GROTIUS' CONTRIBUTION TO THE NATURAL LAW OF CONTRACT

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In his magnificent treatise, De Jure Belli ac Pacis,[1] Hugo Grotius devotes one chapter explicitly to promises and, following it, another specifically to contract. At first glance, their order seems to suggest that Grotius conceived contract to be merely a sequel to the analysis of promises and contractual obligation to be an expression of the normativity in promising. This immediately raises the following question: If, as we generally suppose, there is an ethical duty to keep one's promises which can be distinct from the juridical phenomenon of contract, does the natural law ground contractual obligation upon that ethical imperative? A widely-shared view of natural law would answer the question in the affirmative. I will try to show that Grotius' conception of the natural law of contract is fundamentally different from this particular construal of contractual obligation, and I will suggest that his conception belongs rather to the history of a philosophically adequate idea of natural law, initially articulated by Aristotle and finally completed by Hegel. By way of introduction, I will identify certain difficulties with the prevailing -- as opposed to Grotius' -- version of natural law. The central features of Grotius' analysis of contract will then be considered. Finally, I shall merely indicate why his account was nevertheless incomplete and that its adequate formulation had to await the elaboration of the notion of moral personality in the practical philosophy of Kant and Hegel.

I

The natural law approach to the law of contract is sometimes construed as deriving the obligation in contract from the ethical duty to keep one's promises. This ethical duty may reflect either the virtue of being truthful in word and deed or an imperative to promote a particular conception of the common good, such as the security of future commercial transactions, which is regarded as a condition of general welfare.[2] In both instances, the ground of the obligation is normatively distinct from law and entails an independently valid end which the law is meant to serve. The specific contribution of law which transforms the initially ethical duty into a legal obligation is, according to this view,

merely that the positive law affixes to the ethical duty a sanction which assures that what ought to be done actually is done. Since the virtue of honesty as well as the various conditions of the common good are desirable and valid as ends whether or not a sanction has been introduced to buttress them, there is no intrinsic and necessary connection between the source of contractual obligation and the existence of the sanction introduced by the positive law. Indeed, the sanction adds a non-ethical motive for keeping promises, because the ethical character of an act lies in the fact that it is done for the sake of the ethical duty, whose content here is either the virtue of honesty or the promotion of the common good, and not on account of some other factor, whether it be a threatened harm or a promised benefit.

When this view of contractual obligation is adopted, there is no reason why the non-fulfillment of a promise must signify the violation of a correlative right in the promisee. The intelligibility of the ethical duty to keep a promise does not necessarily presuppose that an act of promising, in and by itself, transfers any right to the thing promised from promisor to promisee. A promise can mean simply that I have decided that my present purpose to do something in the future will be carried forward into the future and will supersede any contrary purposes. If I am to act consistently with my word, I must do as I promised. The imperative to keep my promise reflects the virtue of inner integrity and self-consistency and has no necessary connection with an other-directed obligation not to injure another's right. It is precisely because the promise need not, of itself, bring about any immediate modification in the respective entitlements of promisor and promisee that the virtue of honesty, which is the integration of present word and future deed, can shine here in its purity.

My promise may, in turn, engender -- and be intended to engender -- your trust in my word. A relation of trust can be intrinsically good as well as instrumentally useful. As intrinsically valuable, a relation of trust signifies sharing in the common good of honesty and the flourishing of a certain kind of friendship and community. As instrumentally useful, a relation of trust makes it possible to rely on the existence of future as opposed to merely present gifts and exchanges and the ability to do so contributes to the general welfare of society.[3] Here again, the present promise need not confer anything upon the promisee;

it is only when the future transaction actually takes place that he will acquire something. The promisee's right to the thing is acquired simultaneously with its future physical transfer to him.

To summarize: in each of these initially non-juridical rationales for the obligation to keep promises, the promisor is ethically bound by his act of promising but it is only when his word is actually carried out that the promisee acquires anything. Once the promisee has acquired the thing, then the promisor is of course obliged to act consistently with the promisee's right to it. However, since the promise itself gives nothing to the promisee, the promisor's failure to fulfill it does not deprive the promisee of anything.

