

# Application of the Precautionary Principle in Dealing with Future Pandemic Diseases: The Dilemma of Legality and Legitimacy Under the Rule of Law



UtrechtLawReview

## ARTICLE

REZA KHABOOK 



## ABSTRACT

Over the past few decades, governments have increasingly employed extraordinary measures in their legal and political decision-making processes. These measures often align with the contemporary risk management approach grounded in the precautionary principle. This shift can be attributed to the uncertain nature of recent times, marked by various viral outbreaks, most notably the enduring COVID-19 pandemic. Furthermore, in the context of governmentality, which represents a modern and post-emergency response to pandemics, governments have favoured the enactment of 'exceptional laws' (*Ausnahmegesetze*) over the declaration of a 'state of exception' (*Ausnahmestand*). This choice is made to uphold their commitment to democratic values and the rule of law. This article claims that the current approach to legislating precautionary-principle-based laws through exceptional laws represents backsliding in terms of upholding the rule of law. Consequently, it emphasises the need to prevent any erosion of the rule of law and its potential consequences for human rights. To address this concern, the article advocates moving beyond a mere focus on legality and instead scrutinising these laws through the lens of legitimacy.

## CORRESPONDING AUTHOR:

**Reza Khabook**

Doctoral Researcher and  
Research Assistant at the  
Academy for European  
Human Rights Protection, the  
University of Cologne, DE  
[m.r.khabook@uni-koeln.de](mailto:m.r.khabook@uni-koeln.de)

## KEYWORDS:

pandemic diseases; state of  
emergency; state of pandemic  
diseases emergency;  
precautionary principle;  
exceptional laws; rule of law

## TO CITE THIS ARTICLE:

Reza Khabook, 'Application of  
the Precautionary Principle in  
Dealing with Future Pandemic  
Diseases: The Dilemma of  
Legality and Legitimacy Under  
the Rule of Law' (2024) 20(3)  
Utrecht Law Review 10–25.  
DOI: [https://doi.org/10.36633/  
ulr.1079](https://doi.org/10.36633/ulr.1079)

This article seeks to investigate the legal framework governing the precautionary principle in the context of addressing potential future pandemic outbreaks, with a specific focus on the importance of the rule of law. To address this inquiry effectively, it is imperative to delve into two sub-questions. The first facet pertains to the manner in which society responds to the threat of pandemic diseases and the interplay of the precautionary principle from the vantage point of risk management. The second facet revolves around comprehending the various legal paradigms and their positioning within the overarching framework of the rule of law concerning the management of risks posed by inherently uncertain occurrences such as future pandemics.

The importance of answering these questions relies on the fact that the COVID-19 pandemic, the most widespread pandemic in the last two decades, raised many concerns regarding the necessity of adopting measures against future pandemic diseases. Accordingly, since the beginning of the COVID-19 pandemic, many international and regional organisations and states have attempted to ‘adapt existing legislative frameworks’<sup>1</sup> or introduce new laws to deal with similar crises. However, this growing trend of legislation raised concern among researchers in various fields of humanities, including legal researchers.

The argument of legal researchers can be understood through the lens of the French philosopher, Michael Foucault. According to Foucault, tackling pandemic diseases and preparing for future cases is the best example of governmentality as a method encompassing complex monitoring of, observation of, and data collection about citizens.<sup>2</sup> As Philipp Sarasin says, the current situation can be seen as a ‘biopolitical dream’<sup>3</sup> for governments since they can impose restrictive regulations and use the justification of the necessity of the precautionary principle to tackle future pandemic diseases. In other words, we can argue that the current situation is the continuation of the growing policy of government since the 17th century to adopt regulations for protecting the ‘life’ of their population rather than ‘the way of life’.<sup>4</sup> Accordingly, the risk of future pandemics can be used to justify the imposition of restrictive measures against the way of life of individual interests and freedoms in non-exceptional periods.

However, governments’ growing interest in precautionary legislation should be seen from a broader picture of the tendency to assume more exceptional measures in legal-political decisions. Exceptional measures as the ‘paradigm of government in contemporary politics’,<sup>5</sup> rather than executive decisions and decrees, have increasingly emerged in the last two decades within the legal framework of states. Therefore, I argue that, recently, governments have enacted ‘exceptional laws’ (*Ausnahmegesetze*) instead of implementing ‘the state of exception’ (*Ausnahmezustand*) to tackle the potentiality of an emerging pandemic.

The significant point in the growing tendency towards exceptional laws is that governments intend to show their allegiance to democracy and the rule of law. The reason behind this approach is related to the development of legal apparatus within the governmentality method, which adopts various tactics to impose a peculiar code of conduct on ‘subjects’ based on the ‘relationship of self to self’.<sup>6</sup>

Returning to the main argument of this article, the current ‘legislative fever’<sup>7</sup> to impose the precautionary principle to deal with hypothetical pandemic diseases leads us to the necessity

<sup>1</sup> J Grogan & J Begiraj, ‘Rule of Law as a Perimeter of Legitimacy for COVID-19 Responses’ (*Verfassungsblog*, 17 April 2021) <<https://verfassungsblog.de/rule-of-law-as-a-perimeter-of-legitimacy-for-covid-19-responses/>> (accessed 19 August 2023).

<sup>2</sup> M Foucault, *The Birth of Biopolitics Lectures at the Collège de France, 1978–1979* (M Senellart tr, Palgrave Macmillan, 2011), 27.

<sup>3</sup> P Sarasin, ‘Understanding the Coronavirus Pandemic with Foucault?’ (*GENEALOGY+CRITIQUE (G+C)*, 31 March 2020) <<https://blog.genealogy-critique.net/essays/254/understanding-corona-with-foucault>> (accessed 19 August 2023).

<sup>4</sup> A Jakab, ‘Breaching Constitutional Law on Moral Grounds in the Fight against Terrorism: Implied Presuppositions and Proposed Solutions in the Discourse on “the Rule of Law vs. Terrorism”’ (2011) 9 *International Journal of Constitutional Law* 58, 63.

<sup>5</sup> G Agamben, *The Omnibus Homo Sacer* (D Heller-Roazen tr, Stanford University Press, 2017), 168.

<sup>6</sup> A Jayne Innes & B Steele, ‘Governmentality in Global Governance’ in D Levi-Faur (ed) *Oxford handbook of governance* (Oxford Univ Press, 2014), 717.

<sup>7</sup> C Paulussen & K Pitcher, ‘Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges’ (The International Centre for Counter-Terrorism (ICCT), 30 January 2018) <<https://www.icct.nl/publication/prosecuting-potential-foreign-fighters-legislative-and-practical-challenges>> (accessed 6 August 2020).

of reviewing these upcoming laws in light of the rule of law. However, it should be borne in mind that the rule of law in this research goes beyond the understanding of those scholars who merely define this principle based on its formal/procedural criteria. Therefore, here, in addition to the eight principles of Lon Fuller, namely generality, publicity, perspectivity intelligibility, consistency, practicability, stability, and congruence,<sup>8</sup> by the rule of law, I also refer to the compliance of the law with democracy and human rights. I believe that including democracy and human rights or the so-called 'substantive approach' will protect us from the slippery slope of justifying authoritative and arbitrary laws which are merely based on the principle of 'legality'.

From a general point of view, the main argument of this article is that the increment of exceptional laws instead of the state of exception is because of a narrow interpretation of the rule of law. Governments, nowadays, feel that fulfilling the principle of legality can easily convince individual people in their society to give away their freedoms. Therefore, it is crucial to emphasise the element of legitimacy as the indicator of the necessity of justifying any regulations from the perspective of democracy and human rights to prevent backsliding in the rule of law principle.

