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THE EXCLUSION OF THE CONCOURSE OF CAUSES IN ITALIAN CRIMINAL LAW

Giulio Battaglini

The author graduated from the U. of Perugia in 1909. Tutor on Crim. Law and Procedure at Sassari in 1911. From 1912 tutor in the Royal U. of Rome. Professor in the same subject in Messina 1920. Called to the Royal U. of Pavia in 1921. Subsequently Professor in the Catholic U. of Milan and the Royal U. of Bologna. He now holds the chair of Crim. Procedure in the U. of Bari.

He practices as a lawyer. Consultant to the Ministry of Justice. As a polyglott, he has much first hand information as to foreign law and literature. Keen promotor of international collaboration in criminological matters. Member of several It. and for. A. etc.

Among his chief publications, the most prominent are "Diritto Penale" (3rd ed. 1949) and "Il diritto di querela" (3rd ed. in print).

In the present article, regarding a subject of universal appeal, Prof. Battaglini revives the interest of the readers of our JOURNAL. The first series of articles was occasioned by his friends and colleagues, the late Professors James W. Garner and John H. Wigmore.

The author has hitherto published in this JOURNAL as follows:

Function of Private Defense in the Repression of Crime 2 370.

Some Fundamental Problems of Criminal Politics 3 347.

Eugenics and the Criminal Law 5 12.

Fascist Reform of the Penal Law in Italy 24 278.

—EDITOR.

SUMMARY

1. Pre-existing, simultaneous and supervening circumstances as autonomous causal series. The present paper concerns above all the "supervening cause".—2. The general provisions regarding causality in the Italian Penal Code.—3. The supervening cause, specified by It. Penal Code as an exclusive one, is a necessary antecedent, not a mere occasion.—4. The second paragraph of Art. 41 can be rightly explained only by the theory of the "efficient cause".—5. Art. 40 and 41 are related to the objective side of crime.—6. The section deals with pre-existing and simultaneous causes, as alone producing the event.—7. The different theories on causality and the real purpose of the law.—8. Conclusions.

1. Pre-existing, simultaneous or supervening circumstances may constitute autonomous causal series.

Our Penal Code expressly regulates the question as to the *supervening cause*, in the second paragraph of Article 41. Of this we will especially treat in the present essay. We have here a complex case of causality which is often presented by examination by judges in all countries, particularly in trials which deal with homicide and bodily injury. In these trials, as it is well known, medical and other technical examinations take place. Therefore, scholars in the law are not the only ones who are interested in the subject of this discussion. The matter is as old as the world itself. In fact, the jurisconsults of Rome considered this question,¹ though they did not deal with it from the point of view of pure *material cause*, i.e., of mere objective nexus of causality (see especially *infra* No. 5).

1. For example, we find in Roman texts the case of the slave who, mortally wounded, dies as a result of the collapse of a building, or because of shipwreck or other physical event. We find also the case of the slave who dies as a result of not having been treated

From what we can observe in the last two decades of jurisprudence relating to our Penal Code, the judge generally struck the mark when he accepted or refused the argument of the supervenient cause as possessing exclusive relevancy.²

However, there is still among us a conflict of opinion as to the *dogmatic construction* which would best adapt itself to the second paragraph of Article 41. And this conflict is reflected in the uncertainty of the concepts with which the judge reasons in order to arrive at his conclusion.

The matter is thorny. So thorny that French legal doctrine deals with it slightly, if at all, and resigns itself to the good sense of the judge.³

But the judge still has need of knowing what is cause and what is not cause. And it is juridical doctrine itself which must furnish to the Palace of Justice a concept of cause which, despite the thorniness of the matter, should be generally understood.⁴

One cannot say that only one concept concerning causality can be of worth in relation to a given legislation. We plan to show here, in summary fashion, our thesis according to what we consider to be the thought contained in the second paragraph of Article 41 of the Italian Penal Code.⁵

2. The Italian Penal Code of 1930 includes in its first book (which contains the general provisions) two Articles, Nos. 40 and 41, which relate to the *objective casual connection*. In order that the reader may have these Articles before his eyes, we reproduce them below.

for his injury. Both cases were resolved in the sense that the one who did the injury was responsible *de vulnerato*, and not *de occiso*. See for the first case, fragment 15, par. 1, *ad legem Aquiliam*, IX, 2; for the second one, fr. 30, par. 4, *ad legem Aquiliam*, IX, 2. The subject of the nexus of causality in Roman law is amply treated by BETTI, *TEORIA GENERALE DELLE OBBLIGAZIONI IN DIRITTO ROMANO*, I, Lezioni, Milano, Giuffrè, 1947, nn. 26-36, pp. 109-174.

