



REVISTA CIENTÍFICA A BARRIGUDA

RISKS IN RISK SOCIETY AND THE LIMITS OF LAW

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The discussion of topics that are grouped under the label of ‘risk’ and the concerns that have arisen from this subject have been motivated primarily by issues linked to the environmental consequences of new technologies. The problem has been formulated by means of the question as to whether science and the economic uses that scientific achievements have brought about may pose a threat to society itself.

Even though the sensitivity of the subject, the organizations and the institutions has turned to the prospect of risk in the perception of the ecological repercussions of technological developments, the horizon of risk perception invests all of its possibilities in conditions of uncertainty regarding the future. Risks become a generalized medium of communication. Together with Niklas Luhmann, we addressed these issues in the late 1980s, when we were thinking about setting up the Center for Risk Studies at the University of Lecce. The project was submitted to the CNR (Consiglio Nazionale della Ricerca - National Council of Research). The director entrusted the authoritative council with the assessment of our project. It has been ten years since Luhmann left us. Risk study and management have become a global concern. It is thanks to Niklas Luhmann that we are here today discussing risk assessment and management and to affirm that we consider it an issue that concerns the very fiber of modern society. Risk studies, have not only become trendy, they have become political propaganda. The fact, however, that it has become a buzzword has enabled us to realize just how right Luhmann was to be preoccupied with clarifying risk structures. Even today, this structure remains obscure – no light has been shed on the paradox yet, owing to sociological as well as theoretical

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repression. This dissatisfaction with the products currently on the market has motivated us to seek a theoretical clarification of this structure. And this is what we are attempting to do.

2. Risk assessment and management are considered not only in most of the literature, but also in terms of common sense, a sort of subterranean reality, a kind of second, hidden reality that flows beneath the reality which is produced by action. This action may be carried out either by individuals or by social systems. Risks are a type of reality stemming from threats, or a sort of threat of reality, that is kept silent. If this threat did not exist, order would continue to exist. Reality would continue in an orderly fashion. Events and actions could be coordinated according to expectations, they could be adjusted according to forecasts and plans. In other words, you could even realize rationally what you intend to realize.

If a risk should arise, it disrupts not only this order, but also the connections among its elements as well as the temporal continuity that holds it all together. The differences between the past and the future would be overcome by the rational ability to envision the future and to act accordingly in order to bring about its realization. The state of maintaining these action conditions is called security. And since security is a condition that deserves preference, a positive value is attributed, whereas a negative value is attributed to the risk. Thus, reason is sublimated by morality. The risk is present and must be avoided, minimized, and managed by devising safety measures. The treatment ingredients, the preventive therapy and the safety measures are infinite. Yet the blueprint for their construction is a recurring one, as basic as the rationality that sustains it. We might even call it barbarous, like the expectation of the universality of reason. This may be blind or violent, since its rationality justifies blindness and violence. If you perceive that there is a risk that world order is being disrupted, you have to intervene to keep that from happening. And if a new technology is developed, the level of risk must be controlled. And if there's the risk that teenagers are taking drugs, a strict educational program that forces them to adopt socially useful values must be implemented. And if there are health risks, alternative life styles must be imposed.



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And if Europe runs the risk of being overrun with migratory waves run by organized crime, let's lock up the immigrants in modern-day lagers and then send them home. Or if the Amazon is burning up, we have to develop a green conscience. Yet another example: if our environment has become so polluted that it is causing irreversible health problems, let's set limits that are strictly enforced. Until we reach that point, everything will go on as it normally does.

Let's stop here: the construction of both the risk management blueprint and the security plan always share the same features. A situation, a condition or a question is deemed risky, i.e., it is believed to be harmful at the present time, or in the future and this danger should be avoided. Since it is deemed to be potentially harmful, it is considered a risk. The risk is considered a concrete fact, something objective. Thus, understanding of this risk is believed to be accessible. This knowledge demands preventive action, or, if the risk poses an immediate threat, management. The horizon against which the level of riskiness is assessed is security, an artificial condition of stability and certainty which is assumed to be rational. In short, security is the alternative to risk.

