

See discussions, stats, and author profiles for this publication at: <https://www.researchgate.net/publication/289580714>

Sustainable uncertainty: Normalising the ecological state of exception

Article in *Journal of Water Law* · January 2014

CITATION

1

READS

74

1 author:



[Ubaldus de Vries](#)

Utrecht University

40 PUBLICATIONS 45 CITATIONS

[SEE PROFILE](#)

Some of the authors of this publication are also working on these related projects:



Reflexive modernisation and law - world risk society [View project](#)



Fighting harmful products – what's wrong with nudging? [View project](#)

SUSTAINABLE UNCERTAINTY: NORMALISING THE ECOLOGICAL STATE OF EXCEPTION

DR BALD DE VRIES

*Utrecht Centre for Water, Oceans and Sustainability Law, Utrecht University**

[W]hat characterised their counterrevolutionary political philosophy was the recognition that their times needed a decision.¹

Modern economic rationality is an instrumental rationality geared towards the idea of 'progress': the continuous need for wealth production (in quantitative terms). This rationality underscores our political and legal order (amongst others). Law and politics can be said to serve the interests of progress. However, we have become increasingly aware of the side effects this rationality brings about. These side effects can be conceptualised, following the German social theorist Ulrich Beck, in terms of 'modern risks'; they are manufactured uncertainties.

Global warming can be considered a modern risk. It is becoming more and more plausible that modern economic rationality and ways of wealth production are contributing factors to global warming and, hence, climate change. It has an impact on water issues in the broadest sense. Climate change poses a threat to the natural environment and carries the potential of catastrophic social consequences. To deal with it implies managing its ecological and social side effects. The question is how. The side effects of economic rationality are countered by another rationality, which one could characterise as 'security' or 'safety' rationality. With this approach we are considered to be in a 'state of exception' – a situation out of the ordinary that demands attention with an aim to return to, or re-establish, the ordinary. The state of exception, as a theoretical concept, suggests an increase of power structures in times of crisis. What is new is that global warming and climate change can be considered as an *ecological* state of exception leading to a *new* normality that demands different ways as to how we want to live together in our social and natural environment.

In this article I seek to explore the idea of an ecological state of exception as the 'normal' state of affairs, demanding a new rationality and, consequently, ask to what extent a reconsideration of self-evident assumptions that underscore modern contemporary life, economic, political and social is necessary and desired.

INTRODUCTION

Modern economic rationality is an instrumental rationality. It is geared towards the idea of progress, understood as the continuous need for wealth production (in quantitative terms). This rationality underscores amongst others

our political and legal order. Indeed, law and politics can be said to serve the interests of 'progress'.

However, we become increasingly aware of the side effects this rationality brings about. The German social theorist Ulrich Beck has conceptualised these side effects in terms of 'modern risks'.² These risks can be defined as uncertain future events with catastrophic potentiality; they are systematically produced and self-inflicted and have a global reach. Risks are 'manufactured uncertainties' and constitute one of the fundamental problems of contemporary global society, depicted by Beck as a world risk society. Increasingly, these risks do materialise in catastrophes with huge ecological, physical and social consequences.³

Global warming can be considered a modern risk. It is now agreed upon that modern economic rationality and ways of wealth production are contributing factors to global warming and, hence, climate change. The fifth report of the IPCC is conclusive, at least in this regard:

Human influence has been detected in warming of the atmosphere and the ocean, in changes in the global water cycle, in reductions in snow and ice, in global mean sea level rise, and in changes in some climate extremes. This evidence for human influence has grown since AR4 [Assessment Report 4, 2007]. It is extremely likely that human influence has been the dominant cause of the observed warming since the mid-20th century.

...

Continued emissions of greenhouse gases will cause further warming and changes in all components of the climate system. Limiting climate change will require substantial and sustained reductions of greenhouse gas emissions.⁴

The current economic rationality and ways of wealth production pose a threat to the natural environment and carries the potential of catastrophic *social* consequences. Global warming and (subsequent) climate change is perhaps the all-embracing manifestation of this threat. It impacts, considering the context of this special issue, on water management in the broadest sense, expanding to securing fresh water resources, dealing with rising sea levels and floods on the one hand and the exploitation of

2 U Beck *Risk Society: Towards a New Modernity* (M Ritter (trans) Sage London 1992).

3 One could also speak of constructed uncertainties, as De Jong did. In this sense, 'risks are constructions in which we express the level of certainty we have about the likelihood that our current behavior will have negative effects in the future'; see De Jong 'Regulating uncertain risks in an innovative society' in E Hilgendorf, J P Günther (eds) *Robotik und Recht Band 1* (Nomos Verlag Baden Baden 2013) 163,183.

4 IPCC *Climate Change 2013: The Physical Science Basis* (IPCC 2013) 15, 17.

* Assistant Professor, Institute of Constitutional, Administrative Law and Legal Theory, School of Law, Utrecht University.

1 C Schmitt *Political Theory* (The University of Chicago Press Chicago 2005).

oceans and oceans beds, rivers and lakes, transportation and the disclosure of the Arctic and Antarctic on the other. To deal with this threat implies to manage these ecological and social side effects. The question is how we can formulate, distribute and enforce responsibilities to deal with climate change and its side effects?

