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Natural and Moral Obligations

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NATURAL AND MORAL OBLIGATIONS†

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LAW HAS AS ITS MISSION the just regulation of human life in society. This mission is accomplished by legislation which states in schematic, abstract form, the actions and conduct which can be classified as typical by the fact that they are more frequently carried out in the social community, and also establishes specific consequences to the realization of these actions and conduct. Judge-made law does not formulate abstract rules; it provides concrete solutions to facts or actions already realized, but, just as legislation does, it establishes consequences for those actions or human conducts.

Anatomy of Obligations[1]

The human conduct with which the law is concerned is conduct of relation, namely, that which enters into the sphere of another person. Law, then, regulates human relations. Among these we must distinguish different types, in accordance with their diverse characteristics. For the purpose of this article, we are interested in those relations known as obligations.

Obligatory relations are established, as are all other juridical[2] relations, by a norm of law, be it a statute, a contract or a judicial decision. In virtue of such norm the result is that *A* must do, give, or omit to do something for the benefit of *B*. Here we have three elements of the obligation: the prestation, *i.e.*, what is owed, the doing, the giving, or not doing; the active subject or creditor, that is to say, he who has

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[1] Entenza, *Concepción normativa de la obligación y del contrato,* REVISTA GENERAL DE LEGISLACIÓN Y JURISPRUDENCIA (Spain Oct. 1961).

These general ideas are here expressed because the author, trained in the civil law, considers it necessary to make his point of view more intelligible to readers trained in the common law.

[2] I use the word "juridical" in the sense given by BLACK, LAW DICTIONARY (4th ed. 1951) to the term "jural" in its third definition, that is: "recognized or sanctioned by positive law; embraced within, or covered by, the rules and enactments of positive law."

the right to what is owed; the passive subject or debtor, he who owes. From this perspective, the obligation is a *relation of debt,* upon which the creditor can demand a prestation from the debtor, who stands liberated if he performs, satisfying thereby the interest of the creditor.

But, what happens if the debtor does not perform? Generally, the norm that establishes the relation of debt does not foresee the consequences of nonperformance. The judicial decision by which the duty to indemnify his victim is imposed upon the tort-feasor does not say what will happen if the debtor does not perform. This is generally provided in some other juridical precept which, starting off from the possibility of default by the debtor, formulates a distinct juridical relation in which the jurisdictional organ of the state intervenes—the judge. Under such a precept the property of the debtor is placed at the disposal of the creditor in whatever quantity necessary to satisfy the creditor's interest in the nonperformed prestation; and the creditor can demand satisfaction of his interest through any one of these means, as the case may require: 1) specific performance; 2) payment of money in an amount equivalent to the value of the unfulfilled prestation, or of the benefits which the creditor would have received through it (money judgment); 3) the restitution of whatever was delivered by the creditor to the debtor in exchange for the unfulfilled prestation; 4) the termination of the contract; and further, in any of the four cases, the indemnification for damage and loss caused by the nonperformance.[3] This is the *relation of responsibility.*

But, both relations—of debt and of responsibility—which are in concept distinguishable, are united by a functional link, inasmuch as the relation of debt would be inoperative without that of responsibility, and the latter is found interacting with the former. Both relations constitute a *binomial* which is, precisely, the obligatory relation.[4]

The Source of Obligations

The juridical norm, we have said before taking the foregoing view of its structure, establishes the obligatory relation. Every juridical obligation derives its being from a norm of law. But this cannot create obligations arbitrarily in order to accomplish its end of realizing a just regulation. The criterion that the norm takes into consideration in establishing obligatory relations—that is, endowing particular human relations with certain juridical efficacy—is the convenience of giving satisfaction to an interest worthy of protection of one of the parties—the creditor—who intervenes in that relation.

The law confers the dignity of its protection on an interest when it rests on one of the following foundations: 1) that the titular owner of the right has reasonably relied on the words or actions of the other

[3] CORBIN, CONTRACTS § § 1214-27 (1951).