This is a highly implausible construct, and without doubt, extremely risky. Risks are not something real and they are not factual. A risk is the possibility of a harmful outcome that another decision would have been able to avoid. Before people knew that AIDS was transmitted sexually, casual sex was not considered risky behavior. Or, as Luhmann once said, before the invention of the umbrella, there was no risk of getting wet when it rained. Or, before the invention of penicillin there was no risk of dying of pneumonia. Thus, after the invention of antibiotics, it is possible to run the risk of going into anaphylactic shock if you are allergic to that particular antibiotic that the doctor could have avoided using. The medical consent form concerning possible harm that may be caused by an invasive medical examination which is needed to formulate a diagnosis, for example, does not inform me about the risks I am running. It is not a risk, as I have no choice in the matter. The danger looms over me like a threat that I am helpless against. So, the person who is actually running a risk is the doctor. I may suffer bodily



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harm because of the test, and if this comes about, it is inevitable. The alternative to running a risk, in this case, is danger and not safety. How safe is safe enough? Aaron Wildavsky asked this question many years ago. There is no answer. Experience has taught us that the greater number of security measures we devise, the greater the number of risks we run. Security systems which are made up of machines controlled by machines which are controlled by machines multiply the risks of controlling the controllers. When faced with high crime rates, the fact that people can carry a weapon to defend themselves increases the risks, not the level of security. Requiring automobile insurance by law has increased uncontrollably the risk of road accidents. Security is not a system that can be set up by excluding the multiplication, the dislocation and the spread of risks which any one model may produce. Politics cannot control the risks that politics itself produces by planning security policies.

3. How can we explain all of this?

One of the characteristics of modern society is the fact that the old systems and the old prerequisites of stabilization are no longer operative. With the verticality of the stratification even the old forms of insurance and the old guarantees of future stability have been shattered. Just as this new structure has called into question formerly useful concepts such natural right and technologically ensured empiricism; by the same token, power is no longer legitimated in the individual's nature nor can people be denied access to knowledge merely because they are proletariat or women. Wealth does not guarantee knowledge, just as knowledge does not guarantee power, which, in turn, does not guarantee health. Social systems as well as the psychic systems that are ineluctably coupled with them, become unstable by themselves, they check up on one another, when any checking up does occur, on their own, they surprise each other on their own, they learn on their own. Structures such as these can neither receive reassurance from external elements, nor can they provide reassurance to external elements. What they consider external is only the other side of the distinction that makes differentiation possible. A structure such as this always starts from itself and from the condition to which it has agreed on with its own operations. This means that if such a structure



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operates, it not only becomes unstable, it becomes unpredictable even to itself. Concepts like security or stability regarding these structures are devoid of sense; they are concepts which could have been justified in the august spheres of the old ontology, like the certainty of being able to use objective or stable measurements in the physics studied in the past.

When the order they have managed to construct on these premises as well as the premises themselves are consumed, even the semantics that had enabled them to describe that order is transformed. The forms of trust, security and stability evolve, just as the conception of time in connection with the complex pace that characterizes modern society evolves - a technique for dealing with the complexity that modern society itself produces. This much is certain: it is pointless seeking guaranties and reassurance in the past. The past will not provide stability. The problem concerns the future and the access to a future that threatens or promises (depending on the observer) to be ever-changing. Indeed, the world has survived various Apocalypses, so it no longer worries much about what St. Paul called “the time remaining”; the world is simply worried about the future, which people now realize is constantly changing. Until now, the most critical level reached along this path was the certainty that how long we have left no longer depends on the will of God; it depends on contemporary society’s ability to control the potential for self-destruction that society itself has generated.

Society, however, continually destabilizes itself, as we have seen. Where can society seek security? Where can it find stability? Certainly not in ontology, but neither can society find it in human nature nor in the nature of nature. The sudden advent of the future has now revealed that nature is a semantic construct which evolves together with the semantics with which society describes itself. Kepler’s nature or Copernicus’ is not Newton’s nature, in turn, Newton’s is not Einstein’s nature. By the same token, the nature of Aristotle’s mankind is not the nature of Kant’s mankind. Furthermore, the bases of Islamic rationale are not those of so-called Western society. The future lays bare the divergent premises of present-day rationales. By the same token, the rationale of the law is not that of science, which in turn, is not the rationale of the economy, and



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the last two are certainly not the rationale of the individual when faced with issues concerning his/her health.

