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## **DOCUMENT DE TRAVAIL**

# **ANTI-GM PROTESTORS AND THE CRIMINAL COURTS - A COMPARATIVE APPROACH: FRANCE AND THE UNITED KINGDOM**

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### **1. INTRODUCTION**

For over a decade, the development of genetically modified organisms (GMOs) has been confronted by public protest. Indeed, it has been reported that in the United Kingdom almost all 54 GM field trials since 2000 have suffered some form of vandalism;<sup>1</sup> and, in the face of such onslaught, there has been call by scientists for secure national testing centres.<sup>2</sup> Significantly, the task of the anti-GM protestors has been made somewhat easier following the decision of the European Court of Justice (ECJ) in *Commune de Sausheim v Azelvandred* that the location of deliberate releases into the environment cannot be kept confidential for

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\* Respectively, Chargé de Recherche, CNRS, University of Nantes; and Professor of Agricultural Law, University of Leeds. This paper is based upon L Bodiguel and M Cardwell, 'Genetically Modified Organisms and the Public: Participation, Preferences, and Protest', appearing at Chapter 1 in L Bodiguel and M Cardwell (eds), *The Regulation of Genetically Modified Organisms: Comparative Approaches* (Oxford University Press, Oxford, 2010); and the topic is considered further in an extended version (L Bodiguel and M Cardwell, 'Les juridictions pénales britanniques et françaises face aux anti-OGM: au-delà des différences, une communauté d'esprit'), to be published in *Revue Juridique de l'Environnement* (2011).

<sup>1</sup> See, eg, *GM Researcher Despairs as Three Years' Work Lost*, Times Higher Education, 7 August 2008. Similarly, it has been reported that in 2004 the majority of GM maize trials in Metropolitan France were destroyed: G Hayes, 'Collective action and civil disobedience: the anti-GMO campaign of the *Faucheurs Volontaires*' (2007) 5 French Politics 293, 296. On public protest in this context, generally, see, eg, L Bodiguel and M Cardwell, 'Genetically Modified Organisms and the Public: Participation, Preferences, and Protest', in L Bodiguel and M Cardwell, *The Regulation of Genetically Modified Organisms: Comparative Approaches* (Oxford University Press, Oxford, 2010) 11.

<sup>2</sup> HJ Atkinson and PE Urwin, 'Europe needs to protect its transgenic crop research' 453 Nature 979 (19 June 2008).

reasons of protecting public order.<sup>3</sup> Moreover, while in 2008 it was reported that the United Kingdom Government planned to grow GM crops in secret, the ECJ judgment has clarified that such plans would not be lawfully permissible.<sup>4</sup>

Inevitably, the destruction of GM crops has led to the involvement of the criminal justice system; and such involvement will be considered in respect of both France and the United Kingdom. However, as a preliminary point, it should be emphasised that as between the two jurisdictions there is a major difference in terms of criminal procedure. Whereas in France the decision is left to magistrates and judges, in the United Kingdom more severe charges may be heard before the Crown Court, where, importantly, the verdict is delivered by a jury of twelve citizens. Accordingly, with so important a role ascribed to members of civil society, there has been the capacity for greater acceptance of popular arguments based on overarching environmental necessity, as may be illustrated perhaps most graphically by a 2008 case relating not to GMOs, but climate change. Six Greenpeace activists, who had scaled and daubed paint on the smokestack of Kingsnorth coal-fired power station, were accused of causing criminal damage to the value of £30,000. In their defence, they argued that there was an immediate need to protect property around the world from the impact of climate change;<sup>5</sup> and their argument was accepted by the jury. It might be suggested that this was a 'perverse verdict' (or instance of 'jury nullification'), which could be characterised as an attempt to usurp the role of the legislature in matters of energy policy. On the other hand, there are those who would argue that the jury was applying democratic checks and balances; and, in any event, fears that juries may be law-making would seem exaggerated by reason that, constitutionally, their verdicts (unlike the decisions of judges) carry no authority as precedent.<sup>6</sup>

## 2. UNITED KINGDOM

As indicated, the presence of the jury system has played a key role in the treatment of anti-GM protestors by the criminal courts, and two examples may be provided. First, following their 'decontamination' of a GM trial, Lord Peter Melchett and 27 other Greenpeace volunteers were charged with theft and criminal damage before the Norwich Crown Court. Initially, on 19 April 2000, they were acquitted by the jury of theft, but no verdict could be reached on the second charge.<sup>7</sup> On 20 September 2000, they were also acquitted of criminal damage and, significantly, the basis for their acquittal was that their actions were justified by

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<sup>3</sup> Case C-552/07 (17 February 2009).

