Essays

Instances of Civil Law in North American Common Law Tradition: Cause and Consideration in Quebec and Louisiana Civil Codes

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Abstract

A practical comparison between the two main legal system families can profit from some unique instances of civil law that lie in the vast North American continent. Reference is made to Quebec, for Canada, and Louisiana, for the US. Both locales are part of federal states ruled mainly by common law. The Canadian and US legal systems embed civil codes that refer to and define a requirement for the validity of the contract, the cause, that European civil codes mentioned, but did not dare to define. The first Italian Civil Code, enacted in 1865, was consistent with the Napoleonic Code: the paragraph called 'upon the cause of contracts' contained section 1119 and section 1120, which read 'An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect' and 'A contract is valid, although its cause is not expressed', following quite literally what section 1131 and section 1132 Code Napoleon stated. In the second and current generation of the Italian Civil Code, enacted in 1942, the rules changed in wording and now cause is referred to the contract (without any explanation of its meaning) and no more to the obligation. After 1942, therefore, scholars and Courts started to refer to the concept of cause, also (or exclusively) as the due control of the legal system on the lawfulness of the legal operation the parties to the contract are seeking, and on the practical results they wish to achieve. Following these paths, the meaning of the term cause also lost its certainty in the civil law systems themselves and often became a duplication of the concept of object (or subject matter): the concept of cause has lost its clarity to the extent that, given a proposal of European restatement or uniform codification, it is doubtful whether it would be worth maintaining the concept or not. In such a situation, the provisions in the Louisiana and Quebec Civil Codes that mention and even define the cause are of great interest also for the civil lawyer from different points of view.

I. Two Instances of Civil Law within Canadian and US Common Law Territories: Quebec and Louisiana

A practical comparison between the two main legal system families can profit from some unique instances of civil law that lie in the vast North

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American continent. Reference is made to Quebec, for Canada, and Louisiana, for the US.

Both Quebec and Louisiana are part of federal states ruled mainly under common law systems. The Canadian and US legal systems embed civil codes that refer to and define a requirement for the validity of the contract, the *cause,* which European civil codes mention but do not define. Therefore, taking a glance at them may be of some interest also for an Italian scholar.

As law school students, during the late 1980s, we were taught that *cause* and *consideration* perform quite a similar task, but that they are specific to different legal systems, and therefore they do not coexist within the same framework, thus relinquishing any comparison between them on a merely theoretical point.

On the one hand, it is true that the doctrine of *consideration* is very complex; on the other hand, the concept of *cause* is mostly ambiguous, because European civil law code drafters did not involve themselves in definitions. This is why the matter seems difficult to address.

II. Louisiana Civil Code of 1870 and the First Louisiana Civil Code Digest of 1808

The US took possession of Louisiana on 20 December 1803, some months after completion of the Louisiana Purchase from France.[1] At the

[1] It is worth mentioning that the object of the Purchase was far more extensive than the actual State of Louisiana: it included land from fifteen present US States and two Canadian provinces: Arkansas, Missouri, Iowa, Oklahoma, Kansas, and Nebraska; the portion of the western part of Minnesota of the Mississippi River; a large portion of North Dakota and South Dakota; the Northeastern section of New Mexico; the northern portion of Texas; the area of Montana, Wyoming, and Colorado east of the Continental Divide; Louisiana west of the Mississippi River (plus New Orleans); and small portions of land within the present Canadian provinces of Alberta and Saskatchewan.

'The Louisiana Purchase encompassed 530,000,000 acres of territory in North America that the United States purchased from France in 1803 for $15 million (…) Since 1762, Spain had owned the territory of Louisiana, which included 828,000 square miles. The territory made up all or part of fifteen modern US states between the Mississippi River and the Rocky Mountains (…) France acquired Louisiana from Spain in 1800 and took possession in 1802, sending a large French army to St. Domingue and preparing to send another to New Orleans. (…) In addition to making military preparations for a conflict in the Mississippi Valley, Jefferson sent James Monroe to join Robert Livingston in France to try to purchase New Orleans and West Florida for as much as $10 million. Failing that, they were to attempt to create a military alliance with England. Meanwhile, the French army in St. Domingue was being decimated by yellow fever, and war between France and England still threatened. Napoleon decided to give up his plans for Louisiana, and offered a surprised Monroe and Livingston the entire territory of Louisiana for $15 million. Although this far exceeded their instructions from President Jefferson,

time, the Napoleonic Code had not yet been enacted and in the new territory the laws of Spain were still in force. There was a huge number of provisions (more than twenty thousand laws and eleven different codes), with many conflicting statements: a situation of chaos that resembles what would also be depicted, some years later, in the main novel of Alessandro Manzoni, '*I promessi sposi*' ('The Betrothed').[2]

The new State needed to choose between common and civil law tradition systems and two parties opposed: William C.C. Claiborne, a former lawyer from Tennessee, appointed as commissioner of the US to take possession of Louisiana, wanted to establish English common law in the new State, while Edward Livingston, a New York lawyer who emigrated to Louisiana in 1803, opposed it and stood as a champion for the civil law system, with the support of a large part of the population because, as it has been noted:

