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Abstract

Catastrophes are a powerful breakdown of our normative world, due to how they affect legal systems as jurisgenerative forces and the negation of law they produce at the same time. In this article I discuss the theoretical impact that the concept of catastrophe has on legal systems. To do so I focus on the strategies of response to the consequences of catastrophes enforced by the legal systems, exploring tensions between regulatory approaches and the guarantee of fundamental rights. In the second part of the article I assess the theoretical framework developed by connecting crime scenes to the idea of catastrophe. The analysis is conducted with reference to different cases such as the Bhopal disaster, the tsunami in the Indian Ocean, hurricane Katrina and a particular case of man-made and criminal catastrophe, the extensive toxic waste devastation caused by criminal organisations in the area of Naples, in Southern Italy. These cases show the links between environmental disasters, the inefficiency of law and the massive devastation of an entire area, which leads to different kinds of crime scenes from those normally evaluated, for their source, their physical extensions and for the enormous impact they had on local communities.

Catastrophes as Crime Scenes: Analysing the Legal Context

Valerio Nitrato Izzo

Introduction

Catastrophes have a strong conceptual link with modernity, even if this is rarely remembered. Surprisingly, we can also trace a date for the first general recognition of the importance of this issue, at least in the western world. It was during the aftermath of the Lisbon earthquake in 1755 that thinkers started questioning catastrophe. The immense devastation caused by the earthquake, in a big and wealthy city such as Lisbon in that period, caused an enormous impression and different reactions concerning its origins. Two of the most important thinkers of the time, Voltaire and Rousseau, directly considered the topic, but with different approaches. Voltaire vigorously attacked the idea according to which the world was assumed to be good because, as claimed by Leibniz, it was the creation of God. He insisted on the contradictory widespread presence of such evil and harmful events in a world supposed to be good. On the one hand, Voltaire was lamenting the fate of humanity suffering from the evil face of Nature, underlining the difficulty of understanding the nature of evil. On the other, Rousseau insisted on the human attitudes that call for responsibility in the outcomes of the events, focusing on the part played by the social and cultural context in an event out of human control.

Here lies the challenge that the concept of catastrophe still poses to us today, and probably more than ever. Rousseau's view can be considered to pioneer a modern social science approach to the topic of catastrophes, for he acknowledged the role of the emerging nation state as the main social actor in charge of a response to disastrous consequences (Dyne 2000).

However, we can try to clarify the meaning of catastrophe by emphasising its strong connection to the normative world. Notwithstanding the fact that 'law and catastrophe' is a very recent topic, it is common to find reference to law in disaster literature, underlining the tautology implied in some legal definitions of disaster as that which the intervention of disaster relief units make necessary (Dombrowsky 1998: 14). The connection that recurs most of the time is the one between catastrophe and order, which can also be found in many definitions provided by international organisations such as the OECD or by UN bodies. In this sense, catastrophe is an event producing a subversion of the very concept of order itself (Douglas et al 2007: 2). Religious thought considered catastrophe issuing from law as an expression of normativity, sometimes in the sense of punishment.¹ The liberal approach underlines, instead, that it is law that arises from catastrophe and focuses on catastrophe as a breakdown of the normative world. Confronting the law, catastrophe is Janus-faced, juris-generative and antithetic to law, all at the same time (Douglas et al 2007: 4). Catastrophes are moments when we confront the limits of our normative world (Ross Meyer 2007: 20). In this article I will discuss the way law shapes, creates and sometimes destroys such limits when catastrophes happen. Public injustice, the responsibility of the State and the possibility of a 'state of exception' are features that can link catastrophes to crime scenes, as shown by the cases of Hurricane Katrina, the Bhopal industrial explosion and, especially, urban and toxic waste in Naples. Crime scenes that arise from such occurrences can enlighten not only the response of law and legal system in extreme events, but also the hidden logic and significance of the relationship between law, 'crime scenes' and the catastrophe.

Catastrophic Risks

Those events defined as catastrophes always demand an urgent response from the legal system. For a better understanding and assessment of the impact of catastrophes on a legal system, a conceptual framework is required which links different elements such as regulatory techniques and normative approaches. Governmental policies use law as a means of assessing, reducing and controlling risk in a sovereign territory. It is the very concept of risk as something that can be controlled by human forces that recalls a normative meaning. Risk is a human creation, depending on its perception, which is always culturally influenced and, from this point of view, always relative to some extent, because perception of risk can vary not only among societies but also within a society (Douglas and Wildavsky 1982).

Consequently, here stems an important question: what are the features that make catastrophic risks different from other kind of risks? Firstly, we should be aware of the fact that catastrophes challenge the reliability of common risk assessing methods. Due to features such as magnitude, uncertainty and possible irreversibility in outcomes, the actuarial and probabilistic approach, typical of the insurance companies, is weak when it must face effects that are not foreseeable. Each risk assessment is a matter of classification, and it simply cannot be possible without assigning values — in the broadest meaning — to the outcomes (Steele 2004: 25). Modernity and the scientific approach have always attempted to place everything under the umbrella of possible assessment via calculation. In the ‘risk society’, it is the creation and the distribution of risks in society that play a central role, but in a new context where risks are, more and more, non-reciprocal. Due to the complexity of the contemporary world, risk is not always under control and many social groups are affected by risks that they did not help create. The role of science is crucial here because it lies at the heart of the connection between risk evaluation and decision-making. Risk is not something ‘natural’ but it is always man-made; it is ‘manufactured’, as Giddens states, through the development of technology (1999: 4).

