THE NOTION OF 'CAUSA'

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INTRODUCTION

As a general doctrine 'causa' was not developed under Roman Law. It was only developed by the commentators of Roman Law in the nineteenth century. At most it was considered under the heading of 'object' which had to be possible and lawful. This close identification of 'causa' with object tended to obscure the development of 'causa' the doctrine of which was often confused with that of object.

This close identification of 'causa' with object is still to be found in the English Law of Contract. In fact, 'consideration' is defined by Morley and Whitley in their Law Dictionary as:

> 'a compensation, matter or inducement, or quid pro quo for something promised or done. A valuable consideration is necessary to make binding every contract not under seal. It need not be adequate consideration, but must be of some value in the age of the law and must be legal. It must also be present or future – it must not be past.'

Later on, Sutton and Shannon commenting on this definition, pointed out that a valuable consideration may consist either in some right, interest, project or benefit accruing to one party, or in some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

Thus, the English notion of consideration is very similar to what we call the subject matter or object of the contract. In fact, our Section 1025 defines subject matter as:

> 'a thing which one of the contracting parties binds himself to give, or to do, or not to do'.

But there is no doubt that our Code, like the Italian Code, expressly requires in Section 1007 (art. 1325 of the Italian Civil Code) the element of 'causa' or 'consideration' as an essential element for the validity of a contract and this as a distinct element from that of subject matter. Moreover, neither our Civil Code, nor the Italian Code defines 'causa' and so for this purpose we must refer to commentators and textwriters.

First of all, we must be careful not to confuse the juridical

meaning of the word 'causa' with the meaning given to that word by common parlance.

Thus Torrente warns:

> 'Per ben comprendere il concetto di "causa", occorre anzitutto tener presente che l'espressione "causa" non è adoperata nel significato comune, per cui essa designa l'antecedente di un determinato evento (es. malattia causa della morte), ma nel significato di fine, scopo.'

It is important to keep this distinction in mind because the confusion of these meanings has tended to make even more difficult the understanding of the notion of 'causa'.

DEFINITION

Let us now look at some definitions of 'causa'. Pacifici Mazzoni teaches:

> 'Per causa..... s'intende il motivo giuridicamente sufficiente a determinare ambedue i contraenti od uno di essi ad obligarsi. Questa causa è ben distinta dal motivo di fatto che può avere indotto le parti a formare il contratto.'

Therefore, here, 'causa' is the consideration in view of which each of the parties binds himself. In an onerous contract, the consideration is the reciprocal performance of each of the contracting parties to the contract. As Pacifici Mazzoni puts it:

> 'A titolo oneroso è "causa" sufficiente dell'obbligazione il vantaggio che ciascuno dei contraenti intende procurarsi, per effetto diretto del contratto, avuto riguardo alla sua speciale natura.'

But a difficulty arises as regards the donee or the recipient in the case of a gratuitous contract. In gratuitous contracts the party who binds himself does not stipulate any consideration in his favour, and, therefore in such contracts the intention of performing an act of liberality or of bounty takes the place of the intention of obtaining such consideration. Indeed, the same writer goes on:

> 'A titolo gratuito è "causa" sufficiente dell'obbligazione l'intenzione di esercitare un'atto di liberalità o di rendere servizio.'

Pacifici Mazzoni's definition and notion of 'causa' is a clear illustration of the doctrine of 'causa' as it was generally understood in the early twentieth century. This doctrine had induced some writers to maintain that it is useless to talk of 'causa' in bilateral contracts, because whenever we refer to the inexistence or to the unlawfulness of cause, there is always at the same time the inexistence of the object or an unlawful object. So that if a thing sold

does not exist, the inexistence of the object is sufficient to explain the invalidity of the sale both as regards the seller, and as regards the purchaser. So these latter hold that object and 'causa' go together.

Pacifici Mazzoni, in fact, acknowledges this intimate relationship between the notion of 'causa' and that of object. But he says that the difference between them is brought about according to the attitude which is to be taken when considering the one and when considering the other. Thus, when considering the 'causa', one looks at both 'prestazioni' together, while when considering the subject matter, they are considered as two and distinct. Thus he writes:

> 'Nei contratti bilaterali la "causa" della obbligazione di una delle parti si confonde coll'oggetto della obbligazione dell'altra; dimodochè la teoria della "causa" di questi contratti è legata intimamente con quella dell'oggetto; v'ha soltanto differenza nel modo di considerarli; quando trattasi dell'oggetto, la prestazione dovuta da ciascuno delle parti è considerata in se medesima e isolatamente quando trattasi della "causa", le prestazioni reciprocamente dovute si consideranno l'una in opposizione dell'altra.'

Indeed from the point of view of subject matter there are two objects involved in a bilateral contract. In sale, for example, the price is the object of the purchaser, and the article to be bought is the object of the vendor; while, on the other hand, the 'causa' of this contract is the reciprocal performance of both obligations. Thus, if we accept the equiparation of 'causa' to object, if a thing sold does not exist, the inexistence of the object promised by one of the parties to the contract, does not imply that the obligation of the other party (which is separate and distinct from the former) is devoid of all the elements necessary for its validity, since the object of the obligation of the buyer is the price. Thus the buyer would still be bound to pay the price. But if 'causa' is the reciprocal performance, then this contract is invalid because one of its elements is lacking.

Moreover, the 'anti-causalistes' (i.e. those who maintain that the notion of 'causa' is redundant) try to support their theory by emphasising the connection between the obligations which arise from bilateral contracts, saying that each of the parties only binds himself in view of what he obtains in return. However, this so-called 'rule of correlatives' which can be equated to the English concept of the 'quid pro quo', is in fact nothing but the application of the theory of 'causa' itself.

On the other hand, in the case of unilateral contracts, as Pacifici Mazzoni says:

'l'oggetto e la "causa" dell'obbligazione sono distinti'.

MODERN NOTION

The notion of 'causa' has, during the last thirty or forty years, developed into something quite different. The 'causa' is in reality the ECONOMIC FUNCTION of the contract, or as Torrente puts it,

'la funzione economico-sociale del negozio'.

