Chapter 11

THE WILL IN THE PERFORMANCE OF THE OBLIGATION: BETWEEN COERCIBILITY AND SPONTANEITY

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ABSTRACT: *Starting from the well-known definition of debtor contained in Mod. 4* pand. *D. 50.16.108, according to which the debtor is the one from whom performance can be demanded even against his will* (invito*), this contribution aims to examine the reflections of classical Roman jurisprudence on the theme of the non-coercibility of the obligatory bond. In particular, it focuses on the* voluntas *of the* solvens *(and the potential relevance of its defects, especially* error*) in cases of undue payment and in the case of a payment made* sua sponte *by the debtor. This analysis provides a foundation for evaluating the changes introduced in the transition from the 1865 Italian Civil Code to the 1942 Italian Civil Code on the subject of natural obligations, where the adverb 'voluntarily' was replaced, thus more faithfully recovering the Roman legal tradition, by the adverb 'spontaneously'.*

KEYWORDS: *Coercibility of the obligatory bond* – Soluti retentio – *Spontaneous performance.*

1. To will or not to will: That is the question

Will (*voluntas*) necessarily implies the possibility of not willing, a concept that in Latin finds an excellent expression in the term *invitus*, employed in many literary and legal sources. Among the latter, a text by Modestinus assumes particular relevance, taken from his *Pandectae* and, not by chance, included by the Justinianic compilers in the title of the *Digesta* dedicated to the meaning of words (50.16). In this text, the *debitor* is defined as one who can be compelled to perform 'even against his will' (*invito*),[1] as he opposes it:[2]

[1] Brutti 2011, 449 f., on the connection between performance and payment of *pecunia*, as an implication of the purely pecuniary judgment in the formulary procedure.

[2] On the ambivalence of *invitus*, see Scognamiglio and De Cristofaro, in this volume, in part. 281 ff. and 293 ff.

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Mod. 4 *pand.* D. 50.16.108: *'Debitor' intellegitur is, a quo invito exigi pecunia potest.*

The genesis of the relationship could therefore be connected, or not, to an act of *voluntas*; and such *voluntas* was deemed present – even though remedies were available to restore balance between the parties – also where the process of formation of the legal will had been altered by external interference: it is well known the adage found in a text by Paulus (Paul. 11 *ad ed.* D. 4.2.21.5) concerning inheritance, but regarded as valid for virtually any act throughout Roman legal experience: *tamen coactus, voluit.*[3] However, once the legal bond had arisen, the individual defined as the passive subject of the relationship was in the position of having to perform a given obligation irrespective of his actual intention.

Thus, if the argument is framed in such simple terms, the correlation between the 'moment of the right' (and correspondingly, of the duty) and that of the action in its protection (with the consequent subjection) appears linear in its physiological structure. Drawing from German legal doctrine categories, it is possible to retrospectively identify in Modestinus' text – with the awareness of the history of legal thought from the perspective of a modern jurist – on one hand, the *Schuld*, the debt, consisting in the duty to perform a specific obligation, and on the other hand, the *Haftung*, the liability that arises where the debt is not fulfilled, consisting in the personal or patrimonial consequences borne by a determined individual (D'Angelo 2018, 136).

From the perspective adopted here, the following question emerges: granted that a debtor unwilling to perform can be compelled to do so, must such performance, in order to be valid, always be supported by an appropriate legal will to solve (*solvere*)? The answer depends on the nature attributed to performance. Those who, adhering to the *Willensdogma*, opt for a transactional nature obviously believe that, for performance to qualify as such, an *animus solvendi* – freely formed – is essential (and, for some, even accompanied by express acceptance by the creditor). Those who instead conceive performance as a due act (and, in the Italian scholarly debate, they constitute the majority: Rescigno 2000, 501 ff., 508 ff.; Trabucchi 2024, 1046 ff.) stress that the will to satisfy an obligation exists at the time the obligation is undertaken; but if that will is lacking at the time of performance, this does not preclude that performance from being itself valid.