Modernity has brought us not only a deep faith in progress through

knowledge, but also a way of reasoning, theoretically well hidden, regarding the dangers of our era. What is distinctive of catastrophes is that we should always be aware of the possibility of the worst-case scenario. This is sometimes called ‘catastrophism’ in the negative sense. Catastrophes are events with a low probability of materialising but they can produce terrible destruction and harm. Therefore, trying to calculate risks by balancing security and action, using knowledge and technology, does not represent the whole range of problems that catastrophic risks pose. Beck (1992) has noted that it is not the probabilistic approach of science that can end the discussion on the issues of risk. Catastrophic risks are mainly perceived as potential risks that include elements not susceptible of exact scientific prevision (for example the impact of decisions on future generations). Here lies the imperfection of the world and the gap between scientific and social rationality (Beck 1992: 30).

According to Dupuy (2002), catastrophism can also be seen as a kind of metaphysics of the modern world. In our attempt to reduce, minimise and sometimes deny risk, there is a common view that assigns to total reduction of risk an inevitable abstention from action. Dupuy challenges this view, asserting that the worst-case scenario must be taken into consideration as a possible event and that to minimise catastrophic risk does not mean a risk degree equivalent to zero. Inverting the temporal order between possible production of the event and its taking into account, Dupuy warns us that:

What is terrible with catastrophes is that we do not believe it is going to happen, even if we have all the information about this possibility. Once it has happened it will be considered inside the normal order of things. Catastrophe is not judged possible before its coming into existence (Dupuy 2002: 84-85).²

For Dupuy, understanding catastrophe in an era in which technology has reached the point that its use could lead to the total self-destruction of humanity, needs this metaphysical clarification.

Until now, I have not distinguished between human-made and natural catastrophes. This distinction was clear at the time of Voltaire, but is no longer. Of course, it is possible to distinguish between an

atomic war, a terrorist attack, an earthquake, or a tsunami. These different catastrophic phenomena pose different problems and answers. However, from the point of view of the effects of the catastrophe, it is important to underline that there is not such a thing as a 'natural catastrophe': all catastrophes are social, due to their effects (Acot 2006). As acknowledged just after the 2004 tsunami in the Indian Ocean, this event could have been much less catastrophic with a simple and economic system of alerting people to the impending disaster.

With regard to crime, the element of human intention in the making of the catastrophe is evident, yet this aspect does not undermine the social nature of the catastrophe. The extreme degree of harm of such an event cannot be understood without reference to the failure of relevant legal systems that allowed a serious negligence or crime to turn into a catastrophe. This may be seen in the Bhopal and Naples cases that I discuss later.

Approaches to Law and Catastrophe

The topic of law and catastrophe is, surprisingly, quite a recent one with only a small body of literature that examines the topic from a general perspective. Recent events such as 9/11 and the general terrorist threat, the number of tsunamis and Hurricane Katrina, have had the effect of stirring a new interest in the topic, especially within North-American literature. Despite this, it is possible to ground some general points.

It has already been said that the immediate link between law and catastrophe is the call for response. This statement does not mean that law only comes into action when catastrophes have already happened. Quite the opposite, law must face the challenge of catastrophe first of all in the sense of establishing preventive strategies to avoid the harmful event. Regulatory strategies can be roughly divided into anticipation, prevention and amelioration (Douglas et al 2007: 6). Even if the distinction between these approaches is not always clear, because of the mutual influence between different regulatory strategies, it is useful to have an idea of legal regulatory efforts in different branches of law.

Anticipation and prevention seem to play the most important part. This is hardly surprising, as catastrophes have this distinctive feature of tremendous magnitude of harm if they happen, with subsequent amelioration strategies implemented only after bad outcomes have already occurred.

As the world of harm can be divided into criminal and civil wrongs, regulatory techniques, as general legal frameworks, try to classify extreme events into a kind of regulative grid typical of liberal legality (Douglas et al 2007: 15). Such an attempt reflects the distinctive features of different domains of law. Relevant regulatory strategies for anticipation, prevention and amelioration in civil law can include responses from a range of areas from administrative law to tort law, with the possibility of including a criminal law component. Enforcement of regulatory norms, norms of safety and infrastructural development are administrative law measures that fit into anticipation and prevention strategies. For as the focus of tort law on risk accomplishes a similar function to the assignment of corporate risk through the doctrines of foreseeability and strict liability, in the domain of criminal law the content of such strategies varies from anti-terrorism policies such as domestic spying, preventive detention, torture, to military strike and regime change in genocidal regimes.

In civil law, prevention and anticipation are usually taken into consideration under the form of foreseeability of harmful events and can be understood as an assignment of risk to the party that is going to act in a dangerous way. This is a more probabilistic way of reasoning, near to the insurance calculation of costs and trade-offs.

The logic of catastrophe is difficult to reduce to this, because of the immense and impossible costs of amelioration calculation (Posner 2004).³ Massive disaster litigation shows that legal systems are capable of handling small or mid-size disasters but catastrophes in the larger sense — think about Bhopal — lead most judicial procedures to collapse or at least to show an important degree of inefficiency (Durkin and Felstiner 1994).

The main problem here is not the regulatory technique at stake.

From my point of view, the most important thing to understand is the link between social catastrophes and legal strategies to identify the accountable legal entity. My argument is that, notwithstanding the general emphasis on a cosmopolitan approach, the State still plays the biggest part in preventing harmful events from becoming catastrophes. A way to assess the argument is to analyse the importance of national legal systems in the criminalisation of catastrophes and in the management of crime scenes that arise from such events. Beck (2003) has argued that understanding and facing the challenges of a global risk society means to leave aside methodological nationalism in social sciences. His view implies that nation states are not able to face global risks acting independently anymore (Beck 2007). According to him, while authors like Luhmann, Douglas, or Foucault tend to focus on order as the main perspective, global risk leads us to a kind of imposed cosmopolitanism (Beck 2006). Whilst a discussion of the concept of cosmopolitanism and all its implications is beyond the purview of this article, I would like to underline some problems of this idea from the point of view of the role of law and State in a catastrophe.

