

# Eyes Wide Shut: On Risk, Rule of Law and Precaution

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*Abstract.* The rule of law offers legal certainty, laying down boundaries to the state's playing field. The precautionary approach stipulates that the absence of scientific certainty is no reason not to act to prevent harm. Here, uncertainty frames action. The precautionary approach potentially expands the state's playing field, and this expansion might well undermine the precepts of the rule of law. The certainty-uncertainty axis exposes a tension between the rule of law and the precautionary approach in what Ulrich Beck has termed the world risk society in second modernity. It is this tension that is the focus of analysis in this article.

## 1. Introduction

"No life without oil," could be the credo of the modern industrialised world.<sup>1</sup> Like money, oil makes the world go round, in the most literal sense. The BP oil spill in the summer of 2010 illustrates how oil goes around the world in an eco-devastating way. The oil spill is a disaster that affected and will affect many lives, including that of the then chief executive of BP (Anon 2010). Exploring for oil, like the exploitation of other natural resources, co-exists with the production or exploitation of risks. The almost weekly mining disasters around the world are further sad examples, while the Chilean miners' rescue is celebrated as a human triumph.

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<sup>1</sup> For the avoidance of doubt: When we use the term "modern" in this article, we refer to the achievements of modernity.

The acceptance of risk increases as the stakes get higher. This craving for gain at high cost harbours a bitter irony that reveals itself when disasters occur. We cannot but hope that they will not occur, but when they do, no-one is keen to take responsibility. This is not surprising, of course. In the modern world we realise, consciously or subconsciously, that it is our dependence that has caused the disaster. In this sense, we are all responsible. But if we are all responsible, then again no-one is. We want the benefits without the accompanying burdens and uncertainty. It seems that we live our modern lives in a Bermuda-type triangle: Certainties dissolve into risks, dangers and disasters. It is not that we have never lived with uncertainty. Quite the contrary: Legal history in particular provides many examples of the “battle” against uncertainty, and the submission to law of state power is illustrative. But in the contemporary world uncertainty manifests itself in many ways, be it terrorism or ecological hazards. In this article we focus on a qualified kind of uncertainty: risk. In doing so, we build upon the work of Ulrich Beck (1986; 1992; 1997; 2006). The modern Western response to uncertainty (in terms of risk) is the search for its reduction and the prevention of its negative manifestations. The precautionary approach is an exemplary response. In a general sense, it refers to the idea that the absence of information about possible threats is no reason not to take action to prevent these threats from becoming manifest. The typical legalese is striking, using a double negation to allow for exceptions. More directly, the precautionary approach entails that action needs to be taken despite the absence of information. Formulated in this way, it is univocal and implies a positive imperative for states to act, despite and because of uncertainty.

In this article we focus on how the precautionary approach poses challenges to the *modern* function and understanding of the rule of law: prescribing legal certainty in respect of the exercise of state power. The argument is that the precautionary approach challenges the rule of law as it allows for a lowering of the thresholds of the exercise of state power, trading one type of uncertainty for another. These thresholds refer to the separation of powers, legality, human rights and the legislative process, and their interrelations. It raises the question of how to understand and maybe to reinterpret the rule of law against the background of a structurally changed society. Is a trade-off necessary (freedom for security) or can another balance be struck? The first part of the paper is concerned with a social diagnosis in which society is observed as a (world) risk society, illustratively mapping out structural societal changes that defy modern notions such as the rule of law. The extensive worldwide debate<sup>2</sup> about the

<sup>2</sup> The literature on the precautionary principle is vast. The following texts are illustrative and include texts—(governmental) reports, books, articles—from different jurisdictions: Sunstein 2005; Trouwborst 2002; Wetenschappelijke Raad voor het Regeringsbeleid 2008; Cross 1996,

pros and cons of the precautionary approach implies that the description of world society as a risk society, a description coined by Beck as far back as 1986, is informative and to the point. The second part deals with the precautionary approach, which we understand to be a method of interpretation rather than a rule of law or legal principle.<sup>3</sup> The third part of the article is concerned with an analysis of the “thick” version of the rule of law, which views the rule of law as referring not only to the notion of legality, but also to the notions of democracy, human rights and the separation of powers. In this connection, the article lays bare the tension between the rule of law and the precautionary principle, suggesting that dealing with contemporary uncertainty invites a reconsideration or re-evaluation of one of modernity’s essentials.