<sup>4</sup> For such plans, see, eg, A Grice, *Government to Defy Critics with Secret GM Crop Trials*, Guardian, 17 November 2008 (although the Government in response was equivocal as to the existence of such initiatives: see, eg, J Riley, *DEFRA Responds to Secret GM Crop Trial Claim*, Farmers Weekly Interactive, 17 November 2008).

<sup>5</sup> See, eg, Greenpeace UK, *Breaking News: Kingsnorth Six Found Not Guilty* (available at <http://www.greenpeace.org.uk/blog/climate/kingsnorth-trial-breaking-news-verdict-20080910>, last accessed on 25 May 2010).

<sup>6</sup> See, eg, T Brooks, 'A defence of jury nullification' (2004) 10 Res Publica 401 (in particular, at 418).

<sup>7</sup> Greenpeace Press Release, *Jury Fails to Convict Greenpeace Volunteers*, 19 April 2000 (available at <http://www.greenpeace.org.uk/media/press-releases/greenpeace-volunteers-cleared-of-theft-in-lyng-gm-trial>, last accessed on 20 January 2009). See generally, eg, M Stallworthy 'Damage to crops - Part 1' (2000) 150 New Law Journal 728 and 'Damage to crops - Part 2' (2000) 150 New Law Journal 801; and S Tromans and C Thomann, 'Environmental protest and the law' [2003] Journal of Planning and Environmental Law 1367.

the need to protect property.<sup>8</sup> Secondly, an even more cogent illustration of the potential influence of the jury may be provided by the case of *R v Colchester Justices, ex parte Abbott*.<sup>9</sup> In that case, the anti-GM protestors were prepared to argue that the damage to the GM trial site was even greater than that alleged by the prosecution, with a view to meeting financial criteria which would open the possibility of jury trial (and, in all expectation, a more favourable hearing). Thus, the scientific report prepared on their behalf estimated loss of approximately £13,900, while the figure put forward by the prosecution was only £3,250 (the ‘relevant sum’ for the purposes of the financial criteria being £5,000).<sup>10</sup> The fact that they failed to win their argument before both the magistrates and the Divisional Court should not diminish the unusual circumstance that defendants saw the greater costs and potential penalties of a Crown Court trial as a price worth paying for the opportunity to present their case before twelve representatives of civil society. Indeed, in light of the greater sanctions that may be imposed by the Crown Court, one commentator has argued that a jury trial would also be of advantage to the prosecution: ‘[i]f an expensive experiment is being lawfully conducted in the public interest, may not its destruction demand something more than a mere summary conviction and a relatively trivial penalty?’<sup>11</sup>

It may further be noted that, even in the absence of a jury, anti-GM protestors have not always been convicted. Thus, in the High Court case of *Director of Public Prosecutions v Tilly* the defendant was cleared of a charge of aggravated trespass.<sup>12</sup> Under Section 68(1) of the Criminal Justice and Public Order Act 1994 (according to the version then in force), the charge of aggravated trespass required that a person:

‘trespasses on land in the open air and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land in the open air, does there anything which is intended by him to have the effect –

- (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity;
- (b) of obstructing that activity, or
- (c) of disrupting that activity’.

The judge without hesitation concluded ‘that presence is necessary before an offence under this section can be made out’,<sup>13</sup> since it contemplated ‘a situation in which people are meant to be intimidated, or cannot get on with what they are entitled to do’.<sup>14</sup> Thus, the simple fact of crop destruction was not sufficient. Nevertheless, she also made clear that there were alternative charges available to the prosecution, which did not necessitate the presence or imminent presence of those suffering such destruction.<sup>15</sup>

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<sup>8</sup> Greenpeace Press Release, *28 Greenpeace Volunteers Acquitted in GM Trial*, 20 September 2000 (available at <http://www.greenpeace.org.uk/media/press-releases/28-greenpeace-volunteers-acquitted-in-gm-trial>, last accessed on 26 June 2009).