> 'Their experience with Spanish judicial proceedings had left them with little or no respect for the courts, and they were afraid of the common law system where the decisions of the courts became law, and where they would be required to search through English jurisprudence to determine what laws applied. They preferred to continue to be governed by the laws of Spain, with which they were familiar, where all enforceable laws were required to have some statutory origin, and where the decisions of the courts did not assume the status of laws but were considered merely as judicial interpretations of statutory provisions'.[3]

> 'In 1806, the first Legislature of the Territory of Orleans convened and, apparently siding with Livingston, promptly adopted an act providing that the Territory of Orleans should be governed by the Roman and Spanish laws which were in effect at the time of the Louisiana Purchase (…) On June 7, 1806 (…) the Legislature adopted a resolution appointing James Brown and Louis Moreau Lislet 'to compile and prepare jointly a Civil Code for the use of this territory'. (…) They completed the work assigned to them in less than two years, and the civil code which they prepared was formally adopted by the legislature on March 31, 1808 (…) The official title given to the code of laws which was adopted in 1808 was 'Digest of the Civil Laws now in Force in the Territory of Orleans, with Alterations and Amendments Adapted to its

they agreed.' ('Louisiana Purchase, 1803', Office of the Historian, United States Department of State, available at https://history.state.gov/milestones/1801-1829/louisiana-purchase (last visited 24 May 2016)).

[2] A. Manzoni, *I Promessi Sposi (The Betrothed)*, edited by C.W. Eliot, *The Harvard Classics*, Vol 21 (New York: PF Collier & Son, 1909-14).

[3] J.T. Hood jr, 'The History and Development of the Louisiana Civil Code' 19 *Louisiana Law Review*, 21 (1958).

> Present System of Government.' Although these compilers described their work as a digest of the laws then in force, it actually was a complete civil code, divided into three books, each of which was broken down into titles, chapters and articles, similar to our present code, except that in numbering the articles a new series of numbers was used in each title (…) The Civil Code prepared by Brown and Moreau Lislet, however, was not based on the Spanish law, as the legislature had directed, but it was based instead on the then newly adopted French Code, the Code Napoleon'.[4]

On the topic of requirements for the validity of the contract, the 1808 Louisiana Civil Code Digest resembles the Code Napoleon.

Section IV of the Digest was dedicated to the *cause* and reads: 'Art 31. – An obligation without a cause, or with a false or unlawful cause, can have no effect. Art 32. – An agreement is not the less valid, though the cause be not expressed. Art 33. – The cause is illicit when it is forbidden by law, when it is *contra bonos mores* (contrary to moral conduct) or to public order'.

It is easy to pick up, in the above-mentioned wording, the echo of Arts 1131-1133 Code Napoleon ('Art 1131. – An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect. Art 1132. – An agreement is nevertheless valid, although its cause is not expressed. Art 1133. – A cause is unlawful where it is prohibited by legislation, where it is contrary to public morals or to public policy'). These articles, half a century later, would have given the wording to Arts 1119-1122 of the Italian Civil Code, enacted in 1865.

This first Louisiana Digest was, then, substituted in 1825:

> 'On March 14, 1822, the legislature adopted a resolution appointing Moreau Lislet, Edward Livingston, and Pierre Derbigny 'to revise the Civil Code (of 1808) by amending the same in such manner as they will deem it advisable, and by adding unto … (it) … such of the laws that

[4] Ibid 23-26: 'No satisfactory explanation has been offered to this date as to why this was done. It is probable, however, that these two attorneys and the legislature had a high regard for the codification experience in France, not only as to form but also as to content, since both the French and the Spanish systems had many common sources in Roman law, and for that reason they may have used the Code Napoleon as a model without any intent to displace the Spanish law. This theory is supported by the fact that there are many differences between the Code Napoleon and the Louisiana Code of 1808, due largely to the fact that there were incorporated into the Louisiana Code a substantial number of Spanish laws, which had not been included in the French Code. The Louisiana Code contained 2127 articles, a little less than the number contained in the Code Napoleon'.

are still in force and not included therein.'(...) The title of this completed code, as promulgated, is 'Civil Code of the State of Louisiana.' Included in it were provisions originating from Spanish law which were not contained in the Code of 1808. It also contained some provisions from territorial statutes, and others from common law sources. There were a total of 3,522 articles, in this code, more than one and one-half times as many as were contained in the Code of 1808'.[5]

A third and last revision finally gave rise to the current Civil Code of 1870:

'Changes brought about by the Civil War, together with the adoption of a new constitution, made it necessary to again revise the Civil Code. Consequently, the legislature, in 1868, authorized a joint committee to select one or more commissioners to revise the Civil Code. John Ray, of the Monroe Bar, who already had been selected to revise the general statutes of the state and the Code of Practice, also was commissioned to revise the Civil Code. Ray thereupon employed three attorneys to assist him in this undertaking, and he and his assistants submitted a project of a revised civil code which was printed in English in 1869. The revised code which they proposed was adopted as Act 97 of the Legislature of 1870, and it was given the official title of "The Revised Civil Code of the State of Louisiana". The Civil Code of 1870 is substantially the Code of 1825, except for the elimination of all articles relating to slavery and those which had been repealed, and the incorporation of all acts passed since 1825 amending the Civil Code or dealing with matters regulated by the Code'.[6]

As it was noted:

