

JUSTICE UNBOUND

RESPONSIBILITY IN THE SECOND MODERNITY

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INTRODUCTION

Contemporary Western society is boundless. Many socio-structural developments cause scholars to speak of society as a “world society”.¹ This world society seems to usurp other, state-defined, societies. In all domains of sociality, life seems to have become unlimited and borderless. Modern transport leaves no place undiscovered and social relations are within reach by a few mouse clicks. Romantic relations starts in airplanes, our kitchen cupboards are full of exotic spices and other ingredients, and in our gardens exotic plants and flowers emerge. Contemporary society offers endless options and opportunities. At the same time, we see how ‘smart’ investment firms cut the roots of national companies to become part of global corporates with increasing political power. We also become aware that decisions made here, for example about consumption, affect the lives of people elsewhere. Industrialisation and capitalism have brought wealth – if not to all – but is now disclosing its many side effects for humans and the natural environment. World society is not merely a world society in economic terms, although we like to think of globalisation mostly in economic turns. Contemporary society is boundless also in a political sense, where political movements have a global impact and are developing before the eye of the world, to which the spring revolt in Egypt in 2011 attested. And academia too cherishes its global playing field with many cross border research networks and student exchange programmes. Modern law has seen the introduction of global aspects too, although termed internationally, such as the International Criminal Court and other (ad hoc) tribunals and courts, transcending the traditional jurisdiction of the nation state.

* This contribution is based and builds upon a previous publication of the authors; see: Lyana Francot & Ubaldo De Vries, ‘No Way Out. Contracting about Modern Risk’, *ARSP*, Vol. 95, No. 2, 2009, p. 199-215.

1 N. Luhmann, *Die Gesellschaft der Gesellschaft*, Suhrkamp, Frankfurt am Main 1997; A. Schütz, ‘The Twilight of the Global Polis: On Losing Paradigms, Environing Systems, and Observing World Society’, in G. Teubner (Ed.), *Global Law without a State*, Dartmouth, Aldersot/Brookfield (USA) 1997; R. Stichweh, *Die Weltgesellschaft: Soziologische Analysen*, Suhrkamp, Frankfurt am Main 2000; H. Wilke, *Supervision des Staates*, Suhrkamp, Frankfurt am Main 1997, p. 228.

All these developments transform individuals to world citizens, whether they like it or not, whether by choice or default, negative or positive: to both the tourist and the immigrant the world has become their oyster.² Home to the world citizen, this globe is not a safe haven *per se*. The individual, moreover, has become detached from ties that have been instrumental to his identity: nation-state, religion, language, currency, to name but a few.³ It indicates that a world society has not only advantages but also has to deal with its specific problems. (To wit: we suggest that this world society constitutes its unity and identity by and through these problems.)

Exemplary are environmental problems and ecological disasters. The recent three-fold disaster in Japan – earthquake, Tsunami and nuclear threat – and the oil spill in the Gulf of Mexico in 2010 are central topics on the political agenda and in the global media. Catastrophes of this magnitude instil a sense of immediate urgency, duly emphasised by politics and 24/7 coverage by the global media networks – ‘solutions’ must be found, here and now. This experience of urgency renders almost any ecological problem a problem with a global impact. Although environmental disasters take place locally, their consequences carry with them a global effect and not merely in terms of physical damage to the environment and individuals but also in terms of political, economical and cultural damage. The Japan disaster causes stock markets to plummet, makes politicians elsewhere decide to put on hold the development and building of nuclear power plants, sees the destruction of villages and towns and their cultural heritage, uproots people and so on. Or, to say it differently, following Beck & Grande, environmental risks (which constitute the problem) “universalise the probabilities of disaster”.⁴

In this contribution we argue that if contemporary law is to deal with world society problems effectively, it can do so only if it can take issue with its changing environment and the organising principles (or meta-rules of justice) that can be deduced from within this environment. The environment of contemporary law is global now and no longer limited to the nation state or international and supranational alliances. We do not seek to catalogue all problems with a global impact. Rather, we focus upon those problems that are conceptualised, in the social theoretical literature, as ‘modern risks’. We seek to analyse how these modern risks confront contemporary law with unexpected problems. Western society has been preoccupied, throughout its modern development, with the problem of the just distribution of wealth. This distribution problem is compounded now by a second problem: modern risks. It necessitates legal-theoretical considerations, about a possible just distri-

2 See also: Z. Bauman, *Wasted Lives. Modernity and Its Outcasts*, Polity, Cambridge 2004.

3 L. Heidbrink, *Handeln in der Ungewissheit – Paradoxien der Verantwortung*, Kadmos, Berlin 2007, p. 9.

4 U. Beck & E. Grande, *Cosmopolitan Europe* (Tran. Ciaran Cronin), Polity Press, Cambridge 2007, p. 198.

bution of these risks. Is it possible to devise a just distribution key that can deal with the *responsibility* for these risks, as a meta-rule of justice, which allows for the formulation of enforceable legal rules?