Since, from the standpoint of ethics, the imperative to keep one's promises is not necessarily articulated as a relation of correlative duty and right between promisor and promisee, the sanction for breach of promise does not necessarily signify that the innocent party is being compensated for a loss resulting from a violation of right. Because the promisee acquired nothing by virtue of the promise, he lost nothing by reason to compensate him.[4] Just as the promise itself does not necessarily establish an objectively normative relation between promisor and promisee, so the meaning of the sanction for breach of promise need not reflect the import of a transaction which already embraces them. The sanction can be regarded either as an extra-ethical mode of discouraging unethical action or as a means of promoting reliance upon future transactions which, because of the breach of promise, do not in fact occur. There is thus no intrinsic reason why it is the promisee -- and not, for example, the state -- who receives the money extracted from the promisor by the application of the sanction. This view of the basis of contractual obligation cannot preserve the conceptual distinction between an award of damages which compensates and the imposition of a fine which punishes.[5]

This conception of contractual obligation diverges sharply from the way in which the positive law, in both the common law and civil law systems, understands the central features of contract. Both systems regard the sanction essentially as a mode of compensating the innocent party for a loss resulting from the violation of a right which has been acquired through the contract at the moment of its formation. Prior to performance, the parties' respective entitlements are modified by the terms agreed

to through offer and acceptance. That is why mere failure to perform can count as the deprivation by one party of what already belongs to the other and why damages are required to vindicate the initial standard of entitlements established by their agreement and violated by non-performance. The acquisition of a right through offer and acceptance defines the essence of contract and differentiates contractual transactions from those which are delictual or involuntary in nature. The vindication of this acquired right is the principal purpose of the sanction, which therefore signifies not that ethical duties must be fulfilled but rather that causing injury to what belongs to another is prohibited.[6]

Since the essential structure of contractual obligation consists of correlative rights and duties, obligation in contract cannot be reduced to the ethical duty to be truthful or to promote a conception of the common good. It is not surprising therefore that one of the fundamental tasks of the law is to distinguish contracts from "mere" promises. So, for instance, at common law, breach of a mere promise was never a sufficient ground for an action in assumpsit. As far back as 1586, in Golding's Case,[7] the law was that "in every action upon the case upon a promise, there are three things considerable -- consideration, promise and breach of promise." Common lawyers continue to see contract in the light of the doctrine of consideration which, although it has sometimes been criticized as an historical peculiarity, is still the basic touchstone for distinguishing contracts from other kinds of juridical acts. In the civil law, a similar function is performed by the traditional notion of "objective cause."[8]

The structure or form of the ethical duty to keep promises does not correspond to the form of the juridical obligation in contract. The ethical duty presupposes only the act of one individual who binds himself to do something in the future and the form of the duty is inward self-consistency in word and deed. In ethics, the duty is complete although the promise may not have transferred to another a corresponding right to performance. By contrast, the formation of a contract arises through the interrelated voluntary acts of at least two persons in offer and acceptance. The positive law understands the form of the obligation to be essentially a relation between two individuals who are prohibited from injuring what has been

acquired by the other through their agreement. Failure to perform therefore signifies that the party in breach has wrongfully appropriated what belongs by right to the innocent party. From the standpoint of ethics, however, I do not necessarily injure what is yours when I do not keep my promise; I merely fail to confer upon you the promised benefit. These differences between the law's self-understanding of contract and the view which grounds contractual obligation upon the ethical duty to keep promises disqualify the latter as an adequate account of contract.

II

Does Grotius provide an account of contract which coheres with and is not defeated by legal experience? I shall consider his treatment of contract in the following order:

A. The Chapter on Promises: The Form of Contract
   i. The two concepts of promising, the second of which grounds

   ii. The idea of an intelligible exchange or gift, by which is meant a transfer of my right over a thing to you, prior to actual delivery, which expresses

   iii. The form of contract, namely, equality.

B. The Chapter on Contracts: The Content of Contracts
   i. The division of transactions;

   ii. Equality in the acts and

   iii. Equality in the matter of the transaction.

