



No Way Out? Contracting About Modern Risks

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No Way Out? Contracting About Modern Risks

ABSTRACT: This article seeks to illustrate the relevance of social theory for the study and practice of law. As social theory reports on changes that influence societal structures, the question for lawyers is how these changes affect law and what this means for its role and function. To this end, the article draws on Ulrich Beck's theory of the risk society and reflexive modernization to provide the relevant perspective. This theory reports upon and explains the so-called side effects of modernization that take the shape of environmental, industrial and political risks. It is these side effects that constitute the problem in risk society and dealing with them demands a reflexive approach towards modernization. The article seeks to highlight the relevance of this theory for law by placing it in the tradition of social contracts theory. It does so by reformulating the central problem of the risk society and by identifying the main social actors who would be party to a "new" social contract. The article then identifies and formulates the instruments of negotiation, at which point it becomes clear what the role of law may be. It concludes with a tentative indication of what the main terms of the social contract could look like.

Introduction

The global stage seems nowadays to be determined by two major threats. The first is global terrorism that has held the world hostage since 9/11. It shares its infamy with the threat of climate change and the corresponding environmental dangers. The media forecast, witness and report on them. With a keen eye for drama, the media focus on destruction and on the impossibilities and sacrifices to be made for the sake of ecological survival and "the war on terrorism". Terrorism reaches us through home video of beheadings, while slick Hollywood-like productions, such as Al Gore's "Inconvenient Truth", confront us with the effects of climate change.¹ Winning an Oscar perhaps symbolizes that the message has gotten home: the environmental threat has reached the level of *collective* consciousness. Of course, it remains to be seen whether the calculation and evaluation of these threats, or rather risks (biological, chemical, meteorological or terrorist) is proper and adequate. Indeed, the adequacy of such a risk analysis themselves are difficult to verify: reports contradict each other, or are outdated the moment they are published. The truth cannot be established, so it seems.² What can be established is that risks do exist and materialize in real disasters, loss and injury.

However, these developments in themselves are not the focus in this article. Instead, these developments elicit the relevance of a social-theoretical perspective on law. Social theory observes and strives to explain how society copes with changes and how these changes influence societal structures. Such social theoretical observations and inventories are useful to lawyers and legal scholars as they contribute to insights on the role and function of law in society. Thus, for lawyers and their field of work, the

1 *An Inconvenient Truth*, David Guggenheim (dir.), Paramount Classics, 2006

2 For example, we do know the climate is changing but we seem confused why, or what causes it: the Working Group II Contribution to the Intergovernmental Panel on Climate Change Fourth Assessment Report – Summary for Policymakers (not yet copy-edited; see: <http://www.ipcc.ch/SPM2feb07.pdf> (accessed: 22 June 2007)), states that "a global assessment of data since 1970 has shown it is *likely* that anthropogenic warming has had a discernable influence on many physical and biological systems" (emphasis added) ("Likely" indicates a 66% change, see p. 22 of the report.)

relevant question is what the significance is of structural developments, such as the abovementioned terrorist threats and environmental risks.

To create a theoretical framework for this fundamental question, this article draws on a social theory, which has enjoyed considerable attention since the mid-eighties of the last century: Ulrich Beck's theory of the risk society, placed within the wider scope of his theory of reflexive modernization. Especially in the nineteen-eighties, his concept of risk society served as a factotum for his more encompassing theory of reflexive modernization. Risk society depicts a change of direction in the process of modernization. This change centres on the search for a new balance between progress (especially of production and material wealth but also of science) and maintenance (of scarce natural resources³). This article attempts to highlight the relevance of the concept of risk society for legal theory. In order to be fruitful for legal theory, the central problem and its extent of its presence in the risk society must be clear.

In Beck's theory, the fundamental problem of the risk society relates to the existence of dangers and threats in the form of risks.⁴ These risks are man-made but at the same time the "producers" of these risks seem to escape responsibility, due to the typical features of modern risks, such as their global nature and the long chain of causal connections which makes it difficult to determine who stands where in the chain. According to Beck, the problem is – in short – how to distribute modern risks. Our proposal is to reformulate this problem into how *responsibility* for modern risks could be distributed or attributed, as we see in this a way to address, at least from a legal perspective, the central problem of risk society.

Our contribution to a solution lies in the formulation of a social contract. This approach provides in our view an appropriate instrument to determine the distribution or attribution of responsibility. Indeed, Beck suggests as much when he asks whether, on the brink of the era of reflexive modernization, "new social contracts [are] waiting to be born?"⁵ The appeal of this approach for lawyers and legal theorists is inherent in the model of the social contract itself. Furthermore, the social contract approach brings to light the normative underflow of Beck's social theory as he *pleads* for a reflexive, that is: a self-confrontational view on his description of society, its structures and the changes within it.⁶ Finally, the social contract approach temporalizes or sequences the search for possible solutions thus enabling a rather clear-cut analysis of "risk society" and its problems.

Three phases can be distinguished: a pre-contractual, contractual and post-contractual phase.⁷ In this article the focus is predominantly on the first phase. The

3 We do not refer only to fossil energy sources, but also to fresh water, clean air, fertile land, forests, living space, etc.

4 Risks, here, are the unwanted side effects of modernization's triumphs. See further, *infra* under "The meaning of risks".

5 Ulrich Beck, Anthony Giddens & Scott Lash, *Reflexive Modernization – Politics, Tradition and Aesthetics in the Modern Social Order*, Stanford, 1994, 1

6 It may be suggested that using social contract theory does not fit in well with a descriptive analysis of society, which is understood to be the realm of sociology, as social contract theory implies a normative description. Be this as it may, we suggest that allowing for such a normative gloss fits in well with Beck's theory.