The policies and the decisions of a State have a direct impact, and sometimes on the very 'creation' of a catastrophe when risks become real. We can say, for example, that some catastrophes, supposed to be natural, could have had a minor impact to a large extent. Hurricane Katrina is arguably the best example. The inertia of the civil protection system produced a clear demonstration of serious gaps in the ability of the legal system to respond to natural disasters and other catastrophic events (Chen 2009). The strategy was to 'privatise' risk, with the U.S. Government abdicating the most basic right since Hobbes: the right to life.⁴ This strategy had the effect of harming the most vulnerable people in New Orleans and the region affected by the devastation, prompting us to face the following question: is protection from harmful events of great magnitude a duty of the State? To understand that this is not just a matter of policy but also a question of rights, it is possible to think, in terms of a prevention regulatory approach, of the right to have an emergency plan provided by the local or national government (Binder 2002: 791) and that such a plan should be effectively enforced.⁵

Prevention in this way transforms itself from a regulatory practice into a right justiciable before a court, as claimed after the 2006 earthquake in Indonesia by Coalisi KPHY, an association of cause lawyers suing the Indonesian State for ‘having not arranged any prevention measure’ (Bultrini 2009).

My argument is that social vulnerability, from the legal point of view, is still, mostly, a matter of national systems rather than of international cooperation. The Bhopal case gives us some evidence of the conflict between cosmopolitan and national approaches. During the night of 2 and 3 December 1984 in Bhopal, India, a massive leak of the deadly gas methyl isocyanate occurred at the plant of pesticide producer Union Carbide. The accident resulted in the killing of several thousands of people among the local population. With its apocalyptic number of deaths, still rising in contemporary times due to the side effects of contamination, Bhopal is the largest industrial disaster that has ever occurred. It has also probably been one of the biggest crime scenes ever, if we regard this not exclusively from a penal liability standpoint but also in terms of a wide-spread and unbearable injustice. From the tragedy arose a long, complex, and still ongoing legal action that involved Union Carbide, the Indian government and the representatives of victims and survivors (see Cassels 1993). The case was the object of a long struggle trying to set liability and have the case heard by a competent judge in the US. The challenge for the victims was to assure a tort law system able to award a just compensation, given it was uncertain which was the best compensatory model: American or Indian. The case was, in the end, declared under Indian jurisdiction while the Indian government appointed itself as the victims’ exclusive representative. The Bhopal disaster’s judicial story contains two narratives: on one side, it shows that cosmopolitan approaches are limited and not always reliable from a victim’s perspective; and on the other side, that the performance of the legal national system is stressed by abnormal events and that law’s promises in this field can be quite elusive, especially in tort law (Galanter 2002).

This short summary of the argument should not be read as a call

for a return to a strict statualism. Assessing risk from a legal point of view surely goes beyond national borders. The development of the principle of precaution doctrine as a general principle of international law can be understood in this way, and not only for its origin in various international documents, but also for the importance that it assumes in enforcing a particular legal view, more attentive to the element of *prudence* in legal theory (Papaux 2006: 220-240). Paradoxically, the precautionary principle can be offended by regulation as well as by non-regulation. Each regulation, including precautionary ones, involves worst-case scenarios of its own (Sunstein 2007: 128). Such scenarios, and the management of injustice they can bring, are still largely under the control of single legal systems, as the analysis of the Naples case shows.

Moral Journeys into the Land of Fires: The Evil that Men Do

During the last 15-20 years, an entire area of Southern Italy, Campania, the region having the city of Naples as administrative capital, has been tremendously devastated by illegal waste disposal. During this time, local bodies and the regional government did not succeed in organising a modern, efficient and ecological system of garbage management and disposal. The reasons for such a failure in the administrative system are complex and probably out of this article's scope. In any case, and this is crucial for the analysis I develop here, the most important element is that the absolutely peculiar mix of inefficiency of the administrative and legal structures, and the role of criminal groups and local mafia — *camorra* — established a perennial emergency that, even if led by the national government through various legal acts, statutes and emergency decrees created, *de facto*, a legal context for a criminal catastrophe.

At this point a clarification is needed. Even if most people associate the Neapolitan trash crisis with the urban waste that filled the streets, due to the ample international media coverage, there are two emergencies that merge into one, even if they are just two faces

of the same phenomenon. The first one is related to the urban garbage issue, the fact that a complete cycle of garbage management was not functioning and is still generally not complete. The second is the toxic waste disposal directly led and organised by the *camorra*. The latter phenomenon is not what is generally expected of criminal organisations: we usually think about 'classic' crimes like international drugs traffic, exploitation of prostitution, rackets and so on. From this point of view the *camorra* was fairly far seeing: giving the word directly to the actors, a member of a *camorra* clan once stated during an interrogation that 'garbage is gold' (Iacueli 2008: 6, Commissione parlamentare 1997: 426), meaning that the drug business was not the only way to make money.

Years of dumping illegal toxic waste, which was an economically convenient way of waste treatment for industries based in Northern Italy and across Europe, had passed without great social, environmental or political alarm. Paradoxically, the Italian Parliament was well aware of the situation, as demonstrated by official reports of parliamentary commissions and bodies of inquiry (see Commissione parlamentare 1998, 2006). Unfortunately for the local population, the whole affair soon turned into a serious public health problem. The toxic waste, without complying with the strict national and EC regulations, had been mainly disposed of in illegal dumps, without any concern for environmental safety. Most of the time, due to the *camorra*'s power in terms of social relations and intimidating acts, toxic and industrial waste was buried in country fields. This practice turned out to be more profitable than agricultural pursuits. It is important to stress that the most affected area located north/north-east of the city of Naples was called *Campania Felix* [*Prosperous Campania*] by the Romans because of the extreme fertility of the area, renowned for its many local food products. As all this seems to have dramatically disappeared, due to a drop in demand for such products by frightened international markets, many authors now call the area *Campania Infelix* [*Unprosperous Campania*] (Iacueli 2008: 1, Iovene 2008). Such massive environmental devastation slowly polluted the eco-system of the area, resulting in contamination of water resources and agricultural fields. As a direct

consequence, the area's important role in agriculture began to be challenged, as many grazing animals such as sheep and buffalo started to get ill. This was due to high levels of dioxin, a highly toxic chemical compound, and other dangerous elements such as polychlorobiphenyls. Furthermore, dioxin is not only toxic for animals but also for humans, as it can cause cancer, malformations, leukaemia and lymphomas.