This contribution seeks, tentatively, to devise such a key. It draws upon the work of Ulrich Beck. His theory of reflexive modernisation allows, in our view, for an inventory of social developments. Such an inventory contributes to the analysis and formulation of the main problem with which world society confronts contemporary law and, subsequently, makes it possible to formulate solutions for the distribution problem from a legal-theoretical perspective. In the second paragraph the theory of reflexive modernisation is introduced. Its essence is constituted by the idea that our world society enters a new phase in the process of modernisation, in which it is confronted with the side effects of its successes. These side effects radicalise, according to Beck, the processes of individualisation and democratisation, and are conceptualised in the notion of modern risks: world society is a risk society. The third paragraph takes issue with these risks and how Beck conceptualises them. This analysis reveals that the problems of the risk society are linked with the unequal position of individuals in a globalising world. These positions transcend the classical, socio-economic, unequal positions in the nation state. This suggests that the nation state is no longer exclusively able to fulfil its distributing role. This conclusion sets us up to formulate, in paragraph four and five, the contours of a distribution key which focuses on the distribution of the responsibility for risks at a global level. Finally, in the sixth paragraph we explore what is demanded from contemporary law in teasing out the key in hard and fast rules.

FIRST MODERNITY'S HERITAGE

Beck's social-theoretical analysis centres on the ongoing process of modernisation, albeit under different conditions and circumstances, rather than implying a post-modern phase as if there is a radical break with the past.⁵ Indeed, Beck presents his findings under the heading of the theory of *reflexive modernisation*. Stripped to its bare essence, the theory boils down to the thought that contemporary world society is confronted with the negative side-effects of the successes of the process of modernisation. The theory seeks to explain the nature and scope of this confrontation of society with itself and the side effects it created – side effects that are global in their social reach and factual impact.

To elucidate this societal self-confrontation, Beck distinguishes between two phases in the process of modernisation: the 'first modernity', followed by the second phase – the

5 Cf. J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (Trans. G. Bennington and B. Massumi), Manchester University Press, Manchester 1984.

‘second modernity’.⁶ The first modernity is characterized by the central problem of scarcity and the search for rational (economic) solutions.⁷ Industrialisation and the development of technology can be seen, in this view, as processes that enabled the efficient and sufficient provision of human’s material essentials. It enabled a large part of the population to attain a level of wealth over and beyond the means of subsistence, at least in Western-styled society. Scarcity changed from an absolute problem to a relative one and the focus on Progress, in the terms of wealth and later of wellbeing, became the norm – a state of being, instrumental to our life biographies. The processes not only changed the material conditions of living substantially but also re-shaped our attitude towards our natural environment and life as such. We are ‘programmed’, so to speak, towards Progress and we expect nothing less: life becomes better and longer. This attitude also translates into our attempts to control, or domesticate, nature, which also confronts us now with all kinds of side effects.⁸ If we want better and longer, this will come at higher costs, which we ‘encrypt’ in our distribution key.

The production of wealth went hand-in-hand with the distribution of wealth. This caused, in fact, the second problem that characterised first modernity: what constitutes a just distribution of wealth? As much as industrialisation captured the problem of scarcity and wealth, the process of democratisation captured the problem of just distribution. Society in first modernity was an industrial society with the nation-state as the primary and exclusive unit of ordering social relations pertaining to the production and distribution of wealth. Its ideal is a free democratic and industrialised nation-state, bound by law in which those who participate in the production of wealth can claim a part of this wealth.⁹

Beck argues that society has now entered a second phase: second modernity. This suggests, at least, that Beck does not say farewell to modernity and modernisation; the second phase is not a radical departure or break with that what preceded it. Rather, second modernity is a progression of the process of modernisation but under different circumstances and new conditions. Second modernity sets the scene for a full-blown confrontation with the unwanted side-effects that resulted from solutions to first modernity’s problems. These

6 Or solid modernity versus liquid modernity, according to Zygmunt Bauman; see: Z. Bauman, *Liquid Modernity*, Polity, Cambridge 2000.

7 First in an absolute sense and later also in a relative sense, during the triumph of the Welfare State.

8 See also: H. van der Loo & W. van Reijen, *Paradoxen van Modernisering*, Coutinho, Bussum 1997, p. 233-275.

9 See also U. de Vries & L. Francot-Timmermans, ‘As Good As It Gets: On Risk, Legality and the Precautionary Principle’, in: L. Besselink, F. Pennings & S. Prechal (Eds.), *The Eclipse of the Legality Principle in the European Union*, Wolters Kluwer, Alphen aan de Rijn 2011, p. 1. The rule of law, as an aspect of the process of democratisation, is also under siege by the problem of risks and how society has responded to them, for example, through the precautionary principle.

side effects see the light of day in the radicalisation of the processes of industrialisation and democratisation into processes of “multidimensional globalisation” and “forced individualisation”.¹⁰ The process of forced individualisation denotes the insight that individualisation is not, or at least no longer, an individual choice but brought about by developments and decisions elsewhere and by others, which are beyond the control or reach of the individual. Multidimensional globalisation embodies the idea, in Beck’s view, that globalisation is not limited to the economic dimension, even though globalisation is most visible and, arguably, successful in this dimension. Globalisation is more than the creation of a worldwide free market of money, goods and services. It also refers to other dimensions: globalisation is also inherently political, cultural and social, tying individuals across borders and nationalities. Society in second modernity has become a post-industrialised society or, even more so, a risk society. In the theory of reflexive modernisation, ‘risk society’, as the locus of second modernity, is made up, as it were, of the effects and results of forced individualisation and multidimensional globalisation. Beck refers to these effects and results as modern risks. The second modernity, hence, has its own distribution problem that does not substitute but accompanies the distribution problem of first modernity which still demands constant care and attention, but now on a global scale. This recent and global distribution problem concerns the distribution of the unwanted, *abundant*, side-effects; the distribution of modern risks. The upshot for this analysis of the consequences of the risk society, Beck has described in his *Risikogesellschaft* in 1986,¹¹ followed, in 1999, by the *World Risk Society*.¹²