The Enlightenment was extinguished with the realization of its normative premises. Modern states were formed, sovereignty as well as citizenship were invented; free, rational men were invented: a universalized education system was founded, a system of charging individuals with responsibility for their actions was created, the law was positivized and legal, economic and political organizations were founded. All of this was made possible through the realization of these premises. The new order, however, consumed the premises' normativity. This normativity has become obsolete and is now an obstacle and a threat. It no longer binds the future. And when it does attempt to bind the future, the outcome is either exclusion or risk. This rationality constructs the future by looking at the past. It possessed only two values: one was free or not free, healthy or sick, rich or poor, developed or underdeveloped. According to the modern form of social differentiation, the reason we are bound is because we are treated as free human beings; new forms of slavery exist because we are capable of freedom; there is greater poverty because there is greater wealth; there is less law because there is greater law; we are left to our own devices because social communication has been universalized. We lack guarantees because we possess universal guarantees. Greater exclusion is produced in this society because the social systems have put into practice the universal inclusion of everyone in the workings of their structures. In this society, the only possibility we have to build future bonds is *risk*.

4. Risk is an issue that concerns time or, rather, temporality, i.e., the dimension of the production of events that makes the duration of the experience possible despite change. Risk is linked both to the future and to the possibility of constructing the future. The future is also linked to the same possibilities, but the law has a specific function in this sense as well. We can state unequivocally that when a form of differentiation that confers primacy on the temporal dimension of the production of sense asserts itself, it becomes an urgent problem for social communication. And this is the form of differentiation that characterizes *the modernity of the modernity*. The fact that social



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systems are specified in the solution of specific social problems without the benefit of the guarantees offered by either a hierarchy or by a center leads to the coexistence of diverse constructs of the world on a temporal plane. Each system builds the world from within. And this occurs simultaneously. This simultaneousness makes it impossible to observe what is occurring. It is impossible to check up on what is happening from any angle. It is impossible to foresee what is going to occur. The present is the space where this simultaneousness occurs. It is, however, a space whose dimensions, i.e., the duration, cannot be indicated. Besides, each social system operates in the dimension of its temporality. Each social system operates in its present. In this dimension it is increasingly linked together and joined to the operations of its environment.

The duration, i.e., the stability in the connection of events, is a necessary condition because neither social systems nor psychic systems rely on the uncontrollable, unpredictable multiplicity of events. The duration, however, can only be constructed in the present. It is only in the present that we can slip into the future, making it irreversibly now.

But how is it possible for this to happen, if even the future is open, and is, in any case, the time of non-knowledge? Time, with regards to knowing in the past which is no longer relevant now? How is it possible? Through the construction of bonds: bonds of time. The normative stabilization of expectations, for example, is one of those bonds – a complex strategy of the construction of future bonds. This is brought about by the law and consists in the fact that it makes it possible to hold onto one's expectations even when they are not met. Another strategy is one which makes it possible to blame possible future harm on a decision, based on the certainty that another decision would have kept the harm from occurring. This mode of constructing the future, this time bond, is called *risk*. Risk, therefore, is correlated to the non-knowing as well as to the need to choose. It is, however, also correlated, in another sense, to knowing. Indeed, the greater the extension of knowing, the greater the extension of non-knowing.

Knowing is always knowledge of the past. And risk is a problem of the future. That is why an element of inevitability has been attributed to risk.



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This has led to describing modern society as a risk society. It is a quite successful description that has not only become fashionable, but has also triggered a great deal of social alarm. Along with alarm, it has spread fear, which in turn has generated warnings and has caused people to seek refuge in both morality and in principles of an ethical nature. The market is full of principles and values. They are constructs which are communicatively stable and targeted at consumers who are psychically weak. Indeed, if the morality of risks is useless, the risk of morality is high because, while risk reflects the contingency of acting, morality eliminates it. And the most important aspect of acting is managing contingencies. Risk is a technique to elaborate contingencies. It requires the maintenance of a cognitive opening of the social system structures, which, in this way, adapt themselves to the complexity of their environment. Modern society is a risk society, but not in the apocalyptic, threatening sense that pop culture has propagated. It is a risk society only in the sense that it has created the conditions that enable it to construct different futures and to keep the contingency of events high, i.e., to keep the door open to an ever-increasing number of possibilities of producing events.

This risk occupies an ambiguous place between knowing and not knowing. If you do not know that there is the chance of future harm as a consequence of making a decision, then there is no risk. The same is true if it is certain that the decision will cause harm, again there is no risk. Knowing about this difference is a part of the duplicity of a risk. The other part is not-knowing about the future which will become the present after the choice is made. With respect to this not-knowing, all other knowledge is pointless. The paradoxicalness of the risk remains. Statistics may absorb uncertainty, it can give hope by thus eliminating contingencies, but it cannot say anything about the risk of the event.

The paradoxical constitution of the risk derives from the fact that risk is a construct of social communication. The latter not only constructs it, but the more it deals with it communicatively, the more it magnifies it. This effect distorts the perception of risks - it focuses the attention on certain risks, while drawing attention away from other ones, causing serious consequences to the construction of the future, to



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which end all the single social systems work, even though they work in different ways. Magnifying the risk is a result of treating it as a topic of communication and not because it possesses an alleged objectivity as some claim. That is why more information does not reduce the risk. Just think of how poorly informed information services actually are. Just think of how stupid the decisions that are made based on information are. Just think of the discussions on the risks of catching AIDS in the 80s and 90s. It was the Apocalypse, while the number of victims of fatal car accidents that occurred daily were infinitely higher. These are two examples that demonstrate how exaggeration and panic do not reduce risk. They can actually increase the danger, i.e., the danger that you may do nothing to prevent possible future harm which is linked to other people's choices. This occurs in social systems as a result of the operations carried out in the environment of each one of these, based on the perception of risk as well as on the way each system elaborates the risk. The same thing happens to individuals.

5. The paradoxical as well as circular structure of risks should be clear by now. You can only attempt to rationalize the fear that risks produce. Paradoxically, an increase in risks means an increase in the chance of avoiding the risk as long as you are willing to run other risks. We have said that every social system in modern society constructs the world from within. It is a risky operation as it is carried out at the same time as other risky operations are carried out, in the untransparency of that which is simultaneously occurring in each social system. The classic rationality cannot be helpful under these conditions. By the same token, neither morals nor principles nor the so-called ethics of responsibility are helpful. All of these ingredients, aside from being useless in solving our problem, are dangerous. None of these are able to say what you have to do in the concrete situation. The borders can be closed so as to avoid mass immigration, but it just leads to an increase in illegal immigration and the criminal organizations that regulate the business become stronger; so-called Western values can be defended, but this only leads to the radicalization of Islam; democracy can be defended by employing force, but it only leads to civil war. Zero tolerance can be affirmed, and jails can be filled with people, thus creating millions of real candidates to



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embark on future criminal careers. We can go on and on. There is no social competence for dealing with risks. There is no universal rationale that can prevent and annihilate risk as a temporal bond in the production of events. All of the social systems as well as the psychic systems, are exposed to risky operations. Insofar as risk is a communication construct and possesses a unique ambiguity, the paradox that we call risk cannot be attacked by forms of causality, whether they are interventions that aim at either producing a condition or at preventing a condition from occurring. That is why dangerous decisions called security policies do not work. The rationality of managing risks eschews the rigid, obtuse form of causality as well as the emptiness of principles, the limits of rational calculation and the abstractness of choice optimization. Several years ago, a big insurance company invited me to hold a conference on risks. The occasion was organized to award a number of policy holders who had been customers for twenty-five years and had never had an accident. As I was speaking I was unable to stop thinking about all those customers who had paid money for twenty-five years for no reason. Besides, the alternative that would have allowed them not to pay money pointlessly would have been to have had an accident. A condition that you would not wish on anyone.

This example prompts me to reflect briefly on yet another characteristic of risks. Risks may be described in monetary terms. All this actually means is that any risk can be transformed into an economic risk. It is an increasingly widespread practice to which a substantial increment in risks can undoubtedly be linked. This increase is produced in two completely distinct senses. People who are insured against risks are inclined to behave in a risky fashion because, if the risk should occur, they feel safe. This behavior, however, is danger to others. The doctor who is insured against malpractice is not as concerned about any possible negative consequences of his diagnoses as a doctor who does not carry insurance. The patient considers the risk of error a danger that he/she can neither avoid nor take action against until harm has actually been caused. He/She can do nothing to prevent harm from taking place. The risk of reducing risk to monetary terms, however, has increased in another sense. After the catastrophe in New Orleans, the