Overall, the article has four Sections that correspond to the questions. Section 2 aims to elaborate on the response to pandemic diseases. The main argument is to introduce governmentality as the dominant model in our current situation as a post-emergency situation. Next, in Section 3, I will study the precautionary principle and its relationship with governmentality. Accordingly, Section 3 will demonstrate the nexus between the precautionary principle and law-making as one of the apparatuses of governmentality. Section 4 will discuss the legal approaches towards the state of exception. It also will examine the growing trend of enacting exceptional laws instead of the state of exception. Later, Section 5 will assess the proposed precautionary legislation for future pandemics, including the 'WHO Convention, Agreement, or other International Instrument on Pandemic Prevention, Preparedness, and Response (WHO CA+)', the amendments to the International Health Regulations (IHR) along with selected national legislative adaptations and scholarly recommendations. The examination of these two WHO legislative instruments will help us to have a better picture of the tendency of states to apply the precautionary principle from the perspective of an international organisation such as the WHO. Also, revealing national trends and scholarly research illustrate that implementing the precautionary principle is not only a matter of international pandemic disease political strategies but also a common trend both at the domestic and academic levels. After elaborating on the international, domestic, and scholarly tendency towards the application of the precautionary principle in tackling pandemic diseases, I will examine these laws and recommendations in the context of the substantive rule of law to seek the answer to the main topic of this paper.

## 2. GOVERNMENTALITY: THE POST-EMERGENCY MODEL

Discussions pertaining to the proclamation of a state of exception in the aftermath of 9/11 have predominantly revolved around issues related to national security crises. This focus has, in turn, limited our understanding and conceptualisation of the state of exception, primarily within the context of national security considerations. Nonetheless, it is imperative to recognise that invoking a state of exception extends beyond situations exclusively tied to traditional security threats. Instead, a state of exception encompasses circumstances that pose substantial threats to 'public concerns',<sup>9</sup> including various dimensions such as security, environmental preservation, sanitation, and other critical elements of communal well-being.

As evidenced by the research conducted by Tom Ginsburg and Mila Versteeg, the underlying cause of an exceptional situation can significantly influence the approach taken in responding to it.<sup>10</sup> In the case of pandemics, the source is inherently natural in origin. Moreover, pandemic-induced crises exhibit a gradual onset, contrasting with the abrupt nature of crises arising from national security incidents, financial instability, or natural disasters. Furthermore, pandemics tend to be of prolonged duration, in stark contrast to the variability observed in national security and economic crisis cases.<sup>11</sup>

<sup>8</sup> See L Fuller, *The Morality of Law* (Yale University Press, 1969).

<sup>9</sup> R Geuss, *Public Goods, Private Goods* (Princeton University Press, 2003), 20.

<sup>10</sup> According to research by Ginsburg and Versteeg, sources of a state of emergency can be threats to national security, financial status, natural disasters, and pandemics. See T Ginsburg & M Versteeg, 'The Bound Executive: Emergency Powers during the Pandemic' (2021) 19 *International Journal of Constitutional Law* 1498.

<sup>11</sup> *ibid*, 1508.

Collectively, these factors underscore the need for a distinct response modality when dealing with emergencies stemming from pandemic diseases. The genealogy of responses to the fast-paced fatal transmittable diseases illustrates three distinct methods: (I) isolation of the infected person as in the case of leprosy in the medieval ages; (II) the quarantine model used during a plague or under a disciplinary power; and (III) the so-called smallpox model and inoculation or the so-called practice of governmentality.<sup>12</sup>

By governmentality here, I intend to refer to the enabling apparatuses (including institutions, procedures, calculations, and laws) for practising a particular form of power.<sup>13</sup> In other words, governmentality in the Foucauldian approach points to ‘the discourses presented as necessary, rational and true and which function as forms of justification and legitimation for government actions’.<sup>14</sup> Moreover, the definition of governmentality mentions a distinctive form of power. This sort of power contrasts with traditional ‘sovereign’ power. The conventional understanding aimed to ensure ‘the growth of the state’s force, wealth, and strength’.<sup>15</sup> According to Foucault, the new type of power is the abolition of *raison d’état* and is moving towards the ‘more state by less government’.<sup>16</sup>

In order to clarify the meaning of this unique form of power, which is the core concept in understanding governmentality – as the current approach of governments towards future pandemics – it is necessary to take a cursory glance at the notion of ‘biopolitics’.<sup>17</sup> Biopolitics refers to the politicisation of the human body. In other words, in this new political approach, the life of humanity is a significant matter within the political discourse. Therefore, modern power focuses on ensuring the existence of people and in this way the notion of ‘population’ is promoted.<sup>18</sup> Here, population equals the study of all aspects of life, gathering data and statistical work to invest in people’s lives in a particular state. Hence, the population’s health is a crucial matter. To foster life, ‘public hygiene’ and ‘social medicine’<sup>19</sup> are significant because they guarantee the population’s life expectancy increment and protect them from death. In a more general way, as Foucault says, the new type of power, which should be named ‘biopolitics’,<sup>20</sup> is ‘to foster life or disallow it to the point of death’.<sup>21</sup>

The governmentality contrasts with the other two methods since it is not about imposing direct limitations on people’s freedoms. One could even argue that it is based on freedom. Hence, the existence of freedom of the nation is the goal of the government. However, there is a paradoxical relationship between freedom and government in governmentality since, in this approach, the government is the one that produces and manages freedom.<sup>22</sup> This necessity for managing freedom manifests itself in the ‘protection of collective interest against individual interests’ and in protecting individual interests against the collective interest.<sup>23</sup> This reciprocal relationship in the heart of governmentality can be seen as ‘the game of freedom and security’, which indicates the necessity of arbitration between freedom and security.<sup>24</sup>

The significance of finding the balance between collective and individual interests has been one of the most crucial matters in dealing with the COVID-19 pandemic. For instance, mass vaccination and imposing restrictions on those who have refused to be inoculated can be seen as the initial measure within the game of freedom and security. However, the governmentality in dealing with pandemic diseases has a particular status. The COVID-19 pandemic is a pertinent

<sup>12</sup> M Foucault, *Security, Territory, Population Lectures at the Collège de France, 1977–78*, F Ewald et al. eds. (Palgrave Macmillan, 2014), 9, 10.

<sup>13</sup> *ibid.*, 120.

<sup>14</sup> E Colombo, ‘Human Rights-Inspired Governmentality: COVID-19 through a Human Dignity Perspective’ (2020) 47 *Critical Sociology* 571, 572.

<sup>15</sup> Foucault (n 2), 27.

<sup>16</sup> *ibid.*, 102.

<sup>17</sup> M Foucault, *The History of Sexuality* (Vintage Books, 1990) 140.

<sup>18</sup> M Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975–76* (Picador, 2003), 254.

<sup>19</sup> Foucault (n 12), 367.

<sup>20</sup> Foucault (n 17), 140, 141.

<sup>21</sup> *ibid.*

<sup>22</sup> Foucault (n 2), 63.

<sup>23</sup> *ibid.*, 65.

<sup>24</sup> *ibid.*

example since it showcases the comprehensive incorporation of the two other models outlined earlier. In the case of the COVID-19 pandemic, governments initially resorted to excluding infected individuals from society during the initial stages of the pandemic. Subsequently, recognising the inadequacy of this approach, authorities pivoted towards the implementation of quarantine measures which, as Foucault aptly noted, contrast with mere isolation and the stark division between groups: 'binary division between one set of people and another'.<sup>25</sup> This shift necessitated the adoption of an individualised approach to distributing measures.<sup>26</sup> Furthermore, it entailed the establishment of intricate surveillance and control mechanisms, as well as the amplification and diversification of power dynamics.