A. The Chapter on Promises: The Form of Contract

Grotius begins the chapter on promises[9] by opposing his own ideas to those of François de Connan, "a man of exceptional learning." De Connan apparently held that, by the law of nature, simple promises do not engage an obligation of justice but merely one of honesty; that simple promises are those which do not belong to a contract or a transaction that entails actual delivery of the promised thing; that liability for breach of promise arises only where the promisee has himself begun to execute what he is obliged to perform according to the terms of the contract and that therefore the consequence of a breach is not that the promisor must execute his side of the transaction but that he must compensate the promisee for the loss arising out of the latter's reliance.[10]

How does Grotius' opinion differ from de Connan's? An examination of the relevant parts of the Treatise[11] suggests that Grotius' view is that the word "promise" is used to denote at least two fundamentally different concepts, of which one, and only one, is the ground of obligation in contract and that in addition this obligation in contract is complete and fully imperative prior to the performance of the terms of the agreement. In making the first distinction, Grotius may not be in fundamental disaccord with Connan; in affirming the normative independence of the contractual obligation from performance, he is. Indeed, the juridical independence of contractual obligation is the basis for the principled distinction between tortious and contractual wrong. What is also at stake, therefore, in this disagreement is the validity of the difference between contract and tort.

The distinction between a promise that, according to natural law, is obligatory but which confers no right upon the promisee, and a promise that does transfer a right, is stated as follows:

> ...the will shapes itself (la volonté se détermine) in respect to future time with a sufficient manifestation to show the necessity of continuance. This also may be called a sort of promise, which, without regard to the civil law, is binding either absolutely or under conditions, but gives no right, properly speaking, to the second party. In many cases it happens that a moral obligation rests upon us, but no legal right is acquired by another ... such as in the duty of constancy or of good faith. So in the face of such a promise, the property of the one promising can be retained, and the promisor cannot be compelled by the law of nature to keep faith.[12]

This kind of promise, which Grotius called an "imperfect promise", is not the mere intention to do something but rather a complete determination of the will that a certain thing promised will be done, or, in short, a true assumption of responsibility for the doing of the thing promised. Nevertheless, according to Grotius, the act is perfectly intelligible as a self-imposed obligation which does not confer a right upon the promisee such that he can compel performance or its equivalence. The analysis of the moral basis of the first concept of promise enables us to conceive how a breach of promise may be in itself wrongful without necessarily entailing the violation of the rights of

another. In this first concept of promise the duty to keep one's promise is not the same thing as the duty not to injure another.

One explanation of this duty is that if the promisor adopts as his maxim the proposition that a promise need not be kept, there will be the following self-contradiction in his will. When I make a promise, my will is now completely determined by a form ("I shall do x") which is meant to supersede the vagaries of need and inclination, so that these latter can no longer count as reasons which may validly determine my will; whereas, when I break my promise, I subordinate this form to my needs and deny my capacity to be free from external determination. But it is only as free from determination by inclination that I am truly purposive.[13] So the contradiction lies in the purposive denial by my will of the possibility of a will that can raise itself above the exigencies of need. By contrast, if the "will" were completely submerged in need and inclination there would be no contradiction if my decision yielded before a contrary need, since this would merely express the essential arbitrariness entailed in determination by inclination.

Promissory obligation does not, according to the conception suggested thus far, entail an intrinsic connection between promisor and promisee since the necessary and sufficient condition of the obligation's existence is the act of the promisor alone and the form of the obligation is inward self-consistency. It is true that the promisee may have faith in my present decision to perform the future act, but his trust is not a necessary condition of the existence of the obligation which I assume in making the promise. That obligation is already complete and the other's faith simply reflects my obligation in the mirror of his subjectivity. The promisee's trust, with its initial hope, may end in disappointment if I breach, but these sentiments are at most the <u>effects</u> produced by my promise and by its fulfillment or breach, and are only contingently related to the nature of the promissory obligation. Because these sentiments determine neither the form nor the existence of the obligation, my breach does not contradict them. Just as the ground of this first concept of promising is located wholly within the self-determining activity of the single will, so the violation of that ground is immediately and conceptually a self-contradiction of that same will. Because it is wholly my act - and not in the least another's act - which constitutes the obligation in the promise, the other does not participate in the making of the

obligation and therefore cannot figure as an end in its creation. Therefore, the breach of my promise, in and of itself, does not directly injure his standing as an end in himself; the promisee's own self-determination is not directly embodied in the making of the promissory act nor violated by its breach.[14] Unless some further factor is introduced, such as my fraudulent intention not to keep my promise at the very moment I make it, the wrongness of my breach does not directly negate his will or his right .[15]