'The Louisiana Civil Code is not simply an adaptation of the Code Napoleon. Neither is it a 'digest' of the Spanish laws which were in force in 1808, as the title of the code adopted during that year seems to indicate. It includes many provisions having a basis in common law, but the common law system does not prevail in this state – despite arguments advanced by some to the contrary. The simple truth of the matter is that Louisiana has developed a legal system of its own, and although grounded on civil law, it must be classified as sui generis'.[7]

Referring to *cause*, the Civil Code of 1870 repeats as follows the rules

[5] Ibid 29-30.
[6] Ibid 31-32.
[7] Ibid 33.

contained in the Digest and taken from Code Napoleon:

> 'Art 1966. – No obligation without cause: An obligation cannot exist without a lawful cause; Art 1968. – Unlawful cause: The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy; Art 1969. – Cause not expressed: An obligation may be valid even though its cause is not expressed; Art 1970. – Untrue expression of cause: When the expression of a cause in a contractual obligation is untrue, the obligation is still effective if a valid cause can be shown'.

Moreover, the lawmakers of the 1870 Code also included a definition of *cause* that is coherent with the one afterwards adopted by Quebec Civil Code: in fact, Art 1967 of the Louisiana Civil Code (LCC), titled 'Cause defined; detrimental reliance' reads (first para): 'Cause is the reason why a party obligates himself'.

III. Quebec Civil Code and the Role of Civil Law Scholarship in Its Drafting

As E. Fabre-Surveyer, a prominent Judge of the Superior Court of the Province of Quebec, pointed out in a speech delivered on 8 April 1938, at the Dedication of the Law Building of the Louisiana State University law school, 'The position of the civil law in Quebec might well have been very different had not the Code of Louisiana been a successful experiment. In Louisiana the civil law was codified in 1808; the Civil Code of Quebec did not come into existence until 1866. Hence the experience of Louisiana in codifying and applying French civil law in America, extending over half a century, was of inestimable benefit to the framers of the Quebec Code'.[8]

The Civil Code of Lower Canada (CCLC)[9] was enacted in 1866 and covered all areas of private civil law, mostly based on and inspired by the

[8] E. Fabre-Surveyer, 'The Civil Law in Quebec and Louisiana' 1 *Louisiana Law Review*, 649 (1939): 'It is true that during the first half of the nineteenth century other countries had modelled their law on the Civil Code of France; but distance and difference of language made their work less valuable to Quebec than the experience of Louisiana. In 1857, the law decreeing the preparation of a civil code for Quebec stated that 'the great advantages which have resulted from Codification, as well in France as in the State of Louisiana, and other places, render it manifestly expedient to provide for the Codification of the Civil Laws of Lower Canada'.

[9] Lower Canada was the name of the southern part of the present-day province of Quebec between 1791 to 1841.

1804 Code Napoleon.[10] The preamble of the Act, passed in 1857, ordered the drafting of a Code, claiming that:

> 'The said Commissioners shall reduce into one Code, to be called the Civil Code of Lower Canada, those provisions of the Laws of Lower Canada which relate to Civil Matters and are of a general and permanent character (...)'.[11]

The need to reduce chaos to order was so evident in 1859, while the Commission for the codification was at work, that M. Désiré Girouard, later a prominent member of the Supreme Court of Canada, could say:

> 'There is nothing more uncertain than the actual law of Lower Canada, nothing more confused than the state of Canadian law'.[12]

Therefore, in the words of Judge Edouard Fabre-Surveyer,

> 'The Civil Code of Quebec may (...) be said to be a younger brother of the Louisiana Code - at least of the Louisiana Civil Code of 1825'.[13]

Like the Code Napoleon, the Civil Code of Lower Canada did not define *cause,* although it required it for the enforceability of the obligation. Art 982 CCLC mandated that: 'It is essential to an obligation that it should have a cause from which it arises, persons between whom it exists, and an object'.

Art 984 of the Civil Code of Lower Canada is also of some interest, because it placed *cause* and *consideration* on the same level: in fact, it stated that: 'There are four requisites to the validity of a contract: Parties legally capable of contracting; their consent legally given; something which forms the object of the contract; a lawful cause or consideration'. It is easy to note that the wording used in Art 984 CCLC is quite the same of

[10] R.A. Macdonald, entry 'Civil Code' *The Canadian Encyclopedia*, available at http://www.thecanadianencyclopedia.ca/en/article/civil-code/ (last visited 24 May 2016): 'The 1866 Code was the fruit of a Codification Commission created in 1857 to consolidate, in a bilingual statement, all civil laws in Canada East. For doctrine, the commissioners relied heavily on the works of the great French jurist Pothier, to a lesser extent on various commentaries on the Code Napoléon and occasionally upon the text of the Louisiana Civil Code. They derived the majority of the Code's rules from the Custom of Paris, brought to New France in 1663'.

[11] E. Fabre-Surveyer, n 8 above, 650.

[12] As reported by E. Fabre-Surveyer, n 8 above, 651.

[13] Ibid 649.

Art 1108 Code Napoleon,[14] except for adding, as fourth requirement, the word *consideration* to *cause,* as if they were synonyms.

In conclusion, while the requirement of *cause* is present in the Civil Code of Lower Canada (Arts 982 and 984), it is not defined, although it is associated with the word *consideration*.

