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NORMATIVITY IN THE SECOND MODERNITY

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I. Introduction

Today's society is a society that presents itself as a complex society. Complexity, here, refers to the endless horizon of options and possibilities from which social actors (individuals, organisations) nowadays can and must choose. All of these options and possibilities cannot be realised, at least not at once and not by one actor. And, indeed, making a selection may be an onerous task. How do we know or how can we know what to select, and how to choose? This is exacerbated by the idea that we may often not be able to foresee or anticipate the intended and unintended consequences of selections and choices we have made. Indeed, it is at least certain that at any given time unknown and unwanted consequences will appear. In addition, it leads to the observation that society is characterised by the experience of contingency: everything could be different.[1] It makes that our society is not as clearly structured as we would like to believe, were we to have a bird's eye view. Nevertheless, we do seem to live in a relative state of social order: within limits, especially those of the law, we enjoy the freedom to make selections without curbing the freedom of others. Although "anything goes" may exude a certain bohemian attraction – with its promise of total freedom – but as it also might bring about complete uncertainty, it is not a favourable option.

Our social order is a *qualified* order by virtue of the *specific* selections and choices we make. We do so by imposing limitations to our decisions as to what to select and choose, using and having designed instruments or mechanisms for that purpose, such as morality and law. It is plausible to assume that these instruments not only bring about evolutionary

[1] Contingency refers to the modal logical concept of *"Auch-anders-möglich-Sein"* or "neither necessary nor impossible": *"A fact is contingent when seen as a selection from other possibilities which remain in some sense possibilities despite a selection."*; see: *N. Luhmann*, Generalized Media and the Problem of Contingency, in: J. Loubser/R. Baum/A. Effrat/V. Meyer Lidz (Eds.), Explorations in General Theory in Social Science – Essays in Honor of Talcott Parsons, New York: The Free Press 1976, pp. 507–532, here p. 509.

changes in society but also adapt to structural developments, such as the process of modernisation for instance, leading Western society into the era of the "second modernity".[2] What options or actions do we exclude and what do we not exclude? Somewhat less abstract: what are preferable courses of action, what not, formulated in do's and don'ts. The process of excluding and including options is a process of selection through which we seek to reduce and transform complexity and contingency. The process of selection does not take place ad random but falls back, basically, on organising principles that are characteristic of a *specific* society. These organising principles not only determine the shape of social order but also its contents – they qualify a social order as a normative one. In our modern Western society, examples of such organising principles are freedom, equality, solidarity, redistributive justice and so on.

It will be clear that we seek to take issue with a specific social order, here and now: the social order in the second modernity, which is primarily characterised by the process of globalisation. Taken this specific social order as our point of departure, one aspect is of particular concern in this article and relates to the breaking down of the national-international structure that has dominated the social order in the first modernity, at least in Western society. With the gradual disappearance of borders, economically and territorial-politically, as well culturally and socially, the question for the boundaries of legal normativity becomes pressing. This is so because legal normativity in the first modernity was (and is), one way or another, connected to the notion of the nation state, even in the case of international and European law, as the main actors are explicitly state-bound or defined in relation to the nation-state. So, the boundaries of legal normativity coincided, and to large degree still do, with the borders of the nation-state or are defined in relation to these geographical borders. But as these borders seem to become less and less important or relevant in the second modernity, the nation-state appears as but one "provider" of legal normativity.[3]

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2 See, for example, *U. Beck*, The Re-invention of Politics – Rethinking Modernity in the Global Social Order, Cambridge: Polity 1997, for example pp. 37–40. He argues that we enter a new phase in the process of modernisation, standing upon the threshold of first and second modernity, in which we become more and more aware of the negative consequences of the successes of first modernity. In this vein he also refers to "reflexive modernity" (ibid., p. 11). A similar distinction is that of "solid" and "liquid modernity"; see *Z. Bauman*, Liquid Modernity, Cambridge: Polity 2000. The authors are well aware of the fact that the use of the concept of first and second modernity limits this analysis to the modern Western society.

3 The notion of legal normativity does not, in this contribution, fully coincide with 'the law' or even the 'legal system' as both latter notions still implicate to a high degree the state-bound character of legal norms. Legal normativity, as a no-

First, in paragraph II., we seek to describe normativity as a general notion and in doing so, we are inspired by and using the instruments of social systems theory as elaborated by Niklas Luhmann. This approach distinguishes between cognitive and normative expectations in respect of their formal appearance. This, in our view, enables the description of the function of normativity in relation to the reduction of contingency and complexity in Western society. In paragraph III., the general and yet rather formal notion of normativity will be qualified as we are interested in *legal* normativity and its function in the second modernity. Furthermore, the relation between legal normativity, social order and organising principles will be illustrated. As organising principles characterise a specific society, it is necessary to examine how legal normativity is geared towards the realisation, at least partially, of organising principles.