We consider this latter approach to be the most correct and that it can already be inferred from the text of Modestinus from which we began. Extending its meaning slightly beyond the letter, in fact, it seems that the jurist highlights

[3] On the subject, see Guasco, in this volume, in part. 316 ff.

the irrelevance of the debtor's will in performing the obligation: since even if he did not want to perform (even if he was, indeed, *invitus*), he could nonetheless be compelled to perform.

2. Not under a duty, yet willing: The performance of a non-due obligation

The recourse to the bipolar construction of the *obligatio*, which distinguishes and separates the two aspects of debt (*Schuld*) and liability (*Haftung*), allowed for the disruption of the traditional correlation between the 'moment of the right' and the action protecting it. This development broadened the very category of *obligatio*, making room for cases of debt without liability, and vice versa.

For our discussion, at least two essential questions arise: when the interdependence between 'the duty to receive' and 'the duty to perform' is severed, does the debtor's performance always produce the effect of *soluti retentio* (*i.e.*, the creditor's right to retain what he has received)? In such a case, what is the required psychological attitude of the debtor? That is, how relevant is his *voluntas*?

Of particular interest are cases where the obligatory bond is non-coercible, leaving performance entirely to the debtor's initiative.

If we reason strictly in terms of a rigid 'due/not due' dichotomy – attaching to it, positively or negatively, the character of enforceability – then the recipient of the performance would be entitled to retain it whenever it qualifies as such by virtue of the existence of an *obligatio*; conversely, they would be obliged to return it in the case of an *indebitum*: indeed, in this latter scenario it is the *accipiens* who finds themselves in the position of *obligatus*, against whom an action can be brought if they refuse to restore what was received.

It is hardly necessary to recall the extraordinary conceptual construction found in Gaius, who highlighted the divergence between the decision-making process and the legal effects:

> Gai 3.91: … *is, qui solvendi animo dat, magis distrahere vult negotium quam contrahere.*
>
> … a party who gives with the intention of paying a debt, rather desires to discharge an obligation than to incur one (trans. by the Author).

The difficulties, as is well known, arise when questioning the circumstances in which the *animus solvendi* is formed and the possible relevance of those circumstances, especially the importance attributed, already in the

classical period, to error (Lotmar 2019, with commentary by Cardilli 2023), and the distinction between factual and legal error (Galeotti 2020, 111 ff.).

Yet, what remains constant is that the *voluntas* of the *tradens* (Gaius explicitly refers to a *dare* performance [Wegmann Stockebrand 2018, 111 ff.]) was directed at affecting legal relations in the opposite sense to what is actually produced in terms of legal effects.

What has been received *indebite* must therefore be returned, according to a rule that protects the party who suffers a patrimonial loss without valid cause, either because the *obligatio* does not exist at all, or because there is a misalignment between the parties involved (the giver and the receiver) and the roles of debtor and creditor. [4]

However, the action (*condictio indebiti*) granted to the *solvens* encounters limits under certain conditions, which preclude the right to *repetitio*, thereby consolidating the payment in the hands of the *accipiens*, who is thus entitled to retain it. Sometimes these conditions are objective in nature and affect the very existence of the 'non-due' *status*; in other cases, it is the psychological condition under which the act was performed that eliminates the possibility of recovering what was transferred.

A paradigmatic example, in this latter sense, is found in Ulpian at the very beginning of title 12.6 of the *Digesta*, precisely dedicated to the *condictio indebiti*:

> Ulp. 26 *ad ed.* D. 12.6.1.1: *Et quidem si quis indebitum ignorans solvit, per hanc actionem condicere potest: sed si sciens se non debere solvit, cessat repetitio.*
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> Indeed, if someone pays a non-due obligation in ignorance, they may recover through this action; but if they pay knowing they do not owe, repetition is excluded (trans. by the Author).

