Causation in Cases of Environmental Degradation: The Missing Link in Adjudicating Human Rights

Boštjan M. Zupančič*

The problem of the causal link is, for very specific reasons, idiosyncratic. In fact, to a lawyer it is unusual, to say the least, that the simple talk of “causal link” or “causation” has practically no place in science or even in the common sense.

In science, and more specifically in epistemology, causation has no distinct role to play – for the very simple reason, which is obvious to the least sophisticated observer, that every so-called “consequence” has “many causes”. These causes are in fact a multitude of necessary – but not sufficient – conditions. No “consequence” may arise, unless all of the necessary conditions are present beforehand. For this very simple reason it would appear unreasonable to pick out one necessary condition and denominate it as a “cause” of the consequence in question. Nevertheless, the word “cause” will often appear in every day parlance. It is a practical shortcut to expressing the view that this particular necessary condition seems to be the one, without which the problematic consequence would not have arisen, and which is therefore to blame as the “cause” of the said consequence.

Above, the word “blame” is very important. If certain necessary conditions for global warming are to be seen as “caused” by human activity, they become the blame-worthy target of political and legal action. The moment, however, the scientific question of global warming is transposed into the political or even the legal arena, all objectivity is lost. Controversy is thereafter stirred as to the blame-worthiness of unlimited growth, the future of capitalism predicated on this growth, etc.

Law, if you go down to its most basic function, is simply a service offered by the King so that all kinds of controversies, from the most irrelevant to those which happen to be Constitutional or even international, be swiftly and

* Dipl. Jur. (Lab.), LL.M. (Harv.), S.J.D (Harv.), Professor of Law, Judge of the European Court of Human Rights (Email: Bostjan.Zupancic@echr.coe.int).
Boštjan M. Zupančič

efficaciously and finally resolved and thus put to rest. The whole branch of Government, the judicial branch, is dedicated to rendering this service to the King and to the people. It was apparent even to old political theorists such as Hobbes that without this service there will be a regression to combat and thus *bellum omnium contra omnes*.

Social stability depends on it and so does the power of the executive and the legislative branches of Government. All controversies that appear in one form or another, as cases to be resolved before the judicial branch, do have in common an inherent conflict between the two parties to the case and to the controversy. Everything in this procedural context in which the logic of power (combat) is replaced by the power of logic (legal discourse) is geared towards what in epistemology and in analytical philosophy, is called *logical compulsion*. The purpose is, *first*, for the law as the service to provide a procedural context in which the power of logic would supersede such logic of power as would inexorably lead to Hobbes’ war of everybody against everybody, that is, anarchy.

*Second*, in this “power of logic” procedural legal context, the purpose is, inherent to the controversy itself as well as to the role of both parties, that all logical means be employed in order to force the opposite party into admitting that this and no other party is to “blame” for the untoward consequences at stake in the case before any judicial instance.

It follows inexorably, that all legal “procedural” perceptions of what judges and lawyers like to call “truth finding”, is somewhat deformed. They are deformed because both parties to the controversy aspire to show and to “logically compel” the other party in the court, to concede and to admit that the blame for the “cause” of the problem is upon the other party.

In this context, the search for “truth” is further deformed by the tendency built into the whole process, in which the purpose is to subsume the fact pattern established – in the ping-pong exchange of the attempted logical compulsions – to the major premise of the legal norm, which might apply in resolving the case.

This major premise, as Alf Ross has demonstrated, may be a completely voluntaristic legislative or judicial imperative. It may have nothing to do with objective reality. On the contrary, to some extent this objective reality is, through what I call deontological tension, supposed to adhere to the imperative to the norm.

To put it more simply, the issue is not whether something is “true” or not. The issue is whether what has happened does or does not conform to what we are used to calling “law”. If the fact patterns and “causes” do conform to the postulated major premise, then certain legally obligatory consequences begin to flow from the finally established “cause” of the tort or crime, etc. in question.