As social systems theory is informative about the form but not so much about the *contents* of norms, in the following paragraphs recourse must be had to a social theory that takes issue with describing the identity of contemporary society. To this end, the authors rely to a large extent on the theory of reflexive modernisation, as espoused by the German social theorist Ulrich Beck. Contemporary Western society is labelled by Beck as entering second modernity, which entails, among other things, the confrontation of society with the consequences of its successes of the first modernity. The notion of first and of second modernity is addressed in paragraph IV. The self-confrontation of modern Western society with the negative consequences demands a reflexive attitude, to be translated into action. It demands the reconsideration of the function and goal of normativity at a global level. This is addressed in paragraph V. The main argument is that the side-effects of first modernity – conceptualised in the concept of risks – demand a global perspective with a view of their distribution. The nature and reach of this distribution is the key problem in second modernity, which legal normativity can address, based on a new conception of justice. This matter will be dealt with in paragraph VI.

II. Normativity

Before dealing with the main issue of this article, that is: the loci of normativity in the second modernity, the function of normativity in relation to social order must be elaborated. Social order, as implicated by the above, is understood as organised complexity and contingency. Essentially social order comes about by fine-tuning mutual expectations: how

tion, seeks to incorporate the possibility of legal norms originating from other than the traditional sources.

do we deal with the options and possibilities in society and how do we make selections and choices? Expectations aim at the future and are calculations about that what may or may not happen. Expectations can be positive or negative or, at least, they may have positive or negative consequences. It may rain or not, there may be peace in the Middle East, climate change, a bequest that befalls upon you, etc. In more abstract terms, an expectation refers to a possible, but not a necessary, change of a situation in the future of which the result or consequences may be valued positively or negatively. The better we are able to calculate expectations – both expectations we hold ourselves and the expectations of others – the better we are able to make decisions and act accordingly.[4]

The organisation of complexity and contingency, as a feature of social order, points to the relative certainty about choices (in terms of foreseeability). Complexity, here, entails a quantitative as well as a qualitative aspect. The former refers to the array of options society has on offer which demands selection. Selecting or choosing occurs at different levels and can be trivial or principled, both at the individual and at the institutional level. Will I have children or not? Do I marry? Which mobile phone to buy? A European identity: yes or no? Should Turkey become an EU-member? How to deal with terrorism: repressive, defensive, preventative? Do we prefer a free democracy or a safe state, more sustainable development or increasing economic rationality, emphasising growth and profit, etc.?

The foregoing only illustrates the quantity and range of selections to be made but does not give a clue about *how* to make a selection. The second aspect – the qualitative – refers to how one is equipped to make the "right" choice. It is at this point that we rely on organising principles. We are accustomed, in modern Western society, to have our "process of selection" guided by certain well-known principles, such as justice, welfare, equality and freedom. Furthermore, these organising principles not only organise complexity but, by implication, curb contingency also: they make clear that not anything goes: they represent limitations on contingency.

Complexity may be regarded as the social (systems) theoretical version of the philosophical notion of freedom, as freedom implies freedom of choice and hence the existence of options and possibilities. The downside is that it necessitates selection and the more possibilities exist, the more problematic and forceful the necessity of selection becomes. But we do

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4 This representation of social order is based, to a large extent, on the work of Niklas Luhmann; see, for example, *N. Luhmann,* Soziale Systeme. Grundriß einer allgemeinen Theorie, Frankfurt a. M.: Suhrkamp 1983.

seem to manage. Social order implies a particular organisation of this complexity and contributes to clarity, certainty and predictability. Organisation means here: there are still many options but selection is made possible because some of these are no longer regarded as either possible or probable,[5] by either express or implied agreement on the basis of morality and law or other instruments that help shape the range of options, as expressions of the organising principles of social interactions.[6]

The foregoing shows that the *function* of normativity exists in contributing to the organisation of complexity and contingency in modern Western society.[7] To put in a different way: as our future is uncertain, normativity contributes to reducing this uncertainty within certain limits. As Niklas Luhmann puts it:[8]

> "Er [time binding aspect of the legal system] liegt in der Funktion der Normen, nämlich darin, daß man versucht, sich wenigstens auf der Ebene der Erwartungen auf eine noch unbekannte, genuin unsichere Zukunft einzustellen. Daher variiert mit den Normen auch das Ausmaß, in dem die Gesellschaft selbst eine unsichere Zukunft erzeugt."

