As Good as It Gets: On Risk, Legality and the Precautionary Principle

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Introduction

Uncertainty is a social phenomenon of all times but what is new is our heightened awareness of how uncertainty may threaten our daily life. In contemporary society our heightened awareness of uncertainty is among other things expressed in our awareness of certain types of risks that threaten our daily life and activities, such as illustrated by past events, for example the disasters in Bhopal, Chernobyl and, recently the oil spill in the USA. It is the concept of modern risks that will be our focus of attention in the remainder of this paper and in doing so we build upon the work of Ulrich Beck. In this presentation we are not concerned with the question whether the precautionary principle contributes resolving the contemporary problems encapsulated in the notion of modern risks. Rather, it assumes that it does but that it puts, as a side effect, the notion of legality under strain. It does so as it allows withdrawing legislative procedures from the requirements of legality. It defeats the very purpose of legality: to establish legal certainty in the relationship between citizens and state.

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1 The paper is an edited version of a larger paper written for a Utrecht University project on legality (“The Eclipse of Legality in Europe”) and this larger paper is to appear in a volume to be published by Kluwer.
2 Both lecture in the Department of Legal Theory, Faculty of Law, Utrecht University and are co-founders of the Working Group on (Reflexive) Modernisation and Law.
3 U. Beck, Risikogesellschaft – Auf dem Weg in eine andere Moderne (Frankfurt am Main: Suhrkamp, 1986).
Social diagnosis: uncertainty in a global world

The extensive legal debate, world-wide, about the pros and cons of the precautionary principle implies that the description of world society as a risk society, a description coined by Ulrich Beck as far back as 1986, is adequate and to the point. “Risk society” does not merely pertain to the idea that we live in a society of risks but also suggests a society existing of global interdependencies on all levels of social action. The central problem of the risk society gave, initially in Germany, rise to the development and application of prudentia, in the shape of the precautionary principle in respect of environmental protection. The ensuing legal debate has focused on (the application of) the principle, underexposing to a certain extent the central problem, failing to address and analyse the structural features of the problem. For us, a proper understanding of these structural features is essential as they determine the relationship between the precautionary principle and the rule of law. It demands first and foremost and analysis of the central problem: uncertainty, in particular uncertainty in terms of risks.

Ulrich Beck argues that the central problem of contemporary society is constituted by risks. Risks are of all ages but Beck targets a new type of risks. These risks are distinguished from so-called traditional risks, such as adverse consequences which were the result of meteorological conditions, for example crop failures. Traditional risks were perceived as risks of an exogenous character, which we cannot control. This lack of control suggests that these risks are not man-made but perceived like an Act of God or a manifestation of Mother Nature.

This man-made aspect is a central feature of modern risks. Beck presents modern risks as the side-effects of the processes of modernisation. In doing so, Beck distinguishes modernity in first and second modernity. First modernity is constituted by the fundamental belief in the notion of Progress through Reason. The belief in Progress fuelled the twin processes of industrialisation and democratisation addressing the twin problems of scarcity and tradition, culminating, at least in Western Europe, in the industrial society and the Welfare state. These processes were both situated in and circumscribed by the nation-state. The process of industrialisation can be

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characterised as being concerned with the production of wealth through the technological application of science and scientific discoveries. The process of democratisation served, among many other things, the just distribution of this wealth as well as the emancipation of humans as autonomous individuals, freeing them from tradition and political subordination.

Second modernity can be characterised by the radicalisation and transformation of the processes of industrialisation and democratisation. Beck characterises this radicalisation of contemporary society in the second modernity by reference to the processes of “forced individualisation” and “multidimensional globalisation”. The former refers to the insight that individualisation is no longer or not only a matter of an individual choice, but caused by developments and decisions which are not under the control of the individual. Multidimensional globalisation refers to the idea that structural societal developments and the side effects they produce are global in nature. If, for instance, global free trade refers to the free movement of goods and services, it implies by necessity the free movement of their adverse side effects, for example the spread of disease such as bird flu or BSE. Globalisation is not restricted to the economic dimension but includes political, cultural and moral dimensions.

What this radicalisation discloses is society’s confrontation with self-produced side effects. The nature of these side effects, which Beck in respect of industrialisation, conceptualised in the notion of “risk”, causes him to speak of society as a “world risk society”. It confronts society in the second modernity with an additional fundamental problem. Beck formulates this as follows: 

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

The nature of modern risks

In Beck’s view “risks” have become or will become the new fundamental distribution problem, complementing the distribution problem of first modernity. The nature or characteristics Beck ascribes to modern risks illustrate this transformation.