It might be objected against the distinctive intelligibility of the first concept of promising that it is not correct to say that the obligation is constituted by the unilateral act of the promisor alone. After all, it will be said, a promise, in order to be a promise and therefore truly binding, always requires acceptance by the promisee: "it is a... necessary condition of promissory obligation that the promise be accepted."[16] However, if we consider the meaning of "acceptance", we shall see that his word denotes two different ideas and that these two ideas involve fundamentally distinct grounds of obligation.

The relevance of acceptance to the first concept of promising is that, although a promise is made to or for another (the promisee), it is made by only one person (the promisor).[17] We can account for this in the following way. The meaning of an act of promising, inasmuch as it is something for another, presupposes that the promisee wants the thing promised. A "promise" of something which the promisee does not want would not ordinarily be designated as a promise but would be regarded as a threat, at least from the standpoint of the intended target of the "promise".[18] In other words, the promisor is ordinarily thought to intend the conferring of some benefit upon the promisee and the sign that something is a benefit to the latter is that it is wanted by him. In short, the function of "acceptance" is to confirm the purpose of the unilateral act by the promisor which by itself constitutes the binding promise.

Accordingly, it is not enough to relate the meaning of contract to the principle of promising simpliciter because there is a concept of promising which, although it is intelligible as a meaningful act creating obligation, does not entail a structure of correlative right and duty. It is therefore necessary to articulate a different concept of promising which is adequate to the structure of contractual right.

In contrast with the function of "acceptance" that has just been considered, there is another which serves to complete a bilateral transaction, i.e. a transaction that can be constituted only by the combined acts or wills of at least two persons. This is the second concept of promise, or what Grotius called a "perfect promise." A perfect promise is one which consists in "la volonté qu'on a de donner à celui, en faveur de qui l'on s'engage, un véritable droit d'exiger l'effet de notre parole."[19] A perfect promise is compared to the alienation of property:

> C'est là une Promesse parfaite, qui a le même effet, que l'aliénation ou le transport de Propriété. Car elle est ou un acheminement à l'aliénation de quelque partie de nos biens ou une espèce d'aliénation de quelque partie de notre liberté.[20]

Alienation of property can be either unilateral, in which case it is gift, or mutual, and then it is exchange. The connection between a perfect promise and the alienation of property is fundamental to Grotius' explanation of the normative significance of the second concept of promise.

In his preliminary criticism of de Connan, Grotius suggests the intelligibility of this kind of promissory act by drawing upon the elementary capacity to alienate one's property:

> La Propriété d'une chose peut être transférée à Autrui par une simple volonté du Propriétaire, suffisamment notifiée...pourquoi est-ce qu'on ne pourrait pas de la même manière transférer à quelqu'un le droit ou d'exiger qu'on lui transfère la Propriété d'une Chose (ce qui est moins que l'acquisition actuelle du droit même de Propriété) ou d'exiger qu'on fasse quelque chose en sa faveur puisque nous avons sans contredit autant de pouvoir sur nos actions pour en disposer que sur nos biens?[21]

Grotius is referring here to the chapter entitled "Secondary Acquisition of Property by the Act of Man" where he derives the right of alienation from the inherent nature of full ownership: "The definition of ownership ... is to have within one's power the right of alienation."[22] The act which transfers property necessarily entails two constitutive acts: that of the giver and that of the receiver. The first is an act of rational will (i.e. with capacity and competence) which expresses externally the

decision to transfer to the receiver the thing itself or the right to the thing; the second is an act of rational will which expresses externally the decision to receive the thing or the right to it. Then Grotius writes:

> The other conditions which are required both for the transfer of a right and for its acceptance, and the question how both can take place, will be treated below in the chapter on promises. For in these matters the method of alienation and that of promising are alike, at least by the law of nature. (nam in hoc alienandi & promittendi par est ratio....)[23]