## 2. Social Diagnosis: (World) Risk Society

“Risk society” is not confined to the common sense idea that we live in a society of risk. Rather, it suggests that contemporary society is a society existing in and through global interdependencies on all levels of social action (Beck 2006, 22). These global interdependencies are particularly (but not exclusively) revealed in the negative side-effects of Western wealth production: risks that have, as a result, a global impact. The problem, then, is how to deal with these risks, globally, regionally, and locally. The central problem of the risk society has given rise to the development and application of the precautionary approach (as a successor to or a variant of *prudentia*), initially in Germany in respect of environmental protection (Hanschel 2006). The ensuing legal debate has focused on the precautionary approach and its application, while underexposing the central problem.<sup>4</sup> It fails to target and analyse the structural features of the problem that the precautionary approach, in our view, seeks to address. For us, a proper understanding of these structural features is essential as they determine the relationship between the precautionary approach and the rule of law. Indeed, a reflexive understanding of law demands a proper understanding of its environment, i.e., society (Francot and De Vries 2006, 3–20). It requires first and foremost an analysis of the central problem: uncertainty, in particular, uncertainty in terms of risks.<sup>5</sup>

851–1571; De Sadeleer 2006, 139–72; Fisher 2001; Harremoës and European Environment Agency 2001; Sandin 1999, 889–907; Trouwborst 2006; van Asselt and Vos 2006, 313–36; Vos and Claster 2004.

<sup>3</sup> To be clear, we seek to go beyond the commonsense approach of precaution (generally understood) that demands action when side-effects are known and identifiable and to explore the field where these effects are *not* readily known.

<sup>4</sup> So common to monodisciplinary legal scholarship.

<sup>5</sup> We present risk as a feature of uncertainty. For a more extensive description of the notion of uncertainty and how it pertains to modern risks, see Francot-Timmermans and De Vries 2008, 477–94.

### 2.1. "First" and "Second" Modernity

Uncertainty pertains to the idea that, more often than not, we have to make decisions in the absence of definite knowledge about the desired and undesired side-effects of these decisions. We do not know for sure if and which effects will occur and how. Uncertainty is multi-level. The decisions we make reflect a choice and this choice is one among various options or alternatives, not all the side-effects of which are known. This makes it difficult, if sometimes not impossible, to make a fully informed decision about the available options. Furthermore, we are often not free not to make a decision. A parallel can be drawn to the notion of informed consent in health care. A patient has the right to be informed about the pros and cons of a particular medical intervention in order to consent to the treatment. The information at the heart of the consent is necessarily limited, pre-selected, to enable an informed choice. But in the end, it is not known whether the side-effects will occur, and if so, which side-effects and to what extent.

It follows that we are never sure whether we are taking the "right" decision. Decisions are not merely made by individuals, pertaining to their individual lives, as the informed consent example shows, but also by groups and entities such as states. Furthermore, in terms of their consequences the most important decisions are no longer primarily confined to a local or national dimension, but also have a global impact. As described by Beck, risks illustrate the dual uncertainty of the if-and-when—of possible manifestations of undesired or unplanned events. Indeed, Beck argues that the central problem of contemporary society is constituted by a new type of risk and its distribution. These risks can be distinguished from so-called traditional risks, such as the adverse consequences of meteorological conditions, for example, crop failures. Traditionally, risks were seen as risks of an exogenous character, that we cannot control. This lack of control means that such risks are not perceived as man-made but as an Act of God or a manifestation of Mother Nature. Indeed, these risks, or at least our perceptions of them, are projected upon or concentrated on a fixed point over which we have no control. We know where uncertainty comes from—God or Nature—but no more than that. We know it as fate, unalterable. This "luxury" so to speak, of outsourcing uncertainty is absent in respect of modern risks as depicted by Beck.

This man-made aspect is a central feature of modern risk. Beck depicts *modern* risks as man-made side-effects of the processes of modernisation. These processes of modernisation are divided into periods by Beck, placing them in first and second modernity. First modernity is defined by the fundamental belief in the notion of Progress through Reason. The belief in Progress fuelled the concurring processes of industrialisation and democratisation while addressing the twin problems of scarcity and tradition,

culminating, at least in Western Europe, in industrial society and later on in the Welfare State (Beck 1997, 13; 1992, 19). The primary “playground” where these processes took place was within the confines of the sovereign nation-state (Castells 2010b, 5–9, 2010a, chap. 1). The process of industrialisation can be characterised as centring on the production of wealth through the technological application of scientific discoveries. The process of democratisation served to promote, among other things, the just distribution of this wealth as well as the emancipation of humans as autonomous individuals, freeing them from political subordination and traditional structures in feudal society and later on in class society.

Second modernity is characterised by the radicalisation and transformation of the processes of industrialisation and democratisation, both breaking through nation-state borders and spiralling out of its control. Beck characterises this radicalisation by reference to the processes of “forced individualisation” and “multidimensional globalisation” (Beck and Grande 2004, 50). Forced individualisation refers to the insight that individualisation is no longer or not only a matter of individual choice, but caused by developments and decisions that are not under the control of the individual. Multidimensional globalisation refers to the idea that structural societal developments and the side effects they produce are global in nature. If, for instance, global free trade refers to the free movement of goods and services, it implies by necessity the free movement of their adverse side-effects, for example the spread of diseases such as bird flu or BSE.