<sup>9</sup> [2001] EWHC Admin 136; Times, 13 March 2001; and [2001] Criminal Law Review 564.

<sup>10</sup> For the detailed provisions, see Magistrates’ Court Act 1980, s 22.

<sup>11</sup> [2001] Criminal Law Review 564, 565.

<sup>12</sup> [2001] EWHC Admin 821; Times, 27 November 2001; and [2002] Criminal Law Review 128.

<sup>13</sup> [2001] EWHC Admin 821, [25].

<sup>14</sup> Ibid, [26].

<sup>15</sup> For such an alternative charge, see, [2002] Criminal Law Review 128 (suggesting a charge of criminal damage under the Criminal Damage Act 1971).

Likewise, a charge of aggravated trespass was initially dismissed in the case of *Director of Public Prosecutions v Bayer*, where the defendants had attached themselves to tractors with the intention of disrupting the lawful drilling of GM maize.<sup>16</sup> While of the opinion that they were aggravated trespassers, the District Judge held that: they had honestly held and genuine beliefs about the dangers of GM crops; they had genuine fears for surrounding property; they had reasonable grounds for those beliefs and fears given their scientific knowledge concerning GM crop tests and given also their knowledge of the locality; and they acted with all good intentions and had gone no further than was absolutely necessary to try to prevent the sowing of the crops. In consequence, their actions came within the defence at common law of defence of property.

However, the defendants did not enjoy like success when the prosecution appealed to the Divisional Court.<sup>17</sup> In particular, the Divisional Court held that ‘it has always been a requisite ingredient of this element of the common law defence that what is being experienced or feared is an unlawful or criminal act’; and, this issue had not been addressed by the District Judge.<sup>18</sup> On the facts, the defendants were well aware that the drilling of the GM maize seed was lawful and, accordingly, the common law defence was not made out.

Indeed, the extent to which anti-GM protestors could lawfully justify their actions had earlier been explored by the Court of Appeal in *Monsanto PLC v Tilly*;<sup>19</sup> and, as in *Director of Public Prosecutions v Bayer*, no such justification was found. The majority of the defendants were members of GenetiX Snowball, a NGO which has actively campaigned against GM crops. Importantly, their Handbook has emphasised that protest should be non-violent and that the uprooting of GM crops should be symbolic, with members entering into a Pledge, *inter alia*, not to remove more than 100 individual GM plants during the day.<sup>20</sup> A matter of some interest is that the Pledge would seem to track definitions of civil disobedience as found in the work of jurisprudence scholars.<sup>21</sup> Thus, it included also, for example, an undertaking to carry out the action in daylight and to accept the consequences. In the view of the Court of Appeal, these aspects of the campaign showed a material inconsistency in any attempt to justify the destruction of GM crops. If there had been an immediate danger to those in the vicinity, then the eradication of whole crop would have been required. Instead, it was considered that the underlying purpose was to attract publicity in circumstances where the defendants had been unable to change government policy by the strengths of their arguments; and breaking the law was seen as generating potential for martyrdom, with the high degree of media exposure which would ensue.<sup>22</sup> Yet, it may be observed that, when the prosecution advanced the same publicity argument during the trials of Lord Peter Melchett and the other Greenpeace volunteers in 2000, the juries still felt able to find them not guilty.<sup>23</sup>

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<sup>16</sup> For discussion of the judgment of the District Judge, see [2003] EWHC 2567 (Admin); [2004] 1 WLR 2856; and [2004] Criminal Law Review 663.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid, [26] *per* Brooke LJ.

<sup>19</sup> Times, 30 November 1999.

<sup>20</sup> For the GenetiX Snowball Handbook, see <http://www.gene.ch/pmhp/gs/handbook.htm> (last accessed on 28 May 2010).

<sup>21</sup> See, eg, J Rawls, *A Theory of Justice* (Revised edition, Oxford University Press, Oxford, 1999) 320.

<sup>22</sup> Definitely, the language of martyrdom has been widely employed where anti-GM protestors have been convicted: see, eg, *Sheriff Has Made Our Dad a Martyr, Say Children of Jailed GM Protester*, Aberdeen Press and Journal, 20 March 2000.

<sup>23</sup> See, eg, M McCarthy, *Lord Melchett and Company Back in the Dock to Deny GM Crop Damage*, Independent, 5 September 2000.