The side effects of economic rationality are currently countered by another rationality, or so it seems. This rationality one could characterise as a 'security' or 'safety' rationality. The application of the precautionary principle or the demand of 'sustainable' development (when engaging in economic activity) suggests such a rationality. However, this approach falls far short: the focus seems solely upon the management of risks and their consequences rather than addressing the causes of these risks: the manner in which we seek wealth.

In this article I attempt to argue why the approach falls short. The current approach suggests that we are in an 'ecological state of exception' – a situation out of the ordinary that demands attention with an aim to return to, re-establish or, even better, to preserve the ordinary, dominated by economic rationality aimed at 'progress'. The argument, however, is that this ecological state of exception must be considered to be the 'normal' state of affairs. This realisation subsequently forces us to consider a new rationality and a subsequent reconsideration of self-evident assumptions that underscore modern contemporary life. Such rationality must break through the paralysing effects manufactured uncertainties create on the one hand (akin to the Hobbesian state of nature) and complete sustainability (or security) on the other (akin to the Hobbesian state of absolute rule) in order to deal with risk *and* its causes. It suggests a reconsideration of the *Unterbau* of modernity: the institutions and structures that shape modern contemporary life, including the state, democracy, the rule of law, property relations, notions of responsibility, obligations and liabilities etc.

Following this introduction, the next part of the article sketches the contours of the world risk society, as developed by Ulrich Beck, drawing upon previous work. It considers the relationship between wealth and risks, the conceptual characteristics of these risks and how climate change can be perceived as a modern risk. The third part of the article problematises the dominant rationality aimed at 'progress', seeking to explore why it prevents structural solutions to the problem of the risk society and, hence, climate change. In doing so, it draws on the theoretical notions of the 'the state of exception', 'hegemony', 'supremacy' and 'sovereignty', as developed by Carl Schmitt, Giorgio Agamben and Antonio Gramsci, amongst others. In the ecological state of exception, obligations of sustainability and approaches such as the precautionary approach must be considered as no more than band aids to minimise or at least manage the side effects of the dominant, hegemonic, economic rationality. These band aids are of a temporary nature, as a state of exception would suggest them to be, allowing the continuing enforcement of the ecological state of exception.

This state of exception fails, however, to address the (legal) *Unterbau* of contemporary modern society, as this would mean a crisis in and of the economic and political system. It is exactly this crisis, as will be explained in final part of this article, that is needed. One way to force such a crisis

(at least intellectually) is to adopt a new methodology of thought based on the notion of reflexivity with an aim to come to a new instrumental rationality. In the end, this contribution strives to sketch the beginnings of a normative theoretical framework (to be worked out in much more detail later) within which issues on the broad theme of water management can be addressed in subsequent research projects.

RISK SOCIETY

In his modern classic *World Risk Society*,⁵ Beck depicts contemporary society as transforming from a state-based industrial society towards a world risk society. In the risk society, we are confronted with the side effects of the successes of industrial society. Beck has conceptualised these side effects in terms of 'modern risks'. For the sake of theoretical clarity, he makes a distinction in the process of modernisation between two phases: first and second modernity. Each phase is marked by a fundamental problem.⁶

The social theory of first and second modernity: two fundamental problems

The state-based industrial society in first modernity can be characterised by the processes of industrialisation and democratisation. These processes dealt with the problem of scarcity, wealth and its distribution, power and tradition. Indeed, Beck argues⁷ that industrial society had to deal with the question 'how socially produced wealth could be distributed in a socially and also legitimate way'. Technology and economy (capitalist) created answers to the problem of scarcity and wealth production. Political developments (along liberal lines) created solutions to the fair distribution of wealth and the control of power vis-à-vis the individual citizen, shaped by parliamentary democracy and the rule of law, at least in what is called the West. These developments did not take place in a 'territorial void'.⁸ First modernity is firmly embedded in the framework of the sovereign nation state. Rawls's *A Theory of Justice*⁹ might be the perfect legal philosophical description of this scheme.

In second modernity the processes that shaped first modernity have radicalised into processes of 'forced' individualisation, illustrating the disembeddedness of the individual in an uncertain and insecure world and multi-dimensional globalisation (of economy and technology in particular) eroding the concept of the political.¹⁰ The latter refers to the observation that societal developments are now global in nature and to the consequent erosion of the idea of sovereign nation states. The world order is trans-

5 Beck (n 2).

6 It is not the aim to reduce society's identity to that of risks alone. Rather, it is illustrative of one of the problems that become visible in Beck's wider theoretical framework of 'reflexive modernization' (which will be addressed later); see also L Francot, B de Vries 'No way out: contracting about modern risks' (2009) 95(2) *Archiv für Rechts- und Sozialphilosophie* 199–215 at 201.