Thus, the contract of sale, for example, is a contract by means of which property is transferred on a commutative basis, and, in so doing, serves a social purpose. The Italian Corte di Cassazione in a judgement delivered in 1966, defined 'causa' in this way:

'la "causa" del negozio giuridico deve essere individuato nella finalità economico-sociale che il negozio stesso in concreto è destinato a realizzare e che l'ordinamento giuridico positivo riconosca degna di tutela ai propri fini'.

'Causa', therefore, is the 'fine, scopo' towards which the contract as a whole aims. In other words, 'causa' is the result which the contract aims to achieve and it is only in so far that the law considers this result to serve a social and economic function that the law extends its protection and sanctions that contract. In other words, it aims at producing a result which the law considers to be an economic-social function and as such it considers it worthy of extending its protection to such a contract. Indeed as Torrente says:

'Ogni negozio deve avere la sua "causa", perchè ogni negozio deve corrispondere ad uno scopo socialmente apprezzabile'.

This notion of 'causa' has also been accepted by Italian case law. In fact, the Corte di Cassazione in 1947 held:

'La "causa" di un negozio giuridico sta nella funzione economica-sociale del negozio stesso che è la sola rilevante e la sola tutelata dalla legge'.

From this we realise that

'Questo non concede riconoscemento e protezione agli atti posti in essere dall'autonomia privata, se la loro funzione o, se si vuole, il risultato a cui tendono, non corrisponde ad un'esigenza sociale' (Torrente).

Thus, in the Law of Persons and in the case of unilateral contracts, the law does not accept any legal effects produced by a

contract except for those contracts which fulfill a social function, and these particular contracts 'sono già fissate e prestabilite dall'ordinamente stesso'. On the other hand, in the field of patrimonial rights, contracts may be divided into two kinds, namely, nominate and innominate contracts. Now, the function to which the most important bilateral contract may adhere 'sono state considerati dal legislatore'. Thus, in the case of nominate contracts, their aim or 'causa' is regulated by the law itself. Thus, for instance, the 'causa' in every contract of sale is the transfer of a thing for a price. This, therefore, is considered to be an economic function worthy of protection. But in the case of innominate contracts, more individual liberty is allowed to the parties because 'esse possono anche concludere contratti che non appartengono ai tipi aventi disciplina particolare'. Therefore, as far as innominate contracts are concerned, their 'causa' is determined by the will of the parties so long as this 'causa' is lawful in terms of sections 1030 and 1033. Indeed, Torrente brings out clearly this distinction between nominate and innominate contracts:

> 'Si distingue, perciò, i contratti TIPICI, i quali sono già disciplinati dal legislatore (es. compravendita, mandato) ecc. e i contratti ATIPICI o innominati, che non sono stati contemplati dal legislatore, ma che pur sono diretti a soddisfare esigenze degni di protezione'.

Thus, to conclude on this point, we may refer to Messineo, who teaches that every contract has a particular economic-social function which the legal system considers relevant for its own purposes. It is this, the writer says, that is the sole reason for justifying the safeguard which the legal system extends to this private act.

> 'Ogni negozio giuridico assolve a una sua funzione economica e sociale caratteristica, che l'ordinamento giuridico riconosce rilevante ai suoi fini e che solo giustifica la tutela, dall'ordinamento stesso accordata all'autonomia privata'.

Messineo then goes on to explain what one should understand by 'funzione del negozio':

> 'la funzione del negozio sta nell'apprestare al singolo uno strumento, per la modificazione di una data situazione e per il conseguimento di dati risultati giuridici (leciti) in relazione agli svariatissimi bisogni della vita. Suol dirsi che nella detta funzione risiede la "CAUSA" in senso oggettivo, del negozio; la quale, oltre tutto, serve a individuare il dato tipo del negozio, di fronte a tutti gli altri tipi'.

As we have seen, 'causa' is the 'aim' or 'scope' of the contract. But this 'causa' – even in innominate contracts – is different and must be distinguished from the MOTIVE which induces the parties to enter into a contract. Thus, Pacifici Mazzoni writes:

'La "causa" dev'essere tenuta ben distinta dal motivo; questo è un elemento accidentale e variabile, quasi estraneo al contratto: quella invece ne è un'elemento essenziale, la ragione d'essere intrinsica'.

Torrente brings out this distinction by arguing that 'causa' is the scope of the contract taken from the objective point of view, so that the 'causa' or 'scope' is present in every contract of that type; while on the other hand, the motive is subjective and varies according to the individual parties in the contract:

'Causa è, dunque lo scopo a cui il negozio mira, ma questo scopo dev'essere inteso – secondo l'opinione prevalente – in senso oggettivo e dev'essere tenuto distinto dai motivi. I motivi sono rappresentazioni purchè individuale e variano, perciò, da caso a caso, da soggetto a soggetto.

Prendiamo per esempio la compravendità: il venditore vende perchè ha bisogno di denaro, o per fare una speculazione, o perchè la cosa non gli va più a genio; il compratore perchè vuol fare una speculazione, o perchè vuol regalarla ad un amico: tutti questi sono motivi individuali che la parte può non communicare alle persone con cui contratta, e che spesso, perciò restano nella sua sfera psichica interna e sfuggono alla cognizione delle altre persone. Però, in ogni compravendità, v'è peraltro sempre un dato costante comune; lo scambio di cosa contro il corrispettivo denaro. A questo scopo, a questo risultato costante, a questa funzione serve nella infinita varietà di casi concreti il negozio di compravendità.'

This distinction between 'causa' and motive is very important because while 'causa' is an essential requisite for the validity of any contract (sec. 1050), on the other hand, 'i moventi subbiettivi .... non hanno, di regola, rilevanza giuridica' (Cass. 1947).

Before proceeding to discuss the various theories which concern the doctrine of 'causa', we have to solve a preliminary difficulty. Whereas the Italian Code speaks of 'causa' of contracts, our Code speaks at times of 'causa' of contracts and at other times of 'causa' of the obligation. Thus, section 1007 enumerates 'causa' as one of the requisites for the validity of a contract. Section 1007 in fact reads as follows:

'The following are the conditions essential to the validity of the

contract:

(a) capacity of the parties to contract;

(b) consent of the party who binds himself;

(c) a certain thing which constitutes the subject matter of the contract;

(d)a lawful consideration.