THE PROBLEMS OF SECOND MODERNITY

The previous paragraph showed that first modernity’s heritage includes more than the achievements of democracy, wealth and individual autonomy. Modernity’s heritage also includes unwanted side-effects, which second modernity makes visible: modern risks. Initially, in *Risk Society*, Beck restricted himself to a theoretical analysis of the societal effects of ecological risks. In his later work the catalogue is extended to include risks that are political, economical and individual in nature.¹³ The essence of what these risks constitute of has remained the same. A further analysis of modern risks is, hence, relevant for

10 Beck & Grande 2007, p. 29.

11 U. Beck, *Risikogesellschaft: auf dem Weg in eine andere Moderne*, Suhrkamp, Frankfurt am Main 1986. Translated in 1992: U. Beck, *Risk Society: Towards a New Modernity*, Sage, London 1992.

12 U. Beck, *World Risk Society*, Polity Press, Cambridge 1999.

13 U. Beck, *The Reinvention of Politics: Rethinking Modernity in the Global Social Order*, Polity Press, Cambridge 1997. On p. 12 Beck argues that ‘[n]ew insecurities are infiltrating the secure milieu of the welfare state and erupting there. These may involve the loss of formerly secure benefits, threats to health or life itself from toxins, criminality and violence, or the loss of such certainties as the faith in progress, science and experts’.

two reasons: First, such a description discloses the precise nature of the current distribution problem and the consequences for global justice. Second, such a description enables mapping out possible solutions in the light of the processes of forced individualisation and multidimensional globalisation.

Aspects of Modern Risks

Since modern risks are to be understood as side effects of first modernity, in which the process of industrialisation played a key role, the first aspect Beck ascribes to modern risks is that they are self-produced and, consequently, self-inflicted.¹⁴ Modern risks are not incidental risks. Rather, they constitute, as a negative side-effect, a structural part of contemporary society as they are the mirror image of structural wealth production. This means, in the first instance, that modern Western societies are themselves responsible for the production of these risks. But the consequences of risk production (including those in the shape of a disaster (the manifestation of a risk)) are not limited to these societies: they are instead inherently global and future oriented, tying in present and past generations across the globe.

The second aspect is this global character of modern risks.¹⁵ Although modern risks are produced locally (worldwide), their consequences are both local *and* global. So, if globalisation points, among other things, to the free movement of products worldwide, it implies, by necessity, the worldwide movement of modern risks as the latter is intricately bound to the former. Illustrative, here, is the spread of disease through the worldwide movement of livestock, such as BSE, avian flu and foot-and-mouth disease.

The third aspect, one that follows from the global reach of modern risks, refers to the existence of social risk positions.¹⁶ People are exposed to risks in many different ways. Some are able to limit the possible manifestation of risks or to limit the consequences of such manifestation. A large group though is at the mercy of the manifestation and consequences of modern risks.¹⁷ These social risk positions – contrary to class positions – are not limited to the borders of the nation state. These positions are both global and international. What is meant here is that on the one hand there are states that are either more or less exposed to risks and their consequences. Thus, Western states, through better econom-

14 Beck 1992, p. 21.

15 *Id.*, p. 21-22.

16 *Id.*, p. 35-36.

17 The phrase 'consequences of risks' is not, in the view of the authors, elegantly put but serves a purpose: Beck does not distinguish between risks and the manifestation of risks in the shape of disasters. These disasters (and *their* consequences) are what is referred to here.

ical, technological and scientific development, are better able to protect themselves against risks than states in the developing world. On the other hand, social risks positions also refer to individuals or groups of individuals across states and the extent to which these groups are able to protect themselves against risks and their consequences. These groups are not necessarily limited to groups within states but exist globally, for example all those who work in sweatshops – who work in pitiful conditions in either Manila or New York,¹⁸ and who struggle with the problem of wealth as well as of risks. Beck considers however these positions to be temporary – in time we all are exposed to risks equally. The global character of risks has a ‘boomerang effect’: everyone, including those in the West, will be exposed to risks in like fashion. There’s no way out.

The fourth aspect is the ‘invisibility’ of risks. What is meant here is that risks cannot be perceived sensory. Modern risks are constructions of scientific knowledge and exist in mathematical or chemical formulas. It also means that individuals or groups of individuals in scientific and political key positions can determine when what is a risk. The ability to formulate risks does not mean that one is able to predict when and how risks manifest themselves in the shape of disasters and catastrophes. Such knowledge exists merely in probability and educated guesses – in other words, such knowledge exists in terms of uncertainty. In the here and now, risks are formulas and they may become events in the future when they lose the characteristic of ‘risk’, i.e. if and when the uncertainty of their manifestation becomes a certainty, in a yet unknown future. Risks bind the future and the present, as they force us to look forward, making us conscious of a future which may be unfavourable (or not) but without us being able to determine cause and effect.