7 The pre-contractual phase stages the scene: it articulates the fundamental problem and identifies the social actors who face the problem. The contractual phase is characterized by the drafting of the social contract, existing of possible solutions to the problem as well as the rights and obligations of all participants. The post-contractual phase is a description of the improvements brought about by the contract and its implementation. At the same time, it resets the scene and, perhaps, stages the actors for a new problem, caused by the found solution.

article seeks to formulate indications for possible solutions, which exists, in our view, first and foremost in a clear description of the fundamental problem that causes the current state of affairs to be such that a (new) contract is called for and the identification of the relevant social actors who will negotiate the terms of the contract. As the problem is fundamental and affects everyone in a negative way, they have an interest in its solution and this solution necessitates cooperation. The found solution is in part dependent upon the availability of “instruments of negotiation” or to put it differently “conventions of interaction”.⁸ It is here that the function of law becomes clearer, as an instrument that facilitates and consolidates cooperation with an aim to seek solutions for the fundamental problem.

Beck's analysis of contemporary society will be interpreted in terms of this sequence of phases to make the analysis it offers fruitful for legal theory. It elucidates the strong points of Beck's approach without ignoring its weak points. It starts with a description of the concept of risk society in order to articulate the problem of modernization, to identify the main actors and their common interests, justifying the need for cooperation and to identify and formulate the instruments of negotiation. This description is crucial as it uncovers all the available elements that will contribute to a possible solution. Hence, the quality and success of the solution is dependent on the quality of the elements. It then indicates how the contract could look like and describes the possible improvement of society located in the post-contractual phase.

Preparing the stage

Why “risk society”?

By now, Beck is well known for his theory of the risk society. His rise to fame in this respect started with the publication of his *Risikogesellschaft – Auf dem Weg in eine andere Moderne* in 1986.⁹ One could reproach Beck's certain one-sidedness, mistaking one problematic aspect of modern society for its *identity* and sole focus.¹⁰ It would indeed be inadequate to reduce society's identity to the problem of risks alone. The state of affairs, the multitude of problems that become visible in the process of “reflexive modernization”, enforces a selection of one specific problem which the social theorist understands to be *illustrative* for contemporary society. However tempting it might seem to adopt the above critical position, it sells Beck short. It ignores that in Beck's theoretical development, the concept of the risk society has become a central part of his theory of reflexive modernization:—¹¹

Ganz allgemein gesprochen, kann man die Theorie reflexiver Modernisierung in drei Komplexe zerlegen – das Theorem der Risikogesellschaft, das Theorem forcierter Individualisierung und das Theorem mehrdimensionaler Globalisierung.

Furthermore, the attraction of the concept of risk society is that it captures the *Zeitgeist* in a compelling way. The concept of risk society has a high “marketing value” to which anyone can intuitively connect: modern individuals are aware of the exposure to risks and threats

8 Such as the laws of nature in Hobbes or Locke

9 Ulrich Beck, *Risikogesellschaft – Auf dem Weg in eine andere Moderne*, Suhrkamp, 1986. Translated into English: Ulrich Beck, *Risk Society – Towards a new modernity*, Sage, 1992. As this article is written English, we will refer to the English translation.

10 Cfr. Niklas Luhmann, *Die Gesellschaft der Gesellschaft*, Suhrkamp, 1997, 1090ff. (Band 2).

11 Ulrich Beck & Edgar Grande, *Das kosmopolitische Europa*, Suhrkamp, 2004, p. 50

of various kinds and when disaster happens they experience contemporary society as a rather unsafe environment. This “risk sensitivity” is also due to the media contributing to accommodate a common sense understanding and experience of “the risk society”. Risks harbour uncertainty regarding their existence and outcome. As a consequence, they are sources of potential conflicts. Theoretically more important though is that the concept of risk society constitutes, in our opinion, the *framework* of further analysis into other social phenomena in the process of the second modernization, distinguished by Beck. These are forced individualization and multidimensional globalization, both processes taking place *within* the risk society. These will be touched upon when presenting the concept of risk society as the major exponent of the process of reflexive modernization. And with this, we are already in the middle of Beck’s theory.

Reflexive modernization

Contrary to what one may expect, reflexive modernization does not refer, or at least not primarily, to reflection but rather to self-confrontation.¹² It denotes a phase in the process of modernization, following the phase of first modernization. In Beck’s view, the first modernization provided the solution for the problem of absolute scarcity of means (the so-called “needs”): an increased production of goods (in a broad sense) by means of scientific, technological and industrial developments. The necessity of bare survival provoked the development of the industrial society, supplying in one way or the other the means to exist. This solution, the relief of absolute scarcity, had to deal with a concurring problem: the distribution of those goods. Beck states that industrial society had to deal with the question “*how socially produced wealth could be distributed in a socially unequal and also ‘legitimate’ way.*”¹³

Even though this problem might be deemed paradigmatic for first modernization, the democratic *Rechtsstaat* and its positive law turned out to be the more or less adequate instruments in this respect.¹⁴ The process of industrial development, in Beck’s view the core of modernization, did at first not only bring wealth and modern bliss, as is well known. We only need to refer to the so-called “*sociale kwaestie*”, the unequal distribution of the fruits of industrialization and its (social, health, political) consequences for the workingman.¹⁵ However, in due course the solution to this distribution problem acquired the shape of the Welfare state. One characteristic of this solution was its geographical limitation; solutions were generally limited, or did not extend, *the borders of the nation state*. The production and distribution of wealth belonged primarily to the domain of the autonomous and sovereign nation state. Though absolute scarcity is said to be non-existent, relative scarcity still exists in modern Western society. Although the edge might be taken of this distribution problem, it continues to exist and remains to be addressed.

At the peak of the Welfare state, one liked to believe that the modern project had reached its zenith, and that Progress would solely exist in fine-tuning. The belief in be-

12 See also *Reflexive Modernization*, 5. Please note that it is not the aim of this article to elaborate on the concept of reflexive modernization. We seek to contribute to a partial reformulation of the concept in order to make it fruitful for legal theory.

13 *Risk Society*, at 19

14 For example, the constitutional guarantee of property rights, guarded by, as well as shielded from, the democratic *Rechtsstaat*.

