


# Philosophy: Environmental risk policy and public law

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Human beings constantly look for assurances against uncertainty. Scientific data provides assurance, but it only examines the surface ‘facts’ of the causal world. Religion provides assurance, but it requires a belief in and allegiance to a particular definition of God.

Philosophy is a hedge against uncertainty that is more essential than science. It does not require a single theological belief and gives one access to a range of systematic, logical arguments for applying practical reason to choices in an uncertain world.

### **Environmental risk in policy and public law**

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In the world of policy and public law, no issue presents a more all-pervasive uncertainty than environmental risk (ER). The term itself is a misnomer. As a technical matter, the difference between a ‘risk’ and an ‘uncertainty’ is that the former can be accurately assigned a number, a probability, whereas the latter cannot. However, the ‘risks’ presented by the human-environment nexus cannot be so assessed. ER is a zero-infinity problem, that is, a near-zero probability of an infinitely catastrophic outcome.

However, how ‘near zero’ that probability is for any particular issue presents the problem. Given the risk soup we live in and the synergistic effects of the myriad of interactions of risk elements to which we are exposed, combined with the long latency periods between exposure and harm, as well as the stealth nature of ER, it is next to impossible to assign a meaningful probability. These are actually environmental uncertainties, not risks, that, while admittedly small, can have widespread and perhaps irreversible cumulative effects on both humanity and nature.

The policy dilemma is one of persuading people that the intangible possibility of a catastrophe is more pressing than surrendering what are known to be tangible advantages (e.g., carbon emissions for luxury/ convenience). Five decades of failed climate policy attest to the fact that people discount the future and that it is difficult to eliminate a tangible benefit even to create a qualitatively better state of affairs.

### **Philosophical-Policy and Legal Design (PPLD) methodology**

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This dilemma has led me to the methodology of Philosophical-Policy and Legal Design (PPLD). (1) This method allows a decision-maker to utilize an almost unlimited range of comprehensive philosophical arguments to approach an issue defined both in terms of

individual ethics and, more importantly, in terms of the juridical standards of choice in public law. Fundamentally, PPLD assumes that besides the superstructure of positive law and material facts, there is a philosophical substructure of argument, moral principle, and logic that offers a foundation by which any issue can be evaluated.

PPLD begins by analyzing the empirical superstructure or characteristics of a legal or policy issue and then considers alternative substructural moral arguments through various integrated philosophical paradigms. Within each paradigm, PPLD synthesizes a policy's superstructure (empirical logic of investigation) with a philosophical substructure (logic of concepts). This matches the policy objectives with the most supportive philosophical argument for achieving change.

## **What is environmental risk policy?**

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For example, the most prominent approach to environmental risk (ER) policy has been through the market paradigm. The market paradigm's fundamental imperative is Kaldor efficiency, or wealth maximization through markets where everything is priced for exchange. For ER policy, this means that both humanity and nature are hypothetically priced for inclusion in a context where the individual is assumed to be a consumer desiring wealth, and nature is an inventory of materials.

The state is a passive facilitator of market exchange. Any regulation must be only in response to already imposed costs and then only in terms of what the market would do were it not in some way inhibited. The legal burden of proof lies on those who would interfere with market processes.

But is ER policy about wealth maximization? Are we primarily consumers when facing risk? Given the characteristics of ER, like stealth and latency, do we want the state to wait passively for harm to make itself evident before acting? Should the burden of proof for ER not be on those who would impose it? Can PPLD provide an alternative paradigm that reorients the philosophical substructure of the ER debate to address these concerns?

## **Kant's philosophical substructure**

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Yes. Kant's philosophical substructure directly supports an active and anticipatory state empowered with a mandate to prevent harm before it enters the environment. It justifies a risk-conscious society where the burden of proof is on those who seek to create ER. Within a Kantian paradigm, policy choice assumes that the functional integrity of nature and the moral integrity of humanity-in-the-person are a better standard by which to regulate the uncertainty of ER. This imperative further assumes that the individual is seeking freedom within a functioning ecosystem, equal consideration within a system of distributive justice, and opportunity for independent and active citizenship rather than wealth maximization.

## **The Precautionary Principle**

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Anticipating ER is not new. The Precautionary Principle (PP) has been an international legal principle since the RIO declaration of 1992. But its full codification in national and international law has been slow to nonexistent, and it struggles to be applied even in the most obvious cases. Why?

PPLD reveals that this is because the substructural logic of concepts with which we evaluate the empirical application of PP does not support anticipating ER but instead inhibits this goal. If we try operationalizing PP while keeping the conventional substructure of market assumptions, the market's reactive wealth-based imperatives will never support its application.

Only when the positive superstructure of PP is provided with a proper reinforcing substructure of philosophical justification can its full potential become actual. When a compatible substructure, like Kant's PPLD, is substituted as a basis for the evaluation of the success or failure of PP, then the logic of concepts justifies an anticipatory and active state providing for ecosystem integrity and the empowerment of humanity-in-the-person. Now, the potential of PP as an answer to ER can be reasonably assessed.

## Reference

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1. See my Justice & Nature: Kantian Philosophy, Environmental Policy And The Law. Georgetown University Press (2000) and also Ecosystem Policy & Law: A Philosophical Argument For The Anticipatory Regulation Of Environmental Risk". The Palgrave Handbook On Environmental Politics, Activism, And Theory. Palgrave MacMillan. (2023).

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