2. Many of the adjudicated cases concern street accidents.

3. See DONNEDIEU DE VABRES, *TRAITÉ DE DROIT CRIMINEL ET DE LÉGISLATION PÉNALE COMPARÉE*, 13th ed., Paris, Sirey, 1947, p. 82.

4. So much more should this concept be accessible to general understanding because the concept of cause is of interest, not infrequently, in cases to be tried by jury or by mixed benches, according to the countries involved. (In Italy the Court of Assizes is composed of professional and of non-professional judges. It is now of two degrees, in force of a recent law which has instituted also the Court of Assizes of Appeal. Against the decisions of this latter, recourse is allowed, as to questions of law alone, to the Court of Cassation).

5. Further inquiry on the subject in our study *LA CAUSA SOPRAVVENUTA SUFFICIENTE DA SOLA A DETERMINARE L'EVENTO*, in "SCRITTI IN MEMORIA DI ARTURO ROCCO," Milan Giuffrè, 1952, vol. I, p. 117 ff. (Comprehensive review thereof in *REVUE DE SCIENCE CRIMINELLE*, 1952, p. 340 ff.)

Art. 40 entitled "The causal connection" and including two paragraphs, disposes:

"No one may be punished for an act, specified in law as a crime, if the injurious or dangerous event, on which the existence of the crime depends, is not a consequence of his action or omission.

"Not to hinder an event which one is obliged by the law to hinder, is equivalent to causing it."

Art. 41, entitled "Concurrent causes" and including three paragraphs, deposes:

"The concurrence of pre-existing, simultaneous, or supervening causes, even if independent of the action or omission of the offender, does not exclude the causal connection between the action or omission and the event.

"Supervening causes exclude the causal connection when they alone have been sufficient to determine the event. In such a case, if the earlier action or omission constitutes in itself a crime, the penalty which covers it is applied.

"The preceding provisions are applied even when the pre-existing, simultaneous, or supervenient cause consists of another person's illegal act."⁶

3. These two Articles constitute one of the most characteristic of our legislation, not only with regard to preceding Italian legislation, but also with regard to comparative law. In respect to causality, the principle that inspired the lawmaker of 1930 was that of the equivalence of all the antecedents of the event (theory of "equivalence").⁷ Concerning this the prevailing doctrine and jurisprudence are in accord.

But can the second paragraph of Article 41 also be referred to the theory of equivalence? It confronts us with a peculiarity which cannot

6. The draft of a new Penal Code of 1949 regulates the subject matter in Articles 20 and 21.

Article 20 (entitled "Causal connection") is equivalent to present Article 40, save that at the end of the second paragraph the following addition has been made: "nevertheless, the punishment may be diminished."

Article 21 ("Concurrent Causes") includes four paragraphs, instead of three as in Article 41 of the Code in force today. The first and second remain unchanged. The new feature is indicated by the third paragraph, which provides: "The punishment is diminished if the pre-existing or simultaneous causes were unknown to the offender, or if the supervening causes were independent of his action or omission, whenever they have had a noticeable relevancy to the event." The fourth paragraph is equivalent to the third as we have it today.

It is more than doubtful whether the concept of the "noticeable relevancy" laid down in the third paragraph makes an improvement. Many have decisively affirmed that it increases the difficulty of the subject.

7. Of particular importance is the application of the principle of equivalence dealing with the participation of persons in the crime. (Article 110 ff. of the Italian Penal Code.)

but strike us immediately. Here the phrasing, "independent of the action or omission of the guilty one" is not repeated, in contrast with the first paragraph of the same article. Therefore, it must be deduced that for the lawmaker the "interruption" of the causal nexus is relevant, even where there might be a "dependence." In our juridical doctrine and in jurisprudence, we find repeated about this point the same conception which is contained in the preparatory works and in the report of the keeper of the seals concerning the definitive project (Part I, no. 58). According to this report, where a new causal series possessing full sufficiency supervenes, the simple and original action appears irrelevant with respect to the final event, inasmuch as in relation to this event it assumes the role of *mere occasion*.