15 The “*sociale kwaestie*” was the Dutch interpretation of the problem of *Verelendung*.

ing able to shape and design society through decisions on the basis of pre-determined goals seemed confirmed by, for example, increasing regulation in the field of social security, the achievements in fertility control and developments in end-of-life decisions. This belief, as we now know, has shown at the very least the overestimation of regulatory possibilities. Soon the Welfare state revealed itself as too expensive, sometimes even counterproductive and it turned out that achievements in, for example, fertility control and end-of-life decisions caused new ethical dilemmas.¹⁶ In addition, one sensed a loss of social cohesion that was never fully compensated by the imposed, bureaucratic solidarity through taxes and the social welfare system.

Important in the context of this article is the awareness about man-made ecological disasters of which “Chernobyl” and “Bhopal” were illustrative examples, announcing the dawn of the risk society. The process of industrialization proved to be fertile soil for new problems – and in search of new solutions, new analytical concepts are required. Beck offers such a concept with the introduction of the theory of the risk society. Beck points out that two conditions have been fulfilled, to allow him to speak of a transition from an industrial to a risk society, at least in Western society. The first is the reduction of absolute material scarcity through production and its legitimate distribution. The second is that the process of modernization has not only led to the increase of production and wealth but also to an unprecedented and problematic increase of dangers and threats. It is this problem – unprecedented and problematic increase of dangers and threats – that has to be carefully analyzed and articulated as it will allow for the formulation of possible solutions. Beck does not imply here that the problem of the first modernization has become non-existent. Rather it is going to be mixed or accompanied by a new distribution problem: that of risks:–¹⁷

In systematic terms, sooner or later in the continuity the social positions and conflicts of a ‘wealth-distributing’ society begin to be joined by those of a ‘risk-distributing’ society.

The pre-contractual phase: identifying the problem

The problem of risk distribution

Risk society was preceded, as sketched above, by industrial society and its distribution problem of goods. Risk society has to deal primarily with the risks produced by industrialization of first modernization. Nonetheless, at the same time risk society remains concerned with the production and distribution of goods.¹⁸ Risk society has a “career” that can be differentiated into two stages. The initial stage was one in which we knew about risks but regarded them as (latent) side effects of wealth production, which we believed could be controlled. The structure of industrial society is still dominant in this stage. Since society is understood as *machbar*, the perspective on risks was that of total control: only in this case are remaining risks acceptable.¹⁹ In the second stage

16 One can refer to the debate about “designer babies”, the possibility to initiate a wrongful birth or a wrongful life action and the debate in the Netherlands about “existential suffering” as a motive for legal euthanasia. The latter is touched upon in Ubaldus de Vries, A Dutch Perspective; The Limits of Lawful Euthanasia, in: *Annals of Health Law*, 13 (2004), 365–392.

17 *Risk Society*, at 20

18 As the risk society is a world risk society, the following problem must be resolved worldwide or globally: the distribution of absolute scarce means, the distribution of relative scarce means and the distribution of risks.

19 Ulrich Beck, *Die Erfindung des Politischen*, Suhrkamp Verlag, 1993, 35

these risks become politically explosive: one has become aware of the full scope of the risk problem including the fact that they can no longer be perceived as controllable. From this moment on these industrialization risks start to dominate the public and private debate and a new situation in the risk society occurs. These modern risks become a dominant factor and the question how to deal with them becomes urgent. Beck formulates the fundamental question as follows:²⁰

How can the risks and hazards systematically produced as part of modernization be prevented, minimized, dramatized, or channelled? When they do 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?

A first self-evident answer would be to eradicate all self-produced risks. But it is clear that this is not a realistic option, unless one is willing to give up all modern benefits as well. Apparently this would be such a setback that Beck does not consider this option any further. To some extent, reduction or limitation of risks could of course be possible through, for example law, science or economic policy.²¹ But this still leaves modern society with risks that cannot be eliminated or which we do not wish to eliminate because we cannot do without the goods from which they originate.²²

Taking the existence of modern risks as a fact of life, Beck depicts the problem of risk society as yet another problem of distribution. However, this distribution problem does not concern wanted scarce goods but an unwanted abundance, in the shape of modern risks. The social contract has to deal with the distribution of these risks, in one way or another. If we mirror Beck's formulation of the problem of first modernization it deals with the question how socially produced risks could be "distributed in a socially unequal and also 'legitimate' way". This implies that the *unequal* distribution of risks, as much as the unequal distribution of goods, could also be considered as legitimate or justifiable.

It remains however unclear what Beck means with "distribution of risks". Does he refer to risks themselves, their production or merely their effects, or all of these? Be this as it may, for the moment it is immediately clear that the distribution of risks appears as a problem due to the feature of *unwanted* abundance.²³ Formulated somewhat differently, modern risks confront society with a social dilemma: we all want to profit from the goods of modernization but no one has an interest in paying the price: bearing the risks (or responsibility) that come along with them. A free rider problem is obvious and exists in the relocation or the shifting of responsibility. To understand why this is problematic, it is necessary to understand what Beck means with "risks" and what its features are.

20 *Risk Society*, at 19

21 For example: legal regulation of pollution and scientific research into the availability of green energy resources. An example of economic policy would be the trade in emission rights.

22 We do not want to forgo the luxury of local and global mobility through car and air traffic. Nor do we want to forego our level of consumption of perishable goods at a decent price.

23 The problem could also be reformulated from a different perspective: risks demand security or safety, the distribution of risks, thus, implies the distribution of security, which is a *wanted* and *scarce* good.

The meaning of “risks”

As risks are the consequence of industrialization, a first feature is that risks are *self-produced* and, hence, self-inflicted *because* they are the side effects of wealth production. Furthermore, as wealth production is structural and systematic, so is the production of risks. At one level, this indicates that modern (Western) society itself is responsible for the production of modern risks. Their effects, though, are not so limited. Risks also lie in the future – in the present of next generations – and they are immanently global. This *globality* is a second feature of risks and has two aspects. Thus, it may well be that risks are produced locally (and thus everywhere), their effects, though, are global as well as local. If globalization refers to the free transfer of goods throughout the world, it implies also the global transfer of risks. Illustrative in this respect are the recent crises in food products, such as the BSE crisis and the bird flu crises.²⁴ The third aspect is the existence of *unequal social risk positions*. This seems to mirror the division of traditional class society. People are affected by risks in different ways. Some can protect themselves against risks or at least be able to minimize their effects, whilst others are at the mercy of risks. However, as risks are global, different social positions are not limited to the nation state, as in industrial society, but are global too. Beck suggests that globality leads eventually to a *boomerang effect*, i.e. those who cause or produce risk will *in due course* be similarly affected by its effects. In the end, Beck foresees that no one can hide and that risks will have an equalizing effect.