The Code then goes on to take each of these conditions separately under their particular relevant title and states the provisions re-garding them. It must be noted that with regard to 'causa', the title the law gives to the preceding series of provisions is in line with s. 1007 and is entitled 'Of the consideration of conduct'. However the first provision under this subtitle instead refers to the 'causa' of the obligation, and in fact reads as follows:

'An obligation without a consideration, or founded on a false or unlawful consideration, shall have no effect'.

This inconsistency cannot be justified by arguing that a contract and an obligation are synonymous, because though in unilateral contracts there is only one obligation, this is not so in the case of bilateral contracts or of multilateral contracts. This would therefore suggest that in our law, besides the notion of 'causa' of contracts, there is also the notion of the 'causa' of the obligation ut sic.

It has been rightly argued that to accept that the doctrine of 'causa' applies to the obligation taken separately would make such a doctrine useless because the 'causa' of one party would be the object of the other party, and vice-versa. Moreover, it would also follow that although the obligation of one of the parties has no effect because it lacks a 'causa', the obligation of the other party may be still due and this because every obligation in a contract is looked at separately and not as there being one 'causa' in a contract.

There is no doubt, however, that the Code refers to the 'causa' of the contract taken as a whole. Indeed, this can be clearly seen when we consider the modern notion of 'causa' which contemplates the function of that particular taken as one whole. Perhaps, the reason why the legislator speaks of an obligation in section 1030 is that he wants to make it clear that in bilateral contracts there may be an unlawful or false 'causa' only in regard to one of the contracting parties.

Though, as we have seen, every contract in order to be valid must have a 'causa', there are certain contracts – NEGOZI ASTRATTI – which produce their effect even though their 'causa' is

temporarily put aside. In regard to 'negozi astratti' Torrente teaches:

'Ciò non esclude che, in alcuni negozi, gli effetti si producono astraendosi o prescindendosi dalla "causa", la quale resta, per cosí dire, accantonata'.

In these cases, 'causa' is not relevant, but its effects are merely suspended – but they DO exist. Thus,

'Anche nei negozi astratti la "causa" ha la sua rilevanza, nel senso che la sua inesistenza o la sua illecità toglie efficacia all'attribuzione patrimoniale, ma la reazione dell'ordinamento giuridico è, per cosí dire, ad effetto ritardato.'

A typical illustration is a contract involving a Bill of Exchange. Thus, A buys an object and pays with a Bill of Exchange, which is in turn passed on to a third person. Now even if there is an unlawful 'causa' in the original contract of sale, A has to honour the Bill of Exchange, but he can then make an action to try and get back what he had paid – probably not from the person whom he had paid but from the vendor. Thus, Torrente goes on:

'il negozio produce i suoi effetti, ed occorre, pertanto, eseguire la prestazione che ne forma l'oggetto: si può peraltro, agire per la restituzione, se la "causa" non esisteva o era illecità'.

The reason why the law recognizes these 'negozi astratti' is because 'essi servono a facilitare l'acquisto e la circolazione dei diritti'.

Our Law

Section 1030 of our Civil Code reads as follows: 'An obligation without a consideration, or founded on a false or unlawful consideration, shall have no effect'.

In this short provision our law enunciates the whole doctrine of 'causa' (Smith vs Lawrence – XXVIII.ii.4). Indeed, this is why the notion of 'causa' is still very confused and ill-defined in our law. In order to examine this notion, we will discuss it according to the various concepts which emerge from this provision, namely:

(i) the inexistence of 'causa';

(ii) false causa

(iii) unlawful 'causa'.

The Inexistence of 'Causa'

'Skond 1030, l'obbligazzjoni mingħajr kawża m'għandha ebda effett....' (Pullicino vs Mifsud – XXXIV.iii.734).

The inexistence of the 'causa' may be of two types. As Torrente classifies them, these are:

(i) 'mancanza genetica della "causa"' and

(ii) 'mancanza funzionale della "causa"'

(i) *Mancanza genetica della 'causa'.*

Torrente defines this in the following terms: 'la "causa" può mancare fin dall'origine, dalla genesi del negozio'.

We must here distinguish between nominate and innominate contracts, when considering the inexistence of 'causa' in the light of modern development. Torrente explains that it is obvious that in the case of nominate contracts, we cannot, at least in theory, speak of the inexistence of 'causa', because the 'causa' of such a contract is pre-established by the law itself.

However,

> 'Essa può, peraltro, mancare nel caso concreto; ciò che avviene quando, per la situazione in cui dovrebbe operare il negozio non può esplicare la sua funzione'.

Thus, for instance, the contract of sale is regulated by the law and consists in the transfer of the ownership of a thing in return for a price. Now, suppose I buy a thing which is already mine (both parties being unaware of the fact until the contract is concluded). It is evident that the contract can never bring about the transfer of ownership, and therefore it can be said that, in practice, the contract is without a 'cause'.

On the other hand, in the case of innominate contracts, their 'causa' is regulated by the wills of the parties. Now in these contracts, the 'causa' is inexistent when the aim of the contract is not directed to produce any function, which the law considers worthy of its protection. 'Nei negozi atipici la causa manca, quando il negozio non è diretto a realizzare interessi meritevoli di tutela (se, per esempio, il negozio è diretto ad uno scopo futile)' (Torrente.)

It may happen that the 'causa', though lacking from the beginning, lacks only in part – this is called 'difetto genetico parziale della "causa"'. The above mentioned writer explains this:

> 'Il difetto parziale della "causa" consiste nella separazione tra gli interessi rispettivamente sacrificati con il contratto'.

For this notion to arise,

> 'basterebbe che le due prestazioni non siano equivalenti: ma per la sicurezza della contrattazione la legge attribuisce relevanza al difetto di 'causa' solo se lo squilibro tra la prestazione di

una parte e il corrispettivo assuma proporzioni iniqui o snaturali (oltre la metà: azione generale di rescissione per lesione)'.

Now while 'la mancanza originaria' of the 'causa' makes the contract null and void according to section 1030, 'il difetto parziale' of the 'causa' does not produce the nullity of the contract, but it gives the party suffering the damages the right to rescind the contract.