[4] This tendency has the greater number of followers among civil law jurists. See 1 BARASSI, LA TEORIA GENERALE DELLE OBBLIGAZIONI 90 (Italy 1946, 1948); 2 INSTITUCIONES DE DERECHO CIVIL 115, 493 (Spain 1955); Carnelutti, *Dirritto e processo nella teoria delle obbligazioni,* STUDI DI DIRITTO PROCESSUALE IN HONORE DI GIUSEPPE CHIOVENDA 227 (Italy 1927); 1 FERRARA, TRATTATO DE DIRITTO CIVILE ITALIANO 309 (Italy 1921); 1 HERNÁNDEZ-GIL, DERECHO DE OBLIGACIONES 67 (Spain 1960); 1 LARENZ, DERECHO DE OBLIGACIONES 31 (Spain 1958); 3 STOLFI, DIRITTO CIVILE 8 (Italy 1932); 1 TUHR, TRATADO DE LAS OBLIGACIONES 8 (Spain 1943).

person who intervenes in the relation; or 2) has suffered damage, or runs the risk of suffering it on account of the other person; or 3) that the latter has unduly enriched himself at the expense of the other. Thus, the law recognizes the enforceability of the interest of the promisee, because the reliance put on the promisor's promise in accepting it is worthy of protection. It also recognizes the enforceability of the interest of one who suffers damage by the negligence of another, because the survival of the social community demands that its members act prudently; and of the interest of one who becomes poorer without cause to the benefit of another, because it is just that everyone should receive his due.

In sum, those three fundamentals of the juridical recognition of an interest, derive from two Roman legal principles: *alterum non laedere* and *suum cuique tribuere*.[5] Both are principles of natural law. Therefore, the establishment of an obligatory relation when one of those three fundamentals is given is based on natural law.

Positive Law v. Natural Law

Positive law does not always impose an obligation based on the three grounds already mentioned; namely, reliance, damage and unjust enrichment. In effect:[6]

1) There are cases in which one person promises and another relies on that promise and accepts it; nevertheless, there is not in it a juridical obligation. This happens:

a) when the obligation miscarries because some legal precept relative to its constitution is broken.[7] It so happens, for example, if the promisor is incapacitated.[8] Or, at common law, if what is promised is a gratuity; and in civil law, if a donation is made without observing the formality prescribed for this type of contract.[9]

b) when the obligation degenerates because, although initially demandable, after its birth the law suppresses its enforceability. Such is the case when its action is barred by the statute of limitations.[10]

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[5] Instituta 1, 1, 3.

[6] See RIPERT, LA REGLA MORAL EN LAS OBLIGACIONES CIVILES 283 (Colom. 1946); Berdejo, *Las obligaciones naturales*, ESTUDIOS DE DERECHO CIVIL 1962 (Spain 1958).

[7] See MAZEUD, LECCIONES DE DERECHO CIVIL 528 (Braz. 1960).

[8] Precisely the first natural obligations recognized by the Romans were those relative to incapacitated persons (children and slaves) which were under the authority of the same head, and contracted between them or with their chief. The term *(obligatio naturalis)* was also applied to debts with other incapacitated persons (slaves, wards who had the use of reason but lacked the *auctoritas* of their guardians) and against whom there was no possibility of bringing legal action. See BONFANTE, INSTITUCIONES DE DERECHO ROMANO 397 (Campuzano rev. Spain 1959); D'ORS, ELEMENTOS DE DERECHO PRIVADO ROMANO 257 (Spain 1960).

All persons enjoying the free use of their reason may contract, that is, oblige themselves by contract under natural law. See MARÍN, TEOLOGÍA MORAL PARA SEGLARES, BIBL. DE AUTORES CRISTIANOS 494 (Spain 1957).

[9] Donation is a contract under the civil law. Donation, thus conceived, as an accepted promise of a gratuity, can morally oblige. This moral obligation can be of fidelity—light—or of justice—grave. It is of justice if it is solemnly formulated. Such solemnity is not necessarily the one prescribed by positive law. It is thus possible that a donation invalid from the point of view of positive law, may, however, oblige in conscience.

[10] For the statute of limitations to also bar a moral obligation it is necessary that the debtor has acted in good faith, either positively (belief that he does not owe) or negatively (belief that he owes, but that he need not pay until a demand be made). See BITTLE, MAN AND MORALS, ETHICS 429 (1958). Should he be lacking in good faith and the requisites established by the statute of limitations be present, the legal obligation would be extinguished, but the moral

2) There are cases where an injury has been caused, and yet no reparation for the wrong is granted to the victim. It so happens, for example, when the victim cannot prove the causal relation between the action of the wrongdoer and the damage.[11] Another example: At common law the general rule was that mental suffering produced by an act merely negligent is not compensable if there has been no impact or physical contact of the wrongdoer with the victim, or with an interest of the latter protected by the law.