Nevertheless, the contemporary trajectory, such as the case mentioned above of vaccination, points towards adopting the third method within those mentioned earlier three distinct methods which, as Foucault suggests, amalgamates the isolation and disciplinary powers of the previously mentioned approaches. This amalgamation harnesses the synergy of political governance with epidemiological and medical strategies to comprehensively curtail the virus's impact.<sup>27</sup> Therefore, the shift to governmentality can be seen as an act in the post-emergency phase. Even in the case of smallpox as the reference case for Foucault, the invention of its vaccine in 1796 and the knowledge existing about the nature of the virus can be elaborated as the reason to adopt the governmentality approach to deal with it.

Put simply, the eradication of exceptional situations allows the government to move towards establishing 'public health' by administering the medical processes. The administration of health means developing observer tools not only for the sake of disciplining the population but also for collecting data about matters such as 'how many people are infected [with a particular pathogen], at what age, with what effects, with what mortality rate, lesions or after-effects, the risk of inoculation, the probability of an individual dying or being infected by [the virus] despite inoculation, and the statistical effects on the population in general'.<sup>28</sup>

There is no need to mention that many public health measures would inherently contrast with the interests of individual persons in society. Thus, governmentality apparatuses here play the role of facilitators to justify any interventions in freedoms, but it should be remembered that the governmentality apparatuses usually require a grounding justifier to be accepted by the public. Governments, in these cases, as the producers of freedom and the entities implementing restrictions on freedom, usually invoke 'fear' to justify the curtailment of liberties.

### 3. PRECAUTIONARY PRINCIPLE IN THE HEART OF GOVERNMENTALITY APPROACH

The introduction of fear as the main justifier for putting restrictions on freedoms to protect common interest can be seen through the discussions of Ulrich Beck and Anthony Giddens on 'risk theory'. Beck and Giddens separately argue that the notion of risk and the modality of response to it has changed throughout history.<sup>29</sup> On the one hand, in the pre-industrial world, hazards were considered 'acts of God' with an 'external' nature.<sup>30</sup> Therefore, humankind faced a shift in its modality of reaction to the hazards and catastrophes. Accordingly, in the pre-industrial society, any harm to oneself is either the 'fault' of that person or somebody else; hence, we cannot discuss 'victim' as a particular notion that leads us to the right and compensation; it was a man's 'duty' to protect himself and square his acts in line with 'providence'.<sup>31</sup>

---

<sup>25</sup> M Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage Books, 1995), 198.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*, 10.

<sup>28</sup> Foucault (n 12), 10.

<sup>29</sup> See A Giddens, 'Risk and Responsibility' (1999) 62 *Modern Law Review* 1, 1. Also, U Beck, 'From Industrial Society to the Risk Society: Questions of Survival, Social Structure and Ecological Enlightenment' (1992) 9 *Theory, Culture & Society*, 97.

<sup>30</sup> C Walker & J Broderick, *The Civil Contingencies Act 2004: Risk, Resilience, and the Law in the United Kingdom* (Oxford University Press, 2006), 6.

<sup>31</sup> F Ewald, 'The Return of Descartes's Malicious Demon: An Outline of a Philosophy of Precaution' in T Baker & J Simon (eds.) *Embracing risk: the changing culture of insurance and responsibility* (Univ of Chicago Press, 2002), 274, 282.

On the other hand, in the industrial society, the main aim of decision-making is 'to produce and distribute wealth in conditions of scarcity'.<sup>32</sup> Therefore, the notion of fault is replaced by 'risk'.<sup>33</sup> The consequence of this shift from fault to risk is visible in the advancement of rules and regulations in insurance and compensation.<sup>34</sup> Another significant point regarding the nexus between industrialisation and risk is the development of controlling risks through calculations and scientific works.<sup>35</sup> In simpler terms, risk in this new world is the fruit of 'techno-economic'<sup>36</sup> decision-making that must be 'politically managed'.<sup>37</sup>

However, neither Beck nor Giddens consider industrialisation to be the end of the modernisation process. They believe the second phase of modernisation is the emergence of the 'risk society'. The risk society abandoned the 'production and distribution of goods' for the 'prevention of bad'.<sup>38</sup> Hence, we live in a 'risk culture' in which uncertainty is an inherent factor. Indeed, risks in our current society are no longer predictable.

The unpredictability and uncertainty demonstrate the impossibility of both prudence and insurance. Therefore, modern society should replace its preventive and preparatory approach with another risk management method. The new risk management method is the precautionary principle. The difference between precautionary, preparatory, and preventive measures is rooted in the fact that the first mentioned is grounded in the 'lack of scientific certainty',<sup>39</sup> while the other two responses are about scientific calculus methods. As the European Communities Commission says:<sup>40</sup>

The precautionary principle is a decision exercised where scientific information is insufficient, inconclusive or uncertain and where there are indications that the possible effects on the environment or human, animal or plant health may be potentially dangerous and inconsistent with the chosen level of protection.

Now, after clarifying the meaning of the precautionary principle, it is time to understand its deployment methods. I believe that naming its main principles would help in the understanding of its deployment. According to the Wingspread Statement, 'precautionary' has four mutually reinforcing rationalities. These rationalities are:<sup>41</sup>

- 1) preventive action should be taken in advance of scientific proof of causality; 2) the proponent of an activity, rather than the public, should bear the burden of proof of safety; 3) a reasonable range of alternatives, including a no-action alternative (for new activities) should be considered when there may be evidence of harm caused by an activity; and 4) for decision making to be precautionary it must be open, informed, and democratic and must include potentially affected parties.

The first three components illustrate how the precautionary hypothesis focuses on the worst-case scenario due to its emphasis on uncertainty. This links in with the discussion of François Ewald about the precautionary principle:<sup>42</sup>

This [focus on uncertainty] implies that from now on, along with what one can learn from science in a context that is always relative, it will also be necessary to take into account

---

<sup>32</sup> C Aradau & R Van Munster, 'Governing Terrorism Through Risk: Taking Precautions, (Un)Knowing the Future' (2007) 13 *European Journal of International Relations* 89, 92.

<sup>33</sup> Ewald (n 31), 277.

<sup>34</sup> *ibid*, 277, 278.

<sup>35</sup> Aradau & Van Munster (n 32), 92.

<sup>36</sup> Beck (n 29), 98.

<sup>37</sup> Giddens (n 29), 5.

<sup>38</sup> Aradau & Van Munster (n 32), 92.

<sup>39</sup> Report of the United Nations Conference on Environment and Development (Rio de Janeiro 3–14 June 1992) (n.d.) UN Doc A/CONF.151/26/\$3v.1 (Vol. I).

<sup>40</sup> Commission of the European Communities, Communication From the Commission on the Precautionary Principle, 2.2.2000 COM (2000).

<sup>41</sup> Science and Environmental Health Network, *Wingspread Statement on the Precautionary Principle* (1998) <https://www.sehn.org/precautionary-principle-understanding-science-in-regulation> accessed 25 October 2024.

<sup>42</sup> Ewald (n 31), 286.



what one can only imagine, suspect, presume, or fear. The precautionary principle invites one to consider the worst hypothesis (defined as the “serious and irreversible” consequence) in any business decision. The precautionary principle requires an active use of doubt, in the sense Descartes made canonical in his *Meditations on First Philosophy*. Before any action, I must not only ask myself what I need to know and what I need to master but also what I do not know, what I dread or suspect. I must, out of precaution, imagine the worst possible, the consequence that an infinitely deceptive malicious demon could have slipped into the folds of an apparently innocent enterprise.

Based on the mind-set promoted by the precautionary approach, we have not only been asked to take action against known risks but also, since we consider risk an omnipresent concept in our lives, all our actions should be tamed to prevent the occurrence of unpredicted risks.

The complexity of this situation underscores the need for government intervention and strategic measures. Failure to take action from the government’s side results in an impasse, as activities become susceptible to termination due to unforeseen and unpredictable risks. In light of this perspective, Rhodes characterises governance as a regulatory practice essential for managing such intricate circumstances.<sup>43</sup> Consequently, aligning with Pat O’Malley’s viewpoint, we can assert that the precautionary principle serves as a ‘high-profile regulatory resource’.<sup>44</sup> This principle facilitates the implementation of additional regulations and plays a pivotal role in fostering societal functionality while pre-emptively mitigating risks and hazards.