Although this effect sounds plausible, one may wonder whether modern Western society is not much better equipped to deal with them than societies in other parts of the world, as it has knowledge, advanced technology and substantial financial means. Will risks, produced by “us” elsewhere, really come back? And if so, will the consequences not be of an economic, political or legal nature rather than ecological? The equalizing effect of risks is in our view less strong as Beck suggests. There will be *real* unequal social risk positions, exacerbated by the distinction between rich and poor. Indeed, risks may even sharpen this global distinction; rather than an equalizing effect they will have a discriminatory effect. Beck is right though when he says that, in terms of the distribution problem, distribution cannot be achieved within the borders of a nation state but must have a global outlook. The distribution of risks is a global problem foretelling a new and global “*Verelendung*”.

A fourth feature of modern risks is their *invisibility*. What is meant is that risks cannot be detected sensory; they cannot be seen, heard, felt, tasted or smelled. Risks exist in chemical and mathematical formulas. It follows from the “nature” of risks as future and hence contingent, uncertain events. This brings along that we get to know them through hearsay, as our awareness about risks is dependent upon scientific knowledge. Modern risks are constructions of scientific knowledge. This implies that those in scientific and political key positions can determine what the risks are. Consequently, if something is not defined as such, it is not deemed to be a risk. Furthermore, it leaves certain risks truly invisible, risks about which there exists no knowledge and therefore they do not gain social relevance at all. Another aspect of this feature is that although one may be able to determine risks, it remains problematic to determine when and how their effects materialize, if ever, and to what extent. Knowledge about effects exists in probabilities and estimations – in uncertainty. In the end, risks bind the future to the present without us being able to determine, but in vague terms, cause and effect.

24 The effect though of risks – their materialization – may be local again: the individual who gets infected somewhere, say in the south-east of Turkey.

Modern society's complexity, due to, among other things, the specialization and division of labour, is part responsible.

Indeed, in general terms, it is suggested that social interaction has changed in nature. The (physical) proximity of interaction of first modernization is been supplemented by a type of interaction in which parties are no longer in close proximity. As a consequence it has become much harder, of not impossible, to determine what the effects of my actions are elsewhere and how actions elsewhere have an impact on decisions we take.²⁵

This leads to a final feature of risks: the *problem of responsibility*. Central to responsibility is the attribution of an effect to the actor whose action caused the effect or who is responsible for the actions of others. In other words, causality is always considered to be a key aspect of responsibility. As it becomes increasingly difficult to determine causality in the production of risks (and their effects), the more problematic it becomes to determine who is to be held responsible. In other words, it becomes increasingly more difficult to determine what actions of which actors cause which effects. Although one may conclude that the whole of Western society is responsible, it is of no use in respect of the distribution problem. In the end, risks are the result of organized irresponsibility. Or:—²⁶

Corresponding to the highly differentiated division of labor, there is a general complicity, and the complicity matches 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*.

What is, in our view, highly problematic in Beck's concept of risks is that Beck does not seem to differentiate between risks and their manifestation in terms of disasters and other damage-occurring events. Threats, dangers and disasters: all seem to be appearances of "modern risks". Yet there is a significant difference in events, which may or may not manifest themselves in the future, with or without damage, and a "full-blown" disaster with obvious damage.

Another aspect of the problem should also be made explicit: the distribution of responsibility must also refer to those risks that manifest themselves in disasters and for which others may be held responsible than those who have produced the risk in the first place because the risk producer may not necessarily be the producer of its materialization in the shape of a disaster. There is no longer a direct causal connection between cause and effect, attributable to one person. It implies that causality (as in the direct relation between cause and effect) may or can no longer be a key aspect of responsibility.

Furthermore, Beck seems to limit risks to those that are systematically and structurally produced. But in today's society there remain other types of uncertainties such as natural disasters,²⁷ or simply adverse events that are of all ages, such as a fire in café or an explosion in a fireworks factory or ammunition depot. What is similar though is the cause-and-effect problem as well as our approach to these events: we want to hold *someone else* responsible and we want the loss to be remedied.

25 See also: Zygmunt Bauman, *Postmodern Ethics*, Blackwell, 1993, 18–19

26 *Risk Society*, at 31

27 Although some of them are manmade through for example deforestation. Climate change is another case in point as long as scientists are unable to find consensus about its causes. See also, *supra*, note 2.

Finally, the features that Beck attributes to risks all seem to be presented as characteristics of risks. For a better understanding of Beck's risk concept it is important to distinguish these features. Thus, organized irresponsibility and social risk positions are not characteristics of modern risks *per se*, but rather consequences of them: modern risks, which are by their nature self-inflicted and systematic, global in their reach and sensory invisible, *lead to* unequal social risks positions and *result both in and from* organized irresponsibility.

Reformulating the problem: reallocation of responsibility

The central problem of the risk society is, in our view, not about distributing risks *per se*: this is meaningless as risks are about uncertain future events, at the very best captured in scientific formulas. Of course, we can distribute formulas but to what end?

A more plausible option would be the redistribution or re-allocation of the *production* of risks. This might be the domain of science and economic policy. This re-allocation would be a *factual* one, such as the relocation of factories, the use of newer technologies, a new kind of political protectionism, etc. This might offer some relief but, as it is difficult to determine causal connections between an actual producer of risks (such as a factory) and uncertain future events or even scientific formulas, it does not help if and when these risks become manifest in the shape of disasters and actual loss. Of course, law may fulfil a function here, providing a legal framework to support the development of new technologies through subsidies for example, or providing for protectionist laws.

