limits of Article 174 of the Treaty:

> The precautionary principle is not defined in the Treaty, which prescribes it only once – to protect the environment. But, in practice, its scope is much wider, and specifically, where preliminary objective scientific evaluation indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community.

At the same time though, the potential impact of precaution was tempered by the Commission's insistence that (a) measures based upon the precautionary principle should be viewed as provisional [essentially, temporary], and (b) that 'far from being a way of evading obligations arising from the WTO Agreements, the envisaged use of the precautionary principle complies with these obligations.' (p.152)

Neither the Community's insistence on a 'high' level of environmental and consumer protection nor its apparent willingness to embrace the precautionary principle were intended to displace in any way the standard legitimizing benchmarks of sound science and cost-effectiveness. In the years since the publication of the Communication, the legislative institutions and the European courts have continued to hone the Community formulation of the precautionary principle to fit the needs and aspirations of the EU – without displacing the basic premise of this economic (free-trade obsessed) Union of states. In the end, despite the EU's popular reputation as the 'primary promoter' of the precautionary principle and supporter of 'a version which is so 'strong' as to border on the absurd', in real terms there is little to choose between the EU and WTO approaches to precaution.

…The Commission's *White Paper on Food Safety* – published shortly before the Communication on the Precautionary Principle – expressly identifies the precautionary principle as a risk management tool within a

'proactive, coherent and comprehensive' European food policy aiming to provide 'a high level of human health and consumer protection'. (p.153)

…Today, EU trade in GM food and feed is governed by a comprehensive regulatory framework designed to ensure that the risks associated with the importation, cultivation and consumption of GMOs are assessed and managed in a manner capable of both promoting safety and facilitating the effective functioning of the internal market.

Sitting at the very heart of the current framework are Regulation 1829/2003 on GM Food and Feed and its partner, Regulation 1830/2003 on the traceability and labeling of genetically modified food and feed.Whilst the former measure sets out the rules and procedures governing pre-market assessment and authorization of food and feed products consisting of, containing, or produced from genetically modified organisms, the latter imposes stringent traceability and labeling controls upon all such products in order to facilitate (a) accurate labeling; (b) effective post-market monitoring of environmental, animal and human health impacts of GM food and feed; and (c) the implementation of appropriate risk management measures including, where necessary, the withdrawal of (unsafe) GMOS and GM products from the food and feed chain.

Together, with their extended reach and comprehensive coverage of the food and feed chain, these core regulations (along with the various other associated measures) build upon and reinforce the pre-existing GMO framework, strengthening somewhat its general precautionary value. (pp. 156-157)

…The most notable change brought about by the GM Food and Feed/Traceability Regulations must surely be the extension of mandatory pre-market assessment traceability and labeling requirements to include animal feed consisting of, containing, or produced fro genetically modified organisms…Now under the new system, operators seeking to bring a GMO or GMO-derived product to market for…human consumption…[or]…for animal feed…are required to obtain authorization for both uses…The requirement that all new products should be subjected to the full force of the centralized risk assessment and pre-market approval procedure – regardless of whether or not they might objectively be described as being 'substantially equivalent' to, or in layman's terms, materially 'the same as… (p. 158)

…Substantively, lawful recourse to precautionary risk management in the face of scientific uncertainty is provided for through the linking of GM food and feed approval procedures to the Deliberate Release Directive and the General Food Law Regulation – both of which do contain direct references to the precautionary principle…The drafters of the legislation have ensured that (economic) precaution will guide market approvals, and in achieving this have successfully avoided any explicit elaboration of this regulatory concept which might expose the real limits of its (consumer and environmental) protective value. In light of the ongoing controversy colouring perceptions of and attitudes towards GM food and feed, the adoption of a loosely precautionary tone that, whist having some legal clout, does not draw undue attention to the limitations of the relatively weak Treaty formulation of the principle was probably wise. Any unequivocal reference to scientific uncertainty and the precautionary principle within the text detailing risk assessment and risk management procedures would have highlighted the sound-science basis for precaution as well as the cost-benefit proviso for recourse to such pre-emptive measures. This would have rendered their asis much more immediately obvious, inviting the obvious question: to what extent can sound science provide the benchmark against which the legitimacy of precautionary measures might be determined? Moreover, such explicit references could have easily been interpreted as some sort of acknowledgement that current understanding of the potential impacts of these technologies is, in some way lacking, thus fuelling the fire of consumer opposition.