We see, then, that the function of "acceptance" in a perfect promise, as in a transfer of right or property, is qualitatively different from its significance in an imperfect promise. In a perfect promise, unlike an imperfect promise, the act which transfers is constituted by two acts, that of the giver and that of the receiver. Neither side alone can complete the transaction: "Pour qu'une Promesse donne quelque droit à celui en faveur de qui elle est faite, il faut de sa part une acceptation aussi bien que dans le transport de Propriété."[24] It follows that, prior to acceptance - however it is defined - the promisor's promise to give or to do may be withdrawn without thereby causing an injustice against the promisee: "... avant l'acceptation, qui est ce qui fait le transport de droit, on peut révoquer une Promesse sans injustice et même sans se rendre coupable d'inconstance et de légèreté si l'on a véritablement promis avec cette intention que la Promesse ne commençât à avoir force, que quand elle serait acceptée."[25]

This second function of acceptance is a necessary condition of every instance of derivative as opposed to original acquisition. Acquisition is original if, by my unilateral act, I acquire an object that is ownerless; it is derivative if my acquisition is by means of the act of another and is derived from what he possesses as his own. The unilateral act of either party to the transaction is insufficient to accomplish derivative acquisition. If the owner transfers the thing but it is not yet accepted, the transfer does not count as a transfer of ownership but only as a one-sided abandonment or alienation of the thing; this essentially negative act simply releases the thing which then becomes ownerless, a res vacua. But, also, there can be no derivative acquisition without the voluntary alienation of the thing by its owner. The acquisition of what belongs to another

can never be without that person's consent; without it, the acquisition is simply a wrong.[26]

Negatively, the unilateral act of either party is insufficient to create the transaction; positively, the necessity that there be two acts is expressed in the proposition that the united will or, to use the language of the civil law, the common will of the parties can alone constitute the transaction. At no point does the object cease to belong to its original owner without its having been already acquired by the other party to the transaction. In the words of Kant, "... the transfer ... of what is mine to another by contract takes place according to the law of continuity."[27] Otherwise, the party who receives the object would acquire it in the condition of its being a res vacua and would therefore acquire it originally and not derivatively - which contradicts the idea of contract. It is therefore not by the particular will of either party but only by their united will in common that what is mine is transferred to another.

It is necessary that the promisor's act be of a kind which is able to generate the obligation in a perfect promise if it is to function as an element in its formation. There must be, to use a juridical term, an intention on the part of the promisor to create legal relations. However, this quality is only potentially existent until the moment when the acceptance of the receiver is united with the offer of the giver. At that moment alone, the obligation becomes actual. At no time is one party under an obligation without there being a correlative right in the other. It is therefore a confusion to classify the giver's promise as an imperfect promise which is perfected by the acceptance. If that promise is meant to be an imperfect promise, the acceptance of the receiver can never transform it into a perfect promise. It is incorrect to view the elements of a perfect promise as consisting of two promises which are obligatory independently of each other; a perfect promise is not constituted by two imperfect promises. Grotius' view is that the two concepts of promise are two different categories of meaningful acts and that each must be understood in terms of its distinctive structure and intelligibility. The fact of acceptance does not distinguish them because acceptance itself has a conceptually different status according to the category of promise that is involved.

The acceptance by the promisee of a promise does not unilaterally determine whether a promise is perfect or imperfect.

The promisee's act can function as an acceptance in a perfect promise only if the promisor intends that his right be transferred to the promisee. This raises the important problem of determining the appropriate standard of interpretation to be applied to the acts of the relevant individuals. It may be asked: Granted the difference between the two concepts of promise, how can one tell which concept exists in any given circumstance? It should first be stressed that this question does not invalidate the intelligibility of the distinction between the two concepts of promise but only refers to our capacity to determine which one is instantiated in a particular situation.