In sum, the connection between the precautionary principle and governmentality can be seen in the necessity of ‘regulations’. Laws and regulations are ‘normalising’ methods to monitor the population for the upcoming unknown risk. These normalised regulations, which usually are decisions to restrict individual freedoms, are justified by the claim of risk, which is the production of an unknown fear. Indeed, the precautionary principle follows the main idea of governmentality: ‘conduct of conduct’.<sup>45</sup> In other words, if somebody wants a healthy life, environment, and other risk-free factors, they should follow these precautionary regulations.

#### 4. FROM THE STATE OF EXCEPTION TO EXCEPTIONAL LAW

Now, after this rather extensive discussion about the nexus between governmentality and the precautionary principle, and by concluding that the law is the main apparatus in justifying the precautionary principle in light of the uncertain risk of future pandemics, we can discuss the legal approach for responding to those risks. The grounding argument here is that when the risk is based on uncertainty, the modality of response to that risk cannot be a clear-cut answer. Therefore, the uncertain risk and its response should be considered to be exceptional. The exception here indicates the circumstances in which ‘a period of unprecedented crisis’ occurred, and that the state did not foresee the response to that crisis.<sup>46</sup>

Legal systems and various scholarly projects have tried to find the modality of the response to the exceptional moment. The modality of such a response appears to have various terminologies in different legal traditions. For instance, ‘martial law’ or ‘prerogative power’ is the main answer in common law tradition, while the French legal system favours the ‘state of siege’ and Germans adopt the ‘state of exception’.

In any sense and despite different terminologies, scholars can be divided into two camps regarding the modality of the response to an exceptional situation. Kim Lane Scheppele highlights, on the one hand, a particular stance held by a group of experts, asserting that the government’s response to an emergency, characterised as a situation causing substantial disruption to the political system or endangering a nation’s security, should operate beyond established legal parameters.<sup>47</sup>

<sup>43</sup> R Rhodes, ‘The hollowing out of the State: The Changing Nature of The Public Service in Britain’ (1994) 65 *Political Quarterly* 138, 151 cited in Walker & Broderick (n 30).

<sup>44</sup> P O’Malley, *Risk, Uncertainty and Government* (Taylor and Francis, 2012), 179, 180.

<sup>45</sup> T Lemke, ‘Foucault, Governmentality, and Critique’ (2002) 14 *Rethinking Marxism* 49, 51.

<sup>46</sup> M Bayat Komitaki & R Khabook, ‘Nexus between Exceptionalism and Rule of Law in the Light of “Governmentality”’ (2020) 7 *International Journal of Human Rights and Constitutional Studies* 171, 172.

<sup>47</sup> K L Scheppele, ‘Law in Time of Emergency’ (2004) 1001 *University of Pennsylvania Journal of Constitutional Law* 4.

In other words, proponents of this notion, in line with the ancient maxim of *necessitas legem non habet* (necessity has no law), contend that during emergencies, the ordinary constraints of the law should be disregarded, enabling the government to assume complete authoritative control. On the other hand, in contrast to the so-called ‘outsiders’, the followers of the ‘insider’ point of view argue that any response to crises must comply with legal boundaries.<sup>48</sup>

Perfunctory inspection of many international and regional conventions, such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), in addition to the state’s practices and laws,<sup>49</sup> demonstrate that the insider’s standpoint is the dominant approach towards the relationship between the state of exception and the law. However, the insider approach, as the dominant one per se, can be separated into two pathways: ‘monism’ and ‘dualism’.<sup>50</sup>

Advocates of the monism approach assert that discerning between responses to threats and exceptional ones is unwarranted. This notion finds its most eloquent exposition in Benjamin Constant’s work:<sup>51</sup>

There are, no doubt, for political societies, moments of danger that human prudence can hardly conjure away. But it is not by means of violence, through the suppression of justice, that such dangers may be averted. It is on the contrary by adhering, more scrupulously than ever, to the established laws, to tutelary procedures, to preserving safeguards ... Any moderate government, any government resting upon regularity and justice, is ruined by every interruption of justice, by every deviation from regularity.

Consequently, within this paradigm, often termed ‘business as usual’,<sup>52</sup> preserving principles rooted in the rule of law mandates the prohibition of any departures from existing legal frameworks. Moreover, this idea’s supporters consider the Constitution a ‘holy book’ in which its authors predicted any hypothetical situations. Hence, in the case of an exception, the practice of the government should be the same as in normal times.

Dualists as opponents of the monism approach, raise the fact that numerous scenarios, unforeseeable by lawmakers, arise, thus rendering monism a simplistic approach and inadequate to serve the public interest in exceptional situations.<sup>53</sup> Therefore, they introduce the dualism or the so-called ‘toggle-switch model’.<sup>54</sup> In accordance with this model, the government’s conduct must be held accountable to the constitutional framework of guaranteeing the balance between collective and individual interests.

A shift in the discourse of norm versus exception stems from the Nazi jurist Carl Schmitt’s discussions about the state of exception, and in which dictatorship is also visible. Schmitt’s understanding of the exception argues a distinction between the constitution (*Verfassung*) and the constitutional norms (*Verfassungsgesetze*).<sup>55</sup> Schmitt, by this distinction, tries to discuss the necessity of going beyond the constitutional norms, which consist of commands, prescriptions, and orders by which the government and public authorities should abide, and following political decisions for the sake of preserving the constitution as the primary connection loop of a state.

Schmitt’s approach has been interpreted in two distinct ways by insiders. Scholars such as Eric Posner and Adrian Vermeule read Schmitt in light of his well-known assertion, ‘Sovereign

---

<sup>48</sup> Bayat Komitaki & Khabook (n 46).

<sup>49</sup> According to research by C Bjørnskov and S Voigt, ‘Today, some 90 percent of all constitutions worldwide contain explicit provisions for how to deal with states of emergency’. For further information, see: C Bjørnskov & S Voigt, ‘The Architecture of Emergency Constitutions’ (2018) 16 *International Journal of Constitutional Law* 101.

<sup>50</sup> J Ferejohn & P Pasquino, ‘The Law of the Exception: A Typology of Emergency Powers’ (2004) 2 *International Journal of Constitutional Law* 210, 221.

<sup>51</sup> B Constant, *Political Writings* (B Fontana tr, Cambridge University Press, 1988), 136.

<sup>52</sup> O Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?’ (2003) 112 *Yale LJ* 1011, 1043, 1058.

<sup>53</sup> See E Posner & A Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press, 2007); and R Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press, 2003).

<sup>54</sup> K L Scheppele, ‘Exceptions That Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life’ in S Macedo & J K Tulis (eds.) *The Limits of Constitutional Democracy* (Princeton University Press, 2010), 126.