Is the thesis of *mere occasion* compatible with the theory of equivalence? To ask ourselves this question is indispensable. The answer can be only in the affirmative. It is true that it can be observed that regarding the verified event, not even the occasion can be suppressed by the mind without the event itself failing to occur. If anything, this is an affirmation of dependence (i.e., more correctly, of connection or correlation), not causal, but simply occasional. Mere occasion (i.e., the favorable circumstances from which an action may or may not follow), never necessarily postulates the event; from mere occasion the event never arises *de necessitate*. This being the position of occasion with relation to the event, occasion remains outside the causal nexus since causality is not possible without a necessary connection.

However, in our opinion, in the cases in which a connection is offered between the supervening cause and the original action, the phenomenon of mere occasion cannot occur.

Let us take a law book example, particularly appropriate here because it clearly delineates the situation at hand. The example is that of an injured person, who, having been brought to a hospital, dies there as a result of a fire occurring later. Naturally, in the circumstances of the case to be decided, there is no place for a concurrent cause, as there would be if, unlike other patients, our patient could not be saved because of a difficulty arising from the peculiarity of the wound, for example, an injury to the legs. Can it be said that the stay in the hospital (a fact that reenters in the causal series posited by the injuring party), represents mere occasioning in relation to the fire which has killed by its own exclusive virtue? It is evident that the presence of the victim in that place does not constitute a mere propitious atmosphere, a mere attracting element, from which the event does not of necessity de-

pend. We are dealing with quite a different matter. The stay in the hospital is the circumstance *without which* the fire could not have taken the life of the patient. We are, therefore, dealing in most unequivocal terms, with a *conditio sine qua non* with respect to the cause as constituted by the fire.

Let us also suppose that a wounded man is brought into a clinic, where, by a coincidence he falls into the hands of a doctor, who, whatever be the reason, nourishes an implacable hatred for him. If the doctor injects a poison into the patient, thus killing him, can it be said that the presence of the victim in the clinic was the propitious circumstance, the occasion for the doctor's crime, and that the causal series posited by the injuring party is not contributory cause *for such a reason*? Of course, at the beginning, it was a question of pure occasion because the criminal action of the physician could or could not have followed; but *when the doctor acts* to do away with the patient, a *transition takes place from occasion to condition*, since then the presence of the subject constitutes the element which is indispensable for the doctor's action which brings about the death.

Concerning supervening causes, we do not think that there are possible cases wherein the ultimate force (through its sole power), determines the final outcome by interfering with a mere occasion. That which has placed the first agent into being may only constitute an indispensable *quid* for the final force thus allowing it to operate.

Therefore, in order to place the second paragraph of Article 41 into harmony with the theory of equivalence, one would have to ignore the non-repetition of the phrase, "independent of the action or omission of the guilty one." Its application would be limited to those rare cases of so-called "*real independence*." For example, a person who was injured on a moving train, afterward perished as all the other passengers did, as a result of a bomb exploding on the tracks. Such an interpretation would, however, be arbitrary, because it would disassociate itself from the full consideration of the text of law. *In civile est, nisi tota lege perspecta, judicare vel respondere*. What would then be said of the two decades of jurisprudence which has always moved toward a contrary opinion? Has this jurisprudence applied perhaps only the preparatory works, and not the law?

4. Since the text of our law unequivocally encompasses, also, cases which the German doctrine places within the scheme of the so called *apparent independence*, we hold that the sole theory that can safely be deduced from this text is that of *efficient cause*.

This theory which is maintained in matters of causality in general (i.e., not only in the question of supervening causes) by highly-placed authorities on legal doctrine and not too infrequently followed explicitly or implicitly by jurisprudence, is as old as philosophic thought itself. However, it cannot be transplanted in its pristine state from its original field into ours. The jurist has to readapt it for his own ends. Above all, an especially keen analysis is required for the concept of occasion which is of extreme importance and is still in need of clarification.

The negation of the equivalence between cause and condition is fundamental.

Cause is the antecedent which uniquely possesses, by its very nature, the real generating force of the event considered by the law. It is the antecedent which, by its intrinsic efficacy, by its real and fruitful influence, gives life to the event. It is that upon which a given event intimately depends. *Concurrent Cause* is the antecedent which results in being efficient in part only; its degree of efficiency, under the aspect of objective causality is not of interest.