The revamped EU regime is certainly stringent when compared to those in force elsewhere…Some precaution is better than none, but in the face of hotly disputed technological risks, regulatory precaution

lacks the potency to ensure that where uncertainty prevails, the interests of the environment or the consumer will automatically be prioritized over competing interests of state and market. In those cases where precaution is advised but the implementation of decisively precautionary risk management measures is considered to entail excessive costs (economic or, indeed, political), it is entirely possible, if not highly probable, that Community and Member State determinations of 'acceptable risk' will be at odds with those of the consumer. Inevitably, the reality of the 'high' level consumer protection promised by the EC Treaty will fall some way short of what consumers themselves might deem to be appropriately precautionary, thus exposing these individuals to what they would, no doubt, consider to be an unacceptable level of risk.

Conclusion

There is no escaping the inherent tension of a market-based regulatory system…Inevitably then, the 'highest' level of protection boasted by the Commission in respect of GM foods must be understood as implying no more than the highest 'practicable' level of consumer protection feasible within a system that is also fundamentally concerned with protecting the European stake in a profitable biotech future.

In the case of the GM food and feed sector, it was the increasingly explosive and contradictory combination of economic and political pressures and ambition that finally drove the institutions to agree on a new regulatory framework. Consumer mistrust of, and opposition to, GM food on the one hand, and US-led WTO complaints proceedings against the EU moratorium on the other, compelled the Community institutions to introduce new legislation to facilitate the controlled (and relatively 'safe') entry of GM products onto the EU market. (pp. 163-164)

These very same economic and political pressures also, of course, ensured that legislators took care to adequately protect 'the market' – not least by ensuring that (economic) precaution prevails and that key secondary products supported by the GM animal feed sector did not suffer an overly onerous (and economically and politically damaging) regulatory burden.

In the final analysis, it is very clear that in contrast to the uncertainly surrounding the human health and environmental risks associated with GM food and feed, there was very little uncertainty surrounding the significant economic and political risk associated with the embargo on new GM approvals. By the time the new GM food and feed legislation was adopted, GM-related disputes had been rumbling on for several years and the EU was fielding problematic and potentially expensive complaints from three major GM producer countries – Canad, the US and Argentina – all of which claimed that the EU moratorium constituted a serious breach of WTO free-trade rules.

It is also worth noting here that the wisdom of regulating to restart GMO approvals in the EU should, perhaps, be assessed from a rather broader perspective than the purely sectoral. **As Bernauer suggested in 2003 [FN 150], a failure to negotiate a workable regulatory compromise on GM food and feed could have had important implications for EU risk management policies more generally. Referring to recent statements from US policy makers,[FN 151] he commented that the US-led action against the EU's regulation of agricultural biotechnology was, in fact, symptomatic of a much broader dissatisfaction with the way in which Europe deals with risks to consumers and environmental health. Writing just before the new regulations were agreed and the moratorium lifted, he expressed concern that US objections to risk regulation based on the precautionary principle could lead to the sector-specific agri-biotech dispute escalating into a much 'larger and**

fundamental conflict over appropriate regulatory models for [the mitigation of] environmental and consumer risks'.[FN 152].

[FN 150] T. Bernauer (2003), *Genes, Trade and Regulation: The Seeds of Conflict in Food Biotechnology* (Princeton, NJ: Princeton University Press), at 167.

[FN 151] Bernauer refers readers to the website of the US National Foreign Trade Council (NFTC) (http://www.nftc.org) where the publication of the following NFTC report, would have just been announced: *Looking Behind the Curtain: The Growth of Trade Barriers That Ignore Sound Science*, NFTC June 2003. The NFTC press release announcing publication of this report states that it 'offers powerful evidence of a deliberate strategy to invoke the need for 'precaution' in order to protect ailing or lagging industries and block market access.' The Report is available at < http://www.nftc.org/default/white%20paper/TR2%20final.pdf>. The associated press release can be found at < http://www.nftc.org/newsflash/newsflash.asp?Mode=View&articleid=1630&Category=All >.

The thorny issue of GM food and feed 'safety' demonstrates very clearly the character and priorities of the supranational system of market regulation. In this, as in other sectors, **the consumer protection value of regulatory risk analysis is wholly dependent upon, and determined by, the priorities of those responsible for leading the process of assessment, management and communication, and the relative weight accorded to alternative scientific opinions and the views of particular stakeholders**.
(p.165).