<sup>55</sup> Ferejohn & Pasquino (n 50), 223.



is he who decides on the exception',<sup>56</sup> as advocating broad executive discretion. According to Posner and Vermeule, while the executive should have substantial discretion in determining the existence of exceptions and the means of addressing them, this discretion must be granted *ex ante* by the legislature. They argue that the legislature should pass an enabling act to satisfy the 'authorisation requirement', ensuring that the executive's measures are legally justified.<sup>57</sup> Posner and Vermeule contend that, compared to the legislative and judicial powers, the executive power is equipped with more infrastructure, enabling it to determine emergencies with greater accuracy, speed, and flexibility.<sup>58</sup>

Thus, they argue against holding the executive accountable for declaring emergencies and implementing necessary responses. Advocates of this standpoint propose that both legislative and judicial powers should 'defer to the executive branch'.<sup>59</sup>

However, a second group of scholars within the insider camp takes a more cautious approach. They consider Schmitt and his followers' approach more in line with outsiders. This group argues that simply granting full discretion to the executive through an enabling act does not confine emergency powers within legal limits. Despite sharing the same roots of thoughts with the first group about the supremacy of the executive branch during an exception, they propose a restrained power during such a period. These scholars recognise the 'polyarchic structure' of constitutional order and the potential for the 'abuse of emergency powers', shaping their approach accordingly.<sup>60</sup> They believe that the executive should not have exclusive authority to declare and implement a state of emergency. As Clinton Rossiter says, 'no constitutional dictator should be self-appointed'.<sup>61</sup> To mitigate the risks of executive overreach, this group proposes that any emergency declaration should require approval by a supermajority of parliament.<sup>62</sup> Additionally, they argue that the state of emergency should be temporary,<sup>63</sup> and the power of the executive should also be limited in the sense of not being able to change the fundamental principles of the state<sup>64</sup> or violating fundamental human rights.<sup>65</sup> Finally, they emphasise that merely outlining 'determining the procedures for initiation, execution and termination of the emergency powers'<sup>66</sup> is insufficient to ensure that emergency powers remain within legal boundaries. Therefore, they advocate for monitoring mechanisms to control 'material emergency law [as the] *ad hoc* created norms based on emergency powers granted by formal emergency law'.<sup>67</sup>

It can be argued that insiders, compared to outsiders, attempt to constrain government measures within established legal boundaries during exceptional circumstances. Despite these efforts, concerns persist regarding the potential for the executive branch to wield an undue amount of power in such exceptional situations. This apprehension resulted in granting more power to the legislative body during the state of exception. Indeed, in the last half-century, the legislative branch's role is not just about recognising the existence of an exceptional situation.<sup>68</sup> In recent trends, the legislative branch is no longer like the Roman Senate, which affirmed

<sup>56</sup> C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (The University of Chicago Press, 2005), 5.

<sup>57</sup> E Posner & A Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press, 2007), 45.

<sup>58</sup> E Posner & A Vermeule, 'Accommodating Emergencies' in Neal Devins (ed.) *The Constitution in Wartime: Beyond Alarmism and Complacency* (Duke University Press, 2005), 55–92.

<sup>59</sup> *ibid.*

<sup>60</sup> Ferejohn & Pasquino (n 50), 299.

<sup>61</sup> C Rossiter, *Constitutional dictatorship: Crisis government in the modern democracies* (Transaction Publishers, 2002), 299.

<sup>62</sup> B Ackerman, 'States of Emergency' (2020) *Journal of Constitutional Law* 77, 80.

<sup>63</sup> B Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1047.

<sup>64</sup> Rossiter (n 62), 302.

<sup>65</sup> See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 4; and European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) (ECHR), Article 15.

<sup>66</sup> A Zwitter, 'The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy' (2012), 98 *Archives for Philosophy of Law and Social Philosophy* 95, 100.

<sup>67</sup> *ibid.*

<sup>68</sup> Ferejohn & Pasquino (n 50), 218.

the exception and ceased its operation and observation over the executive.<sup>69</sup> Hence, the new function of the legislative branch is open to holding the executive accountable. Still, in line with the insiders' view, the legislative body grants power to the executive and allows it to fulfil certain acts. One of the primary attempts to control the executive and increase the power of the legislative branch can be seen in regulation in constitutions regarding the modality of the emergency power in different aspects, such as its time frame, the responsibility of each branch of the state, and restrictions on the authority during the state of exception.<sup>70</sup>

Nevertheless, these points cannot summarise efforts to control the emergency power. Some scholars, such as Bruce Ackermann, discuss the necessity of an 'emergency constitution' that can be used during an exceptional situation.<sup>71</sup> However, only a few states, such as Germany and Spain,<sup>72</sup> have approached this direction. It is still not the common approach. It can be argued that the common practice is more about passing particular ordinary regulations for discussing the modality of response to an exceptional situation in a highly detailed manner.<sup>73</sup> In other words, we are witnessing the junction of the 'risk society' and the 'regulatory state'<sup>74</sup> and the replacement of 'sovereign exception' with legal measures.<sup>75</sup>

Replacing the sovereign exception with legal measures would be motivated by different reasons. As Andrew Neal discusses, the legislation can happen in different periods: one is during an exception, and the other is after an exceptional moment that triggers the need for particular regulation to deal with similar cases.<sup>76</sup> Replacing the executive emergency with the legislative version can be seen as more the legislation after the exception. This is precisely when the exception is over, but society has realised it can happen again. Therefore, we can argue that the paradigm shifts in responding to the exceptions, which is about replacing the 'state of exception' (*Ausnahmezustand*) with 'exceptional law' (*Ausnahmegesetze*), should be elaborated in line with the precautionary understanding of risks.

The difference between the state of exception and exceptional law can be best understood through the German legal system during the *Kaiserreich*. During the German Empire, we witnessed the adoption of several laws which, in addition to Article 68 of the 1871 Constitution, granted authority to the government to seize the application of some Prussian Constitutional regulations as the German Empire's dominant constitutional document.<sup>77</sup> As examples, I refer to 'Socialist Law' and 'Anti-Jesuit Law'. Both laws attempted to expel the particular group from society, but not through the 'meta juridical' or 'extraconstitutional' sense.<sup>78</sup> In other words, these laws tried to comply with the rule of law (*Rechtsstaat*) and justify the segmentation of some citizens by the force of 'legality'.

Therefore, nowadays, exceptional measures should be seen as the end product of legal provisions. Indeed, sovereignty manifests as 'a collection of different rights, powers and aspirations'.<sup>79</sup> Hence, although the state of exception or the unknown and uncertain risk has to be presented to invoke exceptional measures, the measures remain in an exceptional

<sup>69</sup> *ibid.*

<sup>70</sup> Bayat Komitaki & Khabook (n 46), 101–103.

<sup>71</sup> See Ackerman (n 64).

<sup>72</sup> See A C Romero & E D Redondo, 'Spain: One Pandemic and Two Versions of the State of Alarm' (*Verfassungsblog*, 26 February 2021) <<https://verfassungsblog.de/spain-one-pandemic-and-two-versions-of-the-state-of-alarm/>> (accessed 19 August 2023). See also A K Mangold, 'Germany and COVID-19: A Most Eventful Year' (*Verfassungsblog*, 7 April 2021) <<https://verfassungsblog.de/germany-and-covid-19-a-most-eventful-year/>> (accessed 19 September 2023).

<sup>73</sup> J Grogan, 'Power, Law and the COVID-19 Pandemic – Part I: The Year of Pandemic' (*Verfassungsblog*, 15 May 2021) <<https://verfassungsblog.de/power-law-and-the-covid-19-pandemic-part-i-the-year-of-pandemic/>> (accessed 10 July 2023).

<sup>74</sup> O'Malley (n 44), 172.

<sup>75</sup> A W Neal, 'Normalization and Legislative Exceptionalism: Counterterrorist Lawmaking and the Changing Times of Security Emergencies' (2012) 6 *International Political Sociology* 260, 261.

<sup>76</sup> *ibid.*, 265–273.

<sup>77</sup> L Rogers et al., 'German political institutions' (1932) 47 *Political Science Quarterly* (4), 576, 580.

<sup>78</sup> M P Fitzpatrick, 'A State of Exception? Mass Expulsions and the German Constitutional State, 1871–1914' (2013) 85 *Journal of Modern History* 772, 777.

<sup>79</sup> J J Sheehan, 'The Problem of Sovereignty in European History' (2006) 111 *American Historical Review* 1, 2–3, cited in Fitzpatrick (n 79), 799.