Therefore 'causa' is wanting from the very moment in which the contract is entered into when the particular thing promised by one of the contracting parties does not exist at that moment, or is 'extra commercium', or when the promiser binds himself not to perform a given act which had already been performed, or when the promiser binds himself to do something beyond human possibility, or when a person binds himself in view of a preference which he believes already to exist, whilst in fact there has been no such performance or no pre-existing obligation. In hazardous contracts there is lack of 'causa' when there is no risk in compromise, when there is no uncertainty with regard to the issue of the law suit. 'Causa' is related to some future event in the 'pacta de re sperata'; if the future thing does not come into existence, so that the party who has promised it cannot fulfill this obligation, the 'causa' of the obligation for the other party ceases to exist.

(ii) *Mancanza funzionale della causa*

Torrente defines this:

'Pur esistendo originariamente la "causa", per vicende successive, non sia più realizzabile il risultato a cui il negozio era diritto'.

Indeed, it may happen that though the 'causa' existed at the moment of conclusion of the contract, some new circumstances may supervene which make the execution of the contract, and therefore, the fulfilment of its function, impossible. Torrente calls this 'difetto sopravenuto o funzionale della "causa"'. In other words, certain circumstances may subsequently arise which prevent the 'causa' from functioning. Thus, for instance, in the contract of sale, the buyer may refuse to pay the price or a law may be subsequently enacted prohibiting the transfer to others of such a thing. The 'causa' is, therefore, again defective, and special provisions apply for the rescission of the contract or the recovery of anything which may have been given in anticipation of the corresponding obligation which is never fulfilled.

Therefore, 'causa' may also cease to exist after the conclusion

of the contract, in which case the contract cannot be regarded as null, but the fact that the obligation is not performed, which implies the inexistence of the consideration of one of the parties, must also entitle the creditor of such obligation not to fulfill his obligation, because justice demands equality between the parties; and good faith does not allow one party to demand the fulfilment of the obligation by the other, when he himself does not fulfill his own. This shows that, properly speaking 'causa' is not only the promisē of a performance, but also the fulfilment of that obligation.

'Causa' in the 'pacta de re sperata' may be related to some future event. Now, if the future event does not come into existence, so that the party who has promised it cannot fulfill this obligation, the 'causa' of the contract is considered to be inexistent and the general rules of contract apply. Thus, Giorgi writes

> 'una obligazione contrattuale è senza "causa" quando, essendo relativa al futuro, non siasi verificata....'

This principle was accepted in the case Axiaq vs Caruana (XL.i. 548). In this case, a person booked a car from a car agent, and later sold the right to that to another person. Now it happened that in the meantime, importation of that particular model was prohibited and so the Court held that

> 'dak il-bejgħ ma jistax ikollu effett, u dak li ċeda l-bejgħ ta' dik il-karozza huwa ritenut li jrodd liċ-ċessjonarju s-somma ta' flus li dan kien tah in konsiderazzjoni ta' dik iċ-ċessjoni'.

It must here be noted that impossibility of performance is equivalent to inexistence of 'causa'. This has been expressly stated in the above mentioned case Axiaq vs Caruana where it was held:

> 'Meta l-"kawża" t'obbligazzjoni hija impossibbli b'mod assolut il-kawża hija inesistenti u għalhekk l-obbligazzjoni m'għandha ebda effett għaliex hija mingħajr "causa".'

Finally we must note that section 1030, regarding the inexistence of 'causa', must be read in conjunction with section 1031. Thus, in the case Pullicino vs Mifsud (XXXIV.iii.734) the Court held:

> 'Għalkemm skond l-art. 1030 l-obbligazzjoni mingħajr "kawża" m'għandha ebda effett, oppure skond l-art. 1031 il-ftehim jibqa' jseħħ jekk jiġi pruvat li kien hemm kawża biżżejjed għalkemm mhux espressa. Hija biżżejjed għaldaqstant il-"causa sotto-intesa o presunta" kif isejħilha l-Giorgi'.

Now the question arises, is this 'causa' always presumed or must it be proved? Some writers like Duranton and Aubry et Rau

maintain that it is up to the person alleging to prove that the 'causa' though not expressed, in fact exists. On the other hand, Demolombe holds that unless the contrary is proved, the 'causa' must always be presumed. The Italian Civil Code accepted the latter doctrine in a specific provision which does not exist in our Code. The position accepted by our courts as can be seen from the last mentioned case is that:

> 'Il-prova li kien hemm "kawża" tmiss lill-attur fis-sistema tal-liġi Maltija .... l-art. 1031 juri biċ-ċar li meta ma hijiex espressa l-"kawża" ma hijiex preżunta, iżda għandha tiġi pruvata'.

Section 1031 reads:

> 'The agreement shall nevertheless be valid, if it is made to appear that such agreement was founded on a sufficient consideration, even though such consideration was not stated'.

This argument was also upheld in the case reported in XLII.iii.1207.

An interesting case regarding the inexistence of 'causa' occurred in 1947. A father transferred his property in favour of his four children in consideration of a life annuity in his favour. The father was about 74 years, and the amount transferred was about £70,000, and the annuity created was for £6000 a year. Now if calculated, it will be seen that property of £70,000 would always have an income of £3000/£4000, so that the father was only making a profit of £2000/£3000 and would have had to live for a very long time, so that there would be due element of risk involved on the part of the children. The court held that this contract was invalid because the 'causa' of a life annuity as a hazardous transaction is the risk, which did not exist in this case. Therefore, it was no life annuity because the parties did not stand to the risk of loss or gain, because one party was always gaining and the other always losing. Moreover, as the father was 74 years of age, there was neither a valid donation, because no person over 70 years can make a donation. Therefore, it could not even be said to be 'falsa causa'. Thus the contract of life annuity was held to be invalid

Finally, it must be remembered and emphasised that the English doctrine of consideration must not be equated to the continental doctrine of 'causa' – our legislator has been unwise in translating the Latin word 'causa' to the English word 'consideration' because the English doctrine is very much different. Thus for example, in a case in Malta when a yacht worth about £10,000 was sold for £1, an English lawyer held that there was consideration. From our point of view, we do not take such a mathematical view of 'consideration', because in our view 'causa' of the contract of

sale is the commutative character of the transaction and there must be some sort of proportion between the price and the thing sold. Of course, there is no remedy if the price is too low or too high, because except for immovable property, one cannot institute an action on 'laesio'. But if the price is not a serious price, then it will not be sale – it may of course be something else e.g. a donation.