7 Beck (n 2) 19.

8 L Francot, U de Vries 'Normativity in the second modernity' (2008) 39(4) *Rechtstheorie* 477–94 at 485.

9 J Rawls *A Theory of Justice* (Oxford University Press Oxford 1972).

10 U Beck, E Grande *Cosmopolitan Europe* (C Cronin (trans) Polity Press Cambridge 2004) 28.

forming into a non-exclusive network of interdependent entities: states, IGOs, NGOs, movements, corporates etc.

More to the point, however, second modernity makes us aware of the side effects produced in the slipstream of first modernity; it causes Beck to speak of a 'world risk society'.¹¹ The world risk society, then, exists in the awareness of and confrontation with the side effects of these first modernity processes and their successes: wealth, freedom, democracy etc. In the world risk society we live with 'manufactured uncertainty',¹² through organised non-responsibility in the production of risks. The world risk society confronts us with an added distribution problem:

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?¹³

Risks are the new distribution problem

Risks, in general, can be defined as uncertain future events with a catastrophic or at least unwanted potentiality if and when they materialise. Modern risks, in Beck's analysis, are the same but they differ from, say, traditional risks: they are *manufactured* uncertainties; the production of wealth implies the production of risks. At least five characteristics can be attributed to them.¹⁴

Since modern risks are to be understood as integral side effects of first modernity, in which the process of industrialisation played a key role, the first aspect is that they are self-produced in a structural way and, consequently, self-inflicted.¹⁵ The second aspect is the global character of modern risks.¹⁶ Although modern risks are produced locally (worldwide), their consequences are both local *and* global. Illustrative, here, is global warming and rising sea levels. The third aspect, one that follows from the global reach of modern risks, refers to the existence of social risk positions.¹⁷ People are exposed to risks in many different ways. Some are able to limit the possible manifestation of risks or to limit the consequences of such manifestation. A large group, however, is at the mercy of the manifestation and consequences of modern risks.¹⁸ These social risk positions – contrary to class positions – are not limited to the borders of the nation state but exist in, between *and* across states.¹⁹ The fourth aspect is the

'invisibility' of risks. What is meant here is that risks cannot be perceived as sensory. Modern risks are constructions of scientific knowledge and exist in mathematical or chemical formulas. It also means that individuals or groups of individuals in scientific and political key positions can determine when something is a risk.

The ability to formulate risks does not mean that one is able to predict beforehand and precisely when and how risks manifest themselves in the shape of disasters and catastrophes. Such knowledge exists in probability and educated guesses – in other words, such knowledge exists in terms of uncertainty. Risks bind the future and the present, as they force us to look forward, making us conscious of a future, which may be unfavourable (or not) but without us being able to determine cause and effect in a direct way, linking side effects to actions and actors. What we do know is that if we do not act, catastrophic events will happen. We also know, more or less, which actions are required.

The last aspect Beck ascribes to modern risks follows from this and concerns the problem of responsibility and causality. A central notion of responsibility (not liability, which is a retrospective attribution of responsibility) is the possibility to attribute an effect (or consequence) to an actor, whose actions caused the effect. In other words, the attribution of responsibility is conditioned by this notion of (linear) causality.²⁰

As it becomes increasingly difficult to detect causal connections in the production of risks (and in their consequences), it also becomes more difficult to determine who is, can or should be held responsible and for what, and *how*, ie by which enforcement mechanism should responsibilities be enforced. Given the global nature of the problem on the one hand, and the fact that legal enforcement is nation state-based on the other hand, this is a major issue.

Beck concludes:

Corresponding to the highly differentiated division of labor, there is a general complicity, and the complicity is matched by a general lack of responsibility. Everyone is cause *and* effect, and thus *non-cause*. . . . This reveals in exemplary fashion the ethical significance of the system concept: *one can do something and continue doing it without having to take personal responsibility for it*.²¹

In the end, modern risks, which are by their nature systematically man-made and self-inflicted, are global in their reach and sensorily invisible, leading to unequal social risk positions and result both in and from organised irresponsibility owing to a weak causality. One final characteristic of risks is the magnitude of their manifestations in the shape of disasters, catastrophes and calamities.

Global warming and risk: ecological and social consequences

Global warming and climate change can be considered a modern risk. To be more precise, global warming and subsequent climate change constitute the manifestation of

11 U Beck *Cosmopolitan Vision* (C Cronin (trans) Polity Press Cambridge 2006) 22, 34. See also Beck (n 2) 2.

12 Beck (n 2) 5.

13 *ibid* 19.

14 Derived from L Francot, U de Vries 'Justice unbound: responsibility in the second modernity' in U de Vries, L Francot *Law's Environment: Critical Legal Perspectives* (The Eleven International Publishing The Hague 2011) 201–220 at 206–208.

15 Beck (n 2) 21.

16 *ibid* 21–22.

17 *ibid* 35–36.

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

19 *ibid*. Beck considers risks to have an equalising effect, whereas it may be argued that, at least for the time being, risks have a discriminatory effect; see also Francot and de Vries (n 14) 209–10.

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

21 Beck (n 2) 33 (emphasis in original).

the side effects of the process of industrialisation and wealth production based on a particular economic rationality. Scientific evidence seems to be overwhelmingly pointing to this fact. As the latest report of the IPCC states, to repeat:

It is extremely likely that human influence has been the dominant cause of the observed warming since the mid-20th century.