What this radicalisation highlights is society’s confrontation with self-produced side-effects.<sup>6</sup> The nature of these side-effects in relation to industrialisation was conceptualised by Beck by means of the notion of “risk,” causing him to speak of society as a “world risk society” (Beck 1992; 2006). It confronts society in second modernity with an additional fundamental problem. Not only do we still have to deal with scarcity and the sediments of tradition, but now also with risks and hazards. Beck formulates this as follows:

How can the risks and hazards systematically produced as part of modernization be prevented, minimized, dramatized, or channelled? When do they finally see the light of day in the shape of “latent side effects,” how can they be limited and distributed away so that they neither hamper the modernization process nor exceed the limits of that which is “tolerable”—ecologically, medically, psychologically and socially? (Beck 1992, 19)

<sup>6</sup> Francot observes that the second paradigm shift in social systems theory introduced the concept of “self-referentiality” into societal theory. This introduction demarcates a break with the occidental tradition in which the ability of reflection was a privilege of human beings or “subjects.” This strand of thought attributes the ability of reflection also to complex, non-living systems, such as society (Francot-Timmermans 2008, 29).

## 2.2. The Nature of Modern Risks

In Beck's view, risks have unavoidably become the new fundamental distribution problem, complementing and exacerbating the distribution problem of first modernity. The characteristics Beck ascribes to modern risks illustrate this transition to a dual distribution problem.

Risks are self-produced and self-inflicted systematically, exactly because they are side-effects of industrialised activity, i.e., systemised wealth production. The second feature of modern risks is their "glocal" character. It may well be that risks are produced locally (and thus everywhere), their effects can be global as well as local. If globalisation refers to the free transfer of goods throughout the world, it also implies the global distribution of risks. Illustrative in this respect are the recent crises in food products, such as the BSE crisis and the bird flu crises. However, the effect of risks—their materialisation—may be local again: the individual gets infected somewhere, say in the south-east of Turkey. Thus, risks exist in global threats and local manifestations. The third feature is the existence of unequal social risk positions. People are affected by risks in different ways. Some can afford to protect themselves against risks or are at least able to minimize their effects, whilst others are completely at the mercy of risks. In addition, the "glocality" of risks implies that distribution transcends national borders. Contrary to Beck (1992, 22), who suggests that in the end risks have an *equalising* effect, we suggest that risks have a discriminatory effect. A fourth feature of modern risks is their sensory invisibility (future and hence uncertain manifestations). Modern risks are artefacts, constructions of scientific knowledge that exist in chemical and mathematical formulas or simply as ideas and suppositions. This implies that those in key scientific and political positions are in control of our knowledge and perception of risks. The adage that knowledge is power holds unabridged. Consequently, if something is not defined as such, it is not deemed to be a risk. It also remains problematic to determine when and how their effects materialize, if ever, and to what extent. It merely exists in probabilities and estimations—in uncertainty. In the end, risks bind the future to the present without us being able to determine cause and effect, except in vague terms. Indeed, a final feature Beck attributes to risks refers to causality. The problem is that it is difficult to determine what actions of which actors cause which effects. It is difficult to determine causality in the production of risks (and their effects) and, hence, to determine who is to be held responsible and why. It will be argued later that these last two aspects (knowledge and causality) are fundamental for capturing the implications of the precautionary approach.

To sum up: modern risks, that are by their nature systematically man-made and self-inflicted, are global in their reach and yet invisible, leading to unequal social risk positions, and they result both in and from organised

irresponsibility due to weak causality. One final characteristic of risks is the magnitude of their manifestations in the shape of disasters, catastrophes and calamities as shown by the Chernobyl-disaster, the catastrophe in Bhopal and more recently the oil spill in the USA. (We focus in this article on “ecological” risks, as analysed in Beck’s earlier work, such as *Risk Society*. In his later work, Beck (1997, chap. 1) also refers to other types of risks, social risks, pertaining to immigration, terrorism, and so on.)

### 3. The Precautionary Approach

The precautionary approach is a contemporary interpretation of the notion of *prudentia*, which in essence means that when acting as a decision maker, viz. legislator, regulator or otherwise, caution is a wise counsel.<sup>7</sup> This contemporary interpretation of precaution expresses in more general terms a qualified approach towards uncertainty. In this article, we concentrate on the adoption of the precautionary approach in respect of environmental protection. What is at stake is the extent to which legislators and regulators employ the precautionary approach, executing their responsibility in the face of uncertainty. There are numerous examples of international treaties and declarations endorsing the precautionary approach (Harremoës and European Environment Agency 2001). Perhaps the one that resonates the most is the Rio Declaration, Principle 15 of which states:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. (United Nations 1992, 294)

The essential feature is the scientific uncertainty about risk, in other words, the absence of scientific certainty.<sup>8</sup> A more general description of the precautionary approach, emphasising this point, is found in the academic literature (Renn 2008, 78). Fisher provides a concise description, stating it as a principle:

A principle that in cases where there are threats to human health or the environment the fact that there is scientific uncertainty over those threats should not be used as the reason for not taking action to prevent harm. (Fisher 2001, 316)

Indeed, the literature highlights scientific uncertainty as an important feature, if not *the* distinguishing feature of the approach. Freestone, for

<sup>7</sup> This approach implies taking responsibility. Notions of responsibility in a technological age have been summarized, exploring the work of Jonas and Leopold, by, among others, Alrøe and Kristenen 2003, 65ff.