3) There are cases where unjust enrichment by one person at the cost of another is produced; nevertheless, no obligation that could be judicially enforced arises. Thus, in the civil law, the large disproportion between the reciprocal performance of the parties to a bilateral contract does not, by general rule, engender juridical obligation against he who made the lesser prestation. This is also true at common law, which, by general rule, denies juridical import to the inadequacy of consideration.[12]

In all these cases there is a divergence between natural and positive law. Positive law, in effect, refuses to recognize in them the existence of obligations recognized by natural law.

Natural Obligation and Juridical Obligation

We have, therefore, obligations imposed by positive law—juridical obligations—and obligations imposed by natural law and not recognized by positive law—natural obligations. In them there are no middle terms: they are either juridical obligations or natural obligations.[13] There are no semi-juridical or quasi-juridical obligations.

If the performance of the obligation is demandable before judges or courts, the obligation is juridical. If it is not so demandable, but obliges in conscience, and positive law recognizes in it certain effects distinct from its possibility of demand, the obligation is a natural one.

A natural obligation can be voluntarily performed, but its performance cannot be demanded, or, more exactly said, its demand lacks juridical efficacy.

For this reason, some jurists of the civil law,[14] who start from the supposition that the relations of debt and of responsibility are separable—because there are obligations which create debt only and others responsibility alone—maintain that a natural obligation is founded only upon a relation of debt. There is no basis for this. In effect, the relation of debt assumes the possibility that the creditor may demand its

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one would survive. See SALSMANS, DEONTOLOGÍA JURIDICA Nos. 178-80 (Zalba rev. Spain 1953).

[11] See MARÍN, *op. cit, supra* note 8, at 500.

[12] Nevertheless, lesion or the inadequacy of consideration is contrary to commutative justice. "Et ideo oportet adaequare rem rei: ut quanto iste plus habet quamsuum sit de eo quod est alterius, tantundem restituat ei cuius est. Et sic fit aequalitas secundum 'arithmeticam' medietatem. . . ." AQUINAS, SUMMA THEOLOGICA, II-II, q. 61, art. 2. For this reason he who has enriched himself by the excessively disproportionate prestation of the other party, is morally obliged to make restitution. See MARÍN, *op. cit. supra* note 8, at 699; BITTLE, *op. cit. supra* note 10, at 259.

[13] *But see* Huizing, *A Practical Note on a Type of Juridical "Positivism,"* 7 CATHOLIC LAWYER 11, 14-16 (1961).

[14] The theory was first formulated in Germany by Gierke and von Amira. From there it passed to Italy, where it was adopted by jurists of renown. See GANGI, LE OBBLIGAZIONI, PARTE GENERALE 21 (Gisotti comp. Italy 1941); PACCHIONI, DIRITTO CIVILE ITALIANO, DELLE OBBLIGAZIONI IN GENERALE 18 (Italy 1941).

compliance. But, that possibility would be illusory if the debtor were juridically free, that is, if no unfavorable juridical consequence were to befall him should he fail to perform. And inasmuch as in a natural obligation there is no relation of responsibility, the nonperformance is juridically ineffectual.

There is not even a juridical debt in a natural obligation. The "creditor" obtains nothing by demanding its enforcement. The only thing he can do is to remain cross-armed in wait for the "debtor" to perform when he may care to do so.

But, what would happen if a "debtor" under a natural obligation performs it, that is, realizes that to which he is morally bound?

Performance of Natural Obligation and Moral Obligation. Just Cause *(Causa Justa)* and Good Consideration

At the civil law a prestation which lacks cause *(causa)* can be revoked, recovered or returned to the patrimony of the one who made it, by the exercise of a proceeding having the same characteristics of the Roman action of *in rem verso.*

A clear expression of this principle is that of Article 1235 of the Code Napoleon.[15] The BGB (German Civil Code) contains an analogous declaration in section 812.[16] In turn, Articles 1895 *et seq.* of the Spanish Civil Code, reproduced in the Puerto Rican Code, Sections 1795 *et seq.*, establish the obligation of restitution by one who received a payment not due to him.

In the same sense, common law requires that in order for a conveyance to be sustained the same must be founded upon a "good consideration."[17] The good consideration is thus the basis for a transfer of property already made.