There is another case which brings out the distinction between the English notion of consideration and our doctrine of 'causa'. Four English friends while in Malta hired a car to go on a picnic and on their way back they collided causing about £M350 worth of damages. All these went to the garage owner and signed a document stating that they ALL bind themselves to pay the damages by allotting £M20 per month from their salary to be paid to the garage owner on account of the damages. But some time afterwards, two of these cancelled this allotment. When the matter was taken up with solicitors in England in order to try and enforce payment it was held that the transaction was in fact null because though there is consideration on the part of the driver arguing out of tort, there is no consideration for the other three. But from our point of view, the consideration of the other three is the fact that they signed a document standing security and this out of friendship, just as in a donation.

Thus we can clearly see that the whole concept of consideration in English law is something which is too artificial and legalistic and which has nothing to do with our notion of 'causa'.

False 'Causa'

False 'causa' comes about when the 'causa' stipulated in the contract is not that intended by the parties that contract. Now, this inconsistency may be due either to error or to intentional deviation i.e. simulation. Thus the Court in the case Pullicino vs. Mifsud XXXIV.iii.734 held that a false 'causa' is equivalent to no 'causa' at all. Thus it said:

> 'Kawża falza hija daqs li kieku m'hemmx kawża. U kawża falza tfisser kawża erronea jew simulata'.

Pacifici Mazzoni also teaches that false 'causa' can be divided into two types and he goes on to define these two classes of false 'causa'.

> '"*Causa*" *Erronea:* quando una delle parti si è obbligata per una "causa" immaginaria che supponeva reale;
>
> "*Causa*" *simulata:* quando ambedue le parti hanno indicato una "causa" che sapevono non esistente.'

Now, when the 'causa' of a contract is false, the rule 'plus valet quod agitur quam quod simulati concipitur' is applied. So that in the case of absolute simulation of the 'causa' of the contract, the contract shall have no effect; in the case of a relative simulation section 1032 applies, namely, 'where the consideration stated is false, the agreement may, nevertheless, be upheld if another consideration is proved.'

Let us now consider this principle that if there is absolute simulation the contract is null while in the case of relative simulation the true 'causa' subsists.

In the case Abela vs Galdes (XVI pg.59) the defendant had been left part of an inheritance subject to the condition that before he takes possession of his quota he must pay £50 to plaintiff 'so that she may be compensated for the great expense which she and her family incurred in sending him (defendant) to be educated abroad.' Defendant alleged 'falsa causa' because neither the plaintiff nor her family had contributed in any way towards his education since for that purpose he had borrowed £M300 from his father which he had paid back. In this case the Court, per Debono J., held:

> 'Una disposizione testamentaria fondata sopra una "causa" falsa che solo l'abbia determinato il testatore non ha effetto'.

In the case, Sciberras Trigona vs Calleja Schembri (XIII.p. 101) it was held that when an obligation of 'mutuum' stipulates a sum of money higher than that which is in fact given in the 'mutuum', the 'causa' therein expressed must be held to be false. Nevertheless, one cannot conclude from this fact alone, that the same obligation ought not to produce any effect owing to this excess, for according to law, when the 'causa' expressed in an obligation is false (as in fact part of the 'causa' in the impugned obligation of this case), the contract may nevertheless be upheld on procuring the existence of another 'causa'. The other 'causa' was proven in this particular case, by the sale of a piano.

It must be noted that in case of relative simulation in order that the contract may subsist according to the true 'causa', this 'causa' must not be prohibited by the law in any way. This point has been clearly brought out by our case law. We can here refer to the already mentioned case where the father who was over 70 years of age granted a life annuity. Also, in the case Grech vs Zammit (XVI. p. 332) the Court, per G. Pullicino J., held:

> 'Trattandosi di simulazione relativa, e non assoluta, l'atto è valido se, simulati la "causa" ed il titolo del contratto i contraenti, intendono compiere un atto non riprovato dalla legge'.

An interesting point arising from the case Cachia Slythe vs. Cachia Zammit (XXIX) regarded the prescription of the 'causa' to annuli such a contract. The Court held that if the true 'causa' which was simulated was in fact an illicit 'causa', then the action to annull the contract must be brought within 2 years; while on the other hand if the true 'causa' is licit, then that contract is never null, and so the two year prescription is not applicable here. The Court said:

'Jekk il-"kawża" taparsi, li ssemmiet f'kuntratt dehret biex taħbi "kawża" illecita, dak il-kuntratt jista' jiġi mħassar sakemm ma tkunx għalqet il-preskrizzjoni ta'sentejn. Iżda jekk il-"kawża" taparsi kienet taħbi "kawża" lecita, m'hemm ebda nullità ta' dak il-kuntratt, u għalhekk fuq talba għal dikjarazzjoni mill-Qorti, tal-"kawża" tassew, il-preskrizzjoni ta' sentejn għalxejn tingieb 'l quddiem'.

An interesting case arose concerning the appointment of a player-coach of a local football club. Before the contract, the player made it clear that he wanted to be an amateur player, but wanted also to become the coach of the younger players of the club. The club agreed to register him as an amateur and employ him as a coach for the young players and this latter at a salary of £60 per month. But time passed and though he was called to play he was not asked to coach. Now, according to law, an amateur player cannot receive more than a certain amount which was much lower than £60 a month. He demanded that he should be called in to coach according to the contract, but the club reiterated that his employment as a coach was only a screen to evade the law. But it was quite clear that this devious design of the club was not shown by the other party, because in reality the player's intention was to be genuinely employed as a coach. He threatened to leave the club, but since he was being paid, he was a professional and could not leave without the club's consent.

In the meantime the club stopped paying him the £60 and so he instituted an action against the club. The club pleaded the nullity of that contract, because it was a violation of the rules concerning amateurs. Thus the question arose: was the contract genuine or was it simulated? If the contract was found to be simulated, it would have the effect of what it was really intended to be, unless the real intention is itself illicit, and therefore null. Now since no amateur player could legally be paid for his services as player, the club held that the genuine consideration of that contract was illicit and therefore the contract was null and void.