But, if law really seeks to contribute it should focus on the distribution and attribution of the *responsibility* for risks. This is in our view the central problem of the risk society: it is not about distributing risks *per se* or distributing the production of risks, but rather about allocating and distributing the *responsibility* of those who produce, distribute, "consume" and cause risks to materialize in the shape of actual loss.

A new frame of reference: a cosmopolitan outlook

Narrowing down the problem of the risk society to one of responsibility for risks, offers opportunities for solutions from a legal-theoretical perspective.²⁸ But, reformulating the fundamental problem as such and stressing its global extent and parties involved, indicates the need for a global approach and, hence, a different frame of reference in comparison to traditional social contract theory. In this respect, Beck makes a theoretical offer.

The nation state and its perspective

Beck's premise is that the perspective of first modernization no longer suffices. This perspective revolves around the axis national-international. First modernization was dominated by a primary organization, determining the perspective of all other actors: the nation state. Indeed, as explained above, the alleviation of needs through pro-

28 Indeed, in *Reflexive Modernization*, the authors refer to distributive responsibility; they state at 6: "With the advent of risk society, the distributional conflicts over 'goods' [...] are covered over by the distributional conflicts over 'bads'. These can be decoded as conflicts of distributive responsibility".

duction and the corresponding (unequal) distribution of these needs were within the realm of the nation state. The problem of first modernization was geographically and politically defined and controlled. Beck suggests that, considering the global nature of the problem in second modernization, such a national perspective no longer suffices. It also means that the nation state can no longer be regarded as the primary or sole social actor capable of creating solutions in an international context.

The risk problem, both in Beck's and our (re-)formulation, is not a national or an international problem but a global problem; risks cross state borders and ignore state sovereignty and inter-state relationships. The risk problem is also accompanied by a growing awareness of *multidimensional* globalization. Beck interprets this emerging awareness as a "*category shift in self-perception*" of the nation state.²⁹ This shift, furthermore, "*precipitated an interdependency crisis in the way modern societies organized their institutions and functions, a crisis which found quite diverse expressions*".³⁰ Beck refers to, among other things, climate change, global poverty, transnational terrorism and the BSE crisis. Beck denotes this interdependency crisis as "*world risk society*": risks springing from global interdependencies.³¹ These crises and the risks stemming from them are culturally produced even though they are often experienced as outside threats. It means that it is impossible to "*externalize the problem of accountability*".³² A different perspective is demanded, because these "*civilization risks*" spark new political conflicts that will reshape the institutional and organizational framework:—³³

[T]hese very conflicts perform an integrating function in that they make clear that cosmopolitan solutions have to be found. Such solutions can scarcely be envisaged without new global institutions and rules, and hence without a certain degree of convergence.

Beck clearly points out why the classical function of the nation state (providing security), rather than the nation state itself, erodes under the force of the interdependency crisis. Where traditionally social contract theory legitimizes the state in this regard, (as the outcome of *individual* action, as under the theory of Hobbes and Locke) it now illuminates its shortcomings, similar to the Hobbesian individual. Thus, the nation state is no longer only part of the solution but also part of the problem. Hence, Beck pleads for incorporating the national perspective into a cosmopolitan outlook. This is not to pre-empt the demise of the nation state but rather its repositioning. It may even be suggested, as is done by Fulcher, that it strengthens the nation state, so long as it takes issue with its competitors on the global stage.³⁴

Beck's understanding of the cosmopolitan outlook is a preferred state of affairs, an intellectual endeavour to address the fundamental problem.³⁵ The distinction is made

29 Ulrich Beck, *Cosmopolitan Vision*, Polity, 2006, p. 22

30 *Cosmopolitan Vision*, at 22

31 *Cosmopolitan Vision*, at 22

32 Ulrich Beck, Living in the world risk society, in: *Economy and Society*, 35 (2006), 329–345, at 333 (A 2006 Hobhouse Memorial Public Lecture given on 15 February 2006, London School of Economics)

33 *Cosmopolitan Vision*, at 23

34 See: James Fulcher, Globalisation, the nation-state and global society, in: *The Sociological Review*, 48 (2000), 522–543. In his conclusion he states at 541:—

The nation-state changes, as does the context within which it operates, but there is no sign of its 'demise' or 'withering away' as some global society emerges. [Its] strengths lies in its flexibility and adaptability. [...] We live in a society that has a global level of organization but also regional, national, and sub-national levels of organizations too.

35 Beck distinguishes between the cosmopolitan outlook and banal cosmopolitanism or the reality of a cosmopolitan society: the cosmopolitanization of every day life of which consumerism is a prime

visible by a new methodology. Beck calls this methodology “*analytical-empirical cosmopolitanism*” and departs from “*methodological nationalism*”.³⁶ The latter suffers “*a clinical loss of reality*”, as it holds on to certain premises Beck regards as insufficient.³⁷ Predominant among them are the subordination of society to the state, implying the existence of geographically defined societies, which contributes to a world image based on the axis national-international and to the error presupposing a universal society on the basis of a particular national society (read: the modern Western state). The core of the critique on methodological nationalism is, according to Beck:—³⁸

It views the national state as ‘a self-evident point of departure’ (Daniel Levy in conversation), whereas the cosmopolitan outlook retains a reference to the nation-state but situates and analyses it within a radically different horizon. [...] The circular arguments of methodological nationalism are false because the national outlook analyses the nation-state without questioning its own premises.

From the point of view of methodological nationalism, it is common to ascribe accountability to decisions taken by those in power. An intricate political system has been devised for it. These decisions were aimed at wealth production and distribution. In the world risk society global public opinion is centred also on the negative side effects of first modernization: risks. Modern risks create a new and global public consciousness demanding accountability, which cannot be found in national or international politics. It leads to a transformation “*from a politics centred upon nation-states and international security to a non-state-centred post-international risk politics*”.³⁹ It demands the repositioning of social actors in a field of global rather than international forces.