The juridical "cause" for a conveyance of property under the civil law, from the subjective point of view of the one who carries out the prestation, can be either the purpose to pay a debt *(causa solvendi),* or the animus of liberality *(causa donandi),* or the interest of obtaining something in exchange *(causa credendi).* The good consideration of common law is equivalent to that juridical *causa,* for common law, so apprehensive always regarding gratuities, admits that the affections and family relationship between the one who makes the delivery (prestation) and the one who receives it, are good consideration.[18]

Therefore, the natural obligation is, in civil law, juridical *causa,* and the moral obligation is, at common law, good consideration for a prestation already made.[19]

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[15] CODE CIVIL art. 1235 (Fr. 53d ed. Dalloz 1954) provides: "Every payment presupposes a debt; what has been paid without having been due, is subject to be recovered."

[16] BÜRGERLICHES GESETZBUSCH § 812 (Ger. 10th ed, Polandt 1952) provides: "He who obtains something without legal cause through the prestation of another, or by any other manner whatsoever at the expense of another, is obliged to make restitution."

[17] See Brainard v. Commissioner, 91 F.2d 880 (7th Cir. 1937); Sapp v. Lifrand, 44 Ariz. 321, 36 P.2d 794 (1934).

[18] Gay v. Fricks, 211 Ala. 119, 99 So. 846 (1924); Sapp v. Lifrand, *supra* note 17; Higgs v. Willis, 305 Ga. 857, 55 S.E.2d 372 (1949); Groves v. Groves, 65 Ohio 442, 62 N.E. 1044 (1902).

[19] See Jones v. Loughman, 247 App. Div. 416, 419, 288 N.Y. Supp. 44, 48 (1936), where it is declared that whatever is paid in compliance with a moral obligation is not a gift. On the other hand, in Louisiana, in the expression of motives in the Civil Code, a distinction is made in article 1758 between moral obligations and natural

He who received it has in his favor the *soluti retentio,* that is, he can retain the prestation received, if it was founded on a natural or a moral obligation, and he who made the prestation cannot, in such a case, demand its restitution. This is the principal juridical effect of a natural obligation under the civil law.[20] This is the effect to which the codes refer when they mention or allude to a natural obligation.

Thus, the second paragraph of Article 1235 of the French Civil Code—whose first paragraph we have already quoted—establishes that "no recovery is permitted in connection with natural obligations that have been voluntarily paid." And the Louisiana Civil Code provides in Article 1759 that "although natural obligations cannot be enforced by action, they have the following effect: 1) No suit will lie to recover what has been paid, or given in compliance with a natural obligation."[21] Section 814 of the BGB refers to the same effects: "What has been delivered with the purpose of complying with an obligation cannot be recovered . . . if said prestation responded to an ethical obligation or to a measure to be taken in relation to a matter of decorum." As per Enneccerus,[22] the BGB alludes there to a natural obligation, which he calls "an imperfect obligation." Article 2034 of the Italian Civil Code of 1942, under the heading "natural obligations"[23] states that "no recovery at all will be allowed for whatever has been spontaneously given in the execution of moral or social obligations, except when the obligation has been fulfilled by an incapacitated person." And the Spanish Civil Code (Article 1901) followed by the Puerto Rican Code (Article 1801) establishes that "the person from whom the return is asked may prove that the delivery was made through liberality or for any other just cause." The Spanish doctrine is in unanimous accord in that the reference to the "just cause" is a reference to a natural obligation.

So then, a natural obligation has in the civil law the efficacy of a "just cause" for a transfer of property, so that its fulfillment does not produce an undue enrichment. This effect is also produced by a juridical obligation. Both coincide in this aspect. But, while the fulfillment of the juridical obligation is truly a payment, because what was juridically owed has been satisfied, on the other hand the fulfillment of a natural obligation is not a true payment, for nothing is juridically owed under it. Now then, it is not a donation either, because one who complies with a natural obligation does not do it through mere liberality, but because his conscience impels him to comply with a duty. Consequently, the fulfillment of the natural obligation lies be-

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obligations to avoid considering, like at common law, that natural affection is a good consideration. See Woodley, *Natural Obligations—Sufficiency As Consideration,* 7 LA. L. REV. 445 (1947). In Georgia it is considered that a good consideration is such as is founded on a strong moral obligation. GA. CODE ANN. § 20-303 (1935).