The reference to the future means that we can have and formulate expectations, but that they may not necessarily materialise (which we may evaluate as good or bad). Two examples are illustrative. Modern technology has enabled women to get pregnant other than through sexual intercourse. However, there is no guarantee that artificial insemination or in vitro fertilisation will lead to pregnancy. This is (highly) uncertain (similar to sexual intercourse). However, these alternatives imply that women can formulate expectations about their role as a future mother independently. The end-result should be a pregnancy and a healthy baby. Likewise, modern technology allows women to control their fertility and *prevent* pregnancy, for example, through sterilisation, which demands a medical procedure. The end-result should be infertility as a wished for result.

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5 That does however not imply that these options cease to exist, they are maintained as options: if one selects to go to Italy for the holidays, it is not implied that France as holiday destination is no longer an option. It is just an option that is not realised this year.

6 Thus, organisation does not merely refer to the *reduction* of options. Organisation helps shaping the options, i.e. it may be that some options are less probable but at the same time other options become more probable and these options, perhaps, may fit in better within that particular social order, considering the organising principles.

7 See also: *L.M.A. Francot-Timmermans,* Normativity's Re-entry. Niklas Luhmann's Social Systems Theory: Society and Law, (Dissertation), Nijmegen: Wolf Legal Publishers 2008.

8 *N. Luhmann,* Das Recht der Gesellschaft, Frankfurt a.M.: Suhrkamp 1993, p. 130.

This is important: how to deal with expectations when they materialise or when they do not materialise; when they have reached the present. More important: how do we deal with *disappointment* in respect of expectations? We can distinguish two modes as to how we deal with disappointments in respect of expectations. The disappointment can be, on the one hand, an incentive to learn: we react upon a disappointment by adjusting the expectation at stake. In the first example above, it would mean that the woman accepts, at some point, that she will not be able to become pregnant. On the other hand, it is also possible to maintain the expectation and demand satisfaction from those who have failed in meeting the expectation, for example an apology or, in respect of the second example above, a demand for a remedy in law (compensation or redress). The outcome of the expectation (the disappointment) gives rise to new expectations but this time of the first kind (law cannot guarantee the outcome of a trial). Luhmann distinguishes these two modes of dealing with the disappointment of expectations into a cognitive mode and a normative mode respectively.[9] Normative expectations or norms are maintained counter-factual, that is to say, in view of and despite of their possible disappointment. This is important, as expectations will clash, leading to conflict.

The findings as described above refer to normativity as a general, abstract, concept; they refer to the normative expectations in general, unqualified and unbound by time and space. Yet, normativity *in concreto* is of course qualified in a specific way, like for instance legal, moral or religious normativity.

III. Legal Normativity

We can observe many different systems of norms that operate within society. Reference can be made to moral norms, legal norms, social norms and etiquette, religious norms and norms that exist in organisations. We can categorise these norms into first and second order normativity. Morality could be regarded as a system of first order normativity. Subsequently, a part of these moral norms gain further qualification in many different second order normative systems, i. e. religion, politics, law, etc. What they have in common is that these norms are consolidated within social systems and seem to evolve from the abstract (akin to a value) to the concrete (a specific prescription, discretion or entitlement). Some moral norms however transcend social systems and shape a specific society as a whole. The latter can be regarded as foundational organising

9 Ibid., pp. 80 ff.

principles, such as justice, freedom, equality and welfare.[10] Organising principles are expressions of normative preferences in a specific society and direct the transformation of complexity and contingency in accordance with these normative preferences.

The legal system in modern Western society, for example, enables litigation. It does so, not only as a procedure but also in a manner that guarantees a fair trail.[11] The subsequent stages of a procedure contribute to the organisation of complexity and reduction of contingency. This does not mean that legal procedures are not complex; they are complex within limits. Nor does it imply that the results of procedures are completely certain. The complexity of legal procedures is, so to say, prescribed by the legal system itself: it is in fact a *transformation* of complexity in view of controlling contingent results. The organisation of complexity and contingency in this case pertains to the fact that possibilities of a remedy are limited if one wants to maintain a disappointed, normative expectation. It is prohibited to take the law into one's own hands, as it would cause a lot of uncertainty as regards (long-term) consequences, even though it might grant instant satisfaction. In this sense, legal procedures reduce (but do not annul) contingency: within ranges, consequences are predictable. The requirement of fairness "designs" the actual procedure in modern society. It requires, for example, equal access and equality before the court, equality of arms, the right to a public hearing, an independent and impartial tribunal, the presumption of innocence, the prohibition of self-incrimination and so on. It limits the power of the prosecution *de facto* and protects the defendant. This is not (only) to create clarity of arrangements but these demands stem from such fundamental organising principles as equality and individual autonomy. The same applies to the political system in modern Western society. If its only function (and performance) would be the organisation of complexity and reduction of contingency without reference to normative principles, then democracy would not be such a compelling notion. Dictatorship could serve that particular purpose as well. Here also, democracy articulates specific organising principles: freedom, equality, solidarity and welfare.