Here, I can merely outline the elements of an answer. Grotius accepted what is usually called an objective standard of interpretation, since he viewed the intelligibility of an act constituting a perfect promise as being something that is meant to exist for another.[27] The objective standard articulates a perspective which is adequate to the two-sided nature of derivative acquisition. For the sake of brevity, I shall consider it only in relation to the promisor's act, although the suggested rationale also applies to that of the promisee. On the one hand, there has to be a voluntary decision by the promisor to part with his right. Since it is his property, it must be possible to distinguish its being voluntarily alienated from the unconsented-to taking of it. On the other had, because the second concept of promise entails relation to another, the decision must be expressed to another and must be intelligible for another. The decision must neither remain merely inward nor be understood from the particular perspective of either of the parties to the transaction. Accordingly, what counts as a voluntary decision to transfer a right is determined from the standpoint of a reasonable person, placed in the actual circumstances of the transaction; that viewpoint reflects the abstraction from the particularities of the parties and the externality of their relation which together constitute the essential nature of derivative acquisition.

Grotius' object is to show that the obligation in contract is complete and fully enforceable prior to performance so that an omission to perform can count as a wrongful injury to the promisee's right which he has acquired through the agreement. The meaning of the second concept of promise is that a right to an object is acquired by one person through another prior to its actual physical receipt. What is at stake here is the notion of

an intelligible transfer of property that is distinct from and prior to the physical transfer.

We now turn to Grotius' account of its possibility. According to Grotius, the elucidation of an intelligible exchange presupposes nothing more than the right of full ownership -- and hence the right to alienate -- as well as the right in full ownership, which entails the distinction between being entitled to an object and merely having physical control over it. What is the connection between the intelligibility of a transfer of right and the idea of right in ownership? We begin the examination of an intelligible exchange, i.e. a mutual transfer of rights that is independent of performance, with the analysis of a completed instantaneous exchange, where both aspects are simultaneously realized.

Consider the following example: I exchange my horse for your cow. The result of the exchange is that your cow is now mine and my horse is now yours. What enables us to understand the physical movement of the horse and cow as an exchange? It is obviously inadequate to refer merely to the physical movement of those objects. Nor is it helpful to explain the essential nature of the transaction in terms of the diverse satisfactions that may be produced by the exchange. Reference to our wants may suggest why we decided to enter the transaction, but it does not clarify why it is an exchange. Moreover, a forced exchange would constitute a violation of the coerced party's right so that, as against him, the wrongdoer could not claim as his own what he had obtained; yet the transaction may have conferred useful objects on both parties. If the essential nature of an exchange is the satisfaction of wants there is no reason intrinsic to the transaction why the results of the exchange should stand when it turns out that either party would be better satisfied in some other way. Nor can the central feature of exchange, namely that one particular thing is equated with another and is posited as equal in worth to it, be explained. Insofar as one thing is the equivalent of another, their concrete differences are disregarded or, to be more exact, those differences do not count as aspects which are wanted to satisfy particular needs but rather function merely as the material in which the abstract value-relation is expressed.[28]

The only feature which allows us to understand the nature of the transaction as an exchange is simply that it consists of a

mutual transfer of ownership over things. Every other aspect, strictly speaking, falls outside the juridical significance of the transaction: the movement of the physical objects is intelligible as an exchange inasmuch as it embodies the mutual alienation and acquisition of things that can be owned. Since reference to the particular needs of the parties or to the particular attributes of the object does not explain the essence of a transfer of ownership, the transfer is grasped in abstraction from such factors.

Exchange presupposes that the parties have the capacity to be owners. But I am an owner of something only if I can say it is mine when the object is no longer under my physical control. It is true that original acquisition requires an initial act through which I bring the object under my power. However, once this is accomplished and I am the owner of the object, the fact that you forcibly take it from me does not make it yours but rather constitutes a violation of my right. Unless I do something to alienate it, my entitlement is valid independently of the effects of time and space upon the condition of the object and my physical control over it. Kant called possession that is independent of these factors "intelligible possession": as the embodiment of intelligible possession, actual physical power over a thing signifies something more than brute natural fact.[29]

Let us return to the example of the present exchange. Present exchange does not involve an obligation to perform that is distinct from actual performance since, in present exchange, everything transpires immediately. However, it was suggested that even present exchange presupposes a transfer of ownership and that the idea of ownership is inconceivable unless it is valid and subsists independently of changing empirical circumstances. In present exchange this essential meaning of ownership is present as submerged in the immediacy of the exchange. Following Kant, I call this hidden aspect of present exchange "intelligible exchange".