## 5. LEGITIMACY VS LEGALITY: THE GUARANTEE AGAINST NORMALISED CODE OF CONDUCT

Regarding the adoption of the precautionary principle to tackle future pandemics, the increment of the interest of international and regional organisations and governments is visible. On the one hand, certain countries, such as France<sup>80</sup> and the United Kingdom,<sup>81</sup> have opted to establish new emergency protocols, while others, like Germany,<sup>82</sup> have amended their legislation to enhance their capacity for potential future threats of a similar nature.<sup>83</sup> On the other hand, the World Health Organization (WHO) member states have reached a consensus to prepare for developing a 'Pandemic Prevention, Preparedness, and Response Accord'.<sup>84</sup>

In my view, the best practice for elaborating legislation and amendments to deal with future pandemics and showing the trend of adopting the precautionary principle can be grasped by looking at the international and regional organisations related negotiations, treaties and conventions. The reason behind this claim stems from the fact that the adoption of documents at organisations such as the WHO results from cumulative discussions, proposals and substantively the consent of all or the majority of member states. Therefore, this Section tries to summarise the zero draft of 'the WHO convention, agreement or another international instrument on pandemic prevention, preparedness, and response' ('WHO CA+') and the proposed amendments to the International Health Regulations (IHR).

The WHO CA+ suggests more global and sustainable cooperation in dealing with pandemics. Moreover, the draft discusses the 'equity in, for and through pandemic prevention, preparedness, response and recovery of the health system'.<sup>85</sup> The amendments to the IHR also follow a similar pattern to the WHO CA+. <sup>86</sup> Notwithstanding the overall good and valuable suggestions mentioned,<sup>87</sup> the downside of the WHO CA+ and IHR's amendments should also be taken into consideration.<sup>88</sup>

---

<sup>80</sup> See Code de la Santé Publique, Law no. 2020-290, and Law no. 55-385 of 1995, and Les états d'urgence : l'état d'urgence et l'état d'urgence sanitaire (Daloz Étudiant, 2020) <https://actu.dalloz-etudiant.fr> accessed 25 October 2024.

<sup>81</sup> See Civil Contingencies Act (CCA) 2004, Public Health (Control of Disease) Act 1984, and Coronavirus Act 2020.

<sup>82</sup> See Law on the Protection against Infections (Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen) and its amendments after Covid-19.

<sup>83</sup> For further information see A Vidaschi, 'COVID-19 and Emergency Powers in Western European Democracies: Trends and Issues' (Verfassungsblog, 5 May 2021) <<https://verfassungsblog.de/covid-19-and-emergency-powers-in-western-european-democracies-trends-and-issues/>> (accessed 19 May 2023).

<sup>84</sup> See 'Pandemic Prevention, Preparedness and Response Accord' (World Health Organization, 28 June 2023) <<https://www.who.int/news-room/questions-and-answers/item/pandemic-prevention--preparedness-and-response-accord#:~:text=Member%20States%20of%20the%20World,pandemic%20prevention%2C%20preparedness%20and%20response.>> (accessed 7 July 2023).

<sup>85</sup> Zero draft of the WHO CA+ for the consideration of the Intergovernmental Negotiating Body at its fourth meeting, 1 February 2023, A/INB/4/3, 1.

<sup>86</sup> See 'Article-by-Article Compilation of Proposed Amendments to the International Health Regulations (2005) Submitted in Accordance with Decision WHA75(9) (2022)' (World Health Organisation (WHO) <[https://apps.who.int/gb/wgihrr/pdf\\_files/wgihrr1/WGIHR\\_Compilation-en.pdf](https://apps.who.int/gb/wgihrr/pdf_files/wgihrr1/WGIHR_Compilation-en.pdf)> (accessed 15 February 2024).

<sup>87</sup> It should be clarified that the negotiations related to both amendments to the IHR and Pandemic Prevention, Preparedness and Response Accord are still ongoing. The latest update regarding these two documents, which the author of this article can refer to, is dated 1 June 2024 (seventy-seventh World Health Assembly). For more information, see Pandemic Prevention, preparedness and Response Accord (World Health Organisation (n.d.)) <<https://www.who.int/news-room/questions-and-answers/item/pandemic-prevention--preparedness-and-response-accord>> (accessed 27 September 2024). Also, in order to study the positive sides of the new amendments see R Habibi et al, *The 2024 Amendments to the International Health Regulations: A New Era for Global Health Law in Pandemic Preparedness and Response?* (2024) (SSRN Scholarly Paper 4962876).

<sup>88</sup> The WHO CA+ has received some criticism for different reasons, such as failing to address human rights protection during public health emergencies, weakening intellectual property rights, and not proposing a concrete solution for cooperation of states during pandemics. For more information, see *Joint Statement on the Draft "Pandemic Treaty": Member States Should Include International Human Rights Obligations in Negotiated Text.* (n.d.). Amnesty International <<https://www.amnesty.org/en/documents/ior40/7389/2023/en/>> (accessed 27 September 2024); Draft "Pandemic Treaty" Fails to Protect Rights | Human Rights Watch. (2023, November 7). Human Rights Watch. <https://www.hrw.org/news/2023/11/07/draft-pandemic-treaty-fails-protect-rights> (accessed 27 September 2024); and N Aghogho Evaborhene et al., *The WHO pandemic treaty: Where are we on our scepticism?* (2023) *BMJ Global Health*, 8(6), e012636.

The current zero draft (A77/10), in Article 4, aligns with the trend among many countries worldwide, proposing the strengthening of prevention, monitoring, and data collection systems, as recommended by expert guidance. Article 4 suggests that Member States include surveillance methods that empower them to prevent ‘the emergence [...] of infectious diseases’.<sup>89</sup> However, there is no direct mention of the precautionary principle’s application in the WHO CA+ and IHR. Even as part of the negotiations for the IHR, it can be seen that the proposed amendment to include exercising precaution in Article 3 was rejected by the Review Committee due to its conflict with ‘evidence-based’ measures.<sup>90</sup>

Nevertheless, arguing for measures to prevent the emergence of infectious diseases can still be interpreted through the lens of the precautionary principle. Indeed, the nexus between WHO CA+ Article 4 and the emphasis of both the WHO CA+ and IHR on the One Health approach allows for interpreting some parts of these documents in line with precautionary principles, despite their insistence on ‘scientific and evidence-based’ decision-making processes.<sup>91</sup>

The One Health approach, as discussed by the Food and Agriculture Organisation of the UN (FAO),<sup>92</sup> the European Centre for Disease Prevention and Control (ECDC),<sup>93</sup> and the Centres for Diseases Control and Prevention (CDC)<sup>94</sup> align with the concept of ‘early warning systems’.<sup>95</sup> Therefore, the proposal for deeper monitoring and data collection, particularly to prevent pandemics, reflects the inclination of Member States to observe every aspect of public health to combat future pandemics. Moreover, concerning this suggestion, we can witness the growing emphasis from mainly developed countries on developing more digital technologies and artificial intelligence for surveillance.<sup>96</sup>

Another noteworthy aspect, which is not explicitly addressed within the WHO CA+ and IHR’s amendments yet has become evident across various countries and may potentially be exacerbated by the recommendations in the mentioned documents, is about promoting the harmonisation of pandemic precautions and responses, which pertains to the issue of decentralisation. During the COVID-19 pandemic, it was observed that several federal or decentralised systems opted to delegate their authority to central governments. This shift in approach was perceived as successful in some instances, with countries like the United States<sup>97</sup> and Sweden<sup>98</sup> viewing their decentralised systems as a hindrance. Some countries, such as Finland, even undertook reforms to establish a more centralised response mechanism for future contingencies.

In addition to what has been mentioned above, the recommendations of some experts can also be mentioned. For instance, A S Bhalla argues the necessity of reforming human behaviour, working habits, and lifestyle, believing that humanity should move more towards ‘distance/ remote’ activities as a precautionary way of reducing the chance of pathogenic risks.<sup>99</sup>

89 ‘Proposal for the WHO Pandemic Agreement’ (World Health Organisation, 27 May 2024) <[https://apps.who.int/gb/ebwha/pdf\\_files/WHA77/A77\\_10-en.pdf](https://apps.who.int/gb/ebwha/pdf_files/WHA77/A77_10-en.pdf)> (accessed 22 September 2023).