It is exemplary that in both cases organising principles set goals that can never be fully attained but that nevertheless prescribe how complexity and contingency should be organised. There is however not a fixed

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[10] This categorisation is akin to the one used by Scholten. See *P. Scholten,* Rechtsbeginselen, in: Mededelingen der Koninklijke Akademie van Wetenschappen (afdeling letterkunde, deel 80, serie B), Amsterdam: KNAW 1935, pp. 259–284.

[11] For example article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 14 of the International Covenant on Civil and Political Rights.

set of principles given *a priori,* with an unlimited period of validity. So, organising principles may vary and accents may shift from one principle to another as can be seen nowadays, where the accent on individual freedom seems to shift towards (public) safety.[12]

The foregoing findings allow for a re-formulation. Within a specific society, the issue of organising complexity and contingency acquires specificity as well. First, the reduction of complexity turns out to be a transformation of complexity. The legal system, for instance, contributes to the reduction of overall social complexity by replacing it by its own typical legal complexity. Moreover, the legal function of stabilising normative expectations can be specified in respect of the problem of transforming complexity and controlling contingency in its qualified formulation within a particular society.[13] Thus, the legal system is all about stabilising expectations facing disappointment.[14] The legal system, to put it differently, produces expectations that are to be maintained legally even in case of rejection and disappointment. The legal system offers a possibility of dealing with conflicts in a specific way. It generates law as an instrument to settle present and future conflicts and disputes. Consequently, the legal system is time-binding, according to Luhmann, referring to the fact that presently is determined how future disputes should be settled, based on past cases.[15] Of course, not every expectation can or will be stabilised in this sense. From the vast amount of communicated expectations in society, the legal system selects those sufficiently general or suitable to be generalised and strives to do so in the most congruent way.

So, the function of legal normativity is to provide society with expectations that are to be maintained even in case of factual rejection or disappointment. This does not mean that law guarantees the outcome of expectations. Rather, it allows for future certainty about these expectations as such. It allows us to make a realistic decision about our expectations and law helps us to formulate expectations about disappointments. The function of the legal system pertains to the normative expectations as

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12 Illustrative *H. Boutellier,* De veiligheidsutopie, Den Haag: Boom 2002. (Also available in English: The Safety Utopia, Deventer: Kluwer 2004) Such a shift or reconsideration follows usually after a prevailing type of social order is confronted with events that shock and challenge that specific social order, such as the "9–11"-like events.

13 For the above also see *Francot-Timmermans* (note 7).

14 For example *Luhmann* (note 8), p.138.

15 Ibid., pp. 129 ff. See also and further: *Lyana Francot* and *Bald de Vries,* Legal Education Re-enchanted, in: European Journal of Legal Education, 2006, Vol. 3, Nr. 1, pp. 3–20 and *J. Vranken,* Exploring the Jurist's Frame of Mind: Constraints and Preconceptions in Civil Law Argumentation, Deventer: Kluwer 2006, in particular Chapter 2.

indispensable structures for society and its subsystems. But we must enquire also into the contents of these norms. This is important because law's content is informative about the form and contents of social order of that specific society and hence its conception of justice. For this, recourse must be had to social theory that deals with describing contemporary society (as a specific appearance of social order). In a contemporary society, legal norms fulfil the described function but do that in a particular way, determined by time and space and in doing so they contribute in a particular way to the essence of that particular society. Is this still the case in *our* contemporary society? To delimit our inquiry, we use two axes: time and territory, converging in the concept of modernity. Following Beck, we distinguish modernity into two phases: first and second phase modernity.[16]

IV. Modernity

1. First Modernity

In the first phase of modernity, modernisation was geared towards the problem of absolute scarcity (as regards "needs"). The process of industrialisation contributed to a solution. It enabled, potentially, a certain degree of welfare for most, but it constituted a new problem, that of distribution: how to distribute this welfare justly? The process of democratisation contributed to the solution of the distribution problem. The legal system proved to be an appropriate instrument, both for facilitating industrial and economic development as well as organising democracy and facilitating a fair distribution, based on certain fundamental organising principles such as equality and freedom, and the believe in Progress and a society by design. But this did not take place in a territorial void.