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United States government transferred the running and organization of the civil defense to private companies. The next time a catastrophe occurs, emergency services will be provided by private companies, therefore people are going to have to pay. People who cannot afford to pay for a helicopter, will sadly drown along with their furniture in the home they lived in. The pretext is: greater efficiency. The real issue is: greater exclusion. A catastrophe is a danger. Knowledge and technology tend to change it into a risk. Most of the harmful consequences can be avoided. The economy re-introduces the danger for some people, while for others, it is an economic risk. A barbarous technique that produces exclusion through inclusion. Everyone can have access to the chance to avoid risk. Everyone has the right. The risk, however, cannot be juridicized. When faced with risks, the law clearly reveals its construction defects. The problem cannot be solved by more or fewer rights. The issue concerns the juridical technique itself. The law can intervene either before the action occurs, by preventing it from happening, thus acting before knowing whether possible future harm would occur; or else after the harmful event has occurred. In this case, the law channels the dangerous consequences into either the economic sphere or into the legal field itself. Besides, the demands of risk management have become increasingly more insistent because knowing about risks, i.e., knowing about the possibilities of avoiding risks, has become more and more widespread. Nowadays, these demands are made mainly of the political system, because it is seen as the central system that we have delegated to make the binding decisions. The political system, however, cannot be expected to ponder all the consequences of its decisions. Firstly, because the political system itself is exposed to the risk of losing consensus which constitutes the source of its legitimation to decide. Secondly, because the structure of the social systems excludes the centrality and the verticality of one system with respect to another. Thus the decisions reached by political systems produce consequences that may be risky for the single social systems. The world constructed by politics is actually a political construction of the world, come what may in the economy as well as in the legal system and in healthcare. A further intervention by the political system in order to deal with the consequences of the



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decisions made in the past will produce still more consequences - they will be equally risky, but in different ways. Politics is said to be a system of distribution of resources. Politics actually distributes only risks. Since the political system operates by focusing on the control of risk in politics, it is continually exposed to the risk of the consequences of its own decisions. In contemporary society structural conditions exist that reveal that the future depends more and more on decision made in the present. This means that both risks and the possibilities of their management are produced simultaneously, i.e., the possibility of avoiding risks that the system has decided should be avoided. In other words, we have possibilities that no other society ever had before now. Nevertheless, only highly complex structures are in the condition to develop risk management techniques which not only will maintain high the alternatives of action, but are also able to revise its own decisions. Such structures are being consolidated within social systems that are characterized by a *cognitive* orientation. These are social systems capable of learning from themselves, in particular, they are able to use the results of the elaboration of the complexity that they themselves have produced as information. These systems possess a great ability to evolve, i.e., a great capacity to adapt to their environment.

If the future depends more and more on decision-making, then the specter of the possibility of building the future depends on the capacity for complexity that the decision-making machinery that operates in the present possess. Simultaneity of occurrence, untransparency, closing of social systems and the universal inclusion of all within – these are all requirements of the complexity typical of modern societies. These are the requirements that make it possible for us not only to deal with the dangers that the past has bequeathed us, but also to crush the ancient barriers of both the ontology and the stratification that had produced those dangers. But they are requirements that enable us to bind the future through risk, i.e., by looking at possible solutions to ancient problems, in the certainty that the former will trigger off new problems, although we have no idea what these problems are going to be. In other words, this society can reduce the dangers, i.e., not only the inevitability, the barriers and the impediments, but it can also reduce the extension of what other societies attributed to nature owing to the



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simple reason that, in this way, they were able to attribute objectivity to their barbarous distinctions. This society has the potential because these structural requirements of the production and the control of complexity have been rendered operative. This society, for example, possesses not only a great potential for democracy, but it also has a great potential for self-destruction. Until now, the latter tendency has prevailed; the tendency towards the explosive realization of the former has not.

6. But what is a risk in a risk society? What is at risk in this society? The law, politics, the society itself? And what can be contrasted to risk? What is the other side of the distinction of which one part is the risk society? Security? Stability? Compassion? Order? Or is it once again: rationality, criticism and reflection?

And is the risk of the risk society a question that concerns the operations of society's structure or is it a question related to the character of the semantic descriptions with which society observes?