Risks are self-produced and self-inflicted systematically, exactly because they are side effects of industrialised activity, i.e. systemised wealth production. The second feature of modern risks is their “glocal” character. It may well be that risks are produced locally (and thus everywhere), their effects are global as well as local. The third feature is the existence of unequal social risk
positions. People are affected by risks in different ways. Some can protect themselves against risks or at least be able to minimize their effects, whilst others are at the mercy of risks. The “globality” of risks implies, furthermore, that in terms of the distribution problem, distribution cannot be achieved within the borders of a nation state alone but must also be global. A fourth feature of modern risks is their invisibility. Modern risks are constructions of scientific knowledge and exist in chemical and mathematical formulas or simply in ideas and suppositions. It implies that those in scientific and political key positions can determine what the risks are. Consequently, if something is not defined as such, it is not deemed to be a risk. It also remains problematic to determine when and how their effects materialize, if ever, and to what extent. It merely exists in probabilities and estimations – in uncertainty. In the end, risks bind the future to the present without us being able to determine, but in vague terms, cause and effect. Indeed, a final feature Beck attributes to risks refers to the problem of causality. The problem is that it becomes increasingly more difficult to determine what actions of which actors cause which effects; it becomes increasingly more difficult to determine causality in the production of risks (and their effects) and, hence, to determine who is to be held responsible and why.

To sum it up: modern risks, which are by their nature systematically man-made and self-inflicted, are global in their reach and sensory invisible, leading to unequal social risks positions and result both in and from organised irresponsibility due to a weak causality. One final characteristic of risks is the magnitude of their manifestations in the shape of disasters, catastrophes and calamities as shown by for example the Chernobyl-disaster, the catastrophe in Bhopal and more recently the oil spill in the USA.

**The precautionary principle**

The precautionary principle can be regarded as a modern interpretation of the notion of *prudentia*, which, in its essence means that when acting or making decisions caution – being careful – is a wise counsel.

In this article we seek to concentrate on the adoption of the principle on the global and European stage and in respect of environmental protection and preservation and (also by implication) public health and safety. As risks constitute a global phenomenon they demand a global response. There are numerous examples of international treaties endorsing the principle. 14 Perhaps the ones that resonate most are the Rio Declaration and, in Europe, the EC Treaty. They illustrate this global response and illustrate what could be termed the “globalisation of law”. Principle 15 of the Rio Declaration states: 15

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
The essential feature is the scientific uncertainty about risks – the presence of a scientific deficit of full certainty. A more general description of the precautionary principle, stressing this point, is found in the academic literature. A concise description is the one given by Fisher, stating that it is: 

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.

Indeed, the literature stresses scientific uncertainty as an important feature, if not the distinguishing feature of the principle. Freestone, for example, refers to the precautionary principle as an innovative principle because it changes the role of scientific data. He repeats the adage 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.

In the absence of a wide consensus about what the principle exactly demands, though, the precautionary principle cannot be understood as a hard-and-fast legally binding rule. Indeed, Birnie et al. suggest that it is “far from evident that the precautionary approach [...] has or could have the normative character of the rule of law”. They give a number of plausible reasons. One is that it is far from certain what the meaning is of the principle or its application and consequences in order to consider it as rule of international law. Furthermore, it has not been endorsed as such by major courts, such as the International Court of Justice or the Court of Justice of the European Community. Indeed, the latter refers to it as a legal principle.

Is it merely a matter of semantics or is the distinction important? We consider the distinction and representation of the principle as either a rule of law, a principle of law or a matter of soft law important. As a principle, it allows states and other legal actors to justify policy decisions that may go against, for example, traditional economic interests. Indeed, the principle, in this way, echoes how actors use, strategically or otherwise, other global principles such as the principle of sustainable development. The principle, so used as an expression of an aspiration, cannot be but a principle one ought to agree with. In this context the precautionary principle “does have a legally important core on which there is international consensus”. The precautionary principle forms the basis for action, both politically and legally. To this end, it may be relied upon by decision-makers and courts as an imperative for action (to protect/prevent/remedy). When we consider the precautionary principle this way, surely it has consequences that impact upon legality.