In this juxtaposition (where *solvens ignorans* triggers the right to restitution, validated by the *condictio*, whereas *solvens sciens* of the absence of debt excludes *repetitio*, thereby recognising the right of *soluti retentio*), emerges a perspective of conserving the effects produced by the parties' will: even where no debt exists, if one person performs in favour of another, and that act is sustained by a free and conscious *voluntas*, this *voluntas* itself becomes a

[4] It is well known that a distinction is drawn between objective *indebitum* and subjective *indebitum*: Paul. 17 *ad Plaut*. D. 12.6.65.9: *Indebitum est non tantum, quod omnino non debetur, sed et quod alii debetur, si alii solvatur, aut si id quod alius debebat alius quasi ipse debeat solvat*. See Pellecchi 1998, 79 ff.; Giomaro - Biccari 2022, in part. 485, 503 ff. See also Pomp. 22 *ad Sab*. D. 12.6.19.1.

juridical rule, and the legal system must, so to say, step back. Only where there is an alteration in the formation of the internal *voluntas* – sufficient to affect the awareness of the acting party – does intervention occur to restore balance: the legal effect takes place nonetheless, but the subject is given the possibility to undo it, to go back, to cancel what was done through a contrary act of will.

Pomponius appears crystal clear on this point, also with his perspicuous reference to the *tantundem*, in

> Pomp. 9 *ad Sab.*[5] D. 12.6.7: *Quod indebitum per errorem solvitur, aut ipsum aut tantundem repetitur.*
>
> If a non-due obligation is paid in error, the very thing or its equivalent may be recovered (trans. by the Author).

When the *solvens* realises that their transfer to another arose from a misunderstanding, a mistaken belief, a mere mental projection, we can discern a flaw in their *voluntas* that allows the emergence of the *indebitum* and casts an inequitable light upon the enrichment achieved at another's expense, as affirmed by Papinian, in a statement that was subsequently extended by the Justinianic compilers and included in the same title 12.6:

> Pomp. 21 *ad Sab.* D. 12.6.14: *Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem.*
>
> For it is naturally equitable that no one should be enriched at the expense of another (trans. by the Author).

This is perfectly complemented by the incipit of Paulus' text immediately following in the *Digesta*:

> Paul. 10 *ad Sab.* D. 12.6.15 pr.: *Indebiti soluti condictio naturalis est et ideo etiam quod rei solutae accessit, venit in condictionem, ut puta partus qui ex ancilla natus sit vel alluvione accessit: immo et fructus, quos is cui solutum est bona fide percepit, in condictionem venient.*
>
> The action for restitution of undue payment is of natural essence, and therefore includes in its scope anything acceding to the thing paid, such as offspring born from a slave-girl or alluvial accretion; moreover, even the fruits which the recipient in good faith has collected will be subject to the action (trans by the Author).

[5] Fargnoli 2001, 139 and fn. 202.

However, *detrimentum* here constitutes merely a patrimonial diminution, without negative connotations, reflecting an *aequitas* applicable across various legal frameworks: where *voluntas* is consciously directed towards the enrichment of the other, an intertwining with *causa* arises, precluding the recovery of what was transferred and establishing the recipient's right to *soluti retentio*.

All this is closely linked to another thorny issue: that of *iusta causa traditionis*. If *traditio* must be grounded in a cause that justifies its transfer effect, then the absence of an *obligatio* should undermine the *causa solutionis* to the point of preventing that effect. Without retracing in detail the paths followed, since the era of the *Glossa*, to overcome this impasse (as outlined by Cortese 2013, 100 ff.), we may simply note that in the sources – starting from Gaius, who foregrounded the *animus solvendi* – there appear to be several hooks supporting the idea that the shared intention of the parties to achieve a patrimonial attribution from one to the other acquires such a significant normative value as to sustain the act even in the absence of an underlying legal transaction. In other words, it is a *voluntas* endowed with strong normative force, even compensating for an objective missing requirement.

But such a will must be pure, freely formed, and susceptible to unambiguous interpretation: where the crack of a defect appears, especially *error* in the representation of reality, whether on one side or the other, the entire structure trembles, and collapses entirely when the transferor, no longer willing, exercises the *condictio indebiti* to protect himself.