Some decades later, in a well known Supreme Court of Canada case (Stephanie Brenda Bruker *Appellant* v Jessel (Jason) Benjamin Marcovitz *Respondent* and Canadian Civil Liberties Association *Intervener*) decided in 2007, the Court was asked to ascertain if an agreement with religious implication could be regarded as a contract under the *Civil Code of Lower Canada* (applicable to the claim) and could ground a damages claim. In that decision, the Supreme Court pointed out that:

> 'In the instant case, the appellant argues that the respondent must pay damages because he breached an obligation resulting from clause 12. Article 982 C.C.L.C. says the following about the obligation: 982. It is essential to an obligation that it should have a cause from which it arises, persons between whom it exists, and an object. (...) It must therefore be determined whether clause 12 constitutes a contract in Quebec law. For this purpose, it is necessary to consider the requirements for 'validity' of a contract. According to art. 984 C.C.L.C., a contract must meet four conditions: (...) Cause is not defined in the C.C.L.C., but it is defined in the Civil Code. According to the Minister's commentaries that were published when the Civil Code was enacted, the definition in art. 1410 C.C.Q. is the one that was accepted by commentators and the courts at the time of the reform. Art. 1410 C.C.Q. reads as follows: 1410. The cause of a contract is the reason that determines each of the parties to enter into the contract. According to the commentators, the cause of a contract has an objective aspect. It is the element that justifies the contract's existence. For each party, the objective cause of the contract is the other party's undertaking. But this information is not very helpful. Where a synallagmatic contract is concerned, the cause, defined as the other party's undertaking, is of no assistance in determining whether the contract is valid. What is relevant above all is the subjective aspect, namely the reason why a party enters into the contract. Whether considered in light of its objective aspect or its subjective aspect, the cause need not be mentioned in the

[14] Art 1108 Code Napoleon reads as follows: 'Four requisites are essential for the validity of an agreement: The consent of the party who binds himself; His capacity to contract; A definite object which forms the subject-matter of the undertaking; A lawful cause in the obligation'.

> contract. In view of the words of art. 984 C.C.L.C. ('(a) lawful cause or consideration'), the courts concern themselves with the cause of a contract only when its lawfulness is contested'.[15]

In other words, the Supreme Court interpreted the requirement of *cause*, which the former Code (the Civil Code of Lower Canada) does not define, the same way as the more recent Quebec Civil Code defines it.

The Quebec Civil Code (QCC), in force at the time of the decision (2007) was enacted in 1991 and became mandatory on 1 January 1994. From that time it replaced the Civil Code of Lower Canada.[16]

The drafting of the actual Civil Code of Quebec was a long-lasting task, started in 1955 and completed in 1994:[17] it was inspired and created by the Law Reform Commission, led by the prominent Canadian scholar Roderick Macdonald. The role of the Civil Law scholarship in such a drafting during the late 1970s was emphasized by Macdonald himself, who chose 1977 as a cutoff point for completion of the (first) draft:

'Two related reasons sustain this choice: first, the Civil Code Revision

[15] *Bruker* v *Marcovitz*, [2007] 3 S.C.R. 607, 2007 SCC 54, paras 163-168.

[16] N. Des Rosiers, 'Book Review: Quebec Civil Law: An Introduction to Quebec Private Law, by J.E. C. Brierley and R.A. Macdonald (eds)' 33 *Osgoode Hall Law Journal*, 206 (1995).

[17] 'In 1955, the Government of Québec embarked on a reform of the Civil Code with the passage of the Act respecting the revision of the Civil Code. The Civil Code Revision Office was established to direct the project and it created a number of committees to make recommendations on the reform of various areas of the civil law. Consultations were held on the reports produced by the Office and the committees which were subsequently incorporated into a final report tabled in the Québec National Assembly in 1978 in the form of a Draft Civil Code with commentaries. After receiving the report, the government held public consultations on family law, which it considered a priority. The reforms proposed in this field were passed into law in December 1980. Bills to reform the law of persons, successions and property were later introduced in the National Assembly in 1982 and 1983 before ultimately being consolidated into a single bill which was enacted in April 1987.Between December 1986 and June 1988, broad consultations were held on three draft bills: one dealt with real security and publication of rights, a second draft bill dealt with obligations and a third dealt with evidence, prescription and international private law. During this period, a number of amendments were made to the family law provisions of the Civil Code of Lower Canada and the Civil Code of Québec to address the pressing needs of the day. The new provisions dealt with arbitration law reform, co-ownership and emphyteusis, the establishment of family patrimony and reform of public curatorship and the protective supervision of persons of full age. The articles governing international adoption, which had been substantially amended in 1983 and 1987, were again revised in 1990. The new draft Civil Code of Québec was tabled in the National Assembly on December 18, 1990. It was passed on December 8, 1991, and came into force in 1994', (A Short History of the Civil Code Reform, available at http://www.justice.gouv.qc.ca/english/ministere/dossiers/code/code-a.htm) (last visited 24 May 2016).