90 Proposed Amendments and Technical Recommendations to the International Health Regulations 2005 (IHR) (World Health Organisation, n.d.) <[https://apps.who.int/gb/wgihp/pdf\\_files/wgihp2/A\\_WGIHR2\\_Reference\\_document-en.pdf](https://apps.who.int/gb/wgihp/pdf_files/wgihp2/A_WGIHR2_Reference_document-en.pdf)> (accessed 23 September 2024).

91 Pandemic Prevention, preparedness and Response Accord, n 88.

92 One Health intelligence (Food and Agriculture Organisation of the United Nations n.d.). <<https://www.fao.org/one-health/areas-of-work/one-health-intelligence/en>> (accessed 22 September 2024).

93 ECDC One Health Framework (ECDC May 2024), <<https://www.ecdc.europa.eu/sites/default/files/documents/One-Health-Framework-Directors.pdf>> (accessed 17 June 2024).

For example see ‘Lessons from the COVID-19 Pandemic’ (Publications Office of the EU, May 2023) <<https://op.europa.eu/en/publication-detail/-/publication/20e71e1b-f2d0-11ed-a05c-01aa75ed71a1/language-en/format-PDF>> (accessed 20 September 2024).

94 About One Health (Centres for Diseases Control and Prevention, n.d.) <<https://www.cdc.gov/one-health/about/index.html>> (accessed 20 September 2025).

95 Rogers et al. (n 78).

96 For example, see ‘Lessons from the COVID-19 Pandemic’ (Publications Office of the EU, May 2023) <<https://op.europa.eu/en/publication-detail/-/publication/20e71e1b-f2d0-11ed-a05c-01aa75ed71a1/language-en/format-PDF>> (accessed 19 August 2023).

97 See M Davis et al., ‘Emergency Powers and the Pandemic: Reflecting on State Legislative Reforms and the Future of Public Health Response’ (2023) 21 *Journal of Emergency Management* 19.

98 See A Nordgren, ‘Pandemics and the Precautionary Principle: An Analysis Taking the Swedish Corona Commission’s Report as a Point of Departure’ (2023) 26 *Medicine, Health Care and Philosophy* 163.

99 A S Bhalla, *Lessons for the Future* (Springer Nature Switzerland, 2023), 231.

We are still far from the legislation of these recommendations. However, the status of this recommendation should be examined before the principle of the rule of law. The examination of this future legislation is a challenging task. For example, the European Court of Justice decision in *National Farmers' Union and Others* shows that early intervention to restrict freedoms cannot automatically be dismissed by the claim of being inappropriate due to uncertainty.<sup>100</sup> Indeed, the precautionary principle as an early intervention can be justified from the constitutional law perspective merely based on the 'state's duty to protect individual rights to safety'.<sup>101</sup> Therefore, any intention to be more critical towards such legislation should go beyond the claim of lack of scientific data to support the necessity of having related laws.

Furthermore, it is crucial to acknowledge that the precautionary principle should not be considered illegal and does not constitute a breach of the rule of law. Precautionary laws align well with Fuller's eight principles of the rule of law, also known as 'inner morality'.<sup>102</sup> In other words, the legalisation of the precautionary principle is rooted in their justification as lawful acts, in harmony with the principles of the rule of law. Nevertheless, when one moves beyond the formalistic or procedural interpretation of the rule of law and assesses precautionary regulations based on substantive criteria, potential issues with these laws may arise from a rule of law perspective.

Regarding the Declaration of the 1990 Conference on Security and Cooperation in Europe, in which representatives of the US and Canada were also present, in the principle of the rule of law, 'democracy is an inherent element'.<sup>103</sup> Moreover, the rule of law is based on 'the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression'. According to this 'thick substantive conception of the rule of law',<sup>104</sup> we can argue that the rule of law, besides Fuller's eight principles, should include democracy and human rights to guarantee justice, equality, and fairness 'between government and governed'.<sup>105</sup>

The elements of democracy and human rights are the providers of equality and fairness. These two elements question the legitimacy of enacted laws. Legitimation encompasses two interrelated meanings of being 'acceptable' and 'reasonable'. In other words, as Wojciech Sadurski says, legitimacy 'is a standard located halfway between the benchmarks of validity and justice'.<sup>106</sup> Hence, it is imperative to thoroughly examine the justificatory capacity of precautionary laws to elucidate their legitimacy and understand their standing vis-à-vis the rule of law. To achieve this goal, precautionary laws for future pandemics can be examined from three perspectives: 'justification in a narrow sense', 'content of the law and the birth of the grey hole', and finally, 'pragmatic governmentality and the matter of human rights'.

### *Justification in A Narrow Sense*

The legitimisation of laws from the rule of law standpoint implies the necessity of the existence of the justification for laws. Here, justification emerges in its narrow sense, which indicates being based on 'evidence' and not arbitrary. Therefore, the 'burden of proof for government interventions rests with the state'.<sup>107</sup> As Klaus Meßerschmidt says, 'legislation should not be based on assumptions and hopes but on the determined facts and well-founded forecasts'.<sup>108</sup>

<sup>100</sup> ECJ Case C-157/96 *National Farmers' Union and Others* [1996] ECR I-2211.

<sup>101</sup> K Meßerschmidt, 'COVID-19 Legislation in the Light of the Precautionary Principle' (2020) 8 *Theory and Practice of Legislation* 267, 283.

<sup>102</sup> Fuller (n 8).

<sup>103</sup> Conference on Security and Co-operation in Europe, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (29 June 1990) <URL> accessed 25 October 2024, paras 3 and 4. See also E S Easterly, 'The Rule of Law and the New World Order' (1995) 22 *Southwestern Univ. Law Review* 161, 165–66; J Norton Moore, 'The Rule of Law and Foreign Policy' (1993) *Harvard Journal of World Affairs* 92.

<sup>104</sup> B Z Tamanaha, *On the Rule of Law History, Politics, Theory* (Cambridge University Press, 2004), 110.

<sup>105</sup> *ibid.*

<sup>106</sup> W Sadurski, 'Conceptions of Public Reason in the Supranational Sphere and Legitimacy beyond Borders' (2019) *Legitimacy* 161, 165.a.

<sup>107</sup> Meßerschmidt (n 102), 285.

<sup>108</sup> *ibid.*



However, some would argue that legislation to adopt the precautionary principle against future pandemics is not based on complete uncertainty. This claim is partially correct since some pieces of evidence convince us that pandemics can happen anytime, and we should be prepared for them.

### *Content of the Law and the Birth of the Grey Hole*

The hypothetical argument of those groups which would say that the occurrence of a pandemic is a particular matter, and the only point is the impossibility of forecasting the time of its happening, leads us to the second examination of precautionary laws.

Examination of upcoming precautionary legislation ensures that parliaments and governments try to provide some legal background for their restrictive measures. Therefore, laws are there to fulfil the legality requirement. However, due to the uncertainty within the legal provisions, which merely adapt more data surveillance and modification on our 'way of life', we can argue that these laws would produce legal 'grey holes'. According to David Dyzenhaus, a grey hole is a space based on the law but granting power to the authority to be applied widely without any judicial effects on it.<sup>109</sup> So, here we can talk about a sort of 'validity trap'.<sup>110</sup>

### *Pragmatic Governmentality and the Matter of Human Rights*

The legal grey hole and validity trap result from understanding and interpreting the rule of law merely from the legality aspect. Both the grey hole and validity trap raise concerns about the details of the legislation.

