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Opening Pandora's Box: Contextualising The Precautionary Principle In The European Union

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Over the last decade the precautionary principle has become one of the most high profile and contentious principles in European Union (EU) risk regulation and the principle has given rise to a burgeoning body of complex primary and secondary material as well as an overwhelming variety of arguments about its nature and validity.2 In particular the principle has seemingly become a 'touchstone' for thinking about the challenges involved in regulating risk in a globalising world, concerning as it does both the internal and external exercise of state power (de Sadeleer 2002, Wiener and Rogers 2002). As this is the case the principle is an excellent, albeit daunting, starting point for thinking about, and comparing national, EU, and international regulatory models for risk standard setting.

…THE PRECAUTIONARY PRINCIPLE AND THE IMPORTANCE OF CONTEXT

Before considering the principle in the EU context it is important to understand some basic features of the principle. **The precautionary principle is a principle that is concerned with regulating the exercise of state regulatory power in relation to environmental and public health problems where collective knowledge of those problems is scientifically uncertain.** ***The principle nearly always applies to standard setting and risk appraisal – that is the process of deciding whether to authorise a product or activity*** – and it primarily applies to public decision-makers.

…To paraphrase - 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 minimise such a threat.

Three basic features of the principle can be evidenced from this formulation. The first is that the principle is directly concerned with scientific uncertainty in environmental decision-making in that it states that 'lack of full scientific certainty should not be used as a reason' not to take measures.

…Second, the precautionary principle does not direct a particular outcome to occur. This is consistent with the status of the principle as a legal principle (Dworkin 1977, Fisher 2002) as well as with the fact that in circumstances of scientific uncertainty it would be illogical to talk in terms of outcomes (Mckinney and Hammer Hill 2000). Rather than being concerned with outcomes the principle regulates the way in which a decision is made, or in other words the decision-making process.

…Third, and following on from this the principle's operation will largely depend on the institutional and cultural context in which it operates. In particular, what is deemed to be an acceptable process pursuant to the principle will depend on normative understandings of good decision-making processes embedded in a specific institutional context.

…CONTEXTS OF OPERATION

As already noted the principle is primarily a public law principle. In so being, it can apply to both the internal and external exercise of state authority (Fisher 2002, Godard 2006, MacCormick 1999).

…Application to the Internal Exercise of State Sovereignty

…As already noted, what is understood to be a legitimate interpretation and application of the principle will depend on context. As that context is public administration then the principle must be understood against the background of understandings about the role and nature of public administration. **Indeed, one of the reasons why the principle is so contentious is because in removing 'the facts' as a reason for a decision the principle is seen by some as an excuse for arbitrary administrative decision-making because a factual basis has been a conventional way of ensuring the accountability of public administration (Marchant and Mossman 2004, Sunstein 2005).** ***For others, however, the principle promotes good public administration because the principle allows for a more reflexive and pluralistic administrative process that takes into account the complexity of decision-making in this area (Klinke and Renn 2002, Stirling 2001).***

…This close interrelationship between the precautionary principle and administrative constitutionalism means that how the principle is defined, applied, and decision-making pursuant to it subjected to review, will depend on ideas of administrative constitutionalism.

…All in all, debates over the principle are in essence a continuation of debates over the role and nature of public administration. Whether the principle is accepted as valid, or how the principle is interpreted, will result in one paradigm being promoted over another.

…**External Exercise of State Sovereignty**

The precautionary principle does not only relate to exercises of internal state authority however, but also to the exercise of external state authority. This may be relevant to how a state operates in an international, trans-national, or supranational context. In these circumstances the principle acts as a reason to require sovereign states to take action (Cameron and Abouchar 1991, Trouwborst 2002) or acts as a reason for a state to derogate from their international obligations (Bohanes 2002).

…**While the ways in which the precautionary principle operates in the internal and external spheres are theoretically distinct there is a very close conceptual relationship between the two**.

…**THE EUROPEAN COMMISSION'S COMMUNICATION ON THE PRECAUTIONARY PRINCIPLE**

Throughout the 1990s the principle and associated ideas of precaution were relied on by both the Community and Member States but rarely was there any detailed discussion of the principle and its consequences. With that said, a complex body of jurisprudence was developed by the CFI and ECJ in relation to when and on what basis various categories of precautionary action were valid (Scott and Vos 2002). **What is clear from that body of case law is that understandings of reasonable administrative action were being shaped by a range of different factors including norms of administrative constitutionalism**. Indeed, a clear difference in approach can be seen in how the ECJ considered and analysed precautionary action in the different contexts.

…**There were however no universal requirements for a risk assessment although a careful scrutiny of information by the decision-maker was required.**

…By the end of the 1990s there was an increased perception of a need for there to be more authoritative guidance about the nature of the precautionary principle, what it entailed, and when it could be applied. In

February 2000 the European Commission published a Communication in which they outlined how they would apply the principle.

…***Theoretically***, the Communication relates to risk management but the principle only applies when a risk assessment has identified a 'potential risk' and the uncertainties surrounding it. **When a risk assessment does identify a potential 'negative effect' after a scientific evaluation has been done then, as part of risk management, there must be a decision to act or not to act and the precautionary principle will directly apply to this**.

…**The process of applying the principle must be transparent and inclusive**, particularly in assessing the consequences of different forms of action and inaction. ***The Communication, however, describes this as a 'political decision'*** and provides few guidelines for this process of evaluation. What the Communication does do, however, is set out a series of standards by which the measures to be taken must be judged.

…The Communication is a perfect example of how the precautionary principle is concerned with regulating the process of decision-making on the basis of a particular model of administrative constitutionalism.

…One can also see that **there is a real tension in this statement between requiring a decision-maker to base their decision on the facts and for them act on other grounds in circumstances of scientific uncertainty (Fisher and Harding 2006, Lee 2005). That tension makes the guidelines problematic to the point of being unworkable (Fisher 2006).**

…[A] certain pedantry can be seen in the application of the guidelines and there have been a number of cases in which the principle has not been found to apply because the principle should only apply: to provisional risk management measures; where there is a something more than a 'hypothetical' risk; where there is scientific, as opposed to other types of, uncertainty, and not to cases where the risk is well known. Indeed, it would seem that the principle is being treated more as a 'bright line' rule which dictates certain action in particular situations rather than a flexible principle that might result in a variety of outcomes.

Moreover, in discussing EU risk regulation there has been three tendencies which are a product of the current approach to thinking about the precautionary principle. First, the precautionary principle has become synonymous with risk assessment even though the relationship between the two is a product of the SPS Agreement and the promotion of a rational-instrumental paradigm (Fisher 2006, Fisher and Harding 2006). **There has been little recognition of the fact that risk assessment is a flexible regulatory construct or that the principle may operate separate from risk management**. **Second, the precautionary principle has been treated as short hand for describing the whole of European risk regulation (Kogan 2005, Wiener and Rogers 2002).** The principle is described as a 'central guideline' of EU consumer policy (Strünck 2005) **and there seems little appreciation that the principle may have different meanings.** Third, and following on from this, **there appears to be little appreciation in some quarters that the principle is operating in different contexts and that this will result in different interpretations of the principle and different outcomes (Marchant and Mossman 2004, Sunstein 2005)**.
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…**BIBLIOGRAPHY**

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