As strange as it may seem, for a long time the situation failed to gain media coverage even if the beginning of the spread of the dangerous effects was underway. Similarly, the public health authorities initially refused to link the increasing rates of disease, as a specific causal connection, with the toxic waste affair, also due to the lack of reliable data at a medical level. Things started to change when, in 2004, an article appeared in the prestigious scientific journal *Lancet Oncology* (Senior and Mazza 2004). In the title of the article appeared, for the first time, a sad way to refer to one of the areas most affected by illegal dumps: the 'triangle of death'. The authors gave this term to an area that formed a triangle between the towns of Nola, Marigliano and Acerra, east of Naples. The study demonstrated, using empirical evidence, that in District 73, the public health code which indicated the area, during the period between 1994 and 2000 there was a significant rise of cancer rates. This was higher than the national and regional average, urging for an investigation into the link between the hazardous waste and cancer mortality (Senior and Mazza 2004: 527).

The hypothesis of the article established that the mortality of the sheep in Acerra was being affected by the toxic dumping. As toxic elements, especially dioxin, polluted pastures, the first victims of the disaster were the sheep breeding in the area. The sheep ended up being the first indicators of the disaster (Iovene 2008: 75), showing by their deaths the presence of an enormous concentration of dioxin in the feed and in the whole country-side of Acerra. Shepherds also began to die from the high average of dioxin in blood, and this happened in a zone without any significant industrial activity.⁶

This is only a brief review of a very intricate story. The removal of such a disaster from the public debate in Italy is probably due to a kind

of social schizophrenia mixed with a local and economic interest in not uncovering the veil of ignorance under which all of this was happening. Institutional reports and scientific studies did not become known to the public until the last urban waste crisis that affected Naples and its hinterland in 2007-2008. But, as we have seen, that was just one side of the Neapolitan garbage affair, and probably not the darkest one.

Where official reports did not succeed, literature did. In his widely acclaimed book *Gomorrah*, Roberto Saviano (2008) found the way to give a comprehensive description of the *camorra's* criminal empire in its manifold manifestations. In the last chapter of the book, entitled 'Land of Fires' (2008: 282), Saviano deals with the toxic waste affair. Magisterially reviewing what many of his compatriots tried not to see and hear, he made a descent to hell into the mechanisms and the minds that produced such a disaster, sweeping away the romantic image of the criminal attitude, showing the rising professionalism and the strict tie to the industrial and 'official' economic system. To generate such a massive flux of toxic waste in a one-way direction from northern to southern Italy means having contacts with an organised crime reality that, in order to have access to the rich market of illegal disposal, puts stakeholders and their technical competence in the first line to make business as profitable as possible (Saviano 2008: 288). In order to gain an accurate overview of the real dimensions of the business and its impact on disposal needs, there is no better way than to imagine a mountain with a base of three hectares, made of 14 million tons of unofficial and illegal trash with a height of 47,900 feet: the highest mountain on the planet (Saviano 2008: 283). But nobody is going to see this mountain as it is mainly underground and a substantial part of it is incinerated daily in this devastated land, as the title of the chapter suggests. The visual element results in an aesthetic of a catastrophe, with garbage fires all around, drums of toxic wastes left open in the country-side, urban waste left on the highways.⁷



Figure 1. A Ferrillo 'A toxic waste burning in the Land of Fires'
© Angelo Ferrillo <www.laterradeifuochi.it>

The legal framework that has regulated the garbage affair during the last fifteen years is an extremely complex one. In 1994, to counter the chronic inefficiency of the local bodies regarding garbage treatment and management, the Prime Minister declared an emergency state for waste management in the Campania Region that was based on Civil Protection intervention during natural disasters. This arose from the region's proven inefficiency and the environmental emergency that it caused and was known as the *Ordinanza del Presidente del Consiglio dei Ministri* n.195 1994. This was the first legal act in a long series of acts that would set the legal framework of waste management for years to come (for a clear account and review of the legal framework's evolution see Iannello 2007).

The emergency writs that were issued year after year exploited the legal accountability of the local administrative bodies. The central government created a legal body called *Commissariato per l'emergenza dei rifiuti* that, from 1996 onwards, would be the only legal institution to have authority on the subject. Unfortunately, this administrative law which was to be implemented as an emergency act for a limited time was still in force throughout the 2007 emergency. The constitutionality of these measures may be questioned because they became, once again, extended by *Legge* n. 123 2008 until December of 2009.

However, the original aim of simplifying the bureaucratic procedures in order to assist in the management of the public service ended with exactly the opposite result (Iannello 2007). In the end, the emergency became ordinary with all its possible and imaginable consequences. The exercise of emergency powers, free from any legally binding predetermination, did not solve the problem, but became a legal and administrative issue in itself. The various legal layers that were slowly added, ended up creating other bureaucratic structures, in which no one knew what the others were doing, with an enormous waste of public money, estimated at around two billion Euros. The most eloquent image is the five million balls of garbage (*ecoballe*) that are stored in the suburbs of Naples (Iaculli 2008: 259). While they are there waiting to be burned in an incinerator, they are still owned by the company (*Fibe-Impregilo*) that was in charge of managing the whole process of garbage disposal. The economic aim of the company was to gain money from the incineration of such materials, in an industrial incinerator to be built by the same company. In the end, many public administrators — among which the President of the regional government, members and heads of the *Commissariato per l'Emergenza Rifiuti in Campania*, members of the board of administration of the company *Fibe* and many others involved in the affair — were indicted before a Criminal Court.⁸ So it was not only the illegal waste management that ended up being a criminal affair, but also an important part of the administrative action enforced under the emergency law.