...

Continued emissions of greenhouse gases will cause further warming and changes in all components of the climate system. Limiting climate change will require substantial and sustained reductions of greenhouse gas emissions.²²

Global warming and climate change – as actual processes – present an uncertain future of massive ecological risks and in their wake huge social consequences. Within the context of this special issue, they impact on water management in the broadest sense pertaining to, amongst others, rising sea levels, floods, fresh water resources, fisheries, pollution, exploitation and transportation. Fukushima is a vivid illustration of the ecological and social consequences. It might have well been the case that building a nuclear plant near the shore was safe at the time it was built; however, climate has changed to the extent that the natural phenomenon that caused the disaster has changed in intensity.

Climate change constitutes self-manufactured (directly or indirectly) uncertainty in a structural and self-inflicting way, globally and locally produced. Climate change as such is (as yet) sensorily invisible, calculated and shaped within mathematical and chemical formulas. It leads to disparate social risk positions and result both in and from organised irresponsibility owing to the unwillingness to accept the link between cause and effect. Resulting catastrophes will lead to massive social and ecological damage.

Indeed, as Beck puts it, referring to Giddens, 'there are no excuses left'.²³ Giddens succinctly debunks criticism against the human causes of climate change²⁴ and pleads too for a call to action, breaking through to what he calls the 'Giddens paradox':

Since the dangers posed by global warming aren't tangible, immediate or visible in the course of day-to-day life, however awesome they appear, many will sit on their hands and do nothing of a concrete nature about them. Yet waiting until they become visible and acute before being stirred to serious action will, by definition, be too late.²⁵

In the following paragraphs I seek to tease out an argument with an aim to break through the current frame of thought about how to deal with the ecological and social consequences of climate change, from a political-legal perspective. In doing so, I integrate, methodologically, social and political theory. My aim is not to analyse these theories as such, but to use them for a particular purpose: to think differently – reflexively – about the (legal) *Unterbau* of modernity.

22 IPCC (n 4) 15, 17.

23 U Beck 'Climate for change, or how to create a green modernity' (2010) 27(2–3) *Theory, Culture & Society* 254–66 at 255.

24 A Giddens *The Politics of Climate Change* (Polity Press Cambridge 2009) 17 ff.

25 *ibid* 2.

STATE, SOVEREIGNTY AND EXCEPTION

Our world view is determined by the political concept of the state. We like to consider the world order as organised in terms of nation states on the national-international axis. The sociology of legal concepts considers (the liberal, constitutional, democratic but at least the sovereign) state as 'self-evident in the conscious of our age similar to the monarchy of the seventeenth Century'.²⁶ It is the image of the world having the same structure that is immediately understood as appropriate as a form of its political organisation. Sovereignty is the key word with which the state is identified in this structure. The essence of the state, thus, lies in the idea of sovereignty and for Schmitt sovereignty exists in the power to decide. Indeed, Schmitt famously defined the sovereign as 'he who decides on the exception'.²⁷

State of exception and the role of the state

Sovereignty then, implies the power to deal with internal and external threats through law or, in deciding upon a state of exception, through decision, suspending law. These threats, in Schmitt's theory, pertain to the friend-enemy distinction, which shapes the political landscape and lies outside the scope of the current thesis. It is not my aim to formulate a critique on Schmitt's thesis. Rather, the point is that in the context of climate change it appears that the exception has become the rule. In Schmitt's analysis the state of exception is called upon when the preservation of the state (in terms of power) demands this. It implies the suspension of law for the sake of survival and, implicitly, law itself. In this sense, the state of exception is presented as exceptional, provisional and temporary. Its aim, although paradoxical, lies in restoration: restoring or returning to the normal state of affairs (in which law operates as the instructive point of reference guiding our actions). It is paradoxical, because it cannot be made subject to law:

The exception, which is not codified in the existing legal order, can at best be characterised as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law.²⁸

The state assumes both responsibility and control in Schmitt's view, and does so in an authoritative and authoritarian way. It befits the *raison d'être* of the state, which can be traced in providing certainty and security for its citizens. The sovereign (however it is constituted) can decide upon a state of exception (a state out of the ordinary) with an aim to restore the ordinary and secure certainty. Hence, we call upon the state for solutions when our lives and property, our way of living, is threatened. Indeed, as Beck explains from a sociological perspective, we are limited to 'methodological nationalism': looking at problems only from within the paradigm of the state.²⁹

This notion of the state is outdated and has been overtaken by events. On the one hand, the state has evolved, at least

26 C Schmitt *Political Theology* (The University of Chicago Press Chicago 2005) 44.

27 *ibid* 5.

28 *ibid* 6.

29 Beck (n 11) 24.

in the Western world, into a *liberal* state, with its emphasis on the rule of law (*Rechtsstaat*), democracy and individual autonomy, steering, in a way, the processes of industrialisation, democratisation and individualisation. This has brought wealth and freedom. In Schmitt's view, the political-theoretical implication of this evolution is the demise of the sovereign.³⁰ Indeed, he rejects the liberal state as it makes 'the state a compromise and its institutions a ventilating system. The state and its institutions are confined, in their function, to no more than 'securing the conditions for liberty and eliminating infringements of freedom'. The main driving force is competitive economy (market capitalism).