3. Debt without liability: *Sua sponte solvere*

As observed above, the *condictio indebiti* has no rationale in certain other scenarios. Here, assuming a rigid conception of legal enforceability, the *vinculum iuris* becomes tenuous, sometimes almost imperceptible, and the *debitor* drifts away from the definition we read in Modestinus, since in these cases he cannot be compelled to perform, if he doesn't want (*invitus*).

And yet, a relationship persists between the two individuals, such that payment made by one party to the other is not perceived as unjust and the recipient may retain what has become theirs. In other words, the 'non-due' character arises only within the world of *strictum ius*.

Title 12.6 of the Digest preserves several texts where the impossibility of restitution is linked to such situations. Among them, an absolutely paradigmatic passage is:

> Paul. 32 *ad ed.* D. 12.6.28: *Iudex si male absolvit et absolutus sua sponte solverit, repetere non potest.*

> If the judge wrongly acquitted, and the acquitted person spontaneously pays, he may not recover (trans. by the Author).

The literal meaning is clear: the judge mistakenly acquits the defendant; nevertheless, the latter proceeds to perform *sua sponte*, and Paulus categorically excludes any action for recovery.

We shall return later to the adverbial phrase *sua sponte*, which is central to the diachronic reconstruction of certain rules in Italian law. For now, let us focus on the other adverb used in the text and seek the rationale for this notable decision of Paulus. [6]

In that adverb (*male*) we can encapsulate what we would now describe as a gap between substantive truth and procedural truth: the judge, by wrongly acquitting the defendant, disregards the well-founded claims of the plaintiff. This implies, by logical consequence, the existence of a bond between the two subjects, by virtue of which the debtor, *invitus*, was summoned to court with a view to being compelled to perform.

But the exercise of the action and, above all, the framing of the controversy itself [7] impact the bond, transforming it. According to one line of thought, [8] this transformation consists in the transposition of liability into a procedural context, while the primary debt remains unchanged. [9] However, following the acquittal (which extinguishes liability), what remains is a 'pure' debt, that is, one no longer enforceable.

The conclusion of this reasoning is that Paulus was subsuming this case under the category of *obligationes naturales*; and that he understood *solvere sua sponte* to mean that there was no action to compel payment from the acquitted defendant *invitus*. The original debt, though disconnected from liability, continued to exist: the wrongful *absolutio* generated this discrepancy, leaving it to the debtor – now free from any liability – to decide whether to perform or not. If he chose not to perform, an inequity arose

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[6] We shall leave aside, as entirely irrelevant for the purposes of the present analysis, the issue of the liability of the *iudex privatus* who has made an error in adjudication: on this issue, see Scevola 2004, 349 f.; Fercia 2015, 17 ff.

[7] The procedural context of reference is likely that of the formulary procedure, so one must consider the effects of the *litis contestatio* (see Pugliese 1962; Scevola 2004; Fercia 2015); however, the generic wording allows for an easy extension also to the *cognitio* procedure.

[8] We concur on this point with the reconstruction proposed by Fercia 2015, 17 ff.

[9] On the effects of the *litis contestatio*, in light of the fundamental passage from Gai 3.180, as well as the differing views of the Sabinians and Proculians, see Salomone 2007, 207 ff. The reasoning followed in the text, however, encounters some difficulty where one accepts the idea that the *litis contestatio* entirely extinguishes the principal obligation (the so-called 'judicial novation').

for which the mistaken judge could ultimately be held responsible (Scevola 2004; Fercia 2015); whereas if he chose to perform, the legal system, recognising that a (pure, *i.e.*, without liability) debt indeed existed, would deny the *condictio* and protect the creditor's interest, ensuring their *soluti retentio*.

Yet such satisfaction is possible only because the acquitted defendant transforms his initial 'unwillingness' to perform into a *solvere sua sponte*; an affirmation of individual decision-making that generates effects capable of correcting distortions produced at the systemic level (Albers 2024, 41).