Ultimately, the matter was decided by the English Football As-

sociation, by way of appeal, and the player won his case, and it was accepted that he did not want to present a façade at all, but this was his genuine intention – i.e. to play as an amateur and to be employed as a coach. Thus, though it is true that the other party intended the simulation, this was regarded as an abuse of one party against the other.

Another interesting case decided by the Privy Council was the Formosa case, where an uncle made a transfer of a house to a nephew of his, in order to settle accounts between them. In point of fact, a dispute arose between them, and it resulted that there were no accounts to settle and the whole thing was all fiction and was only a way of how they wanted to donate property, without paying donation duty. This is a frequent abuse when donating property.

Therefore, to conclude the distinction which has been made by our Courts between absolute and relative simulation can be expressed as follows:

Absolute Simulation: when the parties apparently enter into a contract but in reality they do not create anything at all;

Relative Simulation: when the simulated contract is intended to produce some effects, but these intended effects are different from what is stated in the contract.

Therefore, falsity vitiates 'causa' and therefore also the contract, but this only in so far as there is no true 'causa'. This links up with the inexistence of 'causa'.

Unlawful Causa

'L'ordinamento giuridico non riconosce e non tutela l'autonomia privata, se essa è diretta a scopi contrari alla legge e alle concezioni morali comunemente accolta.'

This principle has been categorically accepted by our law and in fact in the case Pace et noe. vs. Agius et noe (1957) (XLI.iii. 689) the Court tells us when unlawful 'causa' exists:

> 'Skond l-art. 1030 hija bla effett kwalunkwe obbligazzjoni magħmula fuq "kawża" illecita u skond l-art. 1033 ġie dikjarat li l-"kawża" hija illecita meta hija projbita mill-liġi jew kuntrarja għall-għemil xieraq jew għall-ordni pubbliku; u konvenzjoni hija kontra l-ordni pubbliku meta hija kontra l-interess ġenerali'.

In considering unlawful 'causa' we must distinguish this notion from the notion of the inexistence of 'causa'. Indeed, in the latter case, 'causa' is the immediate result of the contract (lo scopo) taken as a whole; it is the economic function of the contract, so that as such 'causa' cannot ever be unlawful or immoral. However,

when considering the notion of unlawful 'causa', 'causa' is taken to refer to the aims or motive which the parties have in mind when contracting and which therefore can indeed be unlawful or immoral. In other words, for the notion of inexistence, 'causa' means the intended result or the aim of the contract; while for the notion of 'unlawfulness', 'causa' means the motive of the parties. Thus, for example, if a person contracts to buy a brothel, the 'causa' for the purpose of 'inexistence' is the transfer of the brothel for the corresponding price; but on the other hand, for the purposes of 'unlawfulness' the 'causa' is the intention of organising a brothel which is, no doubt, contrary to public policy. Therefore, solely because of this latter fact the contract is null (vide Mizzi vs. Cassar, infra).

There is no doubt that in examining unlawful 'causa', our Courts have looked at the motive of the contracting parties. This can be seen in a number of cases. Thus in the case Bajada vs. Lamb the Court held:

> 'Dak li hu importanti hu jekk il-"kawża" ta' l-għoti tal-flus jew oġġetti oħra, ikunu meta jkunu mogħtija, ikollhiex jew le rapport dirett mal-konkubinat, jew aħjar jekk il-konkubinat kienx il-"kawża" ta' l-obbligazzjoni jew kienx merament l-okkażżjoni; fl-ewwel każ, l-obbligazzjoni hi nulla, bħala illecita; fil-każ l-ieħor hi lecita'. An identical case which came before the Courts was

An identical case which came before the Courts was Borg vs Portelli (XXXIX).

Again in the case Scicluna vs. Chetcuti (XXXV.ii.513) the Court manifested this point clearly:

> 'Il-"kawża" jew motiv impellenti jew determinanti tal-kontraenti, sabiex waslu għall-konvenzjonijiet u obbligazzjonijiet... kienet "kawża" direttament kontra l-liġi... u kwindi illecita'.

Again, a more recent case dealing with unlawful 'causa', in which 'causa' was clearly equated to motive was the case decided by Magri J., Mizzi vs. Galea in 1959 (XLIII.ii.648)

> 'Il-ħlas ta' rigal bħala kondizzjoni għall-għoti ta' kiri ta' djar huwa projbit mill-liġi. Dan ir-rigal projbit mill-liġi jikkostitwixxi "kawża" u oġġett ta' l-obbligazzjoni bejn il-kontendenti, u għalhekk f'dan ir-rigward l-obbligazzjoni hija illecita u m'għandha ebda effett'.

Thus we can see that in order that the theory relating to unlawful 'causa' may have those effects which it should have in conformity with tradition and with the principles of positive law, it must be kept distinct from the modern theory relating to the inexistence

of 'causa'. This is a case in point where the wording of our provision is illogical, because we find the word 'consideration' in section 1030 being interpreted differently according to the adjectives which qualify it in the same notion itself. Though illogical, this is the position in Malta.

On this point, Maltese and Italian doctrine differ considerably because Italian doctrine does not distinguish between the notion of the inexistence of 'causa' and that of unlawful 'causa', as we do. In other words, in Italian Law they do not inquire into the motive which the parties had in mind. Thus, these look at the 'causa' of the contract as defined above – economic-social function of the contract – and examine whether this function is lawful or not. Therefore, in Italian law – unlike in our law – a nominate contract which has its 'causa' established by the law cannot have an unlawful 'causa'. Thus Torrente explains:

> 'S'intende che il problema dell'illecità della "causa" si pone soltanto per i negozi atipici o innominati: per quelli tipici la "causa" è gia riconosciuta dal legislatore che, appunto per questo li ha disciplinati'.

Section 1033 of the Civil Code tells us what unlawful 'consideration' is. This section reads:

> 'The consideration is unlawful if it is prohibited by the law or contrary to morality or public policy'.

Therefore, the 'causa' is unlawful in three circumstances, namely,

(i) when it is prohibited by the law;
(ii) when it is prohibited by public policy;
(iii) when it is prohibited by morality.

Let us consider these separately.