Schmitt concludes, with a degree of cynicism, that: 'in an economic age, a state which does not claim to understand and direct economic relations must declare itself neutral with respect to political questions and decisions and thereby renounce its claim to rule'.³¹

The economic age, it can be argued, has been radicalised through the ongoing process of globalisation and individualisation, as Beck explained (as outlined above). It has led to a further erosion of the state and its *raison d'être* – the state is no longer in control and is subjected to these processes as much as we are as individuals. It is no longer the exclusive actor on the world stage. It has become, at least in terms of the risk society and its fundamental question (how to distribute risks) part of the problem. The world has become one of mutual interdependencies – a non-exclusive network of interdependent entities: states, IGOs, NGOs, movements, corporates etc.³² It is driven by an instrumental economic rationality. It is instrumental to the idea of linear and quantitative progress based on a particular economic model, best described as neo-liberal capitalism.

Supremacy and a continuous state of exception

The neo-liberal capitalist model is the perceived behemoth of this rational force. It may be suggested that this rationality and the economic system underscoring it, is hegemonic. I have chosen the concept deliberately. It is a concept in cultural and political theory, expanded upon by Antonio Gramsci in his *Prison Notebooks*.³³ In his work, he refers to the idea of subordination by means of implied power, where an elite group controls the system of values in state society (and in other state societies), rather than through the use of express force and domination. In the context of this contribution, it may subsequently refer to the implied power of the contemporary capitalist market-based economic system that controls the system of values in contemporary world society. The point about hegemony, as Gramsci used it, is that hegemonic control is indeed implied in civil society through, for

example, private organisations such as the church, schools, labour unions etc.³⁴

The reality seems more ominous and, in the scholarly debate about hegemony in the global economy, the preference is to speak of supremacy instead of hegemony. As Morton explains, referring to Gill,³⁵ it rests on what is called new constitutionalism, which refers to the erosion of the social fabric of civil society subjected to neo-liberalism discipline, in terms of efficiency, competitiveness, etc, and to market civilisation. The latter refers to contradictory practices of, on the one hand, cultural and ideological forms of capitalist progress and, on the other hand, 'patterns of social disintegration and exclusionary and hierarchical patterns of social relations'.³⁶ Morton concludes:

New constitutionalism results in an attempt to make neo-liberalism the sole model of development by disseminating the notion of market civilisation based on an ideology of capitalist progress and exclusionary or hierarchical patterns of social relations.³⁷

It would suggest that with the demise of the sovereign state there is no possibility of a state of exception; no possibility to decide upon an exception, to turn the tide. It is Giorgio Agamben who develops this argument but in a contrary and oppositional way. Agamben explored the concept in the wake of 9-11 and the state of emergency the Bush administration framed upon society and, indeed, the world. Agamben departs from the notion of it being a *provisional* matter to deal pragmatically with an emergency situation: a terrorist attack; a flood etc. Rather, the state of exception has become a 'the dominant paradigm of government . . . one of the essential practices of contemporary states, including so-called democratic ones'.³⁸

It allows for the unusual extension of power beyond law with the potential to transform democracies into totalitarian states. It is visible in the shift in focus that takes place in many states from freedom to security, prevention and surveillance, for example in the so-called war on terrorism unleashed after 9-11, creating non-legal spaces such as Guantanamo Bay and procedures including extraordinary rendition.³⁹ But it is not only visible in the terrorist/criminal context. It is also visible in how economic interests are served and economic power relations continue to be protected. If we consider, referring back to Beck's wealth-risk continuum, the permanent state of exception, it may be concluded that the state of exception exists also for the benefit of the problem of wealth, its production, accumulation and distribution, ignoring the

30 *ibid.* It is this, as well as his Nazi-affiliation, that makes Schmitt controversial but nevertheless (or because of it) instructive for contemporary thought.

31 C Schmitt *The Concept of the Political* (G Schwab (trans) The University of Chicago Press Chicago 2007) 88.

32 The social evolution of the status and function of the state is subject to much debate. See also for example M Castells *The Rise of the Network Society Vol 1* (2nd edn 2010) <http://onlinelibrary.wiley.com/book/10.1002/9781444319514> and Z Bauman *Postmodern Ethics* (Blackwell Publishing Oxford 1993).

33 Selected in A Gramsci *Selections From the Prison Notebooks* (Lawrence and Wishart London 1971).

34 A D Morton *Unravelling Gramsci: Hegemony and Passive Revolution in the Global Economy* (Pluto Press London 2007) 89. In this sense it is akin to the concept of bio-politics and governmentality; see for example Lemke, drawing upon Foucauldian thought: T Lemke 'The birth of bio-politics: Michel Foucault's lecture at the Collège de France on neo-liberal governmentality' (2001) *Economy and Society* vol 30 Issue 2 pp 190–207.