We commonly assume that in understanding legal systems, the nation state is our point of departure. Indeed, it is within the political realm that law is produced and the nation state constituted the primary actor of the political system in first modernity. It follows that in first modernity, the author of the law was univocal: the state. Within the state, two institutions enjoy the authority to produce law: the legislative and the judiciary. It was within the common law system that the judiciary assumed the primary role of law producer, whereas in the civil law systems, the legislative was regarded as sole law-maker. This is not to say that statutory intervention did not play a pivotal role in the distribution of welfare within the common law jurisdictions also. Likewise, in civil

[16] It goes without saying that these two processes of modernisation are limited to what is termed Western societies.

law, the judiciary no longer is a mere "*bouche de la loi*". The systems are converging in this respect. In legal terms, though, the state remained sovereign in respect of the contents of legal norms within its territory, producing *national* law. It was also the primary author of international law, albeit that the procedure of law making differed from procedures that produced national law. (European law, or rather *Community* law could be considered, in terms of procedure as well as contents, as marking a transition to the second phase of modernity, as it breaks down the foundation of first modernity legal normativity: sovereignty.[17] Indeed, the Community legal system is effectively responsible for this by itself: it produced law to that effect![18])

2. Second Modernity

Second modernity can be termed as a phase in which the processes that took place in first modernity (industrialisation and democratisation) are radicalised and transformed into different processes. Beck distinguishes two: forced individualisation and multidimensional globalisation.[19] The former refers to the continuing process of "disembeddedness" and the search for new forms of social interaction, solidarity and social cohesion. Central here is the key concept of the responsibility of choice, *imposed* upon individuals who are forced to give shape to their lives themselves through making decisions about these choices – both trivial and fundamental – without knowing, or have the certainty, to be right or wrong, and without knowing all the consequences of their decisions. The latter – 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 disease such as bird flu or BSE. Globalisation, thus, is not restricted to the economic dimension but includes a political, cultural and moral dimension. The awareness in second modernity of side effects produced in the slipstream of first modernity causes Beck to speak of a world risk society:[20] a society that is confronted with self-produced risks as side effects of industrialisation,

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[17] This notion is addressed by many contemporary thinkers, for example, *U. Beck/E. Grande,* Das kosmopolitische Europa, Frankfurt a. M.: Suhrkamp 2004.

[18] See: E.C.J. 5 February 1932, 26/62, *Van Gend en Loos v. The Netherlands,* [1963] ECR 1; E.C.J. 15 July 1964, 6/64, Costa/ENEL [1964] ECR 585 and other pivotal cases.

[19] *Beck/Grande* (note 17), p. 50.

[20] *U. Beck,* Cosmopolitan Vision, Cambridge: Polity 2006, p. 22 and also p. 34. *U. Beck,* World Risk Society, Cambridge: Polity Press 1999.

wealth production and democratisation. These risks and consequences now demand (re)distribution. A critical attitude towards these processes and their consequences forms the kernel of the theory of *reflexive* modernisation.[21]

V. Legal Normativity in Second Modernity

Second modernity, described in this manner, has an obvious impact on the prevailing dimension of legal normativity. This impact refers to its territory or rather territories, to its authors and the preceding normativity it assumes (first order normativity). These are all interrelated. In respect of territory, the national domain of legal normativity remains in existence but is riddled with other spaces of normativity. Most obvious are those of European and global legal normativity but also spaces that are much more local, even more local than the state itself, made up of groups of individuals asserting a certain identity or, indeed, cities, metropolis, asserting themselves upon the world stage. One can speak of a globalizing normativity, interrelated to state normativity, but also of regional and local normativity. As normativity deals with the organisation of complexity and contingency, it can do so within different territories or dimensions or levels (as much as in many states, legal normativity is applied at the state, regional and local level). Furthermore, second modernity seems to transcend territory. First modernity legal normativity existed within a well-defined territory (the state) and held, on the whole, no authority outside it. It was the law of the land that applied. Second modernity also includes law that is territorially unbound but is primarily characterised by to whom it applies, wherever they are. Exemplary here is what can be termed "humanity law", found in treaties on genocide, crimes against humanity and the like, whose application is in the hands of "world courts" with unlimited territorial jurisdiction. Although the signature of the state as author still prevails in this legal category, at the same time their signing up to these laws heralds another erosion of the idea of state sovereignty. In another dimension it may be argued that the state is no longer the author at all and another type of legal normativity comes into existence, found in all kinds of protocols, covenants, codes of conduct, etc, drafted and agreed upon by corporations, global movements and other interests groups. It suggests that the state is no longer the exclusive author of legal normativity.