Scenes From a Catastrophe

We can now focus on various aspects that highlight the link between the catastrophe as a theoretical concept and its legal and criminal context. What the Neapolitan story highlights well is that each catastrophe carries a double imperative: one is deeply linked with the idea of risk, mainly conceived as a general reflection on the probability of occurrence of the event, and the second concerns the policies to prevent it or weaken its social consequences. I would like, as an alternative, to follow a different direction that places catastrophe in a more general moral understanding of the event. What a catastrophe always brings is a break in the legal order. Each catastrophe produces such consequences on the legal systems that if the system cannot adequately respond, the social effects of a supposedly natural catastrophe will turn it into a moral one. This aims at a reconsideration in the legal context of the distinction between intentional and unintentional catastrophes. Of course, it is possible to distinguish between catastrophes such as Katrina, Bhopal or Naples. However, only in the last instance can we find a clear criminal intent that took place and that *caused* the catastrophe. But if it is true that there are no such things as natural catastrophes but only social ones, when we look at the consequences and social vulnerability (Chen 2009: 4) the differences are less clear. In New Orleans, when the State failed to protect its citizens by giving them adequate assistance before and after the arrival of Hurricane Katrina, in the same way the national and local governments failed completely to prevent the daily crimes committed in that country. This shows that politics and law are closely bound up in the making of a catastrophe, and that from this point of view the same concept of foreseeability must be necessarily connected with the actions of institutions and governments.

Catastrophes are not only a challenge to the role law ordinarily plays in our societies, but they show the real effects of policy choices in a legal system. The most impressive thing about Katrina's impact is the recognition that some individuals, belonging to identifiable classes and minorities, were not taken into consideration by the law and its institutions, as they were classified just as 'without means to evacuate',

without even asking who should have organised such means (Davis 2005). We can consider such moments as comprising a tremendous legal epiphany in which, by stressing the limits of our normative world, we can more profoundly comprehend the way law really works or what goods and values it protects. That is, the poor and vulnerable in New Orleans were not perceived to be as deserving of the same level of protection from the catastrophe as others.

The schizophrenic attitude of law facing catastrophe is particularly well shown by the centrality of criminal law, instead of a legal paradigm focused on civil law and preventive practices. In the wake of Katrina, the absence of law was evident, as most vulnerable people lacked assistance. It seems a common feature among the cases of Katrina, Bhopal and Naples that the law abandoned victims to their fate, leaving them alone in a scenario which was out of their control. Nevertheless, in this situation law claimed indispensability in assuring order. The projection of traditional crime attitudes and biases regarding crimes committed during the catastrophe was initiated by introducing a false memory of crime related to the event (Simon 2007). A new model of disaster management emerged, centred on fusing natural elements such as floods or earthquakes with violent criminality and terrorism, with the risk of a growing amount of coercive law enforced by the State and local authorities (Simon 2007: 15). After its breaking impact on the legal system, the law tries to exploit and colonise catastrophe (Meyer 2007: 21), trying to avoid recognition of the particularity of the situation. As the analysis of concepts such as looting during catastrophes seems to confirm (Green 2007), criminal law aims firstly at reaffirming the coercive power of the State as if the catastrophe had not happened, so that the law continues to operate normally, through ordinary legal categories, even in exceptional conditions, which the very same law helped create. The 'shoot on sight' order against looters shows the attempts of the law to reaffirm its authority, even in a time in which the law seems to have been depleted by events apparently out of its control.

The case of toxic waste in Naples is, nevertheless, slightly different from other catastrophes such as Katrina, the 2004 Tsunami or Bhopal.

The first objection that can be raised is that the toxic waste affair is anything but natural: that it should not be considered a natural catastrophe but rather an intentional one, in which the consequences were directly human-agency driven. I would like to argue that this point is not as relevant as it may seem at first sight. To do so I wish to introduce some distinctions between intentional and unintentional catastrophes. According to Posner it is possible to distinguish between catastrophes by classifying catastrophic risks in four classes, the fourth one regarding deliberately perpetrated catastrophes such as bio, cyber and technological terrorism, or nuclear winter (Posner 2004: 12). Other 'unintentional' catastrophes which are man-made, are classified into a third category, comprising global warming, exhaustion of natural resources, loss of biodiversity and so on. Since Posner's classification is designed to fit the cost-benefit analysis as the main assessment tool of catastrophic risk, he seems to regard natural catastrophes as not deeply influenced by human agency. This may be true for an asteroid collision, an extreme case in which there is probably not much sense in worrying about social vulnerability. But in all the other cases I think that cost-benefit analysis underestimates the aspect of social vulnerability as it focuses on the value we are willing to pay to avoid risk rather than the meaning in terms of impact these risks have in our lives, especially once they come, unfortunately, into existence. Similarly to Posner, Beck also distinguishes between intended and unintended catastrophes. The difference here lies in the fact that while side effect catastrophes, as unintended, are a mixture of bad and good (eg global warming), intentional ones (such as terrorist attacks) have no benefits (Beck 2009: 77). Even if Beck is aware of the fact that intended and unintended catastrophes can reinforce one another, the consequence, for him, is to stress the cosmopolitan dimension of the catastrophe, underlying the insufficiency of the national dimension. Putting the accent on social vulnerability means to be aware of the fact that, from a legal point of view, the State still plays a central role, and this is even clearer in a typical sovereign field such as criminal law.