35 Morton (n 34) 126–27.

36 S Gill 'Globalisation, market civilisation, and disciplinary neo-liberalism' (1995) 24 *Millennium Journal of International Studies* 399 <http://mil.sagepub.com/>.

37 Morton (n 34) 126–27.

38 G Agamben *State of Exception* (Kevin Attell (trans) The University of Chicago Press Chicago 2005) 2.

39 Margaret L Satterthwaite 'Rendered meaningless: extraordinary rendition and the rule of law (Center for Human Rights and Global Justice Working Paper Number 11 2006); see: http://www.chrgj.org/publications/docs/wp/WPS_NYU_CHRGJ_Satterthwaite_Rendition_Final.pdf.

correlated problem of risk production, accumulation and distribution. How is it possible to break through this?

An ecological state of exception as the 'normal' state of affairs

As noted above, Schmitt saw in the sovereign the entity that can decide on the state of exception. The concept of the state of exception itself has been analysed by Agamben to conclude that we live in a permanent state of exception – as a means of contemporary governance. I 'borrow' the idea of the state of exception, but with a different aim and for a different purpose. Contemporary society is increasingly aware of its confrontation with the side effects (risks) of the modern project and its processes. These have become objects of law and policy with an aim to manage them. However, this 'management' falls short because it merely addresses the side effects without addressing its causes: the production of wealth must continue but its side effect must be addressed. This is, the argument goes, untenable in the long run.

It might also be suggested, indeed, as I do too, that we currently live in a state of exception. This state of exception is, however, an *ecological* state of exception. Usually, those in power decide upon a state of exception: the sovereign, like a state. However, the ecological state of exception is the result of the aforementioned 'manufactured uncertainty'.⁴⁰ We, or modernity as such, have brought about the state of exception. (With some artistic licence, it can also be said that the natural environment (our 'ecology') has decided and imposed upon the social environment (our 'sociology') a state of exception.)

We misinterpret this state of exception as we are blinded by particular interests. The aim, when in a state of exception, is to take measures to control the situation and restore the 'normal' state. However, in line with Agamben, what we see is that the ecological state of exception has become the working paradigm. Ideally, or considering the notion of exception, the idea is to take measures to restore the normal state of affairs. This 'normal' state of affairs is a state in which economic rationality aimed at progress remains the organising principle of society. Emergency measures that are taken are merely directed towards limiting or managing the side effects of this economic rationality. The precautionary principle is a good example, which directs that in case of doubt about possible side effects a given action should not be permitted.

*Precaution: a brief excursus*⁴¹

The precautionary approach is a modern interpretation of the notion of *prudentia*, which in essence means that when acting or making decisions caution is a wise counsel. It expresses in more general terms our qualified approach towards uncertainty. The essential feature lies in the scientific uncertainty about risks – the presence of a deficit of scientific certainty.⁴² A more general description

of the precautionary approach, emphasising this point, is found in the academic literature.⁴³ Fisher provides a concise description, stating it as a principle: '... that in cases where there are threats to human health or the environment the fact that there is scientific uncertainty over those threats should not be used as the reason for not taking action to prevent harm'.⁴⁴

Indeed, the literature highlights scientific uncertainty as an important feature, if not *the* distinguishing feature of the approach. Freestone, cited in Birnie, Boyle and Redgwell,⁴⁵ for example, also stresses that taking regulatory measures should not be obstructed by the absence of scientific evidence about the effects of such activities if there is a threat of environmental damage. The absence of a general consensus about what the approach exactly demands stands in the way of adopting it as a hard-and-fast legally binding rule. It is far from certain what the meaning is of the approach or its application and consequences in order to consider it as a rule of international law. Indeed, Birnie and others suggest that it is 'far from evident that the precautionary approach [...] has or could have the normative character of the rule of law'.⁴⁶

The approach does not prescribe what to do in a situation of scientific uncertainty; rather, it allows policy-makers, legislators, executives and judges to frame a given situation or to construct a set of events in terms of uncertainty to justify a preferred course of action (to protect the environment or public health or to allow experimentation with novel techniques etc) where it is unclear by what interests they are guided.⁴⁷

In doing so, the precautionary approach is used as a means to hold on to the legal fiction that law is based on past events (existing information) to prescribe a future course of action. But this is exactly what the approach cannot do because, in the end, it exists by virtue of an informational void about risks and their consequences. Indeed, it may be suggested that the principle operates in a legal void and is operationalised through decision-making (rather than law).

It echoes how actors use, strategically or otherwise, global principles. The principle of sustainable development can also be understood in this way. As an expression of an aspiration, then, these approaches or principles cannot but be ones with which one ought to agree. In this context, the precautionary approach 'does have a legally important core on which there is international consensus',⁴⁸ although, to add to it, it is not circumscribed by law. To this end, the precautionary approach can, in fact, be understood as a mode of interpretation, as its meaning is quite undetermined. This is not to say it cannot be helpful. Indeed, principles do not give the content of responsibility themselves. Rather, they provide us with normative

40 Beck (n 2) 5.

41 Derived from L Francot, B de Vries 'Eyes wide shut: on risk, rule of law and precaution' (2013) 26(2) *Ratio Juris* 282–301. In this article we have explored the precautionary principle in detail, problematising it in terms of its legality.

