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The Rule of Discretion versus the Rule of Law: Soros Gets Nailed

By **Mario Rizzo** Oct 14, 2011, 12:48 PM Author's Website

In a previous post I reported a Cato Institute panel discussion of Friedrich Hayek's *The Constitution of Liberty* (as reissued in a new edition by The University of Chicago Press). This discussion was among Bruce Caldwell (Duke University), Ronald Hamowy (Cato and the University of Alberta), Richard Epstein (New York University), and George Soros, the mega- financier.

In this discussion, ostensibly about the rule of law, Soros said that the complexities of the financial sector require a new class of regulations that may not be simple, predictable and transparent. They may require considerable discretion on the part of regulators. This is because financial markets are the locus of radical uncertainty. It is thus impossible to predict beforehand the kinds of financial-instrument developments that will occur and, especially, the consequences these will have. Thus the financial regulations must be able to be creative in dealing with such developments. This apparently means the rule of law in its traditional sense will have to be bent or compromised.

It is not my purpose here to criticize this view. I wish simply to point out that Soros may be the victim of his own policy recommendation.

The case as reported by the *Financial Times*:

"The French criminal case hinged on trades that the Hungary-born investor had executed 14 years earlier in the stock of Société Générale that reaped his hedge fund, the Quantum Fund, $2.9m in profits.

Mr Soros was found by the court in 2002 to have had inside knowledge about the intentions of a group of super-wealthy French investors – the "golden granddads" – to bid for the bank.

Although the bid failed, Mr Soros's fund profited by buying shares before – and selling after – the group's intentions became public and resulted in a spike in SocGen's share price."

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"In its decision, the ECHR [European Court of Human Rights] conceded that "the wording of the statutes was not always precise" but said that Mr Soros, as a "famous institutional investor, well-known to the business community . . . could not have been unaware that his decision to invest . . . entailed the risk that he might be committing the offence of insider trading".

Mr Soros's lawyers lamented the ECHR's close decision, pointing out that even the former French market regulator, the Commission des Operations de Bourse, had found France's insider trading laws too ill-defined to warrant a civil case.

"It is inconceivable to expect that the citizen has a better understanding of the law than the authority in charge," Ron Soffer, Mr Soros's lawyer, said on Thursday, referring to the billionaire's criminal conviction by jury.

"The opinion of the regulatory authority is an irrebuttable presumption as to the lack of clarity of the law," Mr Soffer said."

Perhaps this is yet another example of the familiar attitude that it is others who need to be regulated because they are greedy and irresponsible. But the advocate of such regulation is as pure as the driven snow.