That a certain criminal action is voluntary does not mean that we cannot frame such an action as a catastrophe. To do so, we should

consider another dimension of the catastrophe, that cannot be captured by cost-benefit analyses as it is impossible to assign an economic value to the moral dimension of justice. As Shklar (1990) has remarked, what is at stake in the relationship between citizens and catastrophes is the government's answer to the threat posed by the event. Also, according to Shklar, the distinction between misfortune and injustice, more than a cultural one, is clearly political. From this perspective, it is demanded that public servants not be 'passively unjust' and instead act to prevent or alleviate the consequences (Shklar 1990: 56). If we give a voice to the victims of governmental inertia, like in New Orleans, Bhopal or Naples, we are going to assign a political function to the sense of injustice: what began as a natural disaster was, in its full effects, a public injustice (Shklar 1990: 3). This claim implies a solidaristic view of the community in which each individual has a moral responsibility towards the other in order to avoid passive injustice, the refusal of both officials and private citizens to prevent acts of wrongdoing when they could and should do so (Shklar 1990: 5).

This is exactly the case of the toxic waste affair in and around Naples. During the whole period of criminal activity, public institutions completely failed to assure control of the territory in order to avoid the environmental and health disaster. But in the complex social structures in the zones controlled by criminal forces and *camorra* clans, many citizens were involved, at least as 'passively unjust' according to their negligence, or their conspiracy of silence. The very idea of public injustice helps us to consider that in the whole process there has been a collective denial of the catastrophe (Ross Meyer 2007: 22), without considering the consequences that were going to affect the whole community, and without making any distinction between victims and executioners. The transformation of the crisis into an emergency where legal responsibility was weakened time after time caused a loss of faith in law and institutions by the affected people. The victims' group, whose numbers reached one million people (Iaculli 2008: 275), was condemned to having their feelings of injustice ignored as a result of the legal and social negation of the catastrophe. The belief was widely held that no one was able to defend them from such aggression, due to

the incapacity of public institutions to set up a framework of prevention and control of criminal activities in their territory.

Understanding the implication of the assumption that catastrophes are both jurisgenerative and a negation of the law at the same time (Douglas et al 2007: 4) involves trying to combine these two elements in the analysis. The idea of a state of exception captures both concepts well. The link between states of exception and catastrophes has been recently discussed by Beck, who argued that dealing with catastrophic risks means being aware of a planetary state of exception that cannot be afforded at a national level (Beck 2009: 76). He argued that risk is the anticipation of catastrophe, but in order to have an idea of the meaning of the global dimension of the catastrophe we need to question the staging of the catastrophe, which fills the gap between the *anticipated* catastrophe and the *actual* one (Beck 2009: 10, 67). It is the symbolic dimension that transforms a local event into a cosmopolitan and global one. The global media coverage helps to assign a common meaning to the sense of catastrophe, as has happened with terrorist attacks. In this way, the catastrophe has meaning for us; it can capture our attention even if it has happened far from us. The staging of the catastrophe also underlines another dimension: the fact that by coming into existence it reminds us of the effective representation of what we tried to avoid just by assigning it a risk. Understanding catastrophe is possible only through its staging, exactly because, with the coming of modernity, we removed the very idea of the occurrence of the catastrophe (Dupuy 2002).

The aesthetic that results from the catastrophe is a powerful threat to the authority and reputation of the State. The staging of the catastrophe casts a vigorous light on legal failures and inefficiencies. Crime scenes can play different roles with regard to this aspect. They can be the representation of an order to be re-established — as in the case of Katrina — with vulnerable people targeted as criminals, giving the opportunity to picture law and legal order as a means to come out of the catastrophe, denying the role they played in its creation. They can tragically show for a long period the effects that negligence and

the absence of prevention caused, having the function of a perpetual reminder of inflicted pain, as in the Bhopal case. Or they can, as in the Naples case, be the representation of a prolonged and unresolved crime scene that, with its perpetual scandal, is a powerful threat to legal legitimacy and thus must be removed and hidden from the public sphere.

While Beck's approach to the link between catastrophe and state of exception through the staging of the catastrophe is a cosmopolitan one, there is no need to hold his cosmopolitan view to affirm the spreading of the state of exception. According to Agamben, the state of exception has been replaced by a generalisation of the paradigm of security as the normal technique of government in Western societies (Agamben 2005: 14). In Agamben's view, the role of the nation state is still powerful in determining the extension of the law, and for this reason it is more useful in understanding what the staging of the catastrophe means for legal structures. The crucial role played by criminal law in the making of a state of exception during a catastrophe can be well exemplified by the fate of many detainees in the aftermath of Katrina. Most of them were left without any legal assistance for weeks, as they were moved from jail to jail around the zone affected by the hurricane. As a study reports, many of them would not have been in prison if only they had not been deprived of legal assistance (Metzger 2007).

Focusing now on the Neapolitan affair, we are able to explore an example of the theoretical category of 'state of exception' in real life. What renders it really similar to a permanent state of exception is, first of all, the legal framework that governed the territory affected by the garbage emergency. The exercise of emergency powers exploited, on a legal basis, the local bodies of any administrative competence on subjects that were under their control. Little by little, writ after writ, a large part of the Campania region was governed by a law that citizens could not participate in, as the administrative forms of individuals' participation in the decision-making procedure were suspended, together with an enormous body of legislation of primary importance to the Italian legal system (see *Legge* n.123 2008 section 18). At the

same time, for the purpose of removing garbage from the streets, dangerous waste of industrial or pharmaceutical origin was stored in the same dump as urban and normal garbage, deviating from national, and probably EC, laws (*Legge* n. 123 2008 section 9).