How does this intelligible exchange become visible? The notion of ownership presupposes the conceptual distinction between its intelligible and physical aspects. This conceptual distinction is not explicitly posited in present exchange because both aspects are simultaneously realized. Contract, wherein the obligation to perform is complete and valid independently of and prior to actual performance, reveals for the first time this

essential distinction hidden in present exchange. The obligation to perform, which is constituted by the combined acts of offer and acceptance, is the intelligible exchange expressed externally and therefore is a mere sequel, which signifies that the right acquired through the contract has not been violated. The promisee's entitlement to the object does not depend upon whether he has in fact received it from the promisor. By failing to perform according to the terms agreed upon, the promisor is withholding what belongs by right to the promisee against the latter's will. The measure of damages is the reasonably foreseeable loss caused to the promisee by reason of his being deprived of the physical possession and use of the object that is his according to the contractual terms.[30]

This significance of the obligation in contract is fully realized only in the enforceable executory contract. For it is in it that the complete separation of the moment of the transfer of right and the moment of actual performance is expressed. Unless the executory contract is intelligible, contract cannot make explicit the conceptual distinction which is always present in other kinds of juridical transactions - whether voluntary or involuntary; for the latter also presuppose that the parties are not without rights and the notion of right, in its most elementary meaning, rests upon the distinction between entitlement and sheer physical force.

The idea of an intelligible exchange yields the <u>form</u> of contract. To see what it is, we have only to analyse what is already entailed in an intelligible exchange. An intelligible exchange is a transfer of ownership that is independent of empirical circumstances. It requires two persons and two things. The two individuals count as owners -- for the intelligible exchange is a transfer of ownership. The capacity to be owners is their only attribute because their needs, inclinations, moral merits, or other qualities do not concretely determine the meaning of an intelligible exchange. So they count <u>merely</u> as owners and, because there is nothing to differentiate them in this respect, they are equal as such. The things also count as objects that can be owned. Their many different concrete qualities and uses are not directly relevant and so they figure <u>merely</u> as things that can be owned. An intelligible exchange is a mutual transfer of rights to two things between two persons who count merely as owners. This is the form of contract and is nothing other than the structure of the second concept of promise.

B. The Chapter on Contracts: The Content of Contract

The object of the chapter on promises is to identify and explicate the structure or form of obligation in contract and accordingly to distinguish it from other kinds of obligation which do not correspond to that juridical phenomenon. Its aim is, negatively, to show that contractual obligation does not derive from the ethical duty to keep faith and, positively, to indicate its distinctive form or meaning. The chapter on contracts[31] completes the exposition of form by specifying a content of contract that is adequate to its form. According to Grotius, the content of contract concerns the acts and matter which constitute the material basis of a contractual transaction; these factors function as the content of contract because they can and must embody its form, namely, abstract equality, as it is expressed in a transfer of right.[32]

Grotius defines contract as including "all acts of benefit to others, except mere acts of kindness."[33] At first glance, contract seems to be construed in terms of acts which confer advantage and not according to the different modes of acquiring rights through another. However, acts which are merely kind do not, in Grotius' view, involve any sort of mutual obligation and have no legal effect over and above the actual receipt of the benefit that has been conferred. Because contract compromises only those acts which entail mutual obligation, it is properly defined in terms of the different ways of acquiring rights derived through the act of another. Grotius divides contract into two classes of acts, namely those which produce a community of interests between the parties and those which separate them. To these two classes of acts correspond two distinct grounds of determining individual rights as well as two different forms of equality.

In the first class of acts, the parties bring into existence a community of interests which is directed toward their common advantage. The contractual relation is here conceived as a joint venture wherein the parties' interests are not opposed but rather are identical with respect to the risks of gain and loss involved in the undertaking. Accordingly, a party who obtains a separate

profit from a transaction that is within the scope of the venture is not permitted to retain it. Individual entitlements (or obligations) are determined exclusively by the distribution of the benefits (or burdens) which figure as the common asset (or liability) of the joint venture. The distribution is effected according to a criterion which is either expressly agreed upon or implied as a term of the venture and which refers to a particular quality of the venturers that is relevant to the purpose and functioning of their venture. So, for example, a person's entitlement may be determined by the amount of funds he has contributed to the joint venture. Each receives his due and is treated equally if his entitlemnt is proportional to his particular contribution.[34]

The form of equality which obtains in the distribution of advantages is, in Aristotle's words, geometrical equality.[35] Geometrical equality requires that individual entitlements be proportional to the particular quality that has been stipulated as relevant by the criterion of distribution. A particular quality - for example, contribution of funds - is, qua particular, distinct from other qualities such as beauty or riches. In addition, it can be instantiated in differing degrees; for instance, one contribution may be greater or smaller than another contribution. With respect to a particular quality, persons are in principle different. Geometrical equality signifies that the distribution of a common asset or liability reflects the relevant differences in keeping with the criterion of distribution.

