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HISTORICAL DECISION OR DANGEROUS PRECEDENT[1]? - CRIMINAL SENTENCING OF THE NATIONAL ITALIAN COMMISSION EXPERTS WITH "MAJOR RISKS"

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Abstract

In October 2012, the Criminal Court of Aquila (Italy) convicted the seven experts of the Commissione nazionale per la previsione e la prevenzione dei grandi rischi, following the earthquake that took place on 6 April 2009 in the Aquila city and region, resulting in the death and injury of several persons. The authors propose a synthesis of this large-scale judgment – whose core is given by the analysis of the causal link – as well as a critical review of the sentence, which they describe as "a historical decision" and "a dangerous precedent".

The object of this (short) review is the decision of the Criminal Court of Aquila dating from 22 October 2012 (the first instance), which contains 943 pages and regards the criminal liability of the seven experts of the Commissione nazionale per la previsione e la prevenzione dei grandi rischi, in the context of the earthquake occurring on 6 April 6 2009, strongly affecting the city of Aquila and the surrounding region[2].

Keywords: *criminal liability, criminal conviction of experts, causal link, seismic risk assessment, information of the public.*

The sentence is a precedent in at least two respects. First, it concerns the thorough examination of the guilt of scientists as experts in various fields related

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[1] The first version was published in *Droit de la construction. Revue du droit de la construction et des marchés publics*, Zürich: Schulthess, issue no. 4/2013, pp. 161-165.

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[2] The Court of Aquila, Decision no. 380/12 of 22.10.2012. The trial involved 31 hearings from 20.09.2011 to 22.10.2012.

to seismology and civil protection. Secondly, the decision finds criminal conviction for violating their duty of diligence in a particularly sensitive area, *i.e.* the assessment of information in relation to the seismic activity in an Italian area known for the magnitude and frequency of these natural phenomena.

Without a careful and rigorous analysis of this large-scale decision, the court sentence could be summed up to the will to retain the guilt of the scientists acting as official experts in the context of natural disasters. Nevertheless, such a conclusion would empty of substance a particularly complex legal argument, dealing with an extremely sensitive issue: the liability of the experts belonging to a state body with respect to their obligations of seismic risk assessment, forecast and prevention, alongside the clear and complete information of the authorities and the population.

For the Court, the corner stone of the decision was mainly to clarify the charges and damage occurred, *i.e.* the death and injury of many people[3].

I. Seismic episodes ahead of the earthquake of 6 April 2009

Since July 2008, the Aquila city and the surrounding area had experienced a series of earthquakes that culminated in the magnitude 6.3[4] earthquake of 3.32 am on 6 April 2009. In the aftermath 309 people were killed, about 1,600 were injured and almost 100,000 were left homeless. The old city center and many peripheral areas were evacuated.

Among the seismic episodes recurring over several months, the most important ahead of the one in April had a magnitude of 4.1 and occurred on 30 March 2009. In a generalized state of fear of the population, in the context of contradictory information about possible scenarios for the management of the situation, the *Commissione nazionale per la previsione e la prevenzione dei grandi rischi*[5] convened a meeting on 31 March 2009.

The purpose of the meeting was to conduct a careful examination of the scientific and civil protection issues related to the seismic sequences of the previous four months, with the stated aim of providing the citizens in the Abruzzo region with all the information available to the scientific community on the seismic activity during the above mentioned period.

II. Criminal charge

A. Object of the criminal proceedings

The object of the criminal proceedings is the trial of the seven experts, members of the *Commissione nazionale*, indicted for fault-based manslaughter, representing an offense under art. 589 (1) and (3) of the Italian Criminal Code

[3] The charges mentioned the death of 37 people and the bodily injury of another 5 people.

[4] On the Richter scale, 6.3 corresponds to a *strong* and devastating magnitude, 9.0 and + (the highest value) corresponding to a *devastating* magnitude.

[5] Hereinafter referred to as the National Commission.

(ICC). Paragraph 1 provides that anyone who negligently causes the death of a person is sentence to six months to five years in prison, while paragraph 3 stipulates that in the case of several people's death or death of one or several people and injury caused to one or several persons, the judge shall apply the punishment for the most serious offense, increased up to three times, without the penalty exceeding fifteen years.

B. Faulty fulfilment of legal obligations

One of the controversial aspects of this case is the allegation made by the Prosecution against the defendants. The Court attempted to establish (seeking constantly to remove any doubt) that what the defendants were accused of was not failing to forecast the earthquake nor to have not recommended the eviction of the Aquila city nor to have not proposed the declaration of emergency. The allegation consisted of the violation of specific obligations of assessment, forecasting and prevention of seismic risks during the meeting of 31 March 2009, under the Italian law (more specifically the national law on civil protection). As a scientific and technical advisory body responsible for civil protection, the National Commission had the legal obligation to define the needs for study and research in the field of civil protection, to examine the data provided by the institutions and bodies responsible for monitoring hazardous events, and to assess the risks and the related interventions.

The prosecution charged the members of the National Committee with fault by negligence, reckless and inexperience *(colpa per imperizia)*. The court added the violation of the general law of discipline in the information and public communication activities incumbent on administration.

In this case, the court found that during the meeting of 31 March 2009 the defendants made a risk assessment of the previous seismic activity, which was described as generic, superficial and ineffective in relation to their obligations of forecasting and prevention, and that they provided both the authorities (National Department of Civil Protection, Civil Protection Regional Council of Abruzzo, the Mayor) and the Aquila citizens with incomplete, imprecise and contradictory information on the nature, causes, seriousness of threat and future development of the scrutinised seismic activity, via statements delivered to the media and by submitting a report. The Court attached particular importance to the contradictory information provided by the Commission. Thus, on the one hand, the experts professed that it was impossible to forecast earthquakes, that it was extremely difficult to forecast the evolution of seismic phenomena and that any forecast had no scientific foundation. Furthermore, they noted that the major earthquakes in the region had a very long recurrence periods, that in the short term an earthquake similar to that of 1703 was unlikely, although it could not be excluded in an absolute manner. On the other hand, the National Commission concluded that there was no reason to claim that a low magnitude seismic

sequence could be regarded as preceding a powerful event, that the seismic episodes could be classified as normal geological phenomena according to the typology of the area, and that they were safe, the situation being favourable due to the continuous discharge of energy and of shocks that were not too intense.

The court concluded that the experts had met the obligations of risk assessment, forecasting and prevention in a faulty manner, and that they did not inform the public opinion clearly, accurately and completely during and at the end of their meeting.

The obligation to inform the public is co-substantial to the effective implementation of human rights, especially the rights covered by international treaties recently. Thus, the obligation to inform and consult the public gives substance to the people's right to a healthy environment, to respect for private and family life and home. At the European level, in the jurisprudence of both the Court of Justice of the European Communities and the European Court of Human Rights, the communication and public consultation requirement is enforceable against state bodies and regards the fulfilment of the obligations undertaken by the states under the jurisdiction of these courts. With respect to the European Court of Human Rights, the right to a healthy environment is derived from art. 8 of the Convention, which enshrines the right to respect for private and family life. Along with the negative obligations enforced to the states, which should refrain, via commissive acts, from prejudicing this right, the state bodies have the positive obligation of information. In a decision of principle in Tătar *v*. Romania, "The court is convinced that the national authorities did not fulfill their obligation to inform the population of Baia Mare, in particular, the plaintiffs. The latter are unable to learn any measures to prevent a similar accident or appropriate measures in case of recurrence of such an accident"[6]. In conclusion, the Court found a violation of Article 8 of the Convention. In this respect it should be pointed out that "one of the important positive obligations of the state under Article 8 of the Convention, when there is a risk to the environment and human health, is the obligation to inform and consult the public"[7]. In the case mentioned above, the obligation to inform the public proved even more forceful as the inhabitants of Baia Mare had experienced a major environmental accident that affected not only Romania but also Hungary, Serbia and Montenegro, and the uncertainty continued to exist. "Given the impact of the accident on health and the environment, as noted by the international studies and reports, the Court considers that the population of Baia Mare, which includes the plaintiffs, had to live a state of anxiety and uncertainty exacerbated by the inaction of the national authorities, which had the obligation to provide enough detailed information on the past, present and future consequences of the

[6] http://hudoc.echr.coe.int/, Tătar *v*. Romania, § 124.

[7] Sebastian Rădulețu, Răzvan Proca, *Comment on the CEDO decision of 27 January 2009 in the case of Tătar* v. *Romania,* RRDJ issue no. 4/2009, p. 27.

ecological accident on their health and on the environment, and on the prevention and recommendations for the population that could be affected by future similar events. The fear generated by the uninterrupted conduct of business and the possibility of recurrence of the same accident in the future added up"[8].

III. Commissive or omissive offences?

To the Court, which carried out an in-depth analysis of the nature of the crimes committed, the experts' claims and statements issued during and at the end of the Committee meeting of 31 March 2009 represent an action or commissive professional misconduct. Instead, the poor, superficial, inadequate and inefficient evaluation of the various risk parameters in relation to their legal obligations of forecasting and prevention is associated with omissive professional misconduct. Bearing in mind the principles of equivalence and subsidiarity, the Court concluded, however, that it was a case of commissive professional misconduct. Having attended the meeting, the seven defendants were not inactive as they fulfilled the specific tasks related to their being members of the National Commission, thus, performing an incomplete seismic risk analysis.

This finding has at least two legal implications: first, it is not necessary to check whether the experts acted as guarantors, having the legal obligation to act; secondly, with respect to the causal link, the real causal link rather than the hypothetical one should be envisaged.

By way of comparison, in Switzerland, the Federal Court charged the engineer in the Uster village, where the ceiling of the communal pool collapsed causing the death of 12 people and wounding 17 others, stating that: "What we have to accuse the appellant of [...] is not a crime committed by omission, but a crime committed. Actually, his fault is to have given the city authorities his approval orally and then in writing, specifying that the condition of the pool roof had been verified and that it was flawless. The fact that the appellant failed to mention the facts which, however, he had established and [... that] that he had the legal obligation to reveal, nonetheless, does not equate this conduct to an omissive crime, since this report, whose gaps are only one aspect, is concerned"[9].

IV. Examination of causal link

A. Nature of fault

Once established that the defendants had the specific legal obligations deriving from their positions in the National Commission, the Court proceeded to check the adequacy and the (in) correct nature of the activities of the defendants in terms of diligence, prudence, expertise and compliance with the

[8] http://hudoc.echr.coe.int/, Tătar *v*. Romania, § 121.

[9] ATF 115 IV 199, JdT 1991 IV p. 71.

legislation in force. Only if the Court could find that there was a fault-based fulfilment of these obligations and thus retain the defendants' fault by negligence, subsequently, they were able to determine whether the violation of their legal obligations had caused or contributed, indeed, to the death and injuries which constituted the indictment.

With respect to the nature of the defendants' fault, the Court held that the trial of the risk forecasting and avoidance was not related to the natural event itself, *i.e.* the earthquake, but to the acts of the Commission members which could damage the property protected. In this regard, the Court reminds that the Italian Civil Protection Act (Law 401/01) prescribes that the civil protection activities – which fall within the official duties of the National Commission – aim to ensure the protection of life, property, equipment and environment against damage and injury risks arising from natural disasters or other high-risk situations.

On these grounds, the defendants' conduct at the meeting of 31 March 2009 was not assessed on the basis of an *ex post* criterion, i.e. knowledge of what really happened on 6 April 2009. Fault judgment was based on previous or *ex ante* provision, which is typical of the assessment of the defendants' fault. In conclusion, the Court found that the defendants acted superficially, without taking into consideration and without fulfilling the obligations that the law imposed on National Committee members; they were able neither to understand nor use all the information available to them appropriately to assess and predict risks nor to guide interpretation for prevention and accurate information purposes.

Likewise, the Court had to answer the objections of the defendants' lawyers who claimed that the common fault could not be retained, and requested that each of the seven experts answer of his own guilt (individualization of fault). On the basis of art. 113 ICC, admitting cooperation of several authors in the commitment of a crime, including the case when it is committed by negligence, the Court rejected these objections and retained the collegial nature of the Commission and the legal imperative of its heterogeneous composition, which allowed for expert representation in the areas of civil protection, geophysics, volcanology and for external experts with scientific and technical knowledge. The Court took into consideration the overall assessment of the work of the seven members of the Commission, resulting from the collaboration of all the experts who should have attached the necessary importance and significance to it, as indicators of risk in that particular case.

B. Specificity of causal link within the causal network

The Court drafted a detail-oriented presentation of the analysis of the causal link. First, it examined, from the point of view of "natural" causal link, if the mode of action of the defendants did represent a *conditio sine qua non* of the deaths and injuries occurred.