Turning more precisely to the law underpinning the defence of justification, the Court of Appeal in *Monsanto PLC v Tilly* stated that there was legal authority which strongly suggested ‘that the individual has no right to destroy the property of another in the public interest in the sense of protecting others from danger, save in very restricted circumstances; still less that may he do so to attract publicity for what is alleged to be a good cause or to persuade government to legislate against a perceived danger’. The authority to which they referred was the decision of the House of Lords in *Burmah Oil Co Ltd v Lord Advocate*, where it was held that compensation was payable to the oil company for the destruction of its installations in Burma by the British Army, notwithstanding that such destruction had taken place in the dire emergency of war in order to prevent the installations falling into the hands of advancing Japanese forces.<sup>24</sup> In addition, relying on such decisions as *Southwark Borough Council v Williams*,<sup>25</sup> the Court of Appeal held that the danger must be immediate and obvious and that a reasonable person would conclude that trespass was the only option. In addition, it was emphasised that an organisation campaigning to change government policy should seek to do so by lawful as opposed to unlawful means; and in the present circumstances, there would be the possibility of challenging the grant of the licences for the crop trials through judicial review.<sup>26</sup>

### 3. FRANCE

In France, there is not the same distinction between, on the one hand, cases held before judges and, on the other hand, jury trials. Rather, it is the professional judiciary which hears charges relating to the destruction of GM crops (whether on public or private land) by anti-GM protestors, who are known as ‘faucheurs volontaires’.<sup>27</sup> As with the United Kingdom, the underlying principle is that the judiciary applies the letter of the law (more precisely, criminal law) and rejects any arguments presented by the ‘faucheurs’. In so doing, contrary to jury verdicts in the United Kingdom, there is no room in the legal system for actions characterised by their perpetrators as ‘civil disobedience’.

#### 3.1. Strict Application of Criminal Law

On 26 February 2008, the Court of Appeal of Orléans delivered a long-awaited decision,<sup>28</sup> which provides a perfect illustration of the approach adopted by the French judges. In this case, Monsanto enjoyed authorisation to cultivate the disputed GMOs and sought conviction of the ‘faucheurs’ for destruction of the crop, together with compensation of 313,108 Euros. For their part, the ‘faucheurs’ did not dispute that such destruction had taken place: indeed,

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<sup>24</sup> [1965] AC 75.

<sup>25</sup> [1971] 1 Ch 734.

<sup>26</sup> However, GenetiX Snowball was expressly not encouraged to apply for judicial review (which is both an expensive process and one which would require the claimant to prove that no reasonable decision-maker would have granted such licences).

<sup>27</sup> On occasion, they have resorted to ‘spectaculars’, such as the dismantling of a McDonald’s on 11 August 1999.

<sup>28</sup> The anti-GM protestors were hoping that there would be a change in judicial thinking, so as to bring such thinking in line with the moratorium banning MON 810. Further, the overturning of earlier decisions would have had the capacity to influence the proposed law on GMOs, which was then being debated by the French Parliament.

they took full responsibility for it. Rather, they claimed that they were not criminally liable. The Court of Appeal decided in favour of Monsanto, with the ‘faucheurs’ being found guilty of the offence of destroying in concert the property of another, under Article L.322-1 of the Code Pénal.<sup>29</sup> Accordingly, they were given suspended sentences of between two and four months imprisonment, together with fines ranging from 1,500 to 3,000 Euros. On the other hand, at first instance the court had also deprived the ‘faucheurs’ of their civil rights (‘une privation des droits civiques’), but this penalty was not upheld on appeal, being considered inappropriate to the circumstances.