It will be recalled that, by contrast, the equality intrinsic to a transfer of right is that the parties are identical as subjects having the bare capacity to own. This bare capacity is not one particular quality among others and is not instantiated in differing degrees. Rather, it is the product of an abstraction from every particular quality and signifies merely that a person is to be treated as a subject who can own something and accordingly is not without rights. In a transfer of right, both sides mutually recognize each other as subjects identically capable of ownership, irrespective of the originally diverse grounds of their respective entitlements to the things with which they enter the transaction. As a mere capacity for rights, this equality is indifferent to the quality and quantity of the contents of a right: what and how much I own are simply irrelevant. Since the capacity to own presupposes that there can

be holdings but not that holdings need be construed in terms of a pattern which is the result of a particular criterion of distribution, the form of equality in transfers of right is conceptually independent of the form of equality in distributions.[36] It is through the second of the two classes of acts, namely those which Grotius calls separative, that this other and abstract form of equality can be embodied.

In the second class of acts, individuals establish an immediate relation between them whereby what initially belongs to one is transferred to and acquired by the other. The thing transferred is always the exclusive property of either one or the other of the parties and therefore the risks of gain and loss with respect to that thing are never common to the parties. Individual entitlements are determined by the combined acts of offer and therefore by an immediate relation of the will of one to the will of another: their relation is not an association that is mediated by participation in a joint venture directed toward their common advantage.

The necessary and sufficient condition of a transfer of right is a voluntary transaction between two persons. Accordingly, a transfer of right can be either unilateral or mutual. It is unilateral if only one person gives and only the other receives, whereas it is mutual if each person both gives and receives. The first is a gift, wherein I cease to own a thing through the combined acts of my giving it to you and your accepting it; the second is an exchange, wherein each of us is, both at the start and at the finish of the transaction, the owner of something through our mutual alienation and mutual acceptance of two things. Gift and exchange are thus the two fundamental kinds of contract that are established by acts which are separative.

Grotius' discussion of gratuitously beneficial acts in the chapter on contracts and his analysis of the perfect promise in the chapter on promises can be explicitly integrated by us under the category of gift in the following matter. There are, firstly, the completed present gift (donatio) as the well as the enforceable promise to give or to do. The latter signifies that a right has been transferred prior to performance, such that by virtue of the promise and its acceptance alone the thing has already ceased to be the promisor's and has become the promisee's. Consequently, each side is bound: refusal to accept

delivery is no less inconsistent with the contract than is refusal to deliver. Although the structure of a contract of gift consists explicitly of a right (to receive) on one side and a duty (to give) on the other, it is instinct with mutual obligation. So for example, if the promisee refuses to accept delivery, he may be liable to the promisor for the loss the latter has reasonably incurred in maintaining the object until an alternative means of disposing it has been found. In addition to the gratuitous alienation of ownership over a thing and hence of the right over it, there is the gift of a service, such as the safekeeping of a property (depositum) in which a right is transferred to the owner upon the condition of the donor's assumption of control over the thing, as well as the gratuitous loan of a thing, i.e. the gift of something less than complete ownership of a thing or of the limited use and enjoyment of it (commodatum and mutuum).

Mutuality of obligation is, however, the explicit structure of obligation in the contract of exchange and in this regard exchange is the perfect expression of the second class of contract. Exchange comprises reciprocal acts which separate rather than produce a community of interests between the parties. Grotius divides them into the following three categories: I give that you may give; I do that you may do; I do that you may give. Contracts of the first sort, where I give that you may give, are especially called permutatio and can be the exchange of one particular thing for another thