

BOOK REVIEW

## Le principe de précaution en droit de l'Union Européenne

by **Alessandra Donati, Brussels, Bruylant, 2021, 396 pp.**

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The precautionary principle is a cornerstone of environmental regulation, which has taken full effect at the European level. It is a pillar of European Union (EU) actions in environmental affairs, as described in Article 191(2) and (3) TFEU, and it forms the very fabric of environmental law and governance. In this context, Donati's book is a deep dive into the structure and operationalisation of the precautionary principle in EU law. Her excellent contribution to the field of EU environmental law, especially regarding the relationship between law and science in the design and application of the precautionary principle by EU institutions, is needed and timely. Her analysis is sharp, exhaustive and well-written.

In this book review, I explain the arguments that underpin the book, as well as its structure and theoretical framework, before concluding on the merits of the work as a whole.

Firstly, Donati specifically dissects the role and use of “experts” in the assessment of uncertain risks contained in specific behaviours (Chapters 3 and 4). She strongly argues that the strict separation between decision-makers and scientists that was once thought of as the better model did not survive the test of time. In relation to the mad cow disease crisis in the 1990s, she notes that “all barriers between science and politics seem to have been blurred” (p. 143). She then shows the ways in which such barriers have been blurred in a very compelling manner. Indeed, the assumption that science can provide certain and neutral answers causes a range of problems, as it is an incorrect conception of how scientific development actually occurs (p. 150). However, such an erroneous conception then allowed for a lack of regulation of the relationships between experts and policy- and decision-makers and a lack of rules concerning the independence of experts and of their financing.

This discussion is crucial to understanding environmental decision-making, as it is often easier to deflect from hard or controversial political issues by referring to experts' opinions than to tackle the issues in an open and accountable manner. Through the use of experts and special expertise, certain important political discussions can be side-lined.

Secondly, Donati engages with the relationship between scientific uncertainty and law through the analysis of the procedural obligations imposed by the precautionary principle (Chapters 5 and 6). The precautionary principle is operationalised through the application of the obligations of due diligence and of motivation incumbent on decision-makers, as well as an obligation to take into account the potential benefits and costs of action or a lack of action. Lawmakers are also under an obligation to conduct an impact assessment prior to the elaboration of rules. However, as Donati argues, such procedural obligations are weak and not always correctly applied, as she shows in the case of the banning of

certain endocrine disruptors by the EU Commission (p. 235ff). In this case, the impact assessment commissioned by the EU Commission was used as a consensus-building exercise – especially with the lobbies and concerned businesses – rather than a direct application of precaution as a matter of environmental policy (pp. 240–41). She shows that the concrete application of procedural obligations has many pitfalls, as it is often impossible to quantify or put a monetary value on risks such as those to biodiversity or animal life.

Thirdly, Donati shows that the relationship between science and law is often managed through the application of the discretionary powers of the decision-maker (Chapter 7). That way, whenever the risks are too uncertain or the issues too controversial, decision-makers can manage the situation in such a way as they see fit. They do so through the system of authorisations. When certain activities contain uncertain risks, authorities can give or withdraw authorisations to conduct such activities. In this sense, the precautionary principle takes full effect (pp. 252–53). Authorities also use their discretionary powers in cases of environmental or health crises. The application of the precautionary principle in crises is less successful, however, as Donati explains (p. 261ff). She shows how in both the *Xylella* and COVID-19 emergencies there were problems with the implementation of the precautionary principle and action failed to be taken on time. Such delays in its implementation are contrary to the idea of the precautionary principle, and they highlight its practical limitations. Moreover, when a crisis arises, this means that the crisis has not been prevented in time, so decision-makers then have to adopt measures to mitigate harm, not to prevent it. To respond to these limitations, the EU Commission needs to create systems that can more robustly anticipate risks (p. 274).

The role of courts in interpreting the precautionary principle is also central to its development in EU law. But EU courts have taken a rather deferential approach by limiting their capacity to review the application of the precautionary principle by EU authorities (Chapter 8). Indeed, Donati notes that the Court of Justice allows for “a large flexibility in the application of the precautionary principle” (p. 281) based on the scientific and technical complexity of the subject matter. Indeed, the Court of Justice normally does not engage with the content of scientific assessments. However, through its case law, Donati finds that it has broadened its capacity to engage with actual scientific facts (p. 299ff). She also finds that the Court of Justice has strengthened its review of the authorities’ decisions over the years through a process of proceduralisation (p. 286ff). This discussion shows that the Court is concerned with issues of legitimacy and wants to stay relevant, at the cost of sometimes being criticised for being opportunistic. However, when it comes to finding that a decision-maker has violated the precautionary principle, the Court is less expansive. In such cases, the Court has to decide on remedies – often monetary compensation. This has only happened once, in the *Animal Trading Company e.a. v. Commission* (2013), and Donati explains in detail why such judgments finding a violation of the precautionary principle are so rare (p. 306ff). In sum, the fact that the Court of Justice has a limited role in reviewing the application of the precautionary principle strengthens the discretionary powers of the EU decision-makers.

In terms of the structure of the book, it is worth mentioning that it follows the traditional French legal format, whereby all academic work must be split into two parts, two sub-parts, etc. In general, this makes it harder for researchers to find a way to fit the argument into two neat categories, regardless of the topic or issue at hand. The traditional French structure also comes with a necessarily lengthy introduction, which is very helpful for people outside the field of research, but it is somewhat less necessary for experts in the specific field. I find that this necessity of sticking to a predetermined structure sometimes removes space for further contestation or critical engagement with the law. Yet, Donati uses the somewhat constraining structural demands to her advantage and as an opportunity to tackle both the creation and application of the precautionary principle, making it a comprehensive assessment of the EU’s understanding of the principle. She also shows in

Chapter 1 that going back to the basics to unpack the definitions that are the basis of any further discussions on the topic is necessary to have an accurate understanding of the law. Through such definitional work she is able to trace back to where confusions have emerged over certain interpretations of the precautionary principle and its corollaries.

One query that arises in relation to Donati's choice of theoretical framework. Donati uses the concept of post-modern law, and she explains how the precautionary principle embodies this legal development from the rationality and predictability of modern law to a flexible, deconstructed post-modern law (pp. 28–36). However, I find this distinction too abrupt and unreflective of reality. On the contrary, the precautionary principle is trying to bring some predictability to an unpredictable situation. By acknowledging elements of unpredictability in the otherwise relatively stable legal system, it does not make the whole legal system post-modern. Moreover, I wonder how useful this discussion is for the entirety of the legal analysis Donati provides, as it seems somewhat disconnected from the more detailed and concrete doctrinal discussions offered throughout the book.

Overall, this book is a necessary read for anyone interested in environmental law in Europe. Indeed, since the EU's role in shaping environmental law and policy is also so fundamental for Member States and their national laws, and since the precautionary principle is at the heart of any environmental action, it is essential that we study it specifically. This work is a welcome addition to the literature on environmental protection at large due to its comprehensiveness and coherence in translating complex juridical developments into clear and concise analyses. As Donati describes it, the precautionary principle is polycentric in nature and has different levels of ramifications, which can make it difficult to grasp. Through rigorous analysis, the book is able to clarify the full meaning and reach of the precautionary principle in EU law.