### 3.2. The Finding of Criminal Liability

Faced with the claim by Monsanto, the ‘faucheurs’ asked the Court to recognise that they were not criminally liable, on the basis that they had acted by reason of a ‘state of necessity’ (état de nécessité), it being provided in the Code Pénal that a person is not criminally liable who, confronted with a present or imminent danger to himself, another person or property, performs an act necessary to ensure the safety of the person or property, except where the means used are disproportionate to the seriousness of the threat.<sup>30</sup>

Following the vast majority of decisions on this point, the Court of Appeal of Orléans did not entertain this argument. In so doing, it confirmed settled case law,<sup>31</sup> according to which the justifying fact of a state of necessity could not prevent criminal liability for the destruction of the property of another, since there could not be found a real and present

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<sup>29</sup> Since the enactment of Loi No 2008-595 of 25 June 2008 on GMOs (Journal Officiel de la République Française No 0148 of 26 June 2008, NOR: DEVX0771876L), the new Article L.671-15 of the Code Rural has raised the level of the penalties imposed under general criminal law: these penalties can now extend to two years imprisonment and a fine of 75,000 Euros (and it may also be noted that they can be even heavier where the GMOs destroyed had been authorised for research purposes).

<sup>30</sup> This defence of state of necessity is set out in Article L122-7: ‘[n]est pas pénalement responsable la personne qui, face à un danger actuel ou imminent qui menace elle-même, autrui ou un bien, accomplit un acte nécessaire à la sauvegarde de la personne ou du bien, sauf s’il y a disproportion entre les moyens employés et la gravité de la menace’. It may be observed that those charged with damaging GM crops also sometimes seek to justify such activities as acts of self defence under Article 122-5 of the Code Pénal: see, eg, Tribunal de Grande Instance of Orléans, 9 December 2005, No 2345/S3//2005; and see, generally, J-P Feldman, ‘Les “faucheurs d’OGM” et la Charte de l’environnement’ [2006] Recueil Dalloz 814. This ground was not, however, advanced before the Court of Appeal of Orléans.

<sup>31</sup> This line of authority was commenced by the Cour de Cassation Chambre Criminelle, 19 November 2002, No 02-80788 (see Mayer, [2003] Recueil Dalloz 1315; and it was adopted, in particular, by: Cour de Cassation Chambre Criminelle, 18 February 2004, No 03-82951 (see P Trouilly, *Revue Environnement*, July 2004, 22); Cour de Cassation Chambre Criminelle, 28 April 2004, No 03-83783; Cour de Cassation Chambre Criminelle, 7 February 2007, No 06-80.108 (see J-P Feldman, ‘Les “faucheurs” fauchés par la Cour de Cassation’ [2007] Recueil Dalloz 1310); Court of Appeal of Versailles, Ninth Chamber, 22 March 2007, No 06/01902; and Cour de Cassation Chambre Criminelle, 4 April 2007, No 06-80.512. Some first instance courts have sought to modify this approach: for example, the Tribunal Correctionnel de Versailles on 12 January 2006 considered that there was a state of necessity by reason of the impossibility of taking protective measures against GM crops; and see also the Tribunal Correctionnel of Orléans, 9 December 2005, 2345/S3//2005, *Société Monsanto v Dufour*, where 49 ‘faucheurs’ were discharged on the basis of state of necessity: on this last judgment, see also S Monteillet, ‘De la responsabilité pénale des faucheurs jugés à Orléans. Un Etat des lieux du cadre juridique des OGM’ [2007] *Revue Juridique de l’Environnement* 56; J-P Feldman, *supra*; A Gossement, ‘Le fauchage des OGM est-il nécessaire? Réflexions sur la relaxe des faucheurs volontaires par le tribunal d’Orléans’, *Revue Environnement*, January 2006, 9; and P Billet, ‘Fauchage d’OGM: une relaxe sans nécessité’ (2006) 339 *Revue de Droit Rural*, Comm 36.

danger, the act was not necessary to ensure the safety of a person or property and there had been a lack of proportion between the means used and the seriousness of the threat.<sup>32</sup>

Central to this reasoning is that it is not possible to find the requisite level of danger where scientists have produced no definitive answer. Indeed, the judges go even further and affirm that the risk of ‘contamination’ has been demonstrated neither generally (the effects of GMOs on other forms of agriculture) nor more specifically (individual fields being actually contaminated). The decision of the Court of Appeal of Orléans has thus confirmed that a defendant cannot plead a state of necessity where the danger is only potential or hypothetical. In other words, there has been restatement of the approach that a fear which based only on a future possibility can never be considered a present or imminent danger.<sup>33</sup>

Since there is no danger, there are no consequences to address. From this, it follows logically that the Court of Appeal of Orléans could sweep away arguments grounded on the impossibility or ineffectiveness of remedial actions and insurance (the very arguments which, in the eyes of the ‘faucheurs’, generate the state of necessity). However, the failure of attempts to take out injunctions<sup>34</sup> and the absence of insurance<sup>35</sup> to cover risks from GMOs are real; and these *lacunae* raise legitimate questions as to whether or not there is a need to take action.

### **3.3. Prior Authorisation Constituting Scientific Proof**

In basing their decisions on the current state of scientific knowledge, the judges adopt the same thinking as that which prevails in the case of coexistence regimes:<sup>36</sup> namely, that the authorisation precludes any action which seeks to avert an imminent risk, since the risk has already been assessed and considered nugatory. Except where the risk assessment procedure demonstrates to the contrary in a clear and incontrovertible manner, it therefore seems that scientific credibility is generated from the authorisation itself. Little account is taken of the fact that contrary political choices have subsequently been made (for example, to apply the safeguard clause or even to ban the growing of GMOs): such choices can neither interfere with the criminal proceedings nor blot out the criminal liability of the defendants. And the reasoning is simple: the authorisations were granted after a risk assessment; in consequence, there is only a slim chance of any catastrophic event after authorisation; and this removes any justification of collective acts of destruction.<sup>37</sup>

Accordingly, it is easy to understand why there are those who consider that the GMO authorisation procedure under Directive 2001/18/EC of the European Parliament and of the

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<sup>32</sup> On the judgment of the Cour de Cassation, 7 February 2007, No 06-80.108, see A Darsonville, ‘La destruction d’OGM ne relève pas de l’état de nécessité’ [2007] Recueil Dalloz 573.

<sup>33</sup> Court of Appeal of Versailles, Ninth Chamber, 22 March 2007, No 06/01902: for such analysis, see P Billet (above n. 31).

<sup>34</sup> See, eg, L Bodiguel, M Cardwell, A Carretero García and D Viti, ‘Coexistence of Genetically Modified, Conventional, and Organic Crops in the European Union: National Implementation’, in L Bodiguel and M Cardwell (eds) (above n. 1) 163.

<sup>35</sup> Interestingly, insurance has nonetheless become mandatory in France under Loi No 2008-595 of 25 June 2008 on GMOs: see now Article L663-4 of the Code Rural.

<sup>36</sup> See, eg, L Bodiguel, M Cardwell, A Carretero García and D Viti (above n. 34).

<sup>37</sup> Also, in the view of the Court of Appeal of Orléans, where it is claimed that the destruction is symbolic and only a minor offence, such a defence does not hold good where the defendants acted in concert and with careful preparation.



Council on the deliberate release into the environment of genetically modified organisms<sup>38</sup> constitutes less a rampart against the alleged danger and more a dangerous tool ('dangereux outil') for the propagation of GMOs.<sup>39</sup> Above all, the judicial attitude to the authorisation procedure explains the rejection of a key argument of the 'faucheurs' – the failure of France to transpose or, at least, to transpose correctly Directive 2001/18: no such case could be made out, since, under the Directive, any risk would justify, not the destruction of research plots by individuals, but precaution based upon principle and integrated into the authorisation procedure itself.

Adopting this logic, it would seem very difficult for the 'faucheurs' to enjoy any success by reasoning from science.<sup>40</sup>

### **3.4. General Legal Principles Inoperative in Criminal Matters**

Faced with the difficulty of establishing a state of necessity, the 'faucheurs' were obliged to resort to invoking a range of arguments which could give the impression of some confusion, and which sought to advance a broad view of what constitutes 'necessity': namely, a hypothetical risk of danger could be regarded as a present danger and the protection of the 'general interest' could give rise to the need for collective, organised and premeditated action.

This task – made all the harder by the fact that judicial interpretation of defences against criminal liability is notably strict – in essence amounts to praying in aid overarching principles that in large part transcend criminal law. Thus, the activities of the 'faucheurs' are presented as actions necessary to preserve the environment, enshrined as the common patrimony of mankind in the Preamble to the Charte de l'Environnement (which forms part of the Constitution). Further, they invoke two constitutional principles which have the capacity to overturn any claim of an unlawful breach of the right to property: the protection of public health and the precautionary principle, as based upon the European Convention of Human Rights (the right to live in a healthy environment), the Cartagena Protocol (the precautionary principle) and the Aarhus Convention (relating to access to information, public participation in decision-making and access to justice in environmental matters).