[20] In fact, it is the only effect granted to it by some codes which deny to it any other consequences. *E.g.,* CODICE CIVILE art. 2034 (Italy 1942).

[21] See Martin, *Natural Obligations, Their Characteristics and Enforcement,* 15 TUL. L. REV. 497 (1941).

[22] 2 ENNECCERUS, KIPP, WOLFF & LEHMAN, TRATADO DE DERECHO CIVIL 12-13; 3 HEDEMANN, TRATADO DE DERECHO CIVIL 80, 496 (Spain 1958).

[23] The implications of that title have been pointed out by GIORGIANNI, LA OBLIGACIÓN, PARTE GENERAL 107 (Spain 1958).

tween a donation and a payment as just causes for a transfer of property.[24]

This, which is the juridical effect of a natural obligation to which the civil law has given more attention, is precisely the effect of least importance in a legal system such as the civil law, which recognizes liberality as a just cause for a property transfer. In truth, if mere liberality is admitted as a just cause, one cannot advert to what difficulty could exist in also recognizing as a just cause the fulfillment of a natural obligation. This difficulty appears only when he who complies with a natural obligation does so believing that he was juridically bound to comply. Only that case should have merited the attention of the civil law.

At common law, on the other hand, the efficacy of the moral obligation as a sufficient consideration is of no such great importance. The vexing problem of common law is to determine if a moral obligation is a sufficient consideration.

[24] Now, then, as it does not respond to a legal duty, the fulfillment of a natural duty raises the presumption of fraud of creditors, as if under a gratuity. See 1 MARTY & RAYNAUD, DROIT CIVIL 413-14 (1961); Huizing, *A Practical Note on a Type of Juridical "Positivism,"* 7 CATHOLIC LAWYER 11 (1961); Martin, *supra* note 21. On the contrary, Woodley maintains in regard to Louisiana, that the promise backed by a natural obligation falls under the category of onerous obligations. Woodley, *supra* note 19.

CODIGO CIVIL DE ESPAÑA art. 1297, and article 1249 of its Puerto Rican equivalent, declare: "Contracts by virtue of which the debtor alienates property gratuitously are presumed to be executed in fraud of creditors." It is interesting to remark that the official English version of Article 1249 of the Puerto Rican Civil Code translates the Spanish expression "a título gratuito," which we have translated as "gratuitously," with the English expression "for a good consideration," which in our opinion entails a grave confusion.

Moral Obligation and Sufficient Consideration. Contractual Cause, Form and Natural Obligation

In common law, just as in the civil law, "a mere promise without more . . . is unenforceable."[25]

> Both by the civil law and the common law, persons were guarded against haste and imprudence in entering into voluntary agreements. The distinction between "nudum pactum" and "pactum vestitum," by the civil law, was in the formality of execution and not in the fact that in one case there was a consideration, and in the other none, though the former term, as adopted in the common law, has a signification of a contract without consideration. The latter was enforced without reference to the consideration, because of the formality of its ratification.[26]

We derive from these citations that in order for a "meeting of the minds" to be binding at common law, it must, in principle, be set in writing under seal, or that a consideration must have been given. The consideration is, therefore, a juridical cause for a contract at common law.

That consideration, in accordance with the concept of bargain given to a contract by the common law, must be something given or offered in exchange for a promise.[27]

This concept of a contract as a bargain and of consideration as something given in exchange for the promise which predominates in common law[28] eliminates

[25] Stonestreet v. Southern Oil Co., 226 N.C. 261, 37 S.E.2d 676 (1946).

[26] Aller v. Aller, 40 N.J.L. 446 (1878).

[27] RESTATEMENT, CONTRACTS § 75 (1932).

[28] Hamson, *The Reform of Consideration*, 54 L.Q. REV. 233, 235 (1938); see Note, 16 MINN. L. REV. 808 (1932).

from its contractual sphere an informal promise founded only upon a liberality.

For that same reason, common law also denies the contractual nature or the possibility of juridical demand to a promise founded only on the animus to comply with a moral obligation.