Increasing social complexity, arguably, contributes to this.¹⁹ Complexity, here, refers to the endless horizon of options and possibilities from which we must choose. All of these options and possibilities cannot be realised, at least not at once and not by one actor. Furthermore, making a selection may be an onerous task. We may often not be able to foresee or anticipate the intended and unintended consequences of selections and choices we have made. In addition, it leads to the observation that society is characterised by the experience of contingency: everything could be different.²⁰ Complexity, thus, entails a

18 N. Klein, *No Logo*, Picador, New York 1999, in particular ch. 9-11.

19 See: L. Francot-Timmermans & U. De Vries, ‘Normativity in the Second Modernity’, *Rechtstheorie*, Vol. 39, No. 4, 2008, p. 477-494. Illustrative too, is: Heidbrink 2007.

20 Contingency refers to the modal logical concept of “*Auch-anders-möglich-Sein*” or “neither necessary nor impossible”: “A fact is contingent when seen as a selection from other possibilities which remain in some sense possibilities despite a selection”; see: N. Luhmann, ‘Generalized Media and the Problem of Contingency’, in J. Loubser, et al (Eds.), *Explorations in General Theory in Social Science – Essays in Honor of Talcott Parsons*, The Free Press, New York 1976, p. 507-532, at p. 50.

quantitative (the amount of options) as well as a qualitative aspect (how to choose).²¹ The perception of this social complexity has led to the insight that it has become increasingly more difficult to judge the effects of one's own actions (effects that can also manifest themselves outside the actor's field of action) and the effects of others upon our decisions and subsequent actions.²²

The last aspect Beck ascribes to modern risks follows from this and concerns the problem of responsibility and causality. A central notion of responsibility is the possibility to attribute an effect (or consequence) to an actor, whose actions caused the effect. In other words, the attribution of responsibility is conditioned by this notion of (linear) causality.²³ As it becomes increasingly more difficult to detect causal connections in the production of risks (and in their consequences), it becomes also more difficult to determine who is or can be held responsible for what. Beck concludes:²⁴

Corresponding to the highly differentiated division of labor, there is a general complicity, and the complicity is matched by a general lack of responsibility. Everyone is cause and effect, and thus non-cause. [...] This reveals in exemplary fashion the ethical significance of the system concept: one can do something and continue doing it without having to take personal responsibility for it.

Some Notes on Beck's Concept of Risk

Beck's view on modern risks invites at least three critical comments. The first comment deals with 'what' actually must be distributed. The problem is that Beck fails to make a clear distinction between risks on the one hand and the manifestation of risks in the shape of disasters and other catastrophes on the other. Damage, dangers, disasters: Beck considers all these phenomena as appearances of modern risks. But in our view there is a crucial difference between situations where one realises that there is a risk which could manifest itself in the future and situations where an actual disaster has happened with real damage. Essentially, the difference is between that what lies in the future and that what lies in the past. To be more precise, the difference is between the uncertainty inherent in risks (as risks are future-related) and the certainty of the manifestation: the disaster has struck and the uncertainty of risk is replaced by the actual event; the certainty of a manifested risk.

21 L.M.A. Francot-Timmermans, *Normativity's re-entry: Niklas Luhmann's Social Systems Theory: Society and Law*, Wolf Legal Publishing, Nijmegen 2008, Ch. 4.

22 Heidbrink 2007.

23 Much of the civil liability regimes in the world are based on this notion of causality.

24 Beck 1992, p. 31 (emphasis in original).

The manifestation of a risk does not necessarily mean, though, that we know what we are dealing with in the sense that it is immediately clear who or what is responsible and what is cause and effect. The distinction is important also, when we consider the role of contemporary law which struggles with the notions of causality and responsibility under the conditions of the second modernity.

Furthermore, and this is the second comment, Beck seems to limit his concept of risks to those that are systematically and structurally produced, in particular industrialisation risks. However, in addition to these risks there does exist all kinds of other uncertain but probable threats, such as epidemics, natural disasters (earth quakes, tsunamis, volcanic eruptions) which are not necessarily *modern* risks but are of all times. But what these risks have in common with modern risks is the extent of the consequences (which *are* self-inflicted) and how we seek to deal with these consequences and the loss they cause: we want all loss, whatever its nature, to be prevented or if this is not possible remedied. To this end, we look to an earthquake in a highly industrialised society in a similar way as to the (subsequent) nuclear disaster in that same society. It shows that modernisation has weaved a web, so to speak, of modern risks, literally: we live our lives for the most part in such a dense and interconnected way that risks are not clustered in a few locations but are located everywhere. Even if a more traditional risks manifests itself it often causes a chain reaction of modern risks materialising. Again, Japan is a case in point. Second modernity discloses the advent of ‘hyper risks’: we are not merely confronted with self-produced, modern risks but also with the risk that these materialise in disaster through traditional risks – risks over which we have no control whatsoever.

The third comment pertains to Beck’s view on the equalising effect of modern risks. This may be true in abstract terms: when we understand risks as uncertain, invisible, future events presented as formulas, we are all subjected to them in a like manner. But this is different when we consider manifested risks such as disasters and the like. At first sight, it seems plausible to suggest that, sooner or later, we all will be confronted with risks and their consequences equally. Nuclear fall-out is democratic, to paraphrase Beck.²⁵ Epidemics such as caused by avian flu like diseases could be another example. The world trade in poultry could lead to a world-wide epidemic from which it may be difficult to escape. However, the question is whether the *effects* of modern risks are actually as equalising as Beck suggests. Are Western societies not far better equipped to deal with these risks and their consequences? Can they not fall back upon vast resources of money, expertise and advanced technology within a well-organised infrastructure of transportation, health services and rescue services, even if this infrastructure is (partly) destroyed? Furthermore, even if

²⁵ Beck 1992, p. 36.

risks produced elsewhere boomerang back, are the consequences merely or only physical (in terms of physical damage) or rather economical, political and financial? In our view, the equalising effect is not of such a nature that we're all in the same boat. On the contrary, we believe that modern risks radicalise social risk positions, strengthened by the existing global and international institutional order of dependency relations. The poorest regions of the world still struggle with the problem of scarcity (however this scarcity is 'produced') and are now also confronted with the problem of risk. It seems likely that this double problem exacerbate global social risk positions. Risks have a discriminatory effect. Perhaps a parallel can be drawn with Manuel Castell's view of society as a network society. Social risk positions pertain to the extent people are included or excluded from "the global networks that accumulate knowledge, wealth, and power".²⁶

To sum up: the five aspects Beck ascribes to risks are interrelated. Modern risks, which are by their nature systematically man made and self-inflicted, are global in their reach and sensory invisible, *leading to* unequal social risks positions and *result both in and from* organized irresponsibility due to a weak causality. One final characteristic of risks is the magnitude of their manifestations in the shape of disasters, catastrophes and calamities.

Modern risks escalate the global relationship between rich and poor, North and South, deepening the gap and put into focus the injustice of it. We share Beck's view that dealing with the distribution problem of risks, formulating solutions, cannot take place within the confines of the nation state. Instead, it demands a global or in Beck's words, a cosmopolitan perspective that transcends the perspective of methodological nationalism.²⁷ The distribution of risks is a global problem and this problem is a descriptor of a new *Verelendung*,²⁸ this time at a global level. It is this discriminatory effect that shapes the discussion on global justice, puts it into focus and makes it urgent.

The Central Problem

It is now possible, and necessary, to refine the distribution problem in second modernity at least for the benefit of a legal perspective.

26 M. Castells, *The Rise of the Network Society. The Information Age: Economy, Society, and Culture*, Vol. 1. (2nd ed.), Wiley-Blackwell, Oxford 2010, p. xvii.

27 The cosmopolitan methodology, developed over and beyond methodological nationalism is addressed by Beck in U. Beck, *The Cosmopolitan Vision*, Polity, Cambridge 2005 and criticized by, among others, R. Fine, *Cosmopolitanism*, Routledge, London 2007, p. 9-14. It is beyond the scope of this contribution to deal with it, but see, for example, Francot & De Vries 2008.

28 Pauperization, the term with which to describe the awful situation of the proletariat in the industrialised cities in Europe.

To argue that the distribution pertains to risks per se is not sufficient for the current discussion as to if and how law may play a role. Modern risks are uncertain future events, merely visible in mathematical or chemical formulas and as such difficult if not impossible to distribute. Another option is to look at the redistribution of the *production* of risks. This could take place within the domains of the economy, science and politics. It would pertain to a factual redistribution, re-allocating factories and the application of new (no or low risk-producing) technology. Law can fulfil a function here, providing rules to facilitate technological innovation or risk-preventing policies. The precautionary principle is perhaps an illustration of this. But, it is also an illustration, as we have argued elsewhere, that the principle cannot be cast in a hard-and-fast legal rule.²⁹ Law operates *ex post facto*. Only after the event, modern law seems able to offer certainty. It allocates, within a national setting only, responsibility in terms of civil liability, providing remedies for (financial) loss, but stumbles upon all kinds of problems, including the magnitude of loss, problems concerning causality and the notion of several liability). Prior to the event, at the stage of risk, law seems at a loss in respect of risks themselves. If we want distribute risks, it really means that we seek to distribute uncertainty, in a double sense: in respect of the manifestation of a risk (if and when), its consequences and for whom.

We focus, instead, on the distribution of *responsibility* for the production of modern risks. The central problem in the risk society is not the distribution of risks per se or their production but their organised irresponsibility in respect of those who produce, spread and consume these risks, and contribute to their manifestation. It is this insensitivity towards responsibility that must be halted. Hence, the distribution of modern risks lies in the attribution of responsibility for them and their manifestations against the background of global justice.

TOWARDS STATE-TRANSCENDING SOLUTIONS

The kernel of the problem in the second modernity concerns in our view the global injustice that emanates from modern risks. The poorest countries and individuals not only struggle with the problem of (absolute) scarcity but are also burdened with the problem of modern risks, in all its aspects. This is ironic and bitter as these risks follow from wealth production to which the poorest do have little or no access at all.

²⁹ De Vries and Francot-Timmermans 2011.

Insufficient Alternatives

The characteristics ascribed to modern risks constitute in themselves specific but interrelated problems which must be taken into account when formulating suitable solutions.