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16 For a more extensive overview, see: O. Renn, Risk Governance. Coping with Uncertainty in a Complex World, (London: Earthscan, 2008) 78 et seq.
18 An even more general definition would merely speak of threats: “A principle that in cases where there is a threat the fact that there is scientific uncertainty over the threat and its consequences should not be used as a reason for not taking action to prevent possible harm.
20 Ibid., 160-161
21 Birnie, International Law and the Environment, 163.
22 Ibid.
 Liberty and the rule of law

Beck, as was described above, distinguishes within the process of modernisation two phases: first and second modernity. First modernity formulated answers to the problem of scarcity and (political) subordination and saw in the twin-processes of industrialisation and democratisation the correct answers to these problems. Liberty and the rule of law can be regarded as two of the organising principles that underscore the process of democratisation. Indeed, our understanding of the rule of law pertains to our understanding of liberty.23 Liberty qualifies state power.24

The modern concept of liberty suggests, as a point of departure, that the state is not to meddle in the private affairs of citizens unless their actions cause harm, i.e. real (physical) damage to life, liberty and possessions. Indeed, the harm principle, as perhaps the expression of liberal thought, qualifies the rule of law as a functional principle. The rule of law is not merely an expression of the idea that (state) power cannot be exercised arbitrarily, but the subordination of power to rules is functional:25 to allow individual liberty as the fundamental organising principle of early modern society. Legality is, in our view, the pivotal element of the rule of law and is embedded within this concept together with three other fundamental elements of modern society: democracy, separation of powers and respect for human rights. Hence, we employ a so-called “thick” description of the rule of law.26

The principle of legality suggests that state power can only be legally exercised on the basis of rules (legislation) that themselves have been formulated on the basis of a known procedure laid down in rules. Furthermore, legality demands legislation to be general, clear and precise, promulgated, prospective, practicable and stable in that it lasts and serves the notion of legal certainty.27 Thus, legality, according to us, implies a procedural aspect as well as formal characteristics. The former establishes a legal basis to the exercise of power. The latter refers to certain qualitative criteria legislation must posses. These “Fuller-criteria”, so to speak, encapsulate this aspect, in particular to legislation that pertains to regulate the relationship between citizen and state.

Legality ties in with the other three elements. The democratic element suggests that the rule-making procedure is democratic and that those who make and/or apply the rules are democratically elected. Thus, legislation is subject to a parliamentary procedure where the proposed piece of legislation is discussed, debated, and if necessary, amended, before it is voted upon by a majority. It provides legislation legitimacy. Even more so, because those that have decided, democratically, upon the legislation are themselves, democratically, elected. Collectively, by deciding upon the legislation, they delegate, as it were, the executive the power

23 See also R. Unger, Law in Modern Society (Washington: Free Press, 1976), referring to society as a voluntary association.
to executive the law. They even may delegate law-making powers to the executive to enable it to execute the law – so called secondary legislation. The third element refers to this delegation/distribution of this rule-based power among different institutions. Rule-makers delegate executive powers, formulated in the rules, to the executive, who they can call to account in the manner of how they execute policy on the basis of that legislation. The judiciary can be delegated this task also under a system of judicial review, enabling individual complainants to seek redress if and when the executive function harms their interests. Finally, the contents of the rules are based upon, or stem from, certain fundamental values or organising principles of the nation state society. These principles find expression in, among others things, human rights enemanate from the liberal spirit the thicker version of the rule of law exhales. The principles suggest that states exercise their power with respect for and in furtherance of civil political and socio-economic rights respectively. It means that the exercise of state power is not only subjected to rules to prevent abuse but that it is also instrumental/functional in that it should promote these human rights, both through non-interference and interference.

Balancing two principles
The above, functional interpretation of the rule of law assumes that the rule of law served to address the problems of first modernity, as described by Beck. The question arises whether the rule of law can serve this function in respect of the responses, encapsulated in the precautionary principle, to the problems of contemporary society in second modernity (the problems of modern risks). We observe a tension between the precautionary principle, as a response to the contemporary problem of modern risks and the principle of legality that seeks to prevent the arbitrary use of state power (however functional/instrumental the exercise of that power may be). The precautionary principle can be understood as providing the framework for legal responses to distribute modern risks through minimising their production by means of a normative judgement in the absence of conclusive scientific evidence about their acceptance. This is how the legal system may deal with the “scientific deficit” in respect of modern risks. As the legal system has to act within the framework of an informational void it puts legality under strain because power can only be exercises on the basis of rules and the formulation and application of rules require information for them to be effective and legitimate.

Indeed, the claim is that legality is under siege and the precautionary principle illustrates or shows that legality is besieged from within and relates to the material and formal/procedural characteristic of legality.

I. Traditional legislation pertained to prescriptions regulating the relationship among citizens and the relationship between citizens and the state. This type of legislation must meet the so-called Fuller criteria to meet the material aspect of legality: to provide legal certainty for citizens in respect as how to regulate their conduct. The last decades or so has seen a huge shift in the subject of legislation and, hence, its object. This type of legislation formulates a particular objective and, subsequently delegates all kinds of administrative agencies with the task to develop executive policy and to translate this policy into action to address the objective. This

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changing objective of legislation implies that this type of legislation escapes the material aspects of legality.