In the famous case of *Hawkes v. Saunders,*[29] Lord Mansfield declared that when one promises to pay a moral obligation, "the honesty and rectitude of the thing is a consideration." But in the equally famous case of *Eastwood v. Kenyon,*[30] Lord Denman changed that doctrine, reasoning that it "would annihilate the necessity for a consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it." Nevertheless, this argument is erroneous,[31] in the first place, because the moral obligation referred to when one speaks of it as being or not being a sufficient consideration, is one pre-existing the promise; and in the second place, because not every promise creates a moral obligation to perform it.[32]

On the other hand, there are two reasons which militate against the idea of holding a moral obligation as consideration:

1) Consideration is not a loose bolt in the gears of contract at common law. Consideration, on the contrary, is its axis. Then, if the contract is conceived by the common law as a bargain, consideration must in consequence be held to be something which is given or offered in exchange for a promise. The act realized by the promisee and which created a moral obligation for the promisor was not bargained for the promise; it is an act which was not requested for by the promisor, nor one that the promisee could confidently hope would move the promisor to offer repayment therefor.[33] Then, it is not really a consideration.

2) Given the materialistic sense in which contractual law is considered by common law, in order that a consideration may support a promise, it has to be a *valuable* consideration. But "honesty and rectitude," or the "ties of conscience" are not valuable. They thus lack an essential attribute that would make them a consideration.

Yet, the treatment of a contract by the common law as a bargain has become relaxed,[34] and numerous exceptions have been made.[35] It is now admitted that not only the seal or the *quid pro quo* are sufficient reasons for the juridical exaction of a promise, but also that the reliance and change of the juridical position of the promisee may make demandable a promise given without consideration.[36] Neither has there been difficulty in accepting that a previous voidable or lapsed obligation will

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[29] 1782 Cowper 289. See Hassinger v. Solms, 5 S. & R. 4, 15 (1824): "Ties of conscience on an upright man are sufficient consideration."

[30] 11 A. & E. 450.

[31] See 1 CORBIN, CONTRACTS § 230 (1951).

[32] See notes 8, 9, & 10 *supra.*

[33] In a contrary case, there would be something more than a moral obligation.

[34] SEE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1954).

[35] RESTATEMENT, CONTRACTS §§ 85-90 (1932).

[36] *Id.* at § 90. This section has been applied in numerous instances. Among the recent ones are: Air Conditioning Co. v. Richards Constr. Co., 200 F. Supp. 167 (1961); Owen v. Sumrall, 204 Miss. 15, 36 So. 2d 800 (1948); American Handkerchief Corp. v. Frannat Realty Corp., 17 N.J. 12, 109 A.2d 793 (1954); Schafer v. Fraser, 206 Ore. 446, 290 P.2d 190 (1955); Hill v. Corbett, 33 Wash. 2d 219, 204 P.2d 845 (1949).

support an ulterior promise by the obligee.[37]

Regarding both types of cases the question now arises whether the pre-existing reliance and obligation are consideration, or if in such cases consideration is or is not a prerequisite.[38]

The most favored criterion, given the structure of contracts at common law, seems to be that of the *Restatement of Contracts,* according to which in such cases a consideration is unnecessary, because the pre-existing reliance and obligation realize the same function as a consideration; that is, they serve as the foundation—as cause—for the legality of a "meeting of the minds."

Following such a course the promise to perform a moral obligation could be made enforceable at law. But it should be well understood that as long as the common law maintains its concept of the contract—and, therefore, of consideration—no one can speak of a moral obligation as consideration. Should it be judged that the circumstances of a case do warrant it, the requisite of consideration could be excluded in the presence of a moral obligation, this being, in such a case, a sufficient cause for the legal character of the promise; but it should not be said that the moral obligation is consideration.

In civil law the problem to be determined in the face of a promise to fulfill a natural obligation is not whether the *causa* is necessary or not, but whether the formalities required for the donation should of necessity be complied with.

A donation is a gratuitous act. It is not the only one, but the most typical of such acts. In civil law the *causa* for a donation is the mere liberality of the donor. This is a weak cause; such weakness is manifested in diverse manners. One of these is that it must be accompanied by a formality. Thus, a donation, in the civil law, is a formal contract.

It is, therefore, important to determine if the promise to perform a natural obligation is a gratuitous act, an onerous one, or an intermediate act, in-between the onerous and the gratuitous. To be more precise, the question is reduced to determine if this act is a donation or not, inasmuch as the problem of formality is not present in connection with all gratuitous acts, but only in that relative to donation.