> Office submitted its report and wound up its various study committees in 1977; second, a major private law research group, the Quebec Research Centre for Private and Comparative Law was established at the same time'.[18]

In the first draft of the Code, completed in 1977, the concept of *cause* was repelled. The Report on the Quebec Civil Code explained:

> 'In chapter I of Title One on contracts, having made a study of Quebec positive law and foreign legislation, it was decided to abolish the cause as a necessary condition to the formation of a contract. This measure was seemingly justified by the fact that the so-called objective cause is so little used in Quebec positive law and it was considered that this concept was sufficiently compensated for by other provisions relating to the object of obligations, to consent, to the object of a contract, to formalism, to revision for unforeseen events, to abusive clauses, to the exception of inexecution, to resolution, to impossibility of execution and to indivisibility, so as to fulfill the traditional role played by the concept of cause'.[19]

On the contrary, the definitive version of the Code, in force since 1994,[20] mentions the requirement of *cause* for the validity of the contract and

[18] R.A. Macdonald, 'Understanding Civil Law Scholarship in Quebec' 23 *Osgoode Hall Law Journal*, 573-608, 604 (1985).

[19] *Report on the Quebec Civil Code - Civil Code Revision Office* - Volume II, Tome 2 *Commentaries* - 1977 Bibliotheque nationale du Quebec, 554-555. On 1955 'Quebec legislature decided to revise systematically the Code with a view to giving renewed expression to the general law and to render it more in step with the social, political and economic realities affecting private law relations in Quebec. The Civil Code Revision Office was created in that year. Its first chairman was the Hon. Thibaudeau Rinfret, former Chief Justice of the Supreme Court of Canada, who was replaced in 1961 by an advocate, André Nadeau, and, then, by Professor Paul-André Crépeau of McGill University in 1966. The task before the C.C.R.O. was an enormous one: to update the 1866 Code by rethinking it in its entirety, to recast the relationship between the Civil Code and an increasingly complex body of statutory law, and finally to articulate the basis for reform and revision in each of the areas that a new code might touch upon. Rather than proceeding with the whole recodification at once, the C.C.R.O. was called upon by the government to work in stages, with some important parts of its effort culminating in major modification to the body of Quebec private law, enacted during the course of its mandate and thereafter. The end goal was to provide the Quebec legislature with a draft code that was to replace completely the Civil Code of Lower Canada. This draft was completed in 1977, and the resulting publication contains explanatory notes not unlike the codifiers' reports published in 1865 just before the enactment of the Civil Code of Lower Canada' (History of the C.C.R.O. available at http://digital.library.mcgill.ca/ccro/history.php (last visited 24 May 2016)).

[20] 'The Civil Code of Québec was enacted on 4 June 1991 by chapter 64 of the Statutes of Québec. It came into force on 1 January 1994 under the authority of Décret 712-93. While available in many commercial editions, the only official version is that of S.Q.

contains several doctrinal definitions, among which is *cause*, which appears strictly connected to the doctrine of *consideration*.

IV. Doctrine of *Consideration* in Canadian and US Legal Tradition

Consideration is the requirement to enforce a promise under common law, on the basic assumption that, due to the natural selfishness of every human being, a promise can be regarded as serious – and therefore binding – only if made in return for, or in relation to, a detriment of the promisee. Using the words of Benjamin N. Cardozo, *consideration* must consist of three elements: (a) The promisee must suffer legal detriment; (b) The detriment must induce the promise; (c) The promise must induce the detriment.[21]

Canadian scholars add that 'a bargain is not formed merely by mutual assent. There must be some exchange of values. Something must be given or promised'.[22] They note that the final purpose of the doctrine of

1991, c. 64, as amended. The provisions of the new code of 1991 are complemented by those of An Act respecting the implementation of the reform of the Civil Code S.Q. 1992, c. 57. The Ministry of Justice has also released a publication entitled Commentaires du Ministère de la Justice (Quebec City: éd. off., 1993 (vol. 1 & vol. 2), 1994 (vol. 3) (no English version available) in which brief indications of the acknowledged sources of the new provisions and some explanatory comment upon them are provided. Figuring prominently among the cited sources in this text is the Report on the Québec Civil Code/Rapport sur le Code civil du Québec of 1977/78 of the Civil Code Revision Office. It must be observed that during the period between the release of the Report of the Civil Code Revision Office (1977/78) and the enactment of the new code (1991), the government of Quebec carried on with its consideration of the appropriate legislation to adopt. In other words, the Draft Civil Code of the Office was never adopted as such, saving only those portions of it that constituted Book Two (The Family) of the first Civil Code of Québec enacted in 1980. During this 12 year period, governmental jurists re-fashioned much of the original Draft in its organization, style and content.' (The Final Report, available at http://digital.library.mcgill.ca/ccro/final_report.php) (last visited 24 May 2016).

[21] J.D. Calamari and J.M. Perillo, *The Law of Contracts* (St Paul: West Publishing, 3rd ed, 1987), 187-188.