This state of things also affected the judicial organisation: a unique jurisdiction of the Naples court became competent to try all criminal cases regarding violation of laws for waste treatment in the whole region of Campania (*Legge* n. 123 2008 section 3); and with specific crimes only punishable in the area, achieving the result of an unprecedented fragmentation of the penal law (*Legge* n. 210 2008 section 6). The representation of a state of exception is well exemplified by the government's decision to use military forces to patrol and keep under surveillance the sites chosen to host the dumps managed under the exceptional laws mentioned above. The presence of military forces serves as the visualisation of State power in the eyes of the community, with the aim of deterring grass-roots movements from demonstrating and protesting. With this body of rules, the state of exception became the way the law reaffirmed its pretence of order and control, even against itself, as the suspension of the law must be necessary for the common good.

This is, of course, the institutional side of the state of exception. Here it is not possible to deal, for example, with the complex system of intimidation, fear, and corruption by which the *camorra* dominates the local population, imposing its business and often killing the resistant. What the toxic waste affair shows in the relationship between the state of exception and the crime scenes caused by catastrophes is that the moral meaning of a catastrophe cannot be fully understood without taking into serious account how the legal system and its structure react against the stress of harmful events, intentional or unintentional as they may be.

As we have seen, legal institutions are always connected to the making of a catastrophe. This view challenges the traditional and established view of law as a primary means to assure order. The hard question to answer here is whether it is possible that law contributes to

disorder and irresponsibility, rather than order and responsibility. In his last thought-provoking book, Scott Veitch has argued precisely this point: that the legal system can be (legally) involved in the production of irresponsibility (Veitch 2007: 3). Veitch lucidly shows that the rise of the division of labour in organising responsibility within multiple roles and institutions has irresponsibility as the overall effect of these features and their proliferation (Veitch 2007: 49). The Neapolitan case shows how this theoretical framework can find an empirical confirmation in a particular legal system, even a civil law one. In this sense, law just becomes a way of organising irresponsibilities and legitimising immunities (Veitch 2007: 72). The law has therefore the privilege to define its peculiar epistemological status, carrying with it the danger of auto-referentiality. If it is the law itself that establishes that the law has been suspended and that it is possible to act *against* the law during this time, in a kind of anomy, this is the state of exception at work. However, Veitch's insights also point towards another theme, the way law organises the legitimatisation of suffering. One of the ways in which law can do this is by legalising the catastrophe. If a nuclear winter and the use of nuclear weapons able to exterminate humanity is allowed by international law, it is not particularly shocking anymore what national states do to face the threat of catastrophes (Veitch 2007: 121).

Conclusion

In concluding, let us come back to the cause of the Naples catastrophe. As Bauman has noted, modernity has a strong conceptual link with the concept of waste. We eventually produce waste, as it is the end of all economic processes on which capitalist society is grounded. But together with this, there is the production of human wastes, those that are out of any social order. While the production of human wastes is continuous, the dumps are, day after day, getting fuller: the world seems to be full (Bauman 2004). Humanity is fated not to understand the moral meaning of the catastrophe until it is understood that, when evil exceeds certain limits, trying to describe it with the language of natural catastrophe is just senseless (Dupuy 2005). Catastrophes are,

in the end, just another expression of the Promethean gap between humanity and the world of its products (Anders 2003). The aesthetic and symbolic dimensions in which the catastrophe performs its *mise en scène* is a way to reduce such a gap. Catastrophes emerge as large crime scenes in which law tries to claim control, in constant struggle between the break of order and its reaffirmation. The State still seems to be the main arbiter of such a fight. Looking at catastrophes as crime scenes is a promising direction to enlighten such a role.

Notes

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- 1 For example, the Lisbon Earthquake was, for a long time, interpreted by religious bodies as the divine revenge of an angry God.
- 2 Author's translation.
- 3 Posner holds this argument but forces it to some debatable consequences, such as absolutising cost-benefit.
- 4 For a dramatic account of how this method of reasoning could lead to a total privatisation of risk with private companies offering an all-inclusive deluxe evacuation package see Sedersky 2006 'Hurricane victims can evacuate in style' *The Nation* 19 September <http://www.usatoday.com/travel/flights/2006-09-18-hurricane-evacuation-style_x.htm>.
- 5 This is the case, for example, of the evacuation plan for Vesuvius's possible volcanic eruption (potentially affecting more than 1.5 million people): it took many years to have a plan but the effective efficacy is dubious also due to the lack of in-depth knowledge among the population.
- 6 For a dramatic account of the story of the Acerra sheep and their shepherds, the Cannavacciuolo family, see the movie *Biutiful Cauntri* 2007.

- 7 An impressive account of the fires with ample video coverage of the situation can be found in the media activist website <www.laterradeifuochi.it>, where it is possible to see many videos that can explain the situation better than words. The site aims at making documents available for a public denunciation of the state of affairs.
- 8 At the time this article was written, the trial was still in progress.

References

- Acot P 2006 *Catastrophes climatiques, désastres sociaux* Presses Universitaire de France Paris
- Agamben G 2005 *State of Exception* Trans K Attell University of Chicago Press Chicago and London
- Anders G 2003 *L'uomo è antiquato. 1. Considerazione sull'anima nell'epoca della seconda rivoluzione industriale* Trans L Dallapiccola Bollati Boringhieri Turin
- Bauman Z 2004 'Wasteful Planet' Trans M Taborelli in *Kainós* 4/5 <<http://www.kainos.it/numero4/emergenze/bauman-ita.html>> accessed 7 November 2009
- Beck U 1992 *Risk Society: Towards a New Modernity* Trans M Ritter Sage London
- 2003 'Toward a New Critical Theory with a Cosmopolitan Intent' *Constellations* 10/4: 453-468
- 2006 *The Cosmopolitan Vision* Trans C Cronin Polity Press Cambridge
- 2007 'Vivere nella società del rischio globale' Trans P Squadroni *Arts Interpretandi Annuario di Ermeneutica Giuridica* XII: 123-145
- 2009 *World at Risk* Trans C Cronin Polity Press Cambridge
- Binder D 2002 'Emergency Action Plans: A Legal and Practical Blueprint "Failing to Plan is Planning to Fail"' *University of Pittsburgh Law Review* 63/4: 791-814
- Beautiful Cauntries* 2007 [Film] Directed by Esmeralda Calabria and Andrea D'Ambrosio
- Bultrini R 2009 'Il Sisma in Aula' *D la Repubblica delle Donne* May: 82-87 <<http://dweb.repubblica.it/dweb/2009/05/02/societa/societa/082qua64482.html>> accessed 1 July 2009