<sup>8</sup> Scientific certainty would be certainty that allows for the methods of verification and falsification to be applied and pertains to, for example, conditional certainty. Compare Popper 2007



example, also stresses that taking regulatory measures should not be obstructed by the lack of scientific evidence about the effects of such activities if there is a threat of environmental damage (Birnie, et al. 2009, 155). The lack of a general consensus about what the approach entails hinders its adoption as a hard-and-fast legally binding rule. It is far from certain what the meaning is of the approach or its application and consequences in order to consider it as the rule of international law. Indeed, Birnie et al. (ibid., 160–1) suggest that it is “far from evident that the precautionary approach [. . .] has or could have the normative character of the rule of law.”<sup>9</sup>

### 3.1. *Precaution as a Method of Interpretation*

Is it merely a matter of semantics or is the distinction important? We consider the distinction between either a rule of law or a principle of law on the one hand and an approach on the other hand to be relevant. As an approach, it allows states and other legal actors to justify policy decisions that may go against, for example, traditional economic interests but also, and more importantly, against civic interests and corresponding rights, as will be explained later. The approach allows for positive action to deal with risk which is the focus of attention in legal scholarship. In doing so, the negative effects are obscured. Perhaps the last quote above should be supplemented with the observation that there *is* an international consensus but that it only concerns this positive aspect. If so, the approach demands critical scrutiny to lay bare the negative effects. It is relied upon by decision-makers and courts as an imperative for action (to protect, prevent and remedy). When we consider the precautionary approach this way, it clearly has consequences that impact upon the rule of law. The approach does not prescribe what to do in a situation of scientific uncertainty, but rather allows policy-makers, legislators, executives and the courts to frame a given situation or to construct a set of events in terms of uncertainty to justify a preferred course of action (to protect the environment or public health, to allow the experimentation with innovative techniques, and so on). The European approach towards genetically modified crops is perhaps an illustration of this (Frewer et al. 2004: 1181–93; Victor 2001, 295). In doing so, the precautionary approach is used as a means to hold on to the legal fiction that law is based on past events (available information) to prescribe a future course of action. But this is exactly what the approach cannot do because, in the end, it exists by virtue of a lack of information about risks and their consequences.

<sup>9</sup> For a more detailed analysis of the legal status of the precautionary approach, see De Vries and Francot-Timmermans 2011, 19–25.



This echoes how actors use global principles, strategically or otherwise. The principle of sustainable development can also be understood in this way (Birnie et al. 2009, 163). As an expression of an aspiration, then, these approaches or principles should command widespread support. In this context the precautionary approach “does have a legally important core on which there is international consensus” (Birnie et al. 2009, 163). To this end, the precautionary approach can, in fact, be understood as a mode of interpretation. It is an imperative for action without a clear rule-like structure,<sup>10</sup> and, as a result, perhaps an imperative for *any* type of action as its scope is not qualified or limited.

#### 4. Liberty and the Rule of Law

As noted above, Beck distinguishes between two phases in the process of modernisation: first and second modernity. In first modernity, society sought to formulate answers to the problem of scarcity and (political) subordination and supported the twin processes of industrialisation and democratisation as proper responses to these problems. Liberty and the rule of law can be regarded as two of the organising principles that underscore the process of democratisation. Indeed, our understanding of the rule of law pertains to our understanding of liberty (Unger 1976). The political concept of liberty seeks to qualify state power, while the rule of law allows for the limitation of individual freedom. The harm principle may be regarded as an expression of this dual qualification (Mill 1979; Jensen 2002, 39–55). Both suggest as a point of departure that the state is not to meddle in the private affairs of citizens unless their actions cause harm, i.e., real (physical) damage to life, liberty and possessions. Indeed, the harm principle, as an expression of liberal thought, qualifies the rule of law as a *functional* principle. The rule of law is not merely an expression of the idea that (state) power cannot be exercised arbitrarily, but that the subordination of power to rules is functional in a particular way (Dicey and Wade 1968), to allow individual liberty as the fundamental organising principle of early modern society. This function is perhaps the *raison d'être* of the modern (Western) nation-state under the rule of law.