Condition is the circumstance by defection of which cause cannot operate. The event is a necessary consequence both of cause and condition. But the phenomenal datum of the necessary bond between the antecedent and the subsequent is not enough, however, to establish causality, because for this purpose one must look to the intrinsic nature, to the "in itself" of the antecedent (necessary dependence or *necessary connection of causal character* on the one hand, and on the other, necessary dependence or *necessary connection of merely conditional character*).

Occasion (occasional cause or mere occasion) is different from cause and condition: occasion is the coincidence, or the circumstance, or the contingency more or less favorable to the intervention of the cause. The action may or may not follow the occasion. That which eventually follows is never a necessary consequence of the occasion (a purely occasional connection). The occasion does not possess productive strength in any degree. One may also call this an inclining circumstance and nothing else. If it were claimed to be a facilitating circumstance, it would be saying too much, juridically speaking, since, e.g., he who, in one way or another facilitates the commission of a crime, is a participant in crime.

All these three kinds of antecedents, are established on account of

their *different intrinsic properties*. If one or other of them occurs it should be found from the evidence, *in the concrete case*.

It is not necessary to call for help on interpretations *praeter legem* (by which one declares the impotence of juridical dogmatism), nor is it necessary to go in search of conceptions of causality never imagined by earlier scholars. On the basis of the distinction between cause and condition and according to the doctrine of efficient cause, the second paragraph of Article 41 can be easily understood. Here the legislator has established *a derogation to the principle of equivalence*. Given this obvious extension of the concept of the *new* causal series even with respect to the supervening cause, though the latter remain "dependent" on the original action (and it is here that the practical value of the second paragraph lies), and with the assumption that the original action can only be classified as a condition, it is therefore logically impossible to reconstruct the thought of the law with the principle of equivalence.

For the theory of equivalence which *amplifies the concept of cause*, as it maintains that we are in the presence of a cause whatever be the manner of the necessary connection, in the case of the patient who died in the hospital (where he had been taken because of his injury), whether by the burning or destruction of the building as by lightning, the original action, since it represents in itself a condition, can be nothing else than a cooperating circumstance, i.e., a contributing cause.⁸

Someone has said: "If he had not been injured he would not have died." However, this objection cannot hold against the theory of efficient cause, since by such a theory which *limits the notion of the cause* to that which is proper to its essence, even the *conditio sine qua non*, however necessary it may be as an antecedent, is excluded from the causality together with the occasion. If the real generating force, "sufficient by itself," has been exclusively possessed by the supervening factor, then it is this fact that decides the exclusion of the causal nexus. The condition becomes irrelevant to the question of responsibility.

5. In a series of decisions of our judiciary there is mention of the "exceptional" and of the "unforeseeable," which must be necessary in the supervening cause in order that it be considered total and exclusive. We maintain that this is an error, and we base our view on a precise and rigorous dogmatic framework. The *objective nexus of causality* is one thing; *culpability* (to this the exceptional and the unforeseeable are logically related) is a far different thing. Let it not be said that nowhere

8. Cf. LISZT-SCHMIDT, *LEHRBUCH DES DEUTSCHEN STRAFRECHTS*, 26th. ed., par. 29, III. In Italy, for a similar treatment, see, among others, VANNINI, *Istituzioni di diritto penale, Parte generale*, Firenze, Cya, 1939, p. 156, and in other writings by the same author.

is it written that according to the Articles 40 and 41 of the Italian Penal Code the nexus of causality must be necessarily one of simple material or objective causality. It has not been so written, but it can, nevertheless, be considered, with good reason as certain.

First of all, it must be kept in mind that the formula "*have been sufficient in themselves*" was substituted for the earlier "*may be sufficient in themselves*," which had been read into the preliminary project, with the precise aim—expressly declared in the final report to the King (number 25)—of requiring that the judicial enquiry be brought about *ex post*; to wit not in regard to the cause in the abstract, according to the theory of *adequate cause*. This theory, however, it is formulated, by its very nature postulates calculation by the actor, i.e., a subjective *quid*. (Such a subjective *quid* is expressly indicated in the title "*Theorie der subjektiv-adequäten Verursachung*," used by von Kries in his first work on adequate cause.) Secondly, it must be considered that in the Code the first element of the crime—the material fact—(and precisely in this fact does the objective nexus of causality reenter), is regulated of itself logically, and his priority over the psychological element. Therefore, it cannot be claimed that the supervening cause is *non-fortuitive*, and therefore unforeseeable or not foreseen, nor that it is extraordinary or exceptional or ultra-rare, and therefore improbable.⁹