To this end, the Court systematically examined, and for each of the victims (according to the testimony of their friends and relatives):

- the behaviour that they had adopted in the event of seismic risks before 31 March 2009 (when the meeting of the National Commission experts was convened);
- if the victims were well aware of the National Committee meeting of 31 March 2009 and its findings;
- the behaviour that they adopted after becoming aware of the meeting and its findings.

The objective of the Court was thus to verify whether and to what extent the message provided by the Commission had any influence on the knowledge and will of the victims, more specifically if the message caused them, contrary to their well-established habits of precaution, to stay indoors on the night of 5 to 6 April 2009 following the two seismic shocks at 22.48 and at 00.39.

Hence, the Court held as an essential fact that the population of Aquila, who were aware of the seismic risks in the area, developed a social behaviour pattern due to the recurrent seismic episodes: following the careful hearing of witnesses, the Court concluded that in the region there was a well-established behaviour pattern always prompting citizens in the aftermath of one or more seismic shocks to leave their homes in anticipation of stronger tremors and not return home until later on when they were convinced that there was no danger any longer.

On the night of 5 to 6 April 2009, ahead of the strong earthquake of 03.32, two other earthquakes occurred, one at 22.48, of a magnitude of 3.9, and another at 00.39, of a magnitude of 3.5. However, the behaviour pattern of residents (leaving their homes) did not repeat that night, once they have stayed indoors.

The Court concluded that there was a causal link, demonstrating that the Commission experts' attitude and behaviour was very likely to have caused a change of behaviour in the case of each single victim on the night of the tragedy. In this regard, the Court held that if it had not been for the report submitted by the National Committee members and for their statements to the media, the victims would have behaved as usual and protected themselves. Consequently, in the eyes of the Court, the Commission experts' conduct was the direct proof of the risk of causing a typical damaging event that the Commission was supposed to avoid, in compliance with the law and rules which the Commission abode by.

By fault-based fulfilment of the obligations of accurate, comprehensive and rigorous assessment of the information available and then informing the public opinion in a superficial and incomplete manner, the seven experts generated, according to the Court, a false perception of the risks that might arise: admittedly, the cognitive and volitional capacity of the victims was vitiated because of their faulty perception of the seismic risks, to which the defendants contributed significantly.

Having established this "natural" or "objective" causal link *(conditio sine qua non)*, the Court focused (normative causality) on the examination of "lawful alternative conduct", according to which the author could not be accused of a precise damaging act when it was demonstrated that if the author had followed the rules of prudence which in fact he violated – or if he showed a lawful alternative conduct – the damaging event would, however, occured or could not have been avoided. In this respect, the Court held that it would have sufficed that during the National Committee meeting each expert, through an alternative methodology of conduct, clearly expose what he knew about the seismic risks and the vulnerability of buildings in the Aquila region, and that the experts discuss such knowledge presented by each specialist and inform the population in a differentiated manner to avoid that the victims would abandon the personal precautions they usually took.

The Court did not ignore that, under the circumstances, there was a concurrence of causes that led to the harmful events, especially the following three types of concurrent causes: the earthquake of 03.32 on 6 April 2009, the vulnerability of buildings where the victims lost lives or were injured, and the conduct of the defendants, which caused the victims to stay indoors on the night of the tragedy.

Each of these three categories of causes was necessary, but in itself insufficient without the concurrence of the others, so that the second category, i.e. the vulnerability of the buildings prevailed over the defendants' misconduct, while the earthquake ranked the last.

Hence, starting from the harmful results (deaths and injuries) and following the sequence of concurrent causes, the Court endorsed the following causal sequence:

- the collapse of 14 buildings where the victims were at the time, on account of their vulnerability and of the violent earthquake;

- the presence of the victims in those buildings;

- the exclusive and prevailing effect of the fault-based misconduct of the defendants, which represents "la diretta e immediata efficienza concausale … nella produzione del determinismo mortale"[10].

To the Court, the first two categories of causes mentioned above do not break the causal link between the defendants' conduct and the loss of lives and injuries that occurred. Thus, the findings of the Court run as follows:

- the earthquake of 6 April 2009 falls within the normal seismicity of the Aquila region and it is not an exception or an unpredictable case, according to the experts of the National Institute of Geophysics and Volcanology;

- regarding the vulnerability of the buildings, it is a well known and general characteristic of the Abruzzo region and it is specific to the 14 buildings in which

[10] Decision of the Court of Aquila, p. 843.

there were the victims. The vulnerability of the 14 buildings is explained by their age, computation errors, low quality materials, faulty maintenance, etc. It is a question of others' unlawful acts, which, according to the settled case-law, does not make the causal link (between the defendants' conduct and the ensuing damage) break if it is inserted in a predictable and ordinary scheme and if it does not leave room for a completely autonomous causal process.