##### 4.1. Rule of Law Broadly Understood: Law Rules, Law Governs

The rule of law understood broadly, and in contemporary terms, circumscribes the power of nation states and refers to at least four elements. These elements are interlinked: legality, democracy, separation of powers, and human rights. Legality is, in our view, the pivotal element of the modern concept of the rule of law. Legality prescribes that state power can only be

<sup>10</sup> We owe this insight to David Tomkin.

exercised on the basis of prescribed rules laid down in advance. Without the notion of legality, the other three elements remain empty vessels. It is within the framework of legality that they can take shape in a meaningful way. This perspective on the rule of law is commonly referred to as the “thick” description of the rule of law as opposed to the “thin” version that suggests the equation of rule of law with legality (Tamanha 2008, 3–16). Indeed, in the literature there is an intense discussion about how to describe and characterise the rule of law.<sup>11</sup> It is also “thick” in another sense, one that some lawyers tend to ignore, that is, the “thick version” incorporates structural developments of and in modernity, such as the autonomy and political awareness of the national citizen, the notion of human dignity and the worth of individual emancipation. Hence, our understanding of the rule of law is embedded and stems from a deeper understanding of the nature of our society, the meaning of community and the position of the individual. Embedding the rule of law socially highlights the link between the rule of law and the individual, protecting the individual against arbitrary state intervention. In this article we seek to make a plea for a “second” embeddedness, placing the rule of law in the context of ecology and globalisation in order to enable a reformulation or reinterpretation of the meaning and function of the rule of law in the second modernity. This would enable us to counter the negative effects of the precautionary approach.

#### 4.2. *The Four Elements of First Modernity*

The principle of legality suggests that state power can only be legally exercised on the basis of legislation that itself has been formulated on the basis of a known procedure laid down in rules. Furthermore, legality requires legislation to be general, clear and precise, promulgated, prospective, practicable and stable in that it lasts and serves the notion of legal certainty (Fuller 1977, chap. 2). Legality, accordingly, implies a procedural aspect and contains a material aspect. The procedural aspect establishes a legal basis for the exercise of power. The material aspect refers to certain qualitative criteria that legislation must possess. The Fuller criteria encapsulate this aspect, in particular in relation to legislation intended to regulate the relationship between the citizen and the state. Hence legality contributes to the battle against uncertainty, stressing the importance of legal certainty and equality.

The democratic element is two-fold: the legislative procedure should be democratic and those who make and/or apply the rules should be democratically elected. Legislation is subject to a parliamentary procedure in

<sup>11</sup> See, for example, the first issue of the newly established *Hague Journal on the Rule of Law*, in particular, Peerenboom 2009, 5–14. See also, more recently: Moller and Skaaning 2010.

which the proposed legislation is discussed, debated and amended, before it is voted upon by a majority and enters into force. This provides legislation with democratic legitimacy, particularly because those who have decided, democratically, upon the legislation are themselves democratically elected. Collectively, by enacting the legislation, the legislator delegates as it were, the power to the executive to execute the law. The legislature may even delegate law-making powers to the executive, and this is done more and more, to enable the law to be implemented more effectively by means of secondary legislation.

The third element refers to this delegation/distribution of rule-based power among different institutions. Rule-makers delegate executive powers, formulated in the rules, to the executive, whom they can call to account concerning how they execute policy on the basis of that legislation. The judiciary can be delegated this task also under a system of judicial review, enabling individual complainants to seek redress if and when the executive function harms their interests. This distributive element, it is suggested, qualifies certainty even further. Certainty not only refers to foreseeability and knowledge of the law, but also implies the possibility of political participation and/or legal redress, and by implication acceptance of the law in question.

Finally, the contents of the rules are based upon, or stem from, certain fundamental values or organising principles of the nation state. These principles find expression in, among others things, human rights and emanate from the liberal spirit that the thicker version of the rule of law expresses. The principles require states to exercise their power with respect for and in furtherance of civil political and socio-economic rights respectively. This means that the exercise of state power is not only subjected to rules to prevent abuse, but that it is also instrumental and functional in promoting these human rights, both through non-interference and interference. In terms of certainty, this suggests that human rights give certainty its normative edge, arising from the expectation that state power is not merely arbitrary but meets human rights standards enshrined in the notion of individual liberty.

## **5. Precaution as an Undermining Activity**

This interpretation of the rule of law shows that the rule of law is geared towards the social structures and uncertainties of first modernity. However, second modernity, as outlined above, confronts us with social structures that have changed under the influence of the rule of law (though the rule of law is not the only institution giving rise to changes) and with new and different uncertainties, such as modern risks. These new problems give rise to responses such as the precautionary approach and require, we argue, a repositioning of the rule of law. If the precautionary approach is to be

understood as a positive duty to act, demanding flexibility of executive action and the adoption of open norms, then surely the conclusion is warranted that the precautionary approach is at odds with the rule of law, that seeks to prevent the arbitrary use of state power (however functional/instrumental the exercise of that power may be) for the benefit of legal certainty. Indeed, the approach is at odds not only from a politico-legal but also from an economic perspective. In the US the discussion tends to view the approach as undermining economic activity, and by implication the notion of liberty and entrepreneurialism (Sunstein 2005).