The opinions of commentators and jurisprudents of the civil law are divided as to whether the promise to perform the natural obligation is a gratuitous act distinct from donation, or an onerous act, or one in-between, but there is unanimity in considering it not to be a donation.[39]

If one views this problem from a realistic perspective, the question is not trying to adjust conceptual forms to reality, nor in trying to learn if the promise to perform a natural obligation is a donation, but whether it is convenient, in order to make

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[37] RESTATEMENT, CONTRACTS §§ 36, 89 (1932).

[38] For an interesting discussion of the question in relation to the reliance placed upon gratuitous promises, see the opinion of Judge Cardozo in Allegheny College v. National Chautauqua County Bank, 246 N.Y. 369, 159 N.E. 173 (1927). Regarding reliance, see Porter v. Commissioner, 60 F.2d 673 (2d Cir. 1932); Devecmon v. Shaw, 69 Md. 199, 14 Atl. 464 (1888); Boyer, *Promissory Estoppel — Principle From Precedents,* 50 MICH. L. REV. 639 (1952).

[39] See 1 GORLA, EL CONTRATO 151 (Spain 1959); 1 MARTY & RAYNAUD, DROIT CIVIL 413-14 (1961); Woodley, *Natural Obligations—Sufficiency As Consideration,* 7 LA. L. REV. 445 (1947).

such promise demandable in law, that it should be accompanied by the formality prescribed for donation.

The case law of civil law countries of the Mediterranean has declared that the promise to perform a natural obligation does not have to be formal: it is sufficient if it is an earnest promise, even if only verbal, or not accepted in writing.[40]

The pre-existing natural obligation is, then, a substitute of formality; it is something that makes formality unnecessary, because it does fully realize the canalizing and cautionary functions which it is intended to provide,[41] *i.e.*, because it serves as the adequate medium to indicate that the matter is juridical and to avoid that the promisor should make an insincere offer or act incautiously or imprudently.

Important Legal Characteristics of Natural and Moral Obligations

The debate around the concept of a natural obligation refers us, in the end, to a debate about law. Those who adopt a positivist point of view of legal precepts—the traditionalist doctrine—tend to reduce the sphere of natural obligations to those obligations which could be legal or which were so previously, and which could not become such because they were rendered inefficacious by a norm of law (imperfect legal obligations).[42] On the other hand, those who adhere to the natural law are wont to broaden the concept to make it include every intersubjective moral duty, that is, those originating from the relations of two subjects or persons.

An intermediate position would limit moral duties which constitute natural obligations to those having economic import.

In the treatises and legal systems of civil law countries, there is a general tendency to identify natural obligations with moral duties, or, at least, to consider a moral duty as the essential core of a moral obligation.

But those legal systems consider natural obligations in relation to their effect of avoiding recovery of payment; not so as to the other effect of making unnecessary the formalities of donation with respect to the promise of performance.

It is, therefore, convenient to distinguish what characteristics the natural obligation must contain — and, in like manner, the moral obligation—so that the law may recognize their ability to produce each of the following effects:

1) That of avoiding recovery of payment and of being the foundation for an executed contract:

The most certain way of expressing this effect of a natural obligation is that used, without naming it, in the Spanish Civil Code (Article 1901) and in the Puerto Rican Civil Code (Article 1801), that it is "just cause" for the payment.[43]

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[40] The decision of the Supreme Court of Spain of October 17, 1932 declares that in a case where the promise was not accepted in writing, the "formal" promise to perform a natural obligation converts it into a legal obligation. "Formal" must be here understood in the same sense as "serious." See comments on this important Spanish decision in Berdejo, *Las Obligaciones Naturales,* ESTUDIOS DE DERECHO CIVIL 1962 (Spain 1958); GORLA, *supra* note 39, at 178, vol. 2, at 317.

[41] IHERING, THE SPIRIT OF ROMAN LAW No. 45; Fuller, *Consideration and Form,* 41 COLUM. L. REV. 800 (1941); Entenza, *Los principios generales del Derecho contractual puertorriqueño,* 3 REVISTA DE DERECHO PUERTORRIQUEÑO.

[42] LA. CIV. CODE ANN. art. 1758 (West 1952); Mills v. Wyman, 3 Pick. 207 (Mass. 1826); Court of Appeals of Rome, Italy, July 20, 1884.

[43] The expression "just cause" is translated in

Even an intransigent positivist could admit without great effort, or sacrifice of his convictions, that the expression "just cause" may comprise a moral duty. It cannot, in effect, be denied that it is just to pay that which is morally owed.