The first characteristic referred to risks as systematic and structural side-effects of wealth production. We produce risks ourselves. Beck's argumentation, then, seduces us to conclude that the production of risks would end if there is an end to (technological) progress or at least when progress is put in check. In other words, the production of risks would stop if we stop producing wealth in the manner we do. Although it seems like the quickest solution to the problem of unwanted abundance, it obviously is an oversimplification of the problem and hardly realistic. It would demand a change of mentality which cannot be realized in a short time and on a global scale. Whatever the other consequences of a 'return to nature', one can at least surmise that it would see the resurfacing of the problem of scarcity (world wide) and perhaps leading to a truly Hobbesian state of nature. The solutions will double the problem. It would be more realistic to focus technological progress, not on wealth production (progress rationalisation) but on risk reduction (welfare or sustainability rationalisation). Hence, one could plead for a change of perspective as to the goal of the processes of modernisation: not wealth (and the typical material connotation the word accompanies) but welfare in terms of sustainability as desirable outcome of modernisation. This perspective is by no means a new one and features prominently in the discussions about the welfare state. Nowadays, though, welfare is also understood globally and environmentally, in terms of sustainability.³⁰ Talk is about sustainable development (sustainable wealth production) that incorporates concerns for the environment and labour conditions, human rights and poverty, etc. demanding a fresh perspective on the role of politics, law, economy and technology. These two possibilities illustrate a mental and factual change but require time and are not necessarily global as the problem of scarcity remains a real problem locally still. They are really solutions that, in practical terms, only the West can afford, notwithstanding the fact that such solutions should be promoted and sustained whenever possible.

Modern risks do have a global impact, as Beck convincingly illustrates. This second aspect of risks – their globality – demands a global response. Response limited to the nation-state level or the individual level cannot and will not suffice. It goes without saying that individuals (and states) play a crucial role here (in respect of the individual responses they can make). But, in addition to these efforts, the global reach of the problem necessitates also

30 Consider the discussion about "ecological modernization"; see: R. Lee and E. Stokes, 'Ecological Modernisation and the Precautionary Principle', *Ethics, Law and Society*, Vol. 4, No. 1, 2005, p. 103-113.

formal organisations and institutions at the global level.³¹ IGOs such as the IMF and the World Bank, NGOs like Greenpeace, global corporates, states, cities and other regional actors have a role to play here, in particular to the refocusing of technological progress and the ending of poverty/scarcity.³²

The third aspect – the existence of social risk positions – takes a central position in the search of global, state-transcending just solutions. This is so, because we argue that risks (if and when manifested) have a discriminatory rather than, as Beck argued, an equalising effect. It leads to the conclusion that any solution must *strife* at legitimising differentiations between social risk positions. The existence of different social risk positions is accentuated by the fourth aspect: the non-sensory character of risks and their existence in formulas. It implies that those in key positions in politics and science determine in the end what is and what is not be presented or perceived as a risk. Considering the state of knowledge and the availability of the means to expand upon this knowledge in the developed, networked, world,³³ it has an advantage in determining risks and in calculating or evaluating the uncertain but possible consequences and how to respond to them. With this advantage comes the responsibility to share this knowledge in a way similar to how informational technology knowledge is shared for the purpose of its constant regeneration and expansion.³⁴ Knowledge breeds knowledge and this is fundamental in dealing with the problem of modern risks, to which we are all subjected.

Responsibility

We are mostly concerned with formulating a possible solution for what we perceive as the central problem: the distribution of the responsibility for risks. In the first instance, one could argue that distribution follows from actually *taking* responsibility based on a moral duty. However, we believe that a mere moral dimension is insufficiently effective in a globalised world, considering, among other things, the improbability of a universal morality, at least in terms of content. It could be seen, though, as an approach to provide, following Pogge, “necessary, not sufficient, conditions for the acceptability of a moral conception”.³⁵ Although a moral dimension is a necessary element and contributes to formulating a shared perspective of the central; problem, it is insufficient. The moral duty to take responsibility is a first step but we must be realistic in that not everyone (perhaps

31 We have addressed the role of organisations in more detail in: Francot and De Vries 2008.

32 See also Thomas Pogge and his arguments pertaining to the global resource dividend and the borrowing and resource privilege; in: Th. Pogge, *World Poverty and Human Rights*, Polity, Cambridge 2002.

33 Castells 2010.

34 Castells 2010, Ch. 1.

35 Pogge 2002, p. 94.

even most of us) is willing or able to take on a duty merely on moral grounds, based on self-discipline and self-regulation. Morality falls short in respect of the execution and enforcement of distribution and responsibility decisions; morality lacks an 'organisational back-up'. Were the formulation of a shared perspective upon distributing responsibility for risks possible, it should be a matter of politics and law to tease out the details.