The precautionary approach—and this is the claim—besieges the rule of law from within, as a Trojan horse that the rule of law allowed in its midst. In the Netherlands, it was proposed to enshrine the precautionary approach in the Constitution (Wetenschappelijke Raad voor het Regeringsbeleid 2008, 184). At an abstract level the tension exists in the “make-up” of both the rule of law and the precautionary approach. The rule of law exists necessarily in both content and form: the form is needed to realise the content, and the content determines the form. The form of the rule of law exists in procedures (for example, democratic legislative procedures and judicial procedures) and organisations (for example, parliaments, courts, government departments) that shape decisions, the contents of which conform to notions of fundamental human rights. These decisions, in the shape of rules, are formulated and applied on the basis of information, allowing these rules to be potentially effective and legitimate, providing legal certainty. The precautionary approach can be understood as providing an empty framework for legal responses to distribute modern risks by minimising their production by means of a normative judgement about these risks in the absence of conclusive scientific evidence about their existence, magnitude and (scientific and societal) acceptance. It provides no rules and has no form. Its essence seems to counter legal certainty. When it is used or relied upon it has the potential, or so we argue, to undermine the rule of law (at least, in its modern understanding). As we seek to establish below, the implementation of the precautionary approach fails to meet the criteria of legality and escapes proper democratic legitimacy. In applying the approach, the separation of powers is blurred and we see a sacrifice or subrogation of fundamental organising principles such as liberty and equality, trading them against security and safety, without this trade-off being properly justified or even necessary.

### 5.1. Legislation

Traditional legislation pertains to state prescriptions regulating the relationship among citizens, and the relationship between citizens and the state. This type of legislation needs to meet the Fuller criteria relating to the material aspect of legality, to provide legal certainty for citizens allowing

them to anticipate social conduct. In recent decades there has been a huge shift in the subject of legislation and, hence, its object (Krygier 2009, 45–70). The new type of legislation formulates a particular objective and subsequently delegates a range of administrative bodies with the task of developing executive policy and translating this policy into action to achieve the objective. This changing objective of legislation implies that this type of legislation escapes the material aspects of legality.

In more abstract terms, it is possible to distinguish between legislation based on a conditional programme and legislation based on goal-directed programmes (Luhmann 2004, 196; Francot-Timmermans and De Vries 2008, 477–94). The former has the logical structure of an implication, in terms of an “if ... then ...” statement. Here, “if” refers to a fact and if this fact occurs, “then” the rule applies. It is, as a matter of tautology, a normative programme that can be precise or more general. In this case the law always reacts *ex post facto* (Luhmann 2004, 198). This does not mean it has no preventive function. If fact A occurs as a result of action B then rule X applies: in cases in which an actor is liable, the actor can forgo doing B as he knows he will be held liable. As the precautionary approach refers to uncertain and future events, it cannot be captured in a conditional programme. Goal-directed or purpose-specific legislation departs from the “if ... then ...” logic and formulates a particular objective for a government agency to achieve, for example. It does not prescribe the actions to be undertaken to meet the objective; that would be a matter of executive policy. The purpose is to bring about a (normative) evaluation of actions pertaining to the objective. Purpose-specific programmes regulate result-driven instrumental action. According to Wilke (1992, 179), a legislatively described objective is to be achieved by a variety of means. Much legislation pertaining to environmental protection and incorporating the precautionary principle is of this type.

In brief, this type of legislation does not and cannot provide legal certainty, considering its objectives and subject and as a result fails to meet the Fuller requirements intended to allow actors to anticipate their decisions and actions.

## 5.2. *Democracy and the Separation of Powers*

Another feature is that the details of such legislation are worked out by means of secondary legislation. This procedural tinkering with legality impacts upon the separation of powers and by implication upon the democratic element. Legality also requires political power to be exercised only through legislation that has been enacted on the basis of rules laid down in advance (which themselves have been adopted pursuant to legislation, for example, a constitution). It suggests that all legislation materialises by means of a similar legislative procedure. The study of this

type of legislation (primary legislation, statutory law, and so on) is prevalent in the academic literature and in law faculties. However, increasingly, this type of legislation merely indicates in vague terms the goal of the statute and the instruments by which this goal is to be achieved. Indeed, it is purpose-specific or goal-directed legislation, delegating powers to the executive in order to effectively implement the legislation. This type of statute could be termed framework legislation: statutes that lay down certain general rules, pertaining to a particular goal or policy, and these objectives then give rise to detailed, practical rules through secondary legislation. (There is some resemblance to the statutes in US law, known as "framework statutes," constituting institutions and procedures for legislative policies, along the lines of the US Constitution: Young 2008, 93.)