42 Scientific certainty would be certainty that allows for the methods of verification and falsification to be applied and pertains to, let us say, conditional certainty. Compare K Popper *The Logic of Scientific Discovery* (Routledge London 2007).

43 For a more extensive overview see O Renn *Risk Governance: Coping with Uncertainty in a Complex World* (Earthscan London 2008) 78 ff.

44 E Fischer 'Is the precautionary principle justiciable?' (2001) 13(3) *Journal of Environmental Law* 315–34 at 316.

45 P Birnie, A Boyle and C Redgwell *International Law and the Environment* (Oxford University Press Oxford 2009) 155.

46 See Birnie, Boyle and Redgwell (n 45) 160–61.

47 The European approach towards genetic modified crops is perhaps an illustration of this. See for example L Frever 'Societal aspects of genetically modified foods' (2004) 42(7) *Food and Chemical Toxicology* 1181–93.

48 See Birnie, Boyle and Redgwell (n 45) 163.

anchors when formulating and distributing responsibilities, as Dworkin has explained.⁴⁹ In that respect, a well understood precautionary principle can be helpful. The problem with the precautionary principle might be that, as it is an imperative for action without a clear rule-like structure, it is perhaps an imperative for *any* type of action as its scope is not qualified or limited.

REFLEXIVITY: THROUGH THE LOOKING GLASS AND WHAT WE FIND THERE

The ecological state of exception can be understood as the new normality. This does not mean that we have to continue living in this new normality. What it makes us realise is that we cannot go 'back', returning or sticking to the patterns of social, political and economic relations, presented as self-evident and exclusive. We have to move forward. 'Alternatives are possible', to quote Slavoj Žižek.⁵⁰

Normal is the ecological state of exception

The problem in the ecological state of exception is threefold. The first is that existing instruments (the precautionary principle, obligations of sustainability etc) are merely band aids. They serve, secondly, to mitigate the excesses of the dominant economic rationality. Hence, the latter remains the driving force of development globally. This must be broken through. The ecological state of exception cannot be addressed through band-aids. Thus, the realisation must be there that this state is the new state of reality; the *new* normality. It forces, consequently, a reconsideration of the dominant economic rationality, as we do not wish to live in a state of exception. This reconsideration leads to the (first) conclusion that this rationality can no longer be dominant or supreme – it can no longer be sustained.

The task is to reconsider a new rationality to meander between two paralysing positions – that of complete economic freedom and complete environmental security. This new economic rationality is instrumental, not towards the idea of linear and quantitative progress but is instrumental towards the idea of sustainable, equitable and qualitative growth, taking into account both wealth and risks. This in its turn will involve the reconsideration of basic concepts of the 'old' normal state of affairs to synchronise these concepts with this new rationality: what must property mean in this new rationality? How is it claimed? What is the role of the state or the role of power and control in general in this new normality? How to perceive (legal) responsibility and causality? And so on. To agree with Beck: 'Climate politics, then, is not about changing the climate but about transforming the basic concepts and institutions of first, industrial, nation-state modernity'.⁵¹

49 R Dworkin *Law's Empire* (Harvard University Press Cambridge Mass 1988).

50 S Žižek speaking at Occupy Wall Street (10 October 2011) <http://www.versobooks.com/blogs/736-slavoj-zizek-at-occupy-wall-street-we-are-not-dreamers-we-are-the-awakening-from-a-dream-which-is-turning-into-a-nightmare>.

51 Beck (n 23) 256.

Reflexive modernisation

The ecological state of exception implies a move forward, at least intellectually, to think about how to live together and reconsider those notions that we consider self-evident, such as our notion of economic rationality, our notion of a state-centred vision of our world order etc. This is what lies at the core of Beck's theory of reflexive modernisation, of which the theorem of the risk society provides the societal-theoretical description.

We like to capture societal processes as well as society itself, using those words that sum up the essence of society when we observe it. 'Modern' itself is such a word: modern, modernising, modernity, modernisation. The ordinary meaning of the word suggests the promise of positive change. Indeed, perhaps it is the hallmark distinguishing element of Western society's social evolution. In any event, the modern era, however it is historically framed, is believed to be understood as one of success, progress, growth and innovation, spiritually, morally, politically, economically, technologically etc. To this end, 'modern' is an abstract notion, encapsulating a wide range of ideas and concepts about society and how we organise living together and how we organise living in our social and natural environment. Research into it has a long and rich tradition.

Theoretical descriptions are necessary simplifications of observation, as it would not be possible to observe everything and at the same time. We make selections to make sense of the society we live in, to understand social developments and how these are linked (or not). The promise of positive change, of progress is, to repeat, seen as the essence of the modern project of Western society. Its social evolution is perceived as one of success and growth, and man-made. Another such simplification is that we limit our range of observation from within the unit of the nation state. This limitation is informative – forcibly, one could say – in what we observe and how we observe it.