By Law

The 'causa' is considered to be unlawful because it is 'prohibited by the law' when the 'causa' goes against an express provision of the law; in other words, when the aim of the parties as expressed is contrary to a provision in the law. In this respect we have already mentioned the case Mizzi vs Galea concerning 'il-ħlas ta' rigal għall-għoti ta' kiri ta' dar' and also the case Scicluna vs. Chetcuti et 1951 – XXXV.ii.513. Another particular case in point is Borg vs. Caruana et (1950) (XXXIV.ii.637) where it was held:

> 'L-attur kien inkarika lill-konvenut biex iniżżillu l-art minn abbord somma ta' flus u jikkonsenjaha lill-persuna oħra Malta. Il-

konvenut ma kkonsenjahomx. Billi l-attur ried iniżżel dawk il-flus bi ksur ta' l-Finance Reg. 1942, il-Qorti żammet li l-iskop ta' l-inkariku kien illecitu u għalhekk ċaħdet it-talba ta' l-attur għar-restituzzjoni ta' dawk il-flus.'

In this respect, one could also mention the case reported in XXXIX.i. at p. 371, which held that interest over 6% is against the law; therefore a contract which is based on such a 'causa' is illicit:

'Skond l-art. 1949 tal-Kodiċi Ċivili, l-imgħax hu limitat għas-6% u skond id-dispożizzjonijiet kombinati ta' 1030 u 1033, l-obbligazzjoni għall-imgħax ogħla minn dik ir-rata ma jista' jkollha ebda effett u għalhekk hija ineżistenti u nulla b'mod assolut.'

By Public Policy and Morality

The question arises here, as to what are we to understand by public policy and morality. Now, Torrente explains this:

'La ragione di negozio immorale o contrario al buon costume comprende non soltanto i negozi contrari alle regole del pudore sessuale e della decenza, ma più in generale i negozi contrari a quei principi etici, che costituiscono la morale sociale in quanto ad essi uniforma il suo comportamento la generalità delle persone oneste, corrette, di buona fede e di sani principi in un determinato ambiente e in una determinata epoca.'

Indeed, the Corte di Cassazione 1950 also had occasion to explain this point:

'Diversi invece intendere per buon costume il complesso di quei principi etici che, suscettivi di venire universalmente adotti, costituiscono la morale sociale, perchè ad essi uniforma il suo comportamento la generalità delle persone oneste, corrette, di buona fede, e di sani principi, in un determinato ambiente e in una determinata epoca'.

All this seems to fit in the very general definition of public order given by our Courts in the case Pace et ne vs. Agius et ne (1957) – XLI.iii.659:

'konvenzjoni hija kontra l-ordni pubblika meta hija kontra l-interess ġenerali'.

As regards the notion of public order it was also stated by the Court of Appeal in the case Marmarà vs. Caruana ed altri (XXII.i. 193) that no passage of time or repetition of performance can justify a provision against public order. Thus the Court held:

'Nessun atto, per quanto liberamente consentito e talora ripetu-

to, e nessun periodo di tempo, pur tempo, che sia, possono valere a dare efficacia ad una obbligazione proibita per ragione di ordine publico'.

It is sometimes debated whether it is right that a judge should have such a wide discretion since the law does not specify any criterion the judge should use. But even in Roman Law there was the concept of 'contra bonos mores' without there being any written law stating what these 'bonos mores' were. Pacifici Mazzoni discusses this point and he says:

'S'obbietta che è lasciato al giudice un troppo vasto campo d'arbitrio; ma è a riflettere che in questa materia, e specialmente per ciò che riguarda il buon costume, è inevitabile che il giudice abbia libertà d'apprezzamento ad è meglio affidarsi all'equo criterio e all'onestà di esso, piuttostò di tentare di porgli un freno con formole più o meno scientifiche, ma sempre indeterminate, che nella pratica applicazione recono più danno che utile'.

Giorgi is also of this opinion. An interesting case which came before our Courts was Needham vs. Darmanin (XIII. p. 570). In this case the plaintiff had spent a sum of £34 owing to her not working during pregnancy, which eventually terminated in an abortion. She alleged that the defendant was the person responsible for the aborted foetus, in that she was being maintained by him, and at his expense.

The Court held that concubinage being against religion and social custom, any obligation which derives therefrom, is of no effect.

A great number of cases involving unlawful 'causa' are concerned with obligation arising out of concubinage. On this point our Courts have been very categorical and have left no doubt that this is against public policy and morality; thus in the case Muscat vs. Farrugia et (XXVII.ii-iv.250) the Court held:

'È radicalmente nulla l'obbligazione, che alcuno assume di pagare una certa somma di denaro ad una donna come prezzo della promessa che questa gli fa annodare e continuare con lui relazioni illeciti'.

Another case on this point is found in XXXII.ii.170.

The question now arises whether for a contract to be annulled on the ground of unlawful 'causa', both parties had to know about it or not. We must here distinguish between the following hypotheses:

(a) the party who aims at an unlawful object cannot refuse to fulfill his obligation to the detriment of the other party who is un-

aware and who is therefore in good faith. In this case the maxim applies 'nemo auditur propriam turpetudinem alligens';

(b) on the contrary, the right of demanding the nullity of the contract must be granted to the party who, after the conclusion of the contract becomes aware of the unlawful scope of the other party, because in such a way another obstacle is made to the realisation of an unlawful scope.

Therefore, if A takes on lease a house from B for £10 a month for the purpose of committing immoral acts therein, A cannot refuse to pay the £10 to B demanding the annulment of the contract of lease on the ground that he entered into the contract with an unlawful motive in mind, and this because 'nemo auditur propriam turpitudinem alligens'. On the other hand, if B, after the conclusion of the contract, comes to know of A's unlawful motive, he may or may not demand the annulment of the contract at his option.

Indeed, the principle underlying both hypotheses is expressly stated in section 1034(1) of our Civil Code:

'Where the consideration for which a thing has been promised is unlawful only in regard to the obligee, anything which may have been given for the performance of the contract may be recovered'.

It is important to note that together with the right to annull the contract the party in good faith to such a contract vitiated by an unlawful 'causa' has a right to demand the restitution of anything which he has paid or given in consideration of that contract. Thus, if I pay a sum of money for the release of a person held hostage by bandits, the unlawfulness lies only with the bandits and I may therefore recover the money so given. (Torrente).