Nitrato Izzo

- Cassels J 1993 *The Uncertain Promise of Law: Lessons from Bhopal* Toronto University Press Toronto
- Chen J 2009 'Law Among the Ruins' in Malloy 2009: 1-5
- Commissione parlamentare d'inchiesta sul ciclo dei rifiuti e sulle attività illecite ad esso connesse 1997 *Resoconto stenografico seduta del 16/12/1997* Camera dei Deputati – Senato della Repubblica Rome
- 1998 *Relazione territoriale sulla Campania* Camera dei Deputati — Senato della Repubblica Doc. XXIII/12 Rome
- 2006 *Relazione territoriale sulla Campania* Camera dei Deputati — Senato della Repubblica Doc. XXIII/17 Rome
- Davis M 2005 'The Predators of New Orleans' *Le Monde Diplomatique* October <<http://mondediplo.com/2005/10/02katrina>> accessed 8 February 2009
- Dombrowsky W R 'Again and again: Is a disaster what we call a "disaster"?' in Quarantelli 1998: 13-24
- Douglas L, Sarat A and Merrill Umphrey M 2007 'A Jurisprudence of Catastrophe: An Introduction' in Sarat et al 2007: 1-18
- Douglas M and Wildavsky A 1982 *Risks and Culture: An Essay on the Selection of Technological and Environmental Disasters* University of California Press Berkeley and Los Angeles
- Dupuy J-P 2002 *Pour un catastrophisme éclairé. Quand l'impossible est certain* Seuil Paris
- 2005 *Petite métaphysique des tsunamis* Seuil Paris
- Durkin T and Felstiner W 1994 'Bad Arithmetic: Disaster Litigation as Less Than the Sum of Its Parts' in Jasanoff 1994: 158-179
- Dyne R 2000 'The Dialogue between Voltaire and Rousseau on the Lisbon Earthquake: the Emergence of a Social Science View' *International Journal of Mass Emergencies and Disasters* 18/1: 97-115
- Galanter M 2002 *Law's elusive promise: learning from Bhopal* in Likosky 2002: 172-185
- Giddens A 1999 'Risk and Responsibility' *The Modern Law Review* 62/1: 1-10
- Green S P 2007 'Looting, Law and Lawlessness' *Tulane Law Review* 81/4: 1129-1174
- Iaculli A 2008 *Le vie infinite dei rifiuti. Il sistema campano* Rinascita Rome

- Iannello C 2007 'L'emergenza rifiuti in Campania: i paradossi delle gestioni commissariali' *Rassegna di Diritto Pubblico Europeo* 2: 137-178
- Iovene B 2008 *Campania Infelix* BUR Milan
- Jasanoff S 1994 *Learning from Disaster: Risk Management after Bhopal* University of Pennsylvania Press Philadelphia
- Likosky M 2002 *Transnational Legal Process, Globalisation and Power Disparities* Butterworths London
- Malloy R P ed 2009 *Law and Recovery from Disasters: Hurricane Katrina* Ashgate Farnham
- Metzger P R 2007 'Doing Katrina Time' *Tulane Law Review* 81/4: 1175-1218
- Papaux A 2006 *Introduction à la philosophie du «droit en situation» De la codification légaliste au droit prudentiel* Bruylant Bruxelles LGDJ Schulthess Paris Zurich
- Posner R A 2004 *Catastrophe, Risk and Response* Oxford University Press New York
- Quarantelli E L 1998 ed *What is a Disaster?: Perspectives on the question* Routledge London
- Ross Meyer L 2007 'Catastrophe: Plowing up the Ground of Reason' in Sarat et al 2007: 19-32
- Sarat A, Douglas L and Merrill Umphrey M eds 2007 *Law and Catastrophe* Stanford University Press Stanford
- Saviano R 2008 *Gomorra: A Personal Journey into the Violent International Empire of Naples' Organized Crime System* Trans V Jewiss Picador New York
- Sedersky M 2006 'Hurricane victims can evacuate in style' *The Nation* 19 September <http://www.usatoday.com/travel/flights/2006-09-18-hurricane-evacuation-style_x.htm> accessed 10 June 2008
- Senior K and Mazza A 2004 'Italian "Triangle of death" linked to waste crisis' *The Lancet Oncology* 5/September: 525-527
- Shklar J N 1990 *The Faces of Injustice* Yale University Press New Haven and London
- Simon J S 2007 'Wake of the Flood: Crime, Disaster, and the American Risk Imaginary after Katrina' *Issues in Legal Scholarship* Article 4: 1-19
- Steele J 2004 *Risks and Legal Theory* Hart Publishing Oxford and Portland
- Sunstein C R 2007 *Worst-case Scenarios* Harvard University Press Cambridge

Nitrato Izzo

Veitch S 2007 *Law and Irresponsibility: On the Legitimation of Human Suffering*
Routledge-Cavendish Oxon and New York

Statutes

Ordinanza del Presidente del Consiglio dei Ministri n.195 1994

Legge n. 123 2008

Legge n. 210 2008