The Court of Appeal of Orléans dealt with these points only tangentially, being swift to characterise any pleas advanced in reliance on such treaties as ineffective. In its view, the purpose of the 'principles' was only to regulate the rights and duties of every person under the law; they could not be invoked in order to escape criminal liability by defendants who had destroyed the property of another.<sup>41</sup> So was demonstrated a clear refusal to recognise that immunity from criminal liability could be conferred by the defence of a 'public good', such as the environment, or of subjective rights, where it would be difficult to ascertain who should be the beneficiary or who should enjoy *locus standi* for the purposes of enforcement.

On the basis that criminal law stands alone, the judges could find that constitutional or international principles have no bearing on what amounts to a state of necessity. They can, therefore, avoid any line of inquiry which might throw into doubt a strict criminal law reading of the case and which might be regarded as the adoption of a political position. As observed

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<sup>38</sup> [2001] OJ L106/1

<sup>39</sup> S Monteillet (above n. 31) 64.

<sup>40</sup> That said, scientific uncertainty does remain: see, eg, C Vélot, *OGM: Tout S'explique* (Edition Goutte de Sable, Athée, 2009) 89-191.

<sup>41</sup> See S Monteillet (above n. 31).

by Monteillet, if it were accepted that there is a state of necessity in the case of the destruction of GMOs, then there would be a danger of trespassing into political considerations.<sup>42</sup>

#### 4. CONCLUSION

Thus, French judges (like the majority of British judges, but unlike British juries) subscribe to a narrow view of ‘what makes law’, a view camouflaged by a legalistic stance; and they refuse to adopt the broader vision advocated by the anti-GM protestors who carry out acts of ‘civil disobedience’.<sup>43</sup> In such circumstances, one could question whether the judges may not be oversimplifying the legal discourse (and not just on the narrow issue of what constitutes a state of necessity in criminal law), when they fail to take account of the diverse sources of law and their complex interaction.<sup>44</sup> One can even wonder whether they appreciate that their analysis is based on a self-imposed dilution of the very principles which aim to provide some buttress against the risks inherent in a free market.<sup>45</sup>

Nevertheless, jurisprudence scholars have already made clear that, if obedience to the law is to underpin democracies, there remains room for active debate as to the legitimacy of the law in certain, defined situations. As stated by Dworkin, ‘[a] citizen’s allegiance is to the law, not to any particular person’s view of what the law is, and he does not behave unfairly so long as he proceeds on his own considered and reasonable view of what the law requires. ... this is not the same thing as saying that an individual may disregard what the courts have said.) ... But if the issue is one touching fundamental or political rights, and it is arguable that the Supreme Court has made a mistake, a man is within his social rights in refusing to accept that decision as conclusive’.<sup>46</sup>

This view is widely advocated by anti-GM protestors as they argue that action has become necessary (whether by reason of climate change or through risk of cross-contamination by GMOs). They conduct the debate at the political and social levels, while considering that the law provides only a partial expression of these; and they use internal conflicts of the law to oppose technical legislation (such as that governing GMOs) or criminal law against the broad principles which grant the environment a quasi-legal personality, granted subjective rights. According to this generous interpretation, those who carry out acts of civil disobedience disclose an alternative vision of the law, revealing in broad daylight that proceduralisation and internal process may hide the fact that the law is a product of a power-relationship (‘un rapport de force’).<sup>47</sup>

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<sup>42</sup> *Ibid.*

<sup>43</sup> L Bodiguel, ‘Conclusion’, in L Bodiguel and M Cardwell (eds) (above n. 1) 375.

<sup>44</sup> See, eg, E Morin, *Introduction à la Pensée Complexe* (Seuil, Paris, 2005) 11.

<sup>45</sup> A Supiot, *L’Esprit de Philadelphie. La Justice Sociale Face au Marché Total* (Seuil, Paris, 2010) 59-70.

<sup>46</sup> R Dworkin, *Taking Rights Seriously* (Duckworth, London, 1978) 214-5.

<sup>47</sup> D Hiez, ‘Les Conceptions du Droit et de la Loi dans la Pensée Désobéissante’, in D Hiez and B Villaba (eds), *La Désobéissance Civile. Approches Politiques et Juridique* (Septentrion, Lille, 2008) 70.