FORMULATING A DISTRIBUTION KEY: AN UPBEAT

Law by and in itself is unable to offer direct solutions for the central problem at this general level. There is no global law, or regulatory framework, about which there is general agreement and subject to enforcement. International law consists, on the whole, of general guidelines and where it does provide detailed rules, it is on the whole in bi-lateral or multilateral treaties pertaining to the first modernity problem of the nation state system and wealth production and distribution.³⁶ And where law does take issue with the central problem, it does so in a haphazard way, devoid of a solid foundation.³⁷

What is necessary is to develop a shared point of departure, or, if one likes, an organising principle or maxim. This principle, then, can be worked out legally, in hard-and-fast rules. The organising principle, as it is aimed at a distribution problem takes the shape of a distribution key. In doing so, we must take into account a number of considerations. First, modern risks, within the contemporary context, are a given. Only if we forego the production of wealth risks will not be an unavoidable side effect of this wealth. Second, we are not concerned with the distribution of modern risks themselves but with the responsibility for them. First modernity was concerned with the distribution of wealth (wanted but scarce resources) and demanded the formulation of rights (and corresponding duties). Now, we are concerned with an, in principle,³⁸ unwanted abundance, requiring the formulation and attribution of duties (and corresponding rights). The question, then, becomes: who can and must these duties be attributed to?³⁹

The global reach of risks and the fact that they are products of the processes of modernisation have the consequence, as discussed above, that they lead to different social risk positions

36 Is EU law, for example, not about economic integration and the creation of a common market in which persons, services, products and capital can freely roam?

37 Here, again, the precautionary approach is illustrative.

38 Modern risks, too, create their own market. Beck: 'Demands, and thus markets, of a completely new type can be created by varying the definition of risk, especially demand for the avoidance of risk'; Beck 1992, p. 56.

39 And a similarly important question is: who can attribute these duties? To deal with this question demands the formulation of the distribution key, and is outside the scope of this article.

– risks discriminate, as we argued above. And only *some* have actually benefited from the fruits of these risks, i.e. the ‘modernised’ part of the world. Those parts of the world that are not (yet) modernised,⁴⁰ still struggle with the problem of scarcity and are confronted now also with the problem of risk, also because these parts are attractive and cheap places for risk producing industry. As Beck states: “extreme poverty [attracts] extreme risks”.⁴¹

When we take these considerations into account, a risk calculus becomes essential. In this calculus a number of factors are balanced. The point of departure is that everyone is subjected to modern risks and that everyone contributes, in many different ways, to the production of risks. Risks are to be considered as the unwanted side-effects of wealth. This must be balanced against the fact that, although everyone contributes to the production of risks and, hence, the production of wealth, not everyone shares in the enjoyment of and access to this wealth. Furthermore, those who do enjoy access to wealth are less subjected to the risks, whereas those who have no or limited access to wealth are much more exposed to risks. The degree in which people are exposed to risks is inversely proportional to which people have access to wealth, or so it seems. It is reasonable, therefore, to consider these aspects and to argue that responsibility is not to be distributed in proportion to the production of risks but in proportion to the consumption of wealth (from which these risks originate). In a supply-and-demand world economy this is even more so, considering that the demand is instrumental to the production (supply) of risks. It leads to the following two-folded distribution key:

1. Those who do not participate in the production of risks (in the production *and* consumption of goods) are not attributed responsibility for these risks.
2. Those who do participate in the production of risks are attributed responsibility in a measure equal to the access of goods corresponding with these risks.

The key excludes the possibility to burden people (in groups or organisations) who in fact cause the actual production of risks if they do not have access to the corresponding goods. Such a distribution strategy would probably be justified in a modern liberal theory based upon the maxim: “the polluter pays”. But it is not an option that can feasibly be maintained from the perspective of global social justice. On the contrary, responsibility ought to be placed on those who enjoy unbridled access to and consumption of wealth and goods,

40 To be clear: when the problem of *absolute* scarcity is resolved, a country can be said to be modernized – at least, in the Beckian sense.

41 Beck 1992, p. 41.

causing others to suffer.⁴² Indeed, in second modernity, the maxim ought to be: ‘the consumer pays’. The distribution key counters the harm principle as an organising principle in first modernity. The harm principle allows for (state) intervention when one’s actions cause or threaten to cause harm to others. Usually this is based on a direct form of causality. The distribution key safeguards those who actually produce the risk (the potential harm) of being exposed to this direct causality and be imposed responsibility. Rather, the key implies an indirect form of causality, based on consumer demand, so to speak.

THE ROLE OF LAW: A REFLEXIVE APPROACH

The distribution key is a meta-principle and forms the upbeat for further elaboration in hard-and-fast rules. Law in particular, is deemed more than suitable for the task of redistributing responsibilities. This is what it is geared to do: to distribute among, and attribute to, us duties, obligations and responsibilities which we favour not to have. Usually these duties are formulated in response to rights and entitlements, for example, in relation to property. The focus, here, is on how law can play a role in the distribution of responsibility for risks as future events, striving towards an *ex ante* distribution of responsibility. Modern law is not geared towards such a distribution *ex ante*. Understanding first modernity society suggests considering society as based upon the fundamental belief of Progress through Reason, culminating in the belief of the *Machbarkeit* of society, guided by certain fundamental organising principles, or values, such as democracy, rule of law, freedom, equality, solidarity, sovereignty, capitalism, etc.⁴³ Risks illustrate the changing conditions modern law is confronted with, demanding a reflexive approach and this implies, first and foremost, taking into account the changing global condition of the second modernity. This global condition makes also visible the blind spots, limitations and failures of modern law.⁴⁴

42 Cf. Pogge 2002, who argues that the affluent West violates its negative duty not to cause harm to the global poor and suggests institutional reform to stop this violation.