[22] S. Waddams, *The Law of Contracts* (Aurora, ON: Canada Law Books, 5th ed, 2005), § 118, 82. We can add that *consideration* must be present and not merely declared in the recitals of the contract: 'in all commercial agreements, the statement or declaration (of an existing *consideration*) is unnecessary; it adds nothing to the enforceability of the agreement and does not change a court's approach to its interpretation. *Consideration* (in the technical sense now being examined) will be supplied by the promises made by the parties or by the payment of the price by one of them. If the agreement is not a commercial one and, for example, involves a gratuitous promise to transfer land or to make a gift, the recital or declaration that there is consideration will not transform the promise into an enforceable commercial agreement' (J. Swan, *Canadian Contract Law* (Toronto: LexisNexis Canada, 1st ed, 2006), 33). However, they are aware of the ambiguity and uncertainty that the long history of the doctrine of *consideration* shoulders. It also

consideration is to protect legitimate reliance – 'the protection of reliance can be achieved both by contract and by tort':[23] therefore the involvement of the concept of *consideration* occurs only if the claim is raised in a contract, but the need for protection is wider. A more modern approach in Canadian doctrine on promise enforceability can therefore focus on the protection of the parties' *reasonable expectations*:

> 'the questions which any court that is asked to enforce a promise must consider (are) : (i) will the promisor be caught by surprise if the promise is enforced? (ii) will the promisee be similarly caught if the promise is not enforced? (iii) will either party be unjustly enriched if the promise is either enforced or refused enforcement? (…) The common law has dealt with the pervasive risk of surprise by adopting the standard of reasonableness: the belief of the party who runs the risk of being surprised has to be reasonable. The promisor's expectation that the promise will not be enforced has to be reasonable, as has the promisee's expectation that it will be enforced'.[24]

Although other tools exist to ascertain whether a promise must be enforced or not (ie the abovementioned 'risk of surprise' beyond reasonable expectation in the court's decision, that appears to be another way to name the protection of a grounded reliance), the traditional common lawyers' approach remains moored on *consideration*. And, as appears clear from Cardozo's doctrine, the doctrine of *consideration* remains more focused on the *promise* than on the *contract*, although the statement of (c) above – requiring that a promise must have induced the detriment of the promisee – refers to a *contract* because it means, as was affirmed, 'that the offeree must know of the offer and intend to accept'.[25]

happens that the approach to use contractual remedies in any dispute brings a precedent not suitable in other cases: for example 'those who have expectations, even reasonable expectations, of another's generosity, i.e. willingness to make a gift, will, when their expectations are disappointed, sometimes make their case on a promise to make a gift. (…) Because these claims have nothing in common with a claim arising in a commercial relation, their treatment as contractual claims with a careful analysis of the extent to which the requirements of a bargain were met appear almost ludicrous. Again, the use of such case as authorities on the doctrine of *consideration* tends to create awkward, if not bad, precedents' (Ibid 19).

[23] Ibid 24, adding: 'Anyone who relies on a promise may incur detrimental reliance in two principal ways: (i) money may be expended in preparation for the other's reciprocal performance; or (ii) opportunities to make other deals or other arrangements may be foregone'.

[24] Ibid 23.

[25] J.D. Calamari and J.M. Perillo, n 21 above, 189.

In effect, contracts – and in particular bilateral contracts – are borne in mind by common lawyers when drafting the doctrine of *consideration* and weighting its consequence, as they say:

> 'The essence of consideration, then, is legal detriment, that has been bargained for by the promisor and exchanged by the promisee in return for the promise of the promisor'.[26]

Thus, on the one hand, a simple contract is a bargain and must be supported by *consideration*; on the other hand, the promisee that seeks remedy in law can obtain it only if the detriment he has suffered justifies the enforceability he requires: in other words, he will obtain damages only if his reliance upon the promise was justified.

That was quite the same approach which the French codification reflected on Code Napoleon – which led in turn to most of the European private law codes, including the first Italian one, enacted in 1865, after completion of the reunification of the country. In fact, French Code lawmakers speak of contract, but have in mind the obligation and seek the reason – the justification for the obligation itself – finding it in what was named as *cause*.

Section 1108 of the Code Napoleon – which is still in force with the same original wording – reads:[27] 'Four conditions are essential for the validity of an agreement: The consent of the party who binds himself; His capacity to contract; A certain object forming the matter of the contract; A lawful *cause* in the bond', where the bond is an English barrister's translation of the French word *obligation* (the *obligation*). But the *obligation* – its etymology explains[28] – is the equivalent of a legal promise, and the *cause*, therefore, is the reason in *consideration* of which the legal system gives its sanction to the obligation, to the promise.

Regarding the Code Napoleon's requirement of a *cause*, it is also important to bear in mind that a contract was primarily considered a means to acquire property (section 711)[29] – and indeed was the main means to do so – so it was of the essence that an obligation, such as that of transferring ownership of a property, be counterbalanced by a *cause*.

[26] Ibid.

[27] According to the translation *By a Barrister of the Inner Temple* (London: William Benning, 1827).

[28] '*Obligatio est iuris vinculum quo, necessitate, adstringimur alicuius solvendae rei, secundum nostrae civitatis iura*' (*Institutiones Justiniani,* I. 3,13 Pr), where in Latin *vinculum* means 'binding'.

[29] Section 711 Code Civil : '*La propriété des biens s'acquiert et se transmet par succession, par donation entre vifs ou testamentaire, et par l'effet des obligations*'.

Therefore, the Code Napoleon requires a *cause* because it refers to a synallagmatic contract that involves an obligation – a *promise* – that implies a detriment in the counterpart (ie a conveyance of a property). That is why section 1131 NC reads: 'An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect', and the convergence between the unenforceability of a promise lacking *consideration* and section 1131 French Civil Code is evident.