Secondary legislation is adopted as the result of an executive process. What we mean is that this type of legislation is formulated on the basis of primary legislation, by the executive, for the purpose of executing policy to meet the goals set out in primary legislation, usually formulated in a vague and open way: "to serve environmental protection," "to promote public health," and so on. The connection between primary and secondary we consider to be problematic. The connection exists not only at state level (statute and ministerial regulation) but also at the European level (directive/regulation and statute/ministerial regulation) and international level. Indeed, much law is constituted at the regional and international level, in addition to the national level: law is much more layered at different (hierarchical) levels (De Vries and Hol 2006, 73). The changing perspective of legislation and procedural tinkering ties in with the role and function of newly constituted regulatory agencies that are better able to deal with regulatory and supervisory tasks requiring specialised knowledge and expertise, as the argument goes.<sup>12</sup> Of great concern is the lack of democratic control in the decision-making procedure as to how the delegated rules are formulated, what these rules are and what they pertain to.<sup>13</sup> The danger is that the lack of democratic parliamentary control is exacerbated by the complicated nature of the subject matter dealt with in these framework statutes. The lack of specialised knowledge and expertise on the part of members of parliament and the courts (and the lack of time) allows the executive to make rules that have a profound impact on society without proper parliamentary or judicial control. This becomes more problematic in the area of environmental legislation, for example, because expert findings are deemed highly provisional and are said to lack sufficient consensus in respect of scientific findings. The controversy about bio-fuel illustrates this point (Keyzer et al. 2008, 507–27). Indeed, it

<sup>12</sup> It is beyond the scope of this article to address this further. See, among others, Majone 1997, 139–67, and Gilardi 2008. For a different perspective, see Wilke 1997.

<sup>13</sup> See, in respect of the UK for example, Tudor 2000, 149.



suggests that the precautionary principle is employed in an awareness of a scientific deficit, expressed in terms of (scientific) uncertainty about risks.

### 5.3. Human Rights

The rule of law connects to the principle of harm. The harm principle is regarded as an important justification for state intervention, as it regulates the extent to which harm to others is allowed or when intervention is warranted. It does so on the basis of a strict notion of causality between individual action and ensuing damage to a known other, society or the state.<sup>14</sup> The modern human rights framework can be regarded as the legal manifestation and qualification of the harm principle, both horizontally and vertically. Individual liberty is of central importance and individual development is a core principle. From this framework follows another justification for state intervention: to ensure this individual development through both state restraint and state interference and the balancing exercise between these two that comes with it. This is how we can understand the interplay between political and civil rights on the one hand and socio-economic rights on the other.

In legal terms, then, the harm principle allows the attribution of responsibility on the basis of linear causality *ex post facto*. Indeed, most civil liability regimes across Western societies take the harm principle as their point of departure.

This description of the harm principle shows that the precautionary principle seems in many ways a pendant or reinterpretation of the harm principle (Jensen 2002, 39–55). It too requires action on the part of the state to prevent real damage from occurring. However, it is suggested that the difference is that the precautionary principle entails a positive duty in the absence of either a real likelihood of damage or actual damage. Indeed, it calls for action in the absence of linear causality. Whereas the harm principle places an emphasis on liberty, the precautionary principle emphasises the need for (collective) security and protection against dangers not easily proven but often presumed. The precautionary principle lacks the justification that the harm principle has, or so it seems. It implies that the application of the precautionary approach is at odds with the modern human rights framework emphasising individual liberty unless the approach takes issue with the notion of individual liberty in the global risk society. It is part of the wider question, central to this article, exploring the

<sup>14</sup> To note: we do not suggest that the harm principle is the only guidance for legitimate state intervention. State intervention is rationalized on many other grounds, such as the offence principle (Feinberg), paternalism (Dworkin) or the maintenance of some public morality (Lord Devlin). An elaborate analysis of these positions is provided in Schauer and Sinnott-Armstrong 2002, chap. 4. The point here is that the harm principle serves as a counterpoint for the precautionary principle in order to illustrate its primary function.



tension between the precautionary approach and the rule of law with the aim of reconsidering the meaning of the rule of law in a global society in second modernity. To put it somewhat differently: the background of this inquiry is constituted by the question of how contemporary legal instruments relate to legal achievements of modernity: are these achievements rendered obsolete by legal instruments, or do they give rise to a new understanding of modern legal institutions, such as the rule of law?