According to section 1034(2):

'If the consideration is unlawful in regard to both contracting parties, neither of them, unless he is a minor, may recover the thing which he may have given to the other party...'

In this principle we find applied the rule 'in parti turpitudine melior est conditio possidentis'. Therefore, if both parties to the contract know of the unlawful 'causa', the contract is null and void for both parties and none of them can claim back what he has already given. So that even if one of the parties has executed his obligation vis-a-vis the other party, even though the other party does not perform his part of the contract, the former has no legal means to recover what he has already given to the other party in contemplation of the contract – vide the above-mentioned case Borg vs. Caruana (1950) – XXXIV.ii.637.

There are quite a number of local cases illustrating this point.

Thus in the case Zammit vs. Caruana Scicluna (XXI.i.534) the Court held:

'L'illecitudine della "causa" per parte di ambedue i contraenti, impedisce la repetizione di quanto fu pagato per l'esercizio del contratto'.

Again in the case Scicluna vs. Abela (XXXII.ii.574)

'Meta l-operazzjoni hija illecita għaż-żewġ naħiet, wieħed ma jistax jirrepeti minghand l-ieħor dak li jkun tah in konnessjoni ma' dik l-operazzjoni'.

An interesting case is the case Fenech vs. Newly (XXI.i.290) where it was held that the fact that one rents a house for prostitution makes the lessee also a party to the unlawful contract in that he speculates on the exercise of prostitution. Therefore, the contract can be annulled by both parties but none of them can demand the restitution of what has been given:

'La locazione di un fondo, quando..... ha per oggetto anche per parte del locatore una speculazione nell'esercizio della prostituzione, contiene una contrattazione immorale e quindi è nulla. E quantunque in simile contrattazioni la "causa" sia illecita per parte di ambedue i contraenti, pure ciascuno delle parti può domandare la resoluzione del contratto, salvo la irrepetibilità delle prestazioni eseguite'.

This provision of our law (section 1034)(2) is very similar to art. 1345 of the Italian Civil Code which says that a contract is unlawful when the parties are led to conclude it solely by an unlawful motive common to both.

'Il contratto è illecito quando le parti si sono determinate a concludere esclusivamente per un motivo illecito comune ad entrambe'.

This article is an exception to the above-mentioned Italian general rule that nominate contracts cannot be annulled on the ground of unlawful 'causa'. This provision brings the Italian concept of 'causa' close to ours, in that it considers the motive of the parties in both nominate and innominate contracts. However, this provision only applies when the same unlawful motive is the prime consideration of both parties in contracting. Torrente and Pescatore discuss this provision of Italian law:

'Questo articolo condiziona la nullità del contratto alla circostanza che il motivo illecito sia stato il solo a determinare la volontà delle parti e sia comune ad entrambe nel senso che tutti e due i contraenti devono aver avuto un identico motivo e cioè

devono esservi ispirati al perseguimento della stessa finalità illecita'.

The case Mizzi vs. Cassar

This recent case is interesting in that it pinpoints the various areas of difference between inexistence and unlawfulness of 'causa' in that the First Court found the first, and the Appeal Court, the second.

Facts: Mizzi, Cassar (Texas Garage) and Falzon (Express Garage) were faced with the possibility of a tourist boom after the war. The three garages agreed to form a sort of partnership, by formal agreement, whereby the three would contribute in some way to the common good, and each would reap the profits. Mizzi did in fact make some attempt to attract tourist agents to Malta, and Falzon did, at times, help Cassar with extra cars, for which the latter always paid him. After eight years without distribution of profits, Mizzi and Falzon sued Cassar for such distribution.

Commercial Court: The Court attempted to find out if the old contact of partnership was valid and so had to ask the question 'Is there a "Causa"'?

The Court held that the 'causa' was the desire of the three parties to prevent competition among them. The contract was therefore with a 'causa'.

Appeal Court: Appeal disagreed with the first Court on this same point, arguing:

(i) The desire to prevent competition may be a MOTIVE of a contract, but not a 'CAUSA', and this latter is what is required as an essential element for the existence of a contract.

(ii) Even if we say, as the First Court held, that this was the 'CAUSA' then it was an ILLICIT one, because trade should be free, and so should competition.

So we still remain with the question was there a 'CAUSA'? The facts show that although in the contract, Mizzi and Falzon had promised to contribute, they had in actual fact performed very feeble attempts at fulfilling their obligation. It was held, therefore, by this Court that

(a) as far as the CONTRACT is concerned, this had a 'causa', because here a promise is enough for a 'causa' to exist; but

(b) as far as the OBLIGATIONS are concerned, these (Cassar's) had no 'causa', because Mizzi and Falzon did not really perform their obligations: therefore, here a promise is not enough; there must be PERFORMANCE for a 'causa' of an obligation to exist.

Conclusion

The writer hopes that it is by now clear that it is very difficult to regulate clearly and effectively a complex notion as that of 'causa' in five short provisions as our Civil Code tries to do. So that one can suggest that the adoption 'in toto' of the Italian doctrine of 'causa' would not only eliminate the ambiguities created by the use of the word 'obligation' in lieu of the word 'contract' in section 1030, but would also ensure a better understanding of the notion of 'causa' in relation both to nominate and innominate contracts and a better distinction of motive from 'causa'.

BIBLIOGRAPHY

Caruana Galizia: Notes on Maltese Civil Law.

Ganado: Unpublished lecture notes 1974/1975.

Giorgi: 4th edition 1897 *Teoria delle obbligazioni, Vol. III.*

Messineo: *Manuale di Diritto Civile e Commerciale, Vol. II,* (9th edition 1959).

Mosley & Whitley: *Law Dictionary* (ith edition 1970).

Pacifici Mazzoni: *Istituzioni di Diritto Civile Italiano, Vol. IV* (5th edition 1927).

Sutton & Shannon: *On Contracts* (7th Edition 1970).

Torrente: Manuale di Diritto Privato (5th edition 1961)

Torrente Pescatore: *Codice Civile Annotato con la Giurisprudenza della Cassazione* (1967).