Essentially, the cosmopolitan outlook is about breaking down the juxtapositions of first modernization: us-them; national-international; private-public; etc. It departs from the “either-or” scenario and emphasizes inclusiveness.⁴⁰ In a world of global crises and risks resulting from first modernization these juxtapositions lose their meaning and significance. A new realism – the cosmopolitan one – becomes necessary as a state of being and central reference point in *reflexive* modernization, against which the foundations of first modernization can be re-evaluated and reconsidered. The cosmopolitan outlook offers room for the development of new identities and institutions/organizations, which are based on integration or inclusiveness rather than differentiation and exclusiveness.

example, fusing local loyalty and global openness and has even become an expression of moral interdependency. (*Cosmopolitan Vision*, p. 40) It is also visible in a growing public awareness about risks as well as about the increasing level of inequality that seems to lack any justification.

36 *Cosmopolitan Vision*, at 18

37 *Cosmopolitan Vision*, at 25

38 *Cosmopolitan Vision*, at 33

39 *Cosmopolitan Vision*, at 36

40 No ‘either-or’ but an ‘and’ scenario. Beck refers to an essay by Kadinsky; no longer “*separation, specialization, efforts at clarity and the calculability of the world [but] simultaneity, multiplicity, uncertainty, the issue of connections, cohesion, experiments with exchange, the excluded middle, synthesis, ambivalence*”. See: Ulrich Beck, *The Reinvention of Politics – Rethinking Modernity in the Global Social Order*, Polity Press, 1997, 1; translated from the German original: Ulrich Beck, *Die Erfindung des Politischen*, Suhrkamp Verlag, 1993

Parties to the social contract: organizations

The point of departure of the cosmopolitan outlook does justice to the extent of the problem in the risk society. Given the nature of risks and the subsequent fundamental problem, it is obvious that everyone who is aware of the problem has an interest in solving it; those in the here and now. This follows from the global character of modern risks and the (alleged) boomerang effect.⁴¹ But there is also the temporal dimension. Risks are future-oriented, which means that parties do not only include those who are in the here and now but also include future generations.⁴² Thus, everyone – in the present and in the future – has an interest but not everyone can be party to the negotiations about the contents of the social contract though. This is obvious with respect to future generations. They demand representations by those in the present who are able to defend, as well as define, their interests.⁴³

The cosmopolitan outlook illustrates the necessity to cooperate as well as it opens up the possibility to other actors than only the nation state to cooperate. However, as the problem is global it is also realistic to say that individuals cannot address this by themselves. Traditional social contract theory takes individuals as the point of departure. This is not surprising as these theories emphasize individual autonomy and freedom, stemming from man's Reason. Although the traditional theories present a fiction, it nevertheless is hard to imagine a fiction in which all interested actors (the members of a state for example) participate in the negotiations as parties. At a global level this becomes even more unlikely.

So, here we have to face two problems similar to which traditional social contract theory has been confronted with. The first is who will be party to the negotiations in order to make the negotiations plausible? And closely related to the first question, is the second: how can it be ensured that future generations are bound by the terms of the contract since they cannot be party to the negotiations? The short answer is found in *organizations*. There are several reasons to opt for organizations. A first one is that they are the primary actors of the modern world when it comes to cooperation. They consist of nation states and the network of international organizations that have been set up under their authority (the UN, WTO, World Bank, EU/EG. etc.). Even though the role and function of the nation state demands reconsideration, the organization itself remains, for socio-historical reasons, an important social actor. As it remains an actor, individuals ought to organize themselves enabling them to cooperate with the state (as individuals usually do not cooperate with organizations on the scale of nation states). These organizations can be regarded as late or second modern organizations; representative bodies of social movements such as the feminist movement, the peace

41 Relocation of risky industry to, let's say, African countries, is one possible solution due to that continent's high degree of dependency upon wealth creation. It would be an ironic solution though: such countries must still deal with the matter of first modernization, while at the same time being confronted, as a *fait accompli*, with the problem of second modernization, without the certainty that they will reap the fruits. See also *Risk Society*, at 41–44

42 For these generations, it is suggested here, the problem may even be bigger considering the depletion of natural resources, such as oil and gas, fresh water and fertile land. Although one may rely on the promise of new scientific discoveries such reliance would be a naïve and irresponsible optimism in Progress. Furthermore, there is a moral point, which is whether we may *knowingly* impose upon future generations problems caused in the here and now. This too is a matter of responsibility and its distribution.

43 Their interests lie, first and foremost, in the guarantee that they can come into existence safely and securely.

movement, the environmental movement, consumer movements, and so on. But they also include corporations that operate on a global scale (transnational corporations), powerful research institutes and think tanks, religious groupings and even loose networks that are able to raise a voice and muster support for topical issues through mass information techniques and mass media. A particularly feature of these late modern organizations is that they are expressions of individual choice. As the individual is forced to live in a global world that is breaking down previous certainties, he or she seeks allegiances over and beyond the nation state. Through choice the individual seeks representation on the global stage.

Another, more general feature of organizations is that they, or at least their “products”, usually outlive the individuals who fulfil roles or perform functions within those organizations. This is true for the nation state but it is suggested here that this also applies for the late modern organizations. The “emergent” existence of organizations gains importance in view of future generations. There may be an argument to submit that these organizations have implied powers of representation, acting as fiduciaries for present and potential members. It is up to individuals to join those organizations, which they feel *have represented them when they were not yet in existence*, the best. This would well fit in Beck’s analysis of the new politics of reflexive modernization, when he says that the individual has returned into society. With it, Beck means that the disintegration of industrial-and-welfare society has led to a forced individualization – a disembedding of the individual, uprooted and again longing for certainties no longer to be found in the modern arrangements of the national Welfare state. As a consequence, *“politics breaks open and erupts beyond the formal responsibilities and hierarchies”*.⁴⁴ That we remain blind to this is because we associate politics too much with the state as political organization.⁴⁵ We look for politics in the wrong place. Politics in reflexive modernization takes place on the level of sub politics. It is the area where previously unpolitical institutions, such as industry, become political and where individuals seek new forms of political engagement, different from the left-right divide of industrial society. It indicates that the perspective of the nation state – the national outlook – as the point of reference for making *choices and decisions* is no longer sufficient.