This 'national [or modern] outlook' is at odds with social developments that now transcend the nation state and are inherently global. They do so in real terms as these developments cross the physical boundaries of the state as well as across the conceptual boundaries that have structured the modern nation state (at least in Europe), such as democracy, legality, markets etc. If modernity is to come to terms with this, it has to go through a process of reinventing its foundations and goals. It is this self-confrontation and reinvention that lies at the heart of the theory of reflexive modernisation.

In *Reflexive Modernisation*, Beck, Giddens and Lash⁵² exchange ideas about their previously developed views on modernity and its evolution. Reflexivity, as a point of departure, suggests that nothing is self-evident and can be taken for granted. That what speaks for itself no longer holds value. Uncertainty reigns and is encapsulated by concrete side effects (such as risks). Reflexivity then, is a means to counter these side effects that are of our own doing. Indeed, Beck, Giddens and Lash hold that: "reflexive modernisation" means the possibility of a

52 U Beck, A Giddens and S Lash *Reflexive Modernisation* (Polity Press Cambridge 1994).

creative (self-)destruction for an entire epoch: that of industrial society and it entails first the disembedding and second the re-embedding of industrial social forms by another modernity.⁵³

This other modernity is not postmodernity but ‘a *radicalisation* of modernity, which breaks up the premises and contours of industrial society and opens the path to another modernity’.⁵⁴ In a way, Beck suggests that reflexive modernisation is a task (as well as a process); a task to modernise modernity; a task to deal with the radicalisation of the processes of modernity. To fulfil this task properly the ramifications of this radicalisation must be known and problematised in order to reformulate the direction of progress. This has become clear when describing (see above) the transformation of the industrial society into a risk society.

Reflexivity is to Beck a means of self-confrontation – reflection (thinking) *and* corresponding action – to lay bare and deal with the uncertainties produced by the successes of modernity through a reconfiguration of its foundations.

This contribution ‘borrows’ the notions of reflexivity, as set out above in a mere cursory way, to make the point of what is at stake: how to deal with the side effects of, in this case, climate change. Hence, I take reflexivity to mean a task to understand structural social processes and attendant incidents in order to find out what they mean for the structure of society and its foundations, particularly in politics and law, and to take corresponding action.

Reflexivity, then, is at first a means to process information into knowledge (in the realisation that this knowledge will be incomplete and uncertain). Knowledge, here, is not mere scientific knowledge but also, or perhaps predominantly, knowledge about expectations and interests. It does not refer only to expressing these expectations but also to reflect upon what these expectations and interests mean for the other; their impact both positive and negative. Secondly, the purpose of it is to lay bare, as far as is possible, the ‘blind spots’ or loopholes of modern thought (opening up the side effects). (Blind spots refer to existing circumstances or self-evident assumptions that direct observation, preventing alternative ways of observing.) It helps, thirdly, in re-evaluating modern (self-evident) foundations (in law and politics) in order to realign the modern project, establishing a new (normative?) field for choices and decisions, and corresponding action.

Hence, uncertainty is threatening but it also creates possibilities insofar as one has the courage to embrace uncertainty through communication at the individual

level, the institutional and organisational levels, and the systemic level. It suggests the development of a procedural critique – a critique on how and on what premises and assumptions we come to make decisions.

CONCLUSION

The argument as I tried to set out above can be summarised on the basis of seven steps:

1. We live in an ecological state of exception that exists in terms of self-manufactured uncertainty.
2. This uncertainty is the result of the side effects of an economic rationality based on progress, and are conceptualised in terms of risks, eroding the system from within.
3. This economic rationality is supreme, imposing and coercing a set of self-evident (unquestioned) values, practices and relational patterns.
4. The means with which side effects (or risks) are addressed are mere band aids that ignore the cause of these risks (as this would imply a crisis of the supremacy of the economic system).
5. To address the cause is to reconceptualise the ecological state of exception as the *normal* state and ‘force’, so to speak, this crisis, of which the real existing crises are perhaps a foreboding.
6. This allows us to address and transform the existing economic rationality based on progress towards a rationality based on sustainability (for want of a better word).
7. To act accordingly involves, consequently, the reconsideration of our methodology of thought, shifting towards a reflexive attitude: enabling us to modernise modernisation. It entails the reconsideration, from the lawyer’s perspective, of those legal concepts that shape the *Unterbau* of the modern project. This is our academic task.

I have sought theoretically to embed the line of reasoning in such a way as to provide the reader at least with the necessary background information in respect of the thoughts and theories used. The next step is twofold: the first is to work out the theoretical context in much greater detail; and the second is to illustrate, from a legal perspective, why and how the so-called band aids do not successfully address the side effects, in particular in respect of climate change. One way to go forward with the latter is to work on, for example, the notion of resilience and adaptation in times of climate change,⁵⁵ underscored by the fundamental question: ‘in what kind of society do we want to live?’

53 *ibid* 2.

54 *ibid* 3 (emphasis in original).

55 Resilience here refers to the social-ecological ability to adapt to change and how this could be done: privately, publicly? Does the legal system promote resilience? How adaptive are the measures taken and proposed?