Because the contract borne in mind in drafting the discipline in the Code Napoleon is bilateral,[30] we can easily comprehend why section 1132 NC reads: 'An agreement is nevertheless valid, although its cause is not expressed'– that is, because the *cause* is implicit in the *mutual* promises. The usual reciprocal justification of the mutual promises contained in contract also explains why the unilateral promise – the one that is not embedded in a contract, but 'stands alone' – is now regarded with distrust by the Italian Civil Code: section 1987 reads, 'A unilateral promise of performance is not binding except in specific cases permitted by law'.[31]

Civil Code makers are however more familiar than common law practitioners with an abstract approach and their training is based on the idea of a code – born out of the French *Enlightenment Movement* – as a book summarizing all the duties and rights of a private citizen with respect to others.

Civil Code makers prefer generalizations more than practical examples and therefore they regroup every bilateral agreement in the category of the contract, in some cases in spite of common economic sense. As was reported, Napoleon himself, attending a work session of the Committee drafting the Civil Code, showed surprise and even concern listening to the commissioners defining a gift as a contract, although the donor receives no benefit for himself from the donation, but only a detriment or a disposal. In the case of a gift, defined by section 894 NC[32] – the evident lack of justification for the disposal of the property is balanced by the solemnity of the deed made before a public notary.

In other words, if we wish to return to the reason underlying the requirements of *consideration* or *cause*, we may discover the strict

[30] As defined by section 1102 as 'A contract is synallagmatic or bilateral where the contracting parties bind themselves mutually towards each other'.

[31] The only cases permitted by law are set forth by section 1988, according to promisee only a relief in the proof of a legitimate *cause* of the promise, but allowing the promisor to prove the lack of any *cause*. Section 1988 ICC states: 'A promise of payment or the acknowledgement of a debt exonerates the person in whose favor it is made from the burden of proving the underlying obligation. Such obligation is presumed, subject to contrary evidence'.

[32] Section 894 NC: 'A gift inter vivos is a transaction by which the donor divests himself now and irrevocably of the thing donated, in favour of the donee who accepts it'.

parallelism between them: on the one hand, they both ensure protection of the promisor against a disposal not counterbalanced by an income (the detriment of the counterpart); on the other hand, they assure a grounded and legitimate reliance[33] of the counterpart seeking remedies to enforce the promise or the obligation.

In addition, we can note that the two main legal systems (common law and civil law) have developed alternative ways to enforce simple promises – those that lack *consideration* or a sound *cause* – like in the case of a gift: a special form of expression of consent that guarantees the necessary attention and reflection of the promisor on the promise and the obligation into which he wants to enter. We refer, in the civil law world, to the requirement of the intervention of a public notary with witnesses at the execution of the deed and, in the common law one, to the special form that consists of the *deed under seal*. As already stated:

> 'the essence of the law regarding deeds is that it provides a method for making promises enforceable that depends solely on the fact that the writing that records the parties' promises (or perhaps the promise of one person only) is completed with a certain prescribed formality. What is equally important in light of the general concerns that underlie the enforcement of any promise, is that the necessary formality should be something that brings home to the person making the promise the significance of what he or she is doing'.[34]

The achievements which both legal systems seek with such formal prescriptions are the same: full consciousness and awareness of the donor of the detriment that he is causing himself without any *consideration* or relevant *cause* that counterbalances it.

But since the time civil lawyers lost the root of the concept of *cause,* problems have arisen in managing the concept of *cause* itself and even in communicating on these concepts between the two legal systems.

To give an example familiar to me, the first Italian Civil Code, enacted in 1865, was consistent with the Code Napoleon: the paragraph called 'upon the cause of contracts' contained section 1119 and section 1120, which read 'An obligation without cause or with a false cause, or with an

[33] We would say '*affidamento*', in Italian.

[34] J. Swan, n 22 above, 121. We must point out, however, that due to the complication of the doctrine of *consideration*, deeds under seal are used (more in the past, than nowadays) also to enforce promises or contracts that are not gratuitous, but do not consist in the simple exchange of promises between two parties (ie options, irrevocable offers, rescheduling of debts, amendments of modifications of a previous contract or promise).

unlawful cause, may not have any effect' and 'A contract is valid, although its cause is not expressed', following quite literally what its section 1131 and section 1132 stated.[35]

In the second, and current, generation of the Italian Civil Code (ICC), enacted in 1942, the rules changed in wording and now the *cause* is mentioned in number 2 of section 1325 – which sets out the requirement for a valid *contract* – but without any explanation of its meaning.

The 1942 ICC mentions the requirement of *cause* for contracts and not for obligations. After 1942 scholars and Courts have started to use that concept as a means to control the lawfulness of party autonomy and the results the parties wish to achieve. Following these paths, the meaning of the term *cause* also lost its certainty in the civil law systems, and the term often became a duplication of the concept of object (or subject matter).[36]

Some Italian scholars – aware of the legal comparison – proposed to return to the root of the concept – *cause* as a reason for the binding promise – as the only way to give it back an understandable meaning,[37] but nowadays the concept of *cause* (mentioned in section 1325, second part, ICC) is often used, in courts, as a *general clause* (or *general provision*) to challenge the validity of contracts whose outcomes are not acceptable to the parties to them.