The risk circle closes back up and once again the paradox of an inevitability which can be bypassed is introduced, with which something can be done. Indeed, if we free ourselves of the deceptive, threatening allure that emanates from the idea of security, then we will be able see how knowing, which used to emanate from religion or from cosmology and from their magical truths, has been replaced, in modern society, by not-knowing about the future and the opportunity to act, so as to escape from the inevitability of having to accept whatever comes your way, i.e., being forced to regret not having done something or regret having done something in the future. Risk, then, is a structural feature of the complexity of modern society, of its temporalization, of the symbiosis with the future, of the paradoxicalness of the present and of the ecology of not-knowing. The risks that modern people run have nothing to do with the danger experienced by the ancient world. The risks that modern society faces expand the potential for decisions, duplicate the possibility of choice and rationalize uncertainty in the sense that it enables people to activate mechanisms of its own absorption, creates branches of paths of possible actions as well as duplicating the branches. The alternatives are multiplied, and with regards to the future, this is what is rational.



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It is then evident just how this structural feature of modern society unhinges the assumptions of classical rationality, renders rationality impotent, discredits its certainties, crushes its ontology and imposes expectations of rationality that force differentiated social systems to transform continually. This feature of the decisional operations of social systems enables us to observe just how those societal conditions which are treated as contradictory, are actually constitutive paradoxes of modernity. In this society there is greater poverty because there is greater wealth, a greater quantity of not-knowing because there is a greater amount of knowing, there is greater risk because there is greater security, there is less information because there is greater information, and last but not least, there is less law because there is more law. We could continue with the paradox of democracy as well as with the one of participation, with the reality of public opinion which the less it is informed, the more it is phagocyte information. Or else, the more the environment is destroyed, the more widespread environmental policies become or the more development projects become economic or political reality, the greater the difference between the so-called developed and the so-called underdeveloped.

This is not limited rationality, as Simon may have thought. Rather, it is the emergence of order structures, that unlike the old rationality, are no longer able to understand the paradox. We no longer live in a time where forms have universal validity, as Novalis says in one of his *Fragments*. And this also holds true with respect to the law.

7. The law is also a time bond as well as a means of controlling the future from the point of view of the difference between what is lawful and what is unlawful. The law, however, can neither outlaw nor prevent risks. When faced with risks, the limits of the law are laid bare and it has to devise strategies that reduce the risk of risk management from a legal point of view. Besides, politics is expected more and more to minimize and reduce risks to acceptable levels. But political decisions take on a legal form. Thus, the political system blames the risks involved in its decisions on the law. Moreover, since the possibilities of managing risks become obsolete as soon as the risks produced by



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risk management that are deemed necessary to avoid are brought to light, legislation, or rather, a method of legislative production of the law which overloads and deforms the legal conceptuality is then stabilized.

The law, then, is unable to protect itself against the risk of the law. The dogmatic figures that were stabilized are weakened, we witness the development of new dogmatic figures that force the individual actors of the law to control the risks involved in the situation or to sanction lawful behaviour if, in the exercise of the law, damages are produced that one would have rather avoided. New problems crop up – problems due to the causal determination of effects that are produced over time and involve an unpredictable quantity of concomitant causal factors. Attempts to reach acceptable causal determinations through continual dislocations and incalculable reversals of the burden of proof proliferate. Forecasts of justiceability of interests not clearly definable and of risky constellations which are not precisely determinable become widespread.

The capacity to learn the legal system is widened by means of jurisprudence and thus the tendency to re-politicize risky topics that the political system had dumped on the legal system becomes widespread. The tendency, however, that becomes the most widespread is that of transferring risk management from the law to the economy. Risks are monetarized. Since the economy can limitedly tolerate the externalizations of risks brought about by other social systems, it activates forms of risk insurance, which, in turn, increase the tendency to risk.

This circularity which basically stems from the fact that risky situations are not easily portrayed as problematic situations in terms of norms, compels the law to apply legal practices which have been agreed upon; moreover, it confers, on the one hand, on the judge, on the other hand, on the legal subject, contractual power that continually expands the margins of tolerance of what is unlawful. The trial itself is overloaded with unpredictability and is increasingly unable to control its duration; in addition, the outcome has become more and more uncertain. Thus an administrative-regulatory action develops which exposes the bureaucracy to an uninterrupted process of learning that both blurs issues of responsibility and widens the margin for error. The concerns



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deemed deserving of protection multiply and conflicts and collisions among the various interests that can be safeguarded are amplified. Both politics and the law are prone to continual learning processes, yet time for reflective elaboration is lacking. Thus, both are involved in a situation of reciprocal irritation, where they are testing one another as well as observing each other. Both systems are subject to a level of cognitive *stress* by virtue of which the normativeness of the expectations is constantly losing its original significance as well as its original function. The jurisprudence production of the law is expanded, without, however, enabling it to produce conceptual stability. What actually occurs is the continual jurisprudential irritation of the political system by means of the reactive sensitivity of public opinion.