Placing it in the case *(ex ante)* of experts on the occasion of the meeting of the National Commission on 31 March 2009, in the light of their knowledge, experience and professional status, the Court concludes that it is not possible to note that the other types of cases entering the causal competition with their own behaviour might be abnormal, unusual, exceptional and unforeseeable. The seven experts were part of "the small group of the best specialists" and, consequently, the standard of diligence and expertise required of the defendants, in terms of the requirements of forecasting and avoidance is particularly high.

In conclusion, to the Court, the other concurrent causes – the earthquake and the vulnerability of the buildings, in conjunction with the unlawful acts of other people – fall within the defendants' forecasting.

V. The sentence

At the end of this time-consumming trial and on the basis of a reasoned decision, the Criminal Court of Aquila found the seven experts, members of the National Committee, guilty of 29 non-deliberate fault-based manslaughter (and acquitted of the eight charges) and of grossly negligent bodily injury of four people.

The seven experts were sentenced each to 6 years in prison, being barred from holding a public office during their lifetime. At the civilian level (civil action accompanying the trial), they were sentenced to pay jointly and severally the sum of 7.8 million euro in compensation for damage.

VI. Conclusions – a dangerous precedent

This decision, reasoned but extremely severe, raises some brief comments. In our opinion it is placed at the midpoint between "a historical decision" and "a dangerous precedent".

On the one hand, we feel relieved that a number of senior experts (belonging to the "ristretta cerchia di specialisti") are reinstated to their responsibilities, including criminal ones, when faultily, superficially, inappropriately and inefficiently fulfilling (in the terms of the Court) the obligations deriving from their membership of the committees whose mission was to protect life, health, property and public safety in the event of major risks. Honorary bonuses and tokens are not the only possible rewards for holding such offices. From this point

of view, the judgment of the Criminal Court of Aquila is "a historical decision" and should lead to an increased awareness and accountability of experts (which are extremely numerous in our "expertocracies") facing the importance of the obligations that they must undertake.

On the other hand, we may as well be critical and concerned in relation to that strong punitive and security trends that dominate our contemporary societies characterized by care of "all-risk insurance", marked by the will of "zero tolerance", the desire of exacerbated punishment and search for the guilty (or "fusibles") at any cost. From this point of view and, in particular, because it concerns the senior experts, the Court of Aquila decision is a dangerous precedent.

This precedent is dangerous at least in two respects. First, because the decision ultimately accepts a controversial causal link as exclusive and prevailing[11], in between the professional carelessness and communicative cacophony of the experts of the National Commission for the assessment of "major risks" and the damage to life and physical integrity of people, which, however, resulting, *de facto*, from a natural cause (in the proper meaning), i.e. from the strong earthquake that shook the Abruzzo region on the night of 6 April 2009. In this case, the lack of competence of the experts seems to be presented as "the scapegoat" and to be a readily available argument for the evidence of the recurrent and notorious lack of competence of the Italian public authorities. Admittedly, the Criminal Court of Aquila is quite Byzantine as it repeatedly does not accuse the members of the National Commission of having calmed down and reassured the people, but of so poorly doing their job... of calming down the people!

Finally, this decision is a dangerous precedent because it can open Pandora's box (if confirmed by a higher court or by other decision of the kind). Such a severe decision involves the risk that in their assessment tasks, the scientific and technical experts become extremely cautious, reserved, meticulous, formalist and not risk formulating and disseminating an opinion or a recommendation that could expose them to legal action. As another unfortunate effect, scientists (in particular) will not be too willing to cooperate with the state or a company, if they face a situation similar to that of the experts threatened to withstand the "lightning" of criminal justice.

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[11] In the case of Tătar *v*. Romania, the Court makes use of likelihood to determine the causal link, but, eventually, resorts to the classical causal link approach and decides that there was no causal link between the non-disputed *status quo* and the disease of one of the plaintiffs. For criticism of this majority opinion, see the separate opinions of two of the judges. Similarly, Sebastian Rădulețu, Răzvan Proca, *idem,* pp. 28-31.

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