Returning to the substantive approach towards the rule of law enables us to examine a law in the light of human rights principles. This examination is necessary so as to go beyond the *rule by law* and guarantee the legitimacy of the law through the lenses of equality and fairness.

Numerous scholars have explored the imperative of incorporating human rights principles within the rule of law framework. However, I propose employing the discourse of governmentality to address this issue. The rationale behind this choice lies in the contemporary approach to handling future pandemics which, as has been discussed in this article, is deeply rooted in governmentality. Consequently, utilising the same discourse underscores that we must recognise the governmentality approach. Nevertheless, it is essential to recognise that governmentality comprises certain facets that moderate its inclination to unduly curtail individual freedoms and human rights under the guise of collective interests, often to bolster state authority.

While Foucault and numerous scholars influenced by his work have traditionally viewed governmentality as a tool wielded by governments to legitimise their actions, adopting an alternative perspective on governmentality transforms it into an instrument that accentuates the incorporation of 'legitimation' within the legislative process. This, in turn, poses a potential impediment to authorities seeking to justify their restrictive precautionary legislation.

In the core of governmentality, three features play an important role.<sup>111</sup> The first feature is 'generality'. It points out that governmental regulation is not the only prudential recommendation for specific situations. It indicates that, regardless of the context, the government should follow 'a relatively uniform line in terms of principles valid at all times and all circumstances'.

The second feature introduces governmentality as an internal limitation against the authority's decisions. The argument here is that there are two different restrictions against the excessive desire of the government to control its people. The first one is law, which merely by producing judgment against the state authority attempts to limit it externally<sup>112</sup>. The second one functions from inside the government. It is termed internal since the only authority producing it is the government through its speeches, promises and legal-political conventions such as the constitution.

---

<sup>109</sup> *ibid.*

<sup>110</sup> D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2012), 57, 58.

<sup>111</sup> Foucault (n 2), 10, 11, 12, 13.

<sup>112</sup> G Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, 2004), 18.



Finally, the last feature of governmentality is related to the notion of ‘action between’. According to this notion, the limitations are not imposed by one side but rather are the creation of interaction among different actors.

The first two features demonstrate that the government cannot easily pass laws based on precautionary principles against its people’s freedoms, human rights, and democratic life. Basically, human rights have been internalised in the rationality of contemporary governments, and they should be respected in a general way and under all circumstances. Therefore, invoking the principle of legality for the violation of human rights or democratic life should be viewed as a breach of the limitations on the government.

Moreover, the third feature within governmentality, in addition to the necessity of ‘open, informed, and democratic’ precautionary decision-making raised by the Wingspread Statement,<sup>113</sup> affirms that precautionary legislation should be perfectly justified for society.

Hence, by governmentality, the government must follow all its promises to the nation. On the one hand, according to constitutional law, the government is responsible for providing a secure environment for its nation. On the other hand, the government ought to respect human rights. Therefore, in the case of precautionary legislation, the government cannot violate human rights (in other words, the rule of law) by using the excuse of protecting ‘lives’.

## 6. CONCLUSION

As elucidated in this article, the concept of state of exception has evolved to encompass domains beyond traditional security threats, including areas such as the economy, environment and public health. Moreover, it has been underscored that the underlying contextual factors of an exceptional situation will significantly influence the nature of the response it necessitates.

In accordance with the aim of this project which was the examination of those exceptional responses to fast-paced fatal transmittable pandemic diseases, this article referred to the three types of responses, namely the isolation method, disciplinary power and the practice of governmentality.

Governmentality, on the one side, is the amalgamation of the isolation method and disciplinary power in addition to enabling apparatuses (including institutions, procedures, calculations and laws) to justify and legitimise government actions to restrict individual interests against common interests. On the other side, governmentality embodies a unique understanding of the concept of power based on the politicisation of life and, therefore, a mere focus on fostering the population’s life.

This article also argued that the concept of governmentality in the case of dealing with pandemic diseases should be thought of more as a post-emergency measure. Since it attempts to restrict freedoms so as to guarantee the population’s life, this post-emergency measure requires a particular justification for imposing its restrictions. In this case, the grounding justifier aligns with the so-called risk society as the post-industrialisation phase of modern society. Risk society is based on the omnipresent fear and uncertainty within society.

Regarding this understanding of the risk presence, instead of being in line with prevention and preparation, the new risk management follows the precautionary principle. In other words, the precautionary principle contrasts with preventive and preparative measures by being based on uncertainty and unclear scientific evidence for adopting its measures.

In addition, this article, following O’Malley, discussed the nexus between the precautionary principle and law-making. Indeed, I claimed that the precautionary principle justifies adopting restrictive decisions against freedoms to save the common interest. Accordingly, governmentality uses the legal apparatus to normalise those precautionary decisions.

This article also elaborated on the laws with precautionary concern, from the outsider and insider views, on responding to exceptional situations as circumstances encompassing the risk. After demonstrating the insider view as the dominant approach towards the relationship between law and exception, I concluded that, in the last half-century, the legislative power

---

<sup>113</sup> Science and Environmental Health Network, *Wingspread Statement on the Precautionary Principle* (1998) <https://www.sehn.org/precautionary-principle-understanding-science-in-regulation> accessed 25 October 2024.

has broadened its competency during the state of exception. Hence, the legislative power's role is not merely about confirmation of the exception and granting all the power to the executive. In this new trend, we witness the legalising of exceptional decisions by the legislative power and the replacing of the state of exception (*Ausnahmezustand*) with exceptional law (*Ausnahmegesetze*).

In addition, the examination in this article revealed the status of exceptional law regarding the precautionary principle towards future pandemic diseases. To fulfil this examination, the zero drafts of the WHO Convention, Agreement or other International Instrument on Pandemic Prevention, Preparedness, and Response (WHO CA+) and the amendments to International Health Regulations (IHR), in addition to a few states' legislation adaptations and scholarly suggestions, were scrutinised through the lens of the rule of law. My elaboration illustrated that, in order to carefully examine upcoming precautionary legislation to tackle pandemics, it is necessary to go beyond the formal/procedural approach of the principle of the rule of law.

Finally, the main argument of this paper was based on the fact that however much precautionary legislation against future pandemics can be seen in line with the rule of law through the lens of their legality, their legitimisation would be problematic. Indeed, by defining legitimisation as justifying, any legislation should be in line with democracy and human rights to guarantee the respect of the law for equality and fairness.

To conclude, it should be mentioned that the argument here was that although laws based on the precautionary principle, as a modern risk management device, in certain cases can save our lives and protect humanity from various disasters, their enactment should be carefully considered. The reason for being cautious about precautionary principles stems from the fact that it can easily turn into backsliding and a threat to our way of life or, in other words, to democracy and human rights. In order to prevent this failure, considering precautionary laws merely based on the principle of legality would not be enough. Those precautionary laws should be considered legitimised from a narrow justification; they are mostly not justifiable because of two supplementary perspectives of legal grey holes and the elaboration of human rights within governmentality discourse.

## COMPETING INTERESTS

The author has no competing interests to declare.

## AUTHOR AFFILIATIONS

**Reza Khabook**  [orcid.org/0000-0001-7384-5248](https://orcid.org/0000-0001-7384-5248)

Doctoral Researcher and Research Assistant at the Academy for European Human Rights Protection, the University of Cologne, DE

### TO CITE THIS ARTICLE:

Reza Khabook, 'Application of the Precautionary Principle in Dealing with Future Pandemic Diseases: The Dilemma of Legality and Legitimacy Under the Rule of Law' (2024) 20(3) Utrecht Law Review 10–25.  
DOI: <https://doi.org/10.36633/ulr.1079>

**Published:** 18 November 2024

### COPYRIGHT:

© 2024 The Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited. See <http://creativecommons.org/licenses/by/4.0/>.

Utrecht Law Review is a peer-reviewed open access journal published by Utrecht University School of Law.