The weakening of the normative function of the law and the increasingly pronounced temporalization of normative validity, have transformed the expectations addressed to the law. The law provides fewer guaranties against disappointment, while access itself to the law has become risky. The most serious problem that the judicial system is facing is due to the difficulty the judicial system has in accepting its own riskiness. In other words, the law is unable to control its own temporal instability by means of recourse to the function traditionally carried out by the normativeness, i.e., by the validity: provide the certainty that, in any case, there will be a law. The certainty that whatever the outcome of the conflict is, whatever the expectation or resistance or disappointment may be, in any case, there will be a law.

The expectations addressed to the law change under this condition. Politics treats the law as though it were a place in society where one can experiment with as well as try out solutions. The public has substituted the new certainty which suggests in the future there may be another law that will recognize the possibilities of an action which is at present excluded, for the old certainty that there will be, in any case, a law. The law itself reacts against the indeterminateness of the tasks with which it is entrusted by the political system by accentuating its temporal dimension. The judicial system is oriented more and more towards causality and not, as before, towards case studies; it works less and less systematically and is increasingly sensitive to an environment towards which it



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had previously shown it was able to learn to be indifferent. A form of illegality which has been agreed upon as well as frequent mediation of tolerable illegality have become widespread. It is as though the violation of the law not only constitutes the result of a normalized mode of legal action, but it is also more of a structural aspect of the social system operations, and not the result of a negation of the law. It is a structural illegality that is not only tolerated, but also clearly motivated.

Besides, when society treats the future as a risk that depends on a decision, the law in this society will bind itself and its own recognition to the possibilities of controlling risks. If the economy can use new forms of slavery without producing social unrest, indeed, with the expectation that this use of the work force will reduce, in some way, the form and the degree of social danger deriving therein, then the law is able to not see. And if the destruction of part of the Amazon Forest touches converging interests, then the law is able not to see. And if the damage caused by unlawful behaviour has become too widespread or too vast, then the administrative measure adapts better than the penal measure.

In other words, the law constructs hierarchies and priorities of judicial goods which definitely do not represent the ontological qualities of things, situations or facts; they constitute the reverse reflection of the willingness to tolerate the structural violation of the law. In a very different sense from how Kelsen had used the term approximately a century ago, we can say that the unlawful - the violation of the law - is the real basis on which the law functions. The structure of the trial is constitutive, and acts selectively both in relation to access to the law and in relation to the outcome of the intervention of the law. In Italy, nearly all of the care givers who assist senior citizens in their homes are illegal workers who come from eastern European countries. Nearly one third of the legal economy of southern Italy derives from jobs from which no earnings are declared. Hidden in this economy we can find undocumented workers from Europe as well as from non-European countries. No-one who has worked for years under these conditions of illegality would ever turn to the law to get their demands or expectations met. Yet, any invention of turmoil of the public order leads to their selective expulsion.



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Naturally, none of these workers can ever call in sick. They can die – this is possible and allowable.

The trial, then, is the selective structure that makes it possible to control political and judicial tolerance towards the structural illegality. The trial, however, is also the social system wherein inclusion and the bond of an open future are experimented; it is the social system wherein the riskiness of the law embodies risk in the risk society. The trial is a structure of the social system that continuously discriminates between inclusion and exclusion. The trial temporalizes the riskiness of the future. It not only provides time to not gain access to the law, but it also provides time to evade and forget the law. The trial marks the boundary line - the unity of the difference of inclusion and exclusion. It is a constantly shifting horizon which manages to keep the expectations of inclusion, on the one hand, and the intolerability of exclusion, on the other, under control through continuous remembering and forgetting, seeing and not seeing.

In the background, human rights. Human rights are actually the right to humanitarian assistance rather than the right to protection against the intrusion on the part of the state, rather than the right of each person to be protected against the law and rather than the rights of each person, including the majority of human beings who are excluded, to be safeguarded. These rights summarize the anguish, the fear and the illusion of those who live in exclusion. And what about humanity? Humanity finds its true freedom when it is violated. In the eyes of the law, mankind is only a humorous role, as Novalis said.