At this point it becomes essential to understand the meaning to be attributed to the expression *sua sponte*. Its literal translation indeed leaves ample room for interpretation (Oxford Latin Dictionary 1968, 1809 f.). What we feel compelled to exclude, in light of the foregoing analysis, is that the phrase should be understood as marking the relevance of the debtor's subjective awareness: in other words, in our view, *sua sponte* does not equate to *sciens* in Ulpian's text. It is true that the debtor knew he had been acquitted;[10] but it is equally true that a *vinculum* persisted upon him, albeit stripped of enforceability.

And this is the key point: the impossibility of coercing payment qualifies such payment as 'spontaneous', left entirely to the individual's free determination, a behaviour that no one could have compelled him to undertake. Paulus therefore inserts *sua sponte* precisely to emphasize the debtor's intervention, necessary to redress an erroneous judicial decision that had distorted the alignment of interests between the parties. In our view, this reflects a broadening by the jurist aimed at achieving justice in the concrete case: for Paulus' solution preserves the effectiveness of the payment even where no specific *animus solvendi* accompanied by an awareness of being able to avoid performance can be identified.

One important observation: this expression appears, within the title on *condictio indebiti*, only in this passage; far more frequent is the reference to possible error undermining the *solvens*' decision-making process, rendering

[10] Thus, Pugliese 1962, 47. We believe we can discern here the case mentioned in Ulp. 26 *ad ed.* D. 12.6.26.3: Indeed, by undue payment we mean not only when something is absolutely not owed, but also when it could not have been judicially claimed because of some perpetual exception always available; therefore, that too may be recovered, unless payment was made with knowledge of being protected by such an exception. The *exceptio perpetua* mentioned in the text could be understood as an instrument for extinguishing the claim at the substantive level (*e.g.*, by invoking a *pactum de non petendo*); in that case, there would be an *indebitum*, as affirmed in the initial part of the passage. If, however, the exception is interpreted in a procedural sense (*e.g.*, the *exceptio rei in iudicium deductae*), then a conceptual construction different from the one we have followed would be required. See also Fargnoli 2001, 51 ff.

repeatable a transfer performed under the mistaken belief that a debt existed. [11]

By contrast, no doubt appears to arise concerning the psychological attitude of the parties in other cases contemplated within this portion of the *Digesta*, [12] cases which can be explicitly grouped under the macro-category of *obligationes naturales* (Di Cintio 2009; Grondona 2023; Longo 2023): with respect to these, the jurists firmly affirm the impossibility of bringing a *condictio*, precisely because – as has become a widely held opinion in modern scholarship – there is no true *indebitum*, since the performance is perceived as due, albeit not protected by an action.

4. Matters of an adverb: From the Italian Civil Code of 1865 to that of 1942

Obligationes naturales in fact represent the ideal ground for reflecting, in diachronic terms, on the problem of the debtor's *voluntas* in the performance of an obligation: on the opposite side of coercibility, where a debtor *invitus* resists performance, stands the spontaneity of a subject who, though not constrained by a *vinculum iuris* in the strict sense, nonetheless chooses to engage in conduct expected of him, but neither demanded nor demandable (Fercia 2010, 206 ff.; Mazzariol 2023, 1187 ff.).

In the Italian legal system, the connection with the Roman legal tradition is expressly stated in the explanatory report (*Relazione*) of Minister of Justice Grandi to the 1942 Italian Civil Code, [13] where, commenting on art. 1933, paragraph two, [14] it is affirmed that to make the meaning of that provision clearer – 'supported by the Roman tradition' [15] – the adverb *volontariamente*

[11] Or, in other words, in the absence of *scientia* regarding the existence of the *indebitum*; but such *scientia* must, at most, be demonstrated by the defendant in the *condictio indebiti* to preclude recovery: Galeotti 2020, 112 f.

[12] By way of example only, see Paul. 10 *ad Sab*. D. 12.6.13; Pomp. 22 *ad Sab*. D. 12.6.19 pr.; Afr. 9 *quaest*. D. 12.6.38.2.

[13] See page 171.