43 The Rawlsian interpretation would be societies geared towards cooperation for mutual benefit within a given jurisdiction, i.e. nation-states circumscribed by the notion of freedom, equality and difference; see: J. Rawls, *A Theory of Justice*, Harvard University Press, Cambridge (Mass.) 1971: “A set of principles is required for choosing among the various social arrangements which determine this division of advantages and for underwriting an agreement on the proper distributive shares. These principles are the principles of social justice: they provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social co-operation.” (p. 4)

44 It also demands a new perspective on legal research. Such a perspective is elaborated in U. de Vries, ‘Kuhn and Legal Research. A Reflexive Paradigm for Legal Research in de Second Modernity’, forthcoming. The text in this paragraph draws upon some of the findings in that article.

The Global Condition

The new approach is occupied with a double problem: the continuing effort to produce and distribute wealth justly (and this time also globally!) and the new effort to manage its side effects. It does not necessitate replacing the 'old' perspective but rather seeks to incorporate this older, first modernity perspective in an encompassing perspective that can take issue with the double problem justly and legitimately. It is this aspect that forms the kernel of Beck's theory of *reflexive* modernisation. As society in the second modernity is characterised by the awareness of the consequences and adverse side-effects of first modernity's successes, a confrontation with and reconsideration of the fundamental beliefs and values of first modernity will herald the transformation from a nation state-based industrial society toward a world risk society that is able to deal with the double problem. Thus, the world risk society is a society that transcends the nation state, is driven by the twin processes of globalisation and forced individualisation, and is, must, in respect of wealth and risks, be geared towards sustainability (rather than progress) under conditions of uncertainty.

Reflexive modernisation exists in society's confrontation with its foundations and organisational structures. A national outlook alone is not sufficient but must be incorporated into an encompassing and transcending outlook, which Beck denotes as a cosmopolitan vision. In respect of the current frame of reference of modern law, it means taking issue with a structural rather than an incidental approach to risks and their manifestations, perhaps leading to a reconsideration of legal regimes, for example, the regime of civil liability; it means a more integrated approach to understanding risk, demanding interdisciplinary cooperation within the domains of law, politics and science; it means a multilateral approach that breaks through the traditional concepts of sovereignty involving other social actors that nation states and international organisations; it means taking serious issue with poverty and social risk positions – particular in those areas where one suffers the twin problem of both scarcity and risk; it demands novel categories of causality and responsibility; it demands new ways to deal with loss and damage.

Blind Spots and Limitations

As much as we are accustomed to think of law as having a problem-resolving potential so do we think of law as distributing or attributing responsibility. Luhmann already pointed to the problem-*generating* potential of law.⁴⁵ In an insightful legal analysis, Veitch shows

⁴⁵ N. Luhmann, *Law as a Social System* (Tran. Klaus A. Ziegert, ed. Fatima Kastner, et al.), Oxford University Press, Oxford 2004, p. 139.

that law and legal institutions, while distributing responsibility, is also '*centrally involved in organising irresponsibility*'.⁴⁶ The kernel of the analysis is that there exists an asymmetry between the production of suffering (through violence, large scale environmental damage, etc.) and legal responsibility for it through the operation of legal mechanisms, such its modes of categorisation, normalisation of behaviour (lawful behaviour is deemed normal despite damage caused and, hence, remains mostly unquestioned), role differentiation (law defining the extent of my responsibility, for example, as shareholder of a major oil company destructing the environment) and as a result the fragmentation of responsibility. It is these mirror notions – law generating conflicts, law organising irresponsibility – that must become more explicit and visible in a reflexive approach to modern law.

CONCLUSION

The point of departure of this contribution is that we live in a world society that is characterised by world wide interdependencies and is confronted by a new, additional distribution problem. This problem is described in a convincing way by Ulrich Beck in his theory of reflexive modernisation. Its essence is that modern society is now confronted with the side effects of its successes that stem from the processes of industrialisation and democratisation. These side effects are rubricated under the notion of modern risks. The impact of modern risks is worldwide, cutting across borders of modernised societies and beyond. It makes contemporary society a world risk society. This global aspect demands a global response. Where Western society is able to rely on knowledge, money and power to address the problem the unfortunate others are at a loss, yet again: the global poor have so far not been able to escape the problem of first modernity (scarcity) and are not also confronted with the effects of the solution: risks. It puts into focus the urgency of the new distribution problem. We are not, cannot be, merely concerned with the distribution of risks per se or their production. Rather, we are concerned with the distribution of responsibility for modern risks. The essence of the distribution key is that those who profit most in the world risk society are burdened with the heaviest responsibility for the side-effects of this profit. The distribution key is geared towards an *unequal* distribution of responsibility in order to envision a conception of global social justice. Following Rawls, the famous modern contemporary thinker of wealth distribution,⁴⁷ the key implies a just procedure. It starts of as moral imperative but must be established within a legal framework. This would involve the reconsideration of modern law's basis elements, such as the notion of for example (exclusive) property rights, contractual liability and incorporation strategies, to

46 S. Veitch, *Law and Irresponsibility. On the Legitimation of Human Suffering*, Routledge/Glass House, London 2007, p. 1.

47 Rawls 1971.

expose existing legal veils of irresponsibility. The distribution key is to stimulate debate about the formulation of such rules, who could or should formulate them and to whom these rules are applied.