Second modernity, thus, poses new problems encapsulated in modern society's confrontation with itself. And legal normativity in the second

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21 *Beck/Grande* (note 17), p. 50.

modernity arises as a reaction to new problems. These new problems are conceptualised as "modern risks". They are side effects sprouting from the successes of first modernity. Beck attributes a number of characteristics to modern risks.[22] One of their important features is their global nature. Although risks may be produced locally – and their effects may become visible locally – their impact is global: as the production and transfer of wealth takes place globally, risks follow this pattern as they are a structural part of wealth production. The end-result is that risks contribute to inequality worldwide and seem to increase this inequality that already existed in respect of wealth distribution. This is particularly true in respect of developing countries. They still struggle with the problem of wealth production and just wealth distribution in an economy that is no longer national but part of a world economy. At the same time, they are confronted with modern risks. Their problem is double-up, and, in part, caused by Western first modernisation. Even if a solution is found for this problem, there is another problem. Beck refers to the idea that responsibility for risks cannot be easily attributed due to the absence of clear relation between cause and consequence.[23] The result is that no one seems to take or seems to be able to take responsibility for the production, distribution and consumption of modern risks. They lead to "organised irresponsibilities".[24] As such, risks function, in the view of the authors, as "complexity multipliers" and "contingency accelerators", and they confront legal normativity with new challenges.

Thus, although law is geared towards contributing to the organisation of complexity and contingency, in the risk society complexity and contingency have gained another dimension: this dimension is constituted by the global nature of risks as well as their unpredictability and weak causality – they are unpredictable future events, they may materialise in the form of a disaster or may not and if they do, one does not know where, when and how. It is clear that the legal normativity as formulated in the first modernity is not equipped to deal with the problem of attributing responsibility for risk at the global level and in the absence of clear causal relationships. Indeed, legal normativity takes clear causal relationship as a point of departure to allocate losses, rewards, rights and obligations and does so within the national space. Yet, if one is to be serious with the distribution of risks, a global conception of justice

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22 *U. Beck,* Risk Society – Towards a New Modernity, London: Sage 1992, pp. 20–22. For a critical analysis, see: *L. Francot/B. de Vries,* No way out? Contracting about modern risks, in: Archiv für Rechts- und Sozialphilosophie 2008 (forthcoming).

23 *Beck,* Risk Society (note 22), pp. 62–64.

24 Ibid. Beck refers to the "general lack of responsibility", p. 33.

needs to be formulated as a point of reference for adjusting basic concepts of legal normativity – such as causality, liability, etc. – in the second modernity.

VI. Organising Principles: Justice and Solidarity

Second modernity requires a reflexive perspective on legal normativity. As second modernity is a continuation of modernity as such, but under changing conditions,[25] legal normativity also is a continuation and has to take issue with these new conditions. This perspective pertains, first and foremost, to the organising principles. Legal normativity in the first modernity was guided by a particular conception of redistributive justice, equality, freedom and solidarity. These principles remain operational insofar they concern the distribution of wealth. However, under the changing conditions, articulated in the concept of risks, the range of these principles needs to be widened and quite literally so, as will be shown below. This particularly is the case in respect of justice and solidarity.

When we consider the principle of justice in first modernity, the first general observation is that justice was territorially bound. It obtained its specific meaning with the nation state and pertained to the distribution of national wealth. The nation state was regarded as the exclusive author of legal normativity on the basis of this conception of justice. Legal normativity was concerned with the vertical relationships between *citizens* and the state, expressed in law under the idea of the Rule of Law and democracy and the horizontal relationships among citizens *inter se* and expressed in the idea of a just redistribution of wealth based on equality but not aimed at equality.[26] Solidarity in first modernity was also a requirement and fulfilled a particular role in respect of redistributive justice. Solidarity too, was confined to the citizens of a state. Exemplary, here, is how solidarity is imposed by the state through for example tax laws that created a progressive taxing system as well as social welfare laws, such unemployment insurance, health insurance and state pension.[27]

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[25] *Beck* (note 2), Chapter 1.

[26] The design of the Welfare state within the (physical) borders of the nation state demanded a conception of distributive justice such as espoused and developed by *John Rawls,* A Theory of Justice, Oxford University Press 1971.

[27] As a general rule, we argue that justice was restricted to the nation state. This is not to say that justice was always limited to the nation state but this was incidental.