Organizations and decisions

The notion of “decision” is considered a suitable point of departure for further analysis for several reasons. A particular feature of modern risks is that they come into existence through decisions (by organizations). It does not imply that modern society decides to produce risks, but that these risks are side products of decisions about the production of wealth. Modern risks then occur as negative external effects that are not or not always accounted for by the decision maker. Where risks find their genesis in structural and systematic decisions (as side-effects of wealth production) their solution, as a consequence, should also be found in decisions. Risks may be the unwanted side-effects of first modernization decisions, second or reflexive modernization is in our view characterized by decisions about these unwanted side-effects and their solutions. Reflexivity, or self-confrontation, exists not only in the awareness of risks but also in action through making new decisions. Consequently, reflexive modernization accounts

⁴⁴ *The Reinvention of Politics*, at 99

⁴⁵ The diagnostic error is “the equation of politics and state; *politics and the political system*”; see: *Reinvention of Politics*, at 98.

for *neue Machbarkeit*: a positivation that takes into account negative external effects of decisions and attributes them to the appropriate actors. The solution is located in an ultimate decision: the decision to cooperate and to lay down this decision in a social contract.

It now becomes clear what the central point must be of the social contract. The reformulation of the problem already indicates the direction to that point, i.e. the distribution of responsibility. More concrete, and legally relevant, the distribution and allocation of responsibility is in fact *attribution* of responsibility and this requires decisions.

The contractual phase: towards cosmopolitan justice

Recapitulating the argument so far, the point of departure is, formulated in traditional social contract theory, a state of nature constituted by the risk society. Against the reality of diminishing scarce resources (in absolute terms), there exists the real threat, inherent in modern risks, of real and potential conflict affecting all individuals as well as nation states and to which the latter as primary social actors no longer have exclusive answers. Indeed, it has been suggested that the root of many of today's conflicts is found in control over scarce resources, the effect of climate change, etc.⁴⁶ The difficulty to formulate answers lies, in part, in the approach: a national outlook which blinds itself to cosmopolitan reality. The risk society is a *world* risk society.

Although modern risks are a threat to all, we believe Beck's suggestion of the boomerang-effect to be an overestimation. The state of nature, i.e. the risk society, is *not* determined by equal positions contrary to the Hobbesian or Lockean point of view. Rather than modern risks having an equalizing effect, the task is one of managing social risk positions, through minimizing unequal risk positions or at least through compensating positions that are worse off. The existing inequality is essentially an economic inequality leading to inequality in risk exposure. Some endure a higher exposure to the effects of risks than others. This difference in exposure corresponds (to a large extent) with the rich-poor divide across as well as among and within nation states. Poor states and poor people are exposed to a higher degree of risks that actually manifest themselves in disasters or actual loss. Whereas equality leads to uncertainty in traditional social contract theory, uncertainty in the risks society results from the nature of modern risks.⁴⁷ They are essentially contingent events. This uncertainty is exacerbated by the problem of irresponsibility: no one seems (to be willing) to carry responsibility for the effects of modern risks or, rather, their consequences, be they economical, biological, legal, financial, political or otherwise. This first aspect of uncertainty, their contingency, can hardly be resolved without foregoing the benefits from which they result. The other aspect, risk irresponsibility, can be dealt with through agreement and decision within the reformulation of the fundamental problem in terms of the distribution of risk re-

46 See, for example, a recent US report, drafted by senior ex-military men: "National Security and the Threat of Climate Change" The CNA Corporation, 2007. (The CNA Corporation is a non-profit institution that conducts in-depth, independent research and analysis, according to its own website; see: <http://www.cna.org>.) (Accessed: 22 June 2007)

47 One could argue that the inequality in the risk society results in some reduction of uncertainty: you know it's fairly certain that you will suffer damage and loss at some point when your social risk position is located on the wrong end of the scale. This is not only so on a global scale. On a global scale, the US may occupy a rather good social risk position but within it positions are diverse, as could be seen, live on television, in the aftermath of the destructive force of Hurricane Katrina in New Orleans.

sponsibility through attribution. This will be the core of the social contract. What would be the central features of such a contract? Without pretending to be all conclusive, the article seeks to explore tentatively possible indications towards drafting the terms of the reflexive social contract.

Preconditions

The contracting parties – organizations – must keep an eye on a number of preconditions, when negotiating the contract. So, although everyone is under threat, inequality exists. As organizations are party to the negotiations, their task is to guard over the interests of the weak as well as of future generations. Organizations must do this from a cosmopolitan perspective, considering the global extent of the inequality problem and the global interdependency crises that result from risks and risk exposure. Furthermore, reaching solutions starts, first and foremost, in breaking down the apathy vis-à-vis risks, starting with *taking* responsibility for them. This is in the first place a moral issue. Thus the first step is becoming consciously aware of a *moral* obligation to take responsibility.⁴⁸ This obligation continues to exist, as much as it existed regarding the distribution problem of first modernization. However, the effectiveness of the moral dimension falls short in a global society: first modernization has eventually lead to a pluralism of norms and values, and the global dimension of the risk society and reflexive modernization makes a universal morality as a necessary prerequisite for global responsibility far from feasible if not impossible.⁴⁹ But whereas morality cannot achieve a common ground, law could fill the gap.

Negotiating a distribution key

The core of the social contract in risk society, as said above, is the distribution of responsibility through attribution.⁵⁰ Attribution requires decisions and is at its core arbitrary: why should this or that actor carry responsibility for this or that? Without some point of reference, this arbitrariness is not acceptable and the attribution of responsibility might turn out to be counterproductive. It is such a point of reference – that limits and legitimizes the attribution of responsibility – which our social contract aims to formulate and establish. It seeks to establish a distribution key or a distributive principle. As its jurisdiction or reach is global, the principle cannot be but a meta-principle. Once agreed upon, further elaboration is required (by organizations, using law).