In more abstract terms, legislation can be distinguished into legislation based on a conditional programme and legislation based on goal-directed programmes. 30 The former has the logical structure of an implication, in terms of an “if…then… statement”. 31 Here, “if” refers to a fact and if this fact occurs, “then” the rule applies. It is, as a matter of tautology, a normative programme and can be precise and general, etc. Law reacts always “ex post facto”. 31 This does not mean it has no preventative function. If fact A occurs through action B then rule x applies, say the actor is liable, the actor can forgo doing B as he knows he will be held liable. As the precautionary principle refers to uncertain and future events, it cannot be captured in a conditional programme. The latter, goal-directed programme or purpose-specific programme departs from the “if…then…” logic and is legislation that formulates a particular objective for, for example, a government agency to achieve. It does not prescribe the actions that ought to be undertaken to meet the objective; that would be a matter of executive policy. They bring about a (normative) evaluation of actions that may pertain to the objective. The purpose-specific programme regulates result-driven instrumental action. A legislatively described objective, according to Willke, is sought to be achieved by variable employable means. 32 Much legislation, pertaining to environmental protection and incorporating the precautionary principle, is of this type.

II. Another feature is that the details of such legislation are worked out in secondary legislation. This “procedural tinkering” threatens legality. Legality does not merely denote the idea that political power can be exercised only on the basis of material criteria but also that legislation comes into being on the basis of pre-prescribed rules (which themselves have been laid down in legislation, for example a constitution). It suggests that all legislation comes into being through a similar procedure. The academic literature on the whole, it is suggested, focuses on this type of, primary, legislation or statute law. However, more and more, this type of legislation merely indicates but in vague terms the goal of the statute and the instruments by which this goal could be achieved. Indeed, it is purpose-specific legislation, delegating powers to the executive in order to effectively implement the Statute. This type of statutes could be termed “skeleton statutes” or framework legislation: statutes that lay down certain general rules, pertaining to a particular goal or policy and these rules are worked out in detailed, practical rules through a myriad of secondary legislation. 33

Secondary legislation is legislation that comes into being as the result of an executive process. What we mean is that this type of legislation is formulated on the basis of primary legislation for the purpose of executing policy to meet the goals set out in the primary legislation, usually

30 The idea of legislation as conditional programmes has also been described in M. Weber, Rechtssoziologie, (München: Luchterhand, 1960, ed. J. Winckelmann).
31 Luhmann, Law as a Social System, 198.
32 H. Wilke, Ironie des Staates (Frankfurt am Main: Suhrkamp, 1992) 179.
formulated in a vague and open way: “to serve environmental protection”, “to promote public health”, etc. The connection between primary and secondary we consider to be problematic. The connection exists not only at state level (statute - ministerial regulation) but also on the European level (directive/ regulation - statute/ministerial regulation) and international level. Indeed, much law is constituted at different levels, national, regional and international.  

The changing perspective of legislation and procedural tinkering ties in with the role and function of newly developed and new-developing regulatory agencies which are better able to deal, as the argument goes, with regulatory and supervisory tasks that demand special expertise. Of great concern is the lack of political or parliamentary control in the decision making procedure as to how the delegated rules are formulated, what these rules are and pertain to. The danger is that the lack of parliamentary control is exacerbated by the complicatedness of the subject mater dealt with in these framework statutes. The lack of specialised expertise of members of parliament (and the lack of time) allows the executive to make rules that deeply affect society without proper parliamentary control. This becomes even more problematic in the area of for example environmental legislation because experts findings are deemed highly provisional and are said to lack sufficient consensus in respect of the scientific findings. Indeed, it suggests that the precautionary principle is employed in the awareness of a scientific deficit, expressed in (scientific) uncertainty about risks.

Reconsidering legality

We fear that legality here, in the guise as we know it, does not sufficiently safeguard against the abuse of power and that the application of the precautionary principle could undermine the (legal) certainty legality seeks to provide for. Protection against the state could be in danger of being subordinated to protection against risk. What is demanded now is striking a balance between the two principles. It cannot be, at least according to these authors, that the principle of legality is subordinated to the precaution principle as this would create too much room for arbitrariness. It withdraws power from control and it becomes impossible to evaluate the extent to which the exercise of power contributes to resolving the problem for which it is exercised or used in the first place: addressing the problem of modern risks through the application of precaution. This balancing act must take place, first, within the confines of the modern state but with the proviso that it takes into account the changing role of the state in the era of globalisation.

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34 A more detailed example of this layered structure of legislation and its implications; see De Vries & Hol, Idealia en Realia, 73 et seq.
36 The controversy about bio-fuel illustrates this point.