In the second modernity, we have observed structural changes in the make up of society, conceptualised by the process of globalisation and individualisation. Globalisation forced the differentiation of state and society and national borders are no longer confining economic, political, legal, social and cultural activity. This does not mean that the first modernity saw no cross border activity. What is new is that such activity has become a structural part of everyday life. Exemplary are the omnipresence of multinationals (or rather: global corporations), the scope of the media, such as the internet but also the development of international humanitarian law and human rights. But globalisation also brings along global problems: global terrorism, ecological and environmental dangers, depletion of fossil resources, etc. These problems are what we refer to as modern risks, following Beck. Furthermore, as we already have claimed above, these problems sharpen the distance between rich and poor in world society and this implies global injustice.[28] To deal with global injustice demands that we have to take a number of considerations into account. The first is that we can no longer fall back on the nation state as the sole author of legal normativity. This is so, as the problem does not concern the citizens of the state but all individuals, worldwide. Within this new constellation, individuals no longer solely obtain their identity by reference to the nation state but also by reference to consumption,[29] in the broadest sense, i.e. consumption of both wealth and risks. Although our welfare is to a large extent measured in terms of wealth consumption and risk avoidance and, hence, constitutive for the dichotomy of poor-rich, we are all "global consumers". The second is that the process of globalisation strengthens the idea that states and individuals can no longer exist in a state of relative isolation. Everything is connected with everything else and the world is one of mutual interdependencies.[30]

The problem of global injustice, taking these considerations into account is a problem of distribution, this time of risks and responsibility for risks. To address this problem demands the formulation of a distribution key. In another publication, the authors have formulated such a distribution key, which appeals to a global conception of justice.[31] This key entails two principles:

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[28] Contrary to Beck, who argues that risks will ultimately have an equalising effect; see also *Francot/de Vries,* No way out? (note 22), see the paragraph "The meaning of *risks*".

[29] This description is borrowed from *Zygmunt Bauman,* Consuming Life, Cambridge: Polity 2007.

[30] See *U. Beck,* Cosmopolitan Vision, Cambridge: Polity 2006, p. 7 as well as pp. 22–23.

[31] See *Francot/de Vries,* No way out? (FN 22).

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.

Rather than that the distribution key focuses on the distribution of wanted, but scarce, goods, it focuses on the abundance of unwanted side-effects. It demands the formulation of obligations no one really wants and aims at an unequal distribution to compensate unequal "risk positions".[32] It is not aimed at solely burdening those who actually or physically cause the production of risks as such a view would imply a huge burden on those who still struggle with the problem of the first modernity.[33] The key imposes responsibility and this should fall on the shoulders of those who enjoy unhindered access to wealth.

Making this key operational demands solidarity on a global scale. As a concept, global solidarity is easily understood. It demands taking into account the interests of others worldwide and acting upon it. The distribution key makes these interests visible. However, reality shows a different picture. In the formulation of our interests and in the undertaking of subsequent action, we employ the rationale of first modernity with its focus on progress in terms of material and quantifiable wealth. It is an economic approach based on cost-benefit calculations, in which both costs and benefits appear in the form of money. Our actions are subsequently guided by the net result of these calculations. This rationale is strong and penetrates almost all domains of life in second modernity as well as it did in first modernity. This rationale seems to be the major obstacle for the constitution of global solidarity. How can we turn the obstacle into an advantage? One way of progressing is to realise that solidarity *is* possible. It may not be a matter of individual moral conviction as was already visible in first modernity. First modernity solidarity evolved into a state-imposed system.[34] The state was perceived as the sole actor who was able to implement solidarity through law. It could do so for two reasons: it could fall back on its monopoly on power and on the belief that only the state was able to organise complexity into a

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[32] *Beck*, Risk Society (FN 22), pp. 41–44.

[33] Industry in developing countries contribute to risk production to a large extent but without enjoying the wealth this industry generates; this flows to the wealthier areas of the world, who also control these industries.

[34] *A. De Swaan*, Zorg en Staat – Welzijn, onderwijs en gezondheidszorg in Europa en de Verenigde Staten in de nieuwe tijd, Amsterdam: Bert Bakker 2004 (Translation: In Care of the State: Health Care, Education and Welfare in Europe and America, Cambridge: Polity 1988).

social order in which it strived at harmonising individual (material) interests.

As stated before, in a global world, the state no longer holds this privileged position but the need to harmonise individual material interests remains, but this time also in respect of risks. The kernel of individual interests in this respect lies in the *avoidance* of risks, their effects and in the case of loss, compensation. Global solidarity refers to the organisation of worldwide interdependencies. One of these relates to the double problem that exists in developing countries. There they focus, first, on the relief of the problem of scarcity; they cannot deal wit the threat of risks. When one is concerned with bare survival, risk management is not a priority.[35] This could lead to problems in the affluent West, affecting "our" wealth and way of life. It may cause the complete depletion of natural resources, large-scale ecological damage that may have factual effects in modern Western societies, in addition to financial, political, cultural and social effects. Hence, it is in the self-interest of Western societies to seek a solution that is mutually beneficial to all, to deal with the problems of risks. It makes it plausible to suggest the implementation of the distribution key through legal normativity.[36]

VII. Conclusion

Contemporary society presents itself to us as complex and contingent. It manifests itself through almost endless possibilities to give shape to one's life and it takes place by means of selections. These selections are not taken ad random but take place within certain frameworks. Instruments draw these frameworks. Through these instruments, aiding us in our decisions, we seek to organise complexity and contingency. Organisation does not only imply reduction but also brings along the transformation of complexity and contingency. At the most abstract level normativity is expressed in organising principles, such as justice and solidarity. These principles give shape to the social order within a given society, determined in time and space. They provided us in first modernity with

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[35] *Beck*, Risk Society (FN 22), p. 41, argues that there is a "systematic 'attraction' between extreme poverty and extreme risk".

[36] One of the remaining questions is who the author of this *transnational* legal normativity should or can be. It is clear that the state or states by themselves are incapable to do so, even at the international level. Second modernity is also characterised by the evolution of many other types of social actors whose decisions and actions have a global impact. It is outside the scope of this article to elaborate, but one can think of NGO's, multinationals, interest groups and global movements. These are in the process, it can be argued, to "become" authors of law.

"social imaginaries" that haunt us in second modernity.[37] A particular category of normativity makes these principles more concrete, riddling everyday life with them. This category is legal normativity – the focus of this article. The enquiry into the spaces of normativity is circumscribed by the eras of first and second modernity, as distinguished by Beck.

At bottom, first modernity normativity was characterised by scarcity and distribution. Organising principles, such as freedom and equality enabled the development of welfare and, hence, a solution to the problem of scarcity. This led, first, to the development of a just redistribution of welfare, which, in a nutshell meant that anyone who participates in the production of wealth has a claim to it, and, second, to the development of a conception of national solidarity: those who could not (temporarily) participate in the production of welfare, still could claim a piece. First modernity legal normativity was based on the organising principles of redistributive justice, freedom, equality and solidarity, circumscribed by the perspective of the nation state. Justice encapsulated the idea of the fair redistribution of resources and wealth at the national level. In also implied a particular relationship between the nation state and its citizens, circumscribed by the rule of law and democracy. The development and implementation of just redistribution, through law, saw its zenith in the Welfare state and the widespread belief in the *Machbarkeit* or design of society. One implication of this belief consisted of the idea that society and nation state coincided and, hence, the borders of the nation state converged with the borders of society and constituted the boundaries of justice: justice in the first modernity implied national justice.

The transition to second modernity is marked by deception: the Welfare state was found too costly to be maintained and other developments made us aware of the idea that society cannot be subjected to design. Processes radicalise in the second modernity and this radical nature transcends the borders of the nation state: globalisation and individualisation confronts society with developments that cannot be contained by the nation state alone. The side effects – risks – shed a new light on the problem of wealth production and its just distribution. Wealth distribution implies risk distribution. The distribution of these risks follows the same pattern as wealth distribution but leads to an unjust result. Why is this so? One important reason is that legal normativity had as its sole focus the *national* distribution of wealth. A related problem is that risks are by their nature global. National legal normativity can manage risks only to a certain degree, merely seeking to contribute to national justice.

[37] Cf. *C. Taylor,* Modern Social Imaginaries, Durham/London: Duke University Press 2004.

But, as the risk distribution problem is a global problem, legal normativity merits a conception of global justice as its organising principle. This new concept of distributive justice demands a new perspective on other, interrelated organising principles such as freedom an equality, but in particular solidarity. This conception entails a radicalised form of social justice, leading to a new, global distribution key, based on global solidarity.

This key is informative about the meaning of global solidarity. Part of it entails the *unequal* distribution of risks. Legal normativity is the appropriate instrument to give shape to global solidarity. It follows that current legal normativity has to reconsider its perspective and transcends the national outlook, as much as it could reconsider its perspective that gave shape to the Welfare state. The validity of this conclusion is a starting point of further research and to investigate legal experiments that attempt to deal with the conception of global justice, such as sustainable development, micro-credits, and Third World debt relief. In the end, global solidarity, when taken seriously, may prove to be sowing the seeds for solutions of problems at the local level – problems that found their origins at the global level.