When the contract is of prejudice to the *public interest*, courts may state that the *cause* is unlawful (section 1346 ICC) – and in that meaning *cause* has lost any connection with *consideration* – but they may also declare, with the same result (nullity of the contract) that the object (or the subject matter, used as a synonym) of the contract is unlawful or contrary to public policy and therefore null as per section 1325, no 3, and 1418, no 2, ICC.

When, on the contrary, the contract is of prejudice to the position of one of the parties to it (ie it affects only *private interest*), the lack of *cause* is the tool courts use to deny validity to the contract. Consider the case, for

[35] Section 1131 NC: 'An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect'; Section 1132 NC: 'An agreement is nevertheless valid, although its cause is not expressed'.

[36] For example, G. Alpa and V. Zeno Zencovich, 'Italian Private Law' *The University of Texas at Austin - Studies in Foreign and Transnational Law*, 162 (2007), translate the word *cause,* requested as per section 1325, no 2, ICC, as 'the object (that) is the outcome that the transaction is calculated objectively to produce' and therefore speak about the *object* (section 1325, no 3, ICC) as 'subject matter (that) is whatever the declarer is making disposition of, in other words the content of the legal transaction'.

[37] R. Sacco and G. De Nova, 'Il contratto', in R. Sacco ed, *Trattato di diritto civile* (Torino: Utet, 3rd ed, 2004), I, 790 following the paths of G. Gorla, *Il contratto. Problemi fondamentali trattati con il metodo comparativo e casistico* (Milano: Giuffrè, 1955), I; G. Gorla, 'Consideration' *Enciclopedia del diritto* (Milano: Giuffrè, 1961), IX, 176.

example, of a derivative swap contract entered into in OTC (over the counter) negotiations, allegedly to provide coverage for a risk of change to which one party is already exposed, but in effect drafted by the financial professional in a manner rendering it incapable of covering such a risk: in that case courts often declare a lack of *cause* and dismiss the request to enforce the contract.

In conclusion, in some civil law jurisdictions the concept of *cause* has lost its clarity to the extent that, given a proposal of European restatement or uniform codification, it is doubtful whether it would be worth maintaining the concept or not.

In such a situation, the provisions which mention – or even define – *cause*, in the Louisiana and Quebec Civil Codes, remind us about the origin of the concept and recall its scope, and are of great interest also for the civil lawyer, from different points of view. Firstly, QCC refers to the *cause* of the obligation as a balance of the promise itself. Section 1371 QCC reads:

> 'It is of the essence of an obligation that there be persons between whom it exists, a prestation which forms its object, and, in the case of an obligation arising out of a juridical act, a cause which justifies its existence'.[38]

Secondly, both Codes consider the *cause* implicit when promises are mutual, as section 1380 QCC states: 'A contract is synallagmatic, or bilateral, when the parties obligate themselves reciprocally, each to the other, so that the obligation of one party is correlative to the obligation of the other'[39] following Art 1908, Louisiana Civil Code (*Bilateral or synallagmatic contracts*) that tells: 'A contract is bilateral, or synallagmatic, when the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other'.

Thirdly, both codes did not refuse to state a definition of the concept: section 1410 QCC reads, 'The cause of a contract is the reason that determines each of the parties to enter into the contract', as previously section 1967 LCC, titled 'Cause defined; detrimental reliance' has stated: 'Cause is the reason why a party obligates himself', using quite the same words.

[38] Section 1371 : '*Il est de l'essence de l'obligation qu'il y ait des personnes entre qui elle existe, une prestation qui en soit l'objet et, s'agissant d'une obligation découlant d'un acte juridique, une cause qui en justifie l'existence*'.

[39] Section 1380 : '*Le contrat est synallagmatique ou bilatéral lorsque les parties s'obligent réciproquement, de manière que l'obligation de chacune d'elles soit corrélative à l'obligation de l'autre. Il est unilatéral lorsque l'une des parties s'oblige envers l'autre sans que, de la part de cette dernière, il y ait d'obligation'.*

Moreover, section 1412 QCC provides, better than any other definition given by Italian scholars after the 1942 ICC,[40] a definition of the *content* of the contract, ie the object, useful to ascertain its lawfulness in relation to the public and general interest, stating:

> 'The object of a contract is the juridical operation envisaged by the parties at the time of its formation, as it emerges from all the rights and obligations created by the contract'.

The above-mentioned section 1410 QCC and section 1967 LCC provide the only given legislative definition of *cause*, to the best of my knowledge. Such definition seems remarkable because it includes both the counter-obligation typical of bilateral contracts, and also the interest of the promisor that supports the unilateral contract not intended to be a gift: for example the case of an employer providing transportation for his employees without charging them but not as a gift.

In conclusion, North American civil codes have achieved, in my opinion, the significant result of reminding civil lawyers of the origin and meaning of the concept of *cause* and of giving a discipline of the contract that harmonizes with the one provided by common law for the rest of North American states or provinces.

[40] E. Betti, *Teoria generale del negozio giuridico* (Torino: Utet, 1955), 169, proposed a definition of *cause* of the contract – different to the one of *cause* of the obligation – that sounded as follows: 'cause is the social and economic goal or aim sought by the contract (or by the juridical operation)', a definition that is not other than the one of the object of the contract.