The following findings have to be taken into account when formulating this principle. Risks cannot be cancelled without cancelling the goods. Furthermore, as risks

48 Indeed, true autonomy, as is a central feature of modernization – lies in moral autonomy: the ability to take moral responsibility for its own sake, an *a priori* responsibility, not depended on reciprocity or heteronymous management; see Bauman (note 25). This obligation extends to future generations, see also, *supra*, note 42.

49 Again, a line of reasoning that can also be found in Bauman. Although the emancipatory zeal of the modern age sought to reduce moral ambivalence, it has strengthened it. Bauman continually stresses the moral ambivalence of men. “A non-aporetic, non-ambivalent morality, an ethics that is universal and objectively founded”, is a practical impossibility; perhaps an oxymoron, a contradiction in terms” Bauman (note 25), 10.

50 Redistribution seems to suggest that responsibility has already been distributed but demands change. Indeed, at stake is the organization of responsibility.

themselves cannot be distributed recourse is to be had to the distribution of risk responsibility. Since goods are wanted and thus scarce (they require the formulation of rights to these goods) risks are unwanted abundance and require the *formulation of obligations*. The scarcity of the wanted goods implies that not everyone had access to these goods. On the other hand, everyone is exposed to modern risks (at least to their effects). Some however are more exposed to risks and this exposure seems to be inversely proportional to the access of goods. Consequently, it seems fair to take into account the following:–

1. Those who do not participate in the production of risks – i.e. in the production *and* consumption of goods – do not carry risk responsibility.
2. Those who participate in the production of risks carry responsibility equal to the degree of access to the corresponding goods.

Thus, it is not an option to burden those who actually or physically produce risks if they cannot enjoy equal access to the corresponding goods. Even though such a distribution key may fit in well with liberal theory, it is not an option that appeals from the perspective of global justice. Rather, responsibility should, first and foremost, be on the shoulders of those who enjoy unhindered access to the corresponding goods.

As this is a meta-principle, further elaboration is necessary. In view of its effectiveness, law is the quintessential instrument to attribute responsibility through decisions. Law is able, considering its general features, to allocate duties that no one really wants. In doing so, it is important to make a distinction between risks themselves and their manifestation in disaster and actual loss and damage. Thus, law can attribute responsibility in terms of liability (after the manifestation of a risk in actual loss), which is an *ex post* distribution of responsibility. But is it also possible to take a preventative approach and seek an *ex ante* distribution of responsibility? If so, it has to deal with responsibility for risk production. Regarding the former, responsibility refers primarily to who must compensate those who have actually suffered loss that can be quantified in financial terms.⁵¹ Nothing else is left to do in these situations. Regarding the *ex ante* distribution of responsibility, responsibility refers not only to a compensatory element but also to other elements. Here, it also refers to minimizing the production and distribution of risks and risk exposure. It involves, among other things, the redirection and proper application of science and technology as well as economic policy. It incorporates the distribution of risk production as one aspect of the overall solution. This can only be effective though if and when it is clear *who* carries the responsibility for risks. It is not enough to simply refer to the actual producers of risks or, for that matter, the consumers of the corresponding goods. As risks are produced structurally and systematically, they are self-inflicted and in the end, everyone is responsible. But such a distribution key – life is lived at one's own peril – is unrealistic and unwanted. It would merely exacerbate unequal risk positions. It ignores the fact that the world risk society does not enjoy and suffer the advantages and side effects of the process of modernization equally. Indeed, is it not true that today the worse off also have to struggle with the proper production and distribution of goods? Their problem is a double problem. Rather, the distribution key is about an unequal distribution of responsibility that nevertheless contributes to global justice. Thus, similar to this other social contract theorist of the modern age (Rawls), it is not about the setting up of a new organization (like the state) but about

51 In addition, responsibility can also be of a criminal or political nature.

formulating a better procedure that can cope with the problems in the risk society. It is such a procedure that must be the subject of further inquiry and analysis.⁵²

Conclusion

The aim of this article was to re-interpret or reformulate Beck's perspective on the state of current society and its fundamental problem. This perspective is that society is confronted with the side effects of its own successes: risks. It denotes a transformation from a national industrial society towards a world risk society. These risks are potentially threatening to social order and demand a solution, which Beck seeks in their distribution. As such, Beck's theory is embedded in his more encompassing theory of reflexive modernization, which, in its essence, demands the ability of society to confront itself with its successes and their consequences, which includes its institutional make-up (denoted by Beck as the national outlook). Beck's formulation of the problem serves a goal in respect of social theory. *Legal* theory and lawyers demand a concretization of the problem in a way that provides them with tools for concrete solutions. This demanded the reformulation of the distribution problem. The article did so in terms of traditional social contract theory, which in its first phase demands a clear demarcation and description of the fundamental problem. In doing so, the article emphasized that what is at issue is not the distribution of risks per se but rather the distribution or allocation of responsibility for these risks and their potential materialization. The rationale of this approach was found in how risks come about: through decisions by organizations, which prompted the suggestion that the solution towards the distribution problem should also be found in decisions by organizations. These are the primary actors and by virtue of the cosmopolitan outlook, organizations do no longer include exclusively the nation state and organizations set up under its guise (the organizations of first modernity) but also organization of second modernity. It then sought to outline indications for possible solutions. Building forth on Beck's theoretical offer of a cosmopolitan outlook, the article indicated towards a principle of global justice as a point of reference of the distribution of risk responsibility. The essence of this principle is that in the allocation and attribution of risk responsibility those who enjoy unlimited access to goods should carry responsibility for most of the bads or, to put it negatively, those who do not enjoy access to goods, whilst they participate in their production, should not be exposed to the responsibility of the risks that are inherent in these goods. As the principle is by necessity a meta-principle a distribution procedure must be teased out, for which law offers the tools.

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52 Nussbaum addresses the idea of "mutual advantage and global inequality" among other things in her recent publication: Martha C. Nussbaum, *Frontiers of Justice – Disability, Nationality and Species Membership*, Belknap/Harvard, 2006.