[14] Art. 1933 of the Italian Civil Code, *Lack of action*: No action lies for the payment of a gaming or betting debt, even if the game or bet is not prohibited. II. The succumbing party, however, may not recover what they have spontaneously paid following the outcome of a game or bet in which there was no fraud. Recovery is permitted in any case if the loser is legally incapacitated (trans. in English by the Author).

[15] The Roman tradition must be identified – as will become clearer later in the text – in the manner of execution of the payment; for in relation to games of chance, in ancient Rome not only was no action available to the winner, but the loser could also recover what had been paid: Di Marzo 1960, 313 f.; Ziliotto 2018, 104 ff. On gambling in ancient Rome more generally, see Fasolino-Palma 2018.

(voluntarily), which appeared in art. 1804 of the repealed code, was replaced with the adverb *spontaneamente* (spontaneously). Immediately before, the report clarifies the meaning of 'spontaneous payment' as 'payment made in a situation of psychological freedom in decision-making', without requiring 'awareness of the lack of enforceability'. The same concept is reiterated further on, [16] when discussing payment of the *indebitum* (art. 2033 of the Italian Civil Code, headed *Objective indebitum*), and when referring to *obligationes naturales* (art. 2034 of the Italian Civil Code) as a limit to the operation of recovery actions, emphasizing that the prerequisite for *soluti retentio* is the spontaneity of the performance.

Accordingly, a consistent substitution of the adverb occurs here as well (art. 1237 of the Italian Civil Code 1865, art. 2034 of the Italian Civil Code 1942): from *volontariamente* to *spontaneamente*, as – according to an astute observation by Di Marzo (1960, 330) – is suggested precisely by D. 12.6.28. This text, as noted above, by breaking the consequential link between *scientia* and non-recoverability (and thus *soluti retentio*), represents a *unicum* in Justinianic treatment of the *condictio indebiti*, where, as we have seen, frequent reference is otherwise made to error as the prerequisite for bringing a *condictio*.

In other words, the replacement of the adverb aimed at eliminating the ambiguity connected to interpretation of the first (*volontariamente*), which could bear multiple meanings: among others, it could be understood either as a mere absence of violence or fraud (*i.e.*, freely), or as requiring awareness of not being legally bound (*i.e.*, knowingly). The difference is far from trivial: only in the latter case would error have significance, such that performance made under the erroneous belief of being obliged would have been subject to recovery.

The perspective of the 1942 Italian legislator, by contrast, is not that of a conscious will but rather of a *voluntas* free from any psychological coercion; error, therefore, is irrelevant, provided that a genuine moral duty objectively exists (Clarizia 2024, 579 ff.).

5. Performance of the obligation, payment of the *indebitum*, spontaneous performance

In the physiological structure of an obligatory relationship, *voluntas* is evident both at the moment of genesis and at the moment of concrete realisation of the intended allocation of interests. Yet with respect to the performance

[16] See page 178 of the cited document.

of the obligation, resistance may arise: the negative side of 'not willing' may surface, against which the legal system asserts itself with its full coercive force: the debtor, as such, whether willing or unwilling, must perform; if he fails to do so, he can be compelled.

At the opposite extreme of this construction, for the purposes of this discussion, two broad alternatives can be identified. Their common denominator is that a performance is carried out voluntarily.

In the first scenario, the performance is entirely detached from the existence of a debt: no obligatory bond exists between the two parties (we are thus in the presence of an *indebitum*). What relevance does *voluntas* then possess? If the decision-making process was flawed – if it was based on *error* – the effects produced can be nullified by an act of contrary will (the exercise of the action for restitution, the *condictio indebiti*). If, on the other hand, that will is free and conscious, it normatively realises a configuration of interests and the patrimonial attribution becomes final.

In the second scenario, while the element of *Haftung* (and thus enforceability) is absent, so that the performance is left to the free initiative of the individual, it is nonetheless possible to identify the *Schuld*, potentially rooted in a normative system distinct from *strictum ius*.

Here, *voluntas* – even if affected by a mistaken perception of reality (provided it is not psychologically coerced) – exercises its full normative power, producing a legal transformation that is deemed, under ordinary conditions, entirely irreversible.

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