We fear that the rule of law in its modern version may not be a sufficient safeguard against the application of the precautionary approach—in terms of its abuse, that is. Protection against the state could be in danger of being subordinated to protection against risk, in a trade off between certainty (the rule of law) and security (precaution). Can a balance be struck? Can legal certainty and security be reconciled? There is a need to ask whether we consider the protection that the rule of law offers or seeks to offer (protection against arbitrary state power) still necessary. Or to put it differently: does the nation state still confront us with the same problems that the rule of law sought to address? Do we need to be protected against arbitrary state power in second modernity in a similar way as we sought protection against it in first modernity? It could be argued that certain developments point in a different direction. The process of individualisation has led to assertive citizens who are able to participate politically in many different ways although these citizens seem less interested in first modernity politics: representative democracy and parliamentary debate. Furthermore, the process of globalisation shows that the function of the state is deteriorating. The nation state is no longer the exclusive actor when it comes to the organisation of society and community: it withdraws from public life with the breakdown of the welfare state, it has lost control (by its own doing) over economic and financial processes, and seems to rely more and more on outsourced knowledge and skill. The domain of the nation state is infiltrated with other institutions that put the notion of state sovereignty in doubt as well as the *raison d'être* of the state: to provide security for its citizens. The relationship between sovereignty (understood in modern terms as the highest authority in a territory over its people) and the rule of law is an evident one, with the rule of law ideally preventing an abuse of power. The point now, in second modernity, is that state sovereignty is limited by the forces of globalisation and forced individualisation, and is transferred to, or shared by, other loci, such as regional entities like the European Union or other political actors, such as IGOs, global corporations, networked enterprises, and global NGOs: actors with authority but without territory. It necessitates a reconsideration or reapplication of the rule of law in order to protect us against the unbridled use of power by these actors as well as the state. The erosion of the nation state does not mean that it is no longer highly instrumental in the way we order

our lives. It demands a reconsideration of the notion of legality, democracy, separation of powers and human rights as fundamental organising principles of society in second modernity. For now, within the nation state, it follows from the foregoing that the rule of law seems unable to deal with second modernity problems, as it fails to respond to the threat of the precautionary approach.

## 6. Conclusion

In this article we focused on the rule of law and the precautionary approach. They are principles that pertain to the limitation, erosion or transfer of power. The rule of law, as we understand it at present, can be seen as a solution to a problem of first modernity, particularly the arbitrary use of the power of the nation state. This is an ongoing problem and continues to exist in second modernity. However, the problem seems less urgent in respect of the nation state but, at the same time, more relevant considering the impact of other political actors infiltrating what used to be the exclusive domain of the nation state. At the same time, second modernity is characterised by another problem: modern risks as side-effects of first modernity's successes. One solution to this problem of risk was found in the application of the precautionary approach, at state level. However, it seems that the rule of law and the precautionary approach fit uneasily together, as the precautionary approach undermines the precepts of the rule of law. It is this mismatch or tension that we have sought to disclose and explain. Clearly, this leaves open the question of what alternatives exist to deal with environmental harm: we do not want to suggest that the tension observed by us leads to the conclusion that the precautionary approach should be abandoned or cast aside.

But it cannot be, at least in our view, that the rule of law is completely subordinated to the implementation of the precautionary approach. It withdraws power from (democratic) control and it becomes impossible to evaluate the extent to which the exercise of power contributes to resolving the problem for which it is exercised in the first place: addressing the problem of modern risks through the application of precaution. This balancing act must take place, first, within the confines of the modern state, with the proviso that it takes into account the changing role of the state in the era of globalisation and, hence, a new interpretation of modern essentials, such as the harm principle and the rule of law. The precautionary approach can be seen as a reinterpretation of the harm principle. The harm principle refers to social interaction between or among individuals and entails a duty not to harm others in the exercise of self-interest. It allows state intervention to redress harm or to prevent harm from being done. This aspect of duty is rather underexposed as the harm principle is often presented as a principle that regulates state intervention and is

enshrined in terms of human rights: if only harm is a cause for state intervention then all else is not.

In the world risk society, the harm principle may be reinterpreted and its reach extended beyond the *social* relationships among individuals and between the individual and the state in order to incorporate our relationship with the natural environment. This (physical) relationship implies a particular sense of responsibility in how we use, explore and exploit our environment. Indeed, it is through this use that we may not only cause harm to the environment but by implication also to others. It is this particular feature that enjoys currency in the world risk society. The world risk society transcends the idea that the state equals society and is its territorial boundary. Our actions as individuals and as modern Western states are not limited to our own society and, hence, our own territory. Our hunger for oil, for example, causes environmental damage outside our state territory, elsewhere in the world, and directly affects the lives of people there. There is a direct correlation between our driving cars to work and the decay of the Niger Delta and the lives of the Ogoni people. However, in the face of this knowledge, we still fail to act. Is it possible, then, to act under conditions of scientific uncertainty, using the precautionary approach as our guide? Can it, as along with the rule of law, be our guide to deal with the destructive forces of globalisation? How can the rule of law be transformed into a global organising principle that is able to contain the forces of globalisation, which are after all man-made forces, at the institutional level, incorporating the notion of precaution? This must be the focus of further research.

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