The doctrine requires that these moral duties shall be endowed with certain qualities in order that they may constitute natural obligations. But really, the only essential quality is that they be intersubjective, flowing from one party to the other. The other qualities that the doctrine demands (that they be typical, that there be a counterprestation, and economic import) are accidental qualities which may or may not enhance the moral duty which integrates the natural obligation. Its presence will unquestionably persuade the judge to recognize in that moral duty the same legal character as belongs to a natural obligation, but its absence does not eliminate the possibility of such recognition.

The writers insist, above all, on the economic import. We shall not deny its importance. Certainly, it realizes two functions worthy of consideration: one of measure, the other of persuasion, as we shall see.

If the moral duty consists in giving, doing or not doing something which is economically appreciable, this value gives the measure of payment; what is paid up to that limit is well paid and its return cannot be demanded; whatever is paid beyond that limit, without the intention of conferring a benefit, may be repaid. On the other hand, if the moral duty lacked economic content, the nature and the quantity of what would have to be paid would be of difficult determination.

This, which, as we see, is reduced to terms of the easy and the difficult, and not of the possible or impossible, takes us to a second plane wherein we advert to the economic import of moral duty. For, in effect, precisely because of that easiness or difficulty in appreciating the object of the payment of a moral duty, we will find the greater easiness or the greater difficulty—we are still in the sphere of the possible—in attributing legal efficacy to moral duty.

Having established that it is not indispensable that the moral duty have economic import in order to be contained in a natural obligation, there arises one other question: How can we know that we are in the presence of a moral duty?

Here it is necessary to establish a distinction, bearing in mind that under the expression "moral duties," before the eyes of the law, fall those properly called moral and those called "of honor." Regarding the latter, the judge must search the manner of thought of the social community and in this search the point of view of the judge as to what is honorable will unquestionably have an extraordinary importance.

With respect to duties properly called moral, the judge will have to ignore his own personal criterion and rely on the opinion of the moralists, as he would on the opinions of writers of another country if he were called to apply the law of that

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the official English edition of the Puerto Rican Civil Code as "sufficient cause." This is patently erroneous, for several reasons, among them: that it transfers the qualification from the qualitative aspect (justice) to the quantitative (sufficiency); that the reference to "just cause" is a call to natural law, whereas "sufficient cause" suggests reasons of opportunity and of policy, which are essentially contingent; that the proper qualifications applicable to the "cause" of the civil law are "valid" or "invalid," "just" or "unjust," "proximate" or "remote," but never "sufficient" or "insufficient," implies an inexcusable confusion between "cause" and consideration.

particular jurisdiction.

We believe that these conclusions are admissible at common law when necessary to determine if a moral duty is good consideration for an executed contract, save what the Statute of Frauds may prescribe.

2) With respect to the effect of making unnecessary the formalities and of constituting a sufficient consideration for the promise to perform:

In the civil law the question has not been formulated in such definite terms as in common law, but it must be borne in mind that in all cases where the civil law courts have declared that a promise to perform a natural obligation is not subject to the formalities of donation, the natural obligations have had economic import.

Perhaps that orientation of the civil law cases does not respond to a preconceived tendency, but only to a mere coincidence. But, it is evident that to require that the natural obligation have economic consequences, in order to exempt the promise to perform a natural obligation from the formalities, responds to a necessity: that of security.[44] The economic implication then comes to fulfill the same function as the formality: that of alerting the promisor and of imposing a definite legal character to the promise.

And then, just as the promise to fulfill a natural obligation does not require the formalities if such obligation carries with it economic import, likewise the promise to perform a moral obligation need not be accompanied by a consideration if that moral obligation has economic implications. The point is not that the moral obligation plus the economic import provide sufficient consideration, but that a consideration as such is not necessary in that case.

With this, the promise to perform a moral obligation poses no problem of determining if it is, or is not, sufficient consideration; but, just as in the case of a gratuitous promise where the promisee has placed upon it a reasonable reliance changing his position, the problem presented is that of determining if the circumstances involved will justify the enforcement of performance even if consideration is lacking.

We hold that if the moral obligation has economic import, the decision must be in favor of the promisee. We see no reason why he should be in a poorer position than a promisee who, relying on a promise made without consideration, has altered his position. With so many doors now opened to the escape of the requisite of consideration, this admittance of the promise to perform a moral obligation with economic import seems to be capable of being resolved without serious disturbance.

[44] GORLA, *supra* note 39, at 170.