The criterion of the casual connection *in concreto* is also followed by the American jurisprudence. For example, in the case of a person mortally wounded, who after cutting his own throat soon died. Here the death did not result from the first wound in the natural course of events. But the Court, according to the test, reached the conclusion that, when the death occurred, the wound inflicted by the defendant did contribute to the event.¹⁰

In regard to the point relative to the existence or non-existence of the *material causality*, the enquiry concerning culpability is an extraneous one, like the enquiry which concerns the third element of the crime characterized by punishability.¹¹

For example, in legitimate defense there is the material fact as well as the subjective element, but there is no crime because punishability is excluded. If to a wound that may be healed, produced by legitimate defense, an independent disease is added (e.g., scarlet fever), from which death occurs, the original action cannot be considered a concurrent cause.

9. Cf. ARTURO ROCCO in *Annali di diritto e procedura penale*, 1937, p. 593.

10. See *People v. Lewis* (California), in DESSON, *CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER*, Charlottesville, Va., 1948, p. 449 ff.

11. Concerning punishability as an element of the crime, see our *DIRITTO PENALE. PARTE GENERALE*, 3rd. ed., Padua, Cedam, 1949, pp. 115 ff., p. 275 ff.

6. As we have noticed at the beginning of the present paper, an autonomous causal series, which, as such, cannot be regarded as cooperating with the series posited by the defendant, can be realized also by *preexisting or simultaneous circumstances*. About this question no word is found in the law.

As an example of preexisting cause we could imagine this. A has taken a lethal poison and then he is mortally injured by B. If A died because of the poison, which operates more quickly than the injury, B will not be held responsible for accomplished homicide. A case of simultaneous cause alone sufficient to determine the event could be that of a person, who, in the same moment in which he receives a mortal blow of a dagger, died of aneurism. If the latter circumstance is really proved, the solution will be the same as in the preceding case.

Is it possible in these cases to apply *analogically* the second paragraph of Article 41? It is not, because Article 14 of our "Provisions about the law in general" forbids to extend the application of an exception to a general rule beyond the cases considered by the law. Now, the second paragraph of Article 41 constitutes precisely an exception to the general rule put by the first paragraph, and so one cannot speak of analogical application.

If it results that the event was not in the least "a consequence of the action" of the offender, but *totally* the consequence of the prior swallowing of a poison or of a simultaneous aneurism, as in our examples, the judge may apply the first paragraph of Article 40. See the text of this article *supra*, n. 2.

7. Some students of law, thinking the attempt to construct the second paragraph of Article 41 with the more modern doctrine of causality to be inane, became discouraged, and finally arrived at the conclusion that the only possibility is a "conceptual interpretation." It did not occur to them that the law in this particular provision might require recourse to a non-modern conception of causality. *De jure condendo*, we are at liberty to say what we will, according to our particular inclination. For the legal scholar, however, that which is paramount is *the thought that is deduced from law*, be it open to criticism or not, be it modern or ancient.

There is one more fundamental point. Whatever the scheme of causality, it cannot be imagined as serving automatically as litmus paper serves the chemist. There will be those notorious or commonplace episodes which perforce will give rise to difficulties in arriving at a decision, despite scrupulous medical examination and careful judicial

enquiry. The theorist can only contribute theories. The rest is subject to the clinical eye of the judge.

8. The chief conclusions, which we have reached, are the following:

- (1) We are in the field of material or objective causality;
- (2) The second par. of Art. 41 is not an unsolvable conundrum, perforce requiring a free opinion by the interpreter;
- (3) Were the provision contained in Art. 41 inspired by the theory of the "real independence," it would constitute a surplus;
- (4) It is on the contrary an exception, which may be satisfactorily explained only by resorting to the theory of the efficient cause;
- (5) What decides is the causal connection *in concreto*;
- (6) After having ascertained the objective causality, it remains to enquire into the culpability and the punishability;
- (7) Pre-existing and simultaneous causes, which have been solely sufficient to produce the event, exclude the causal connection on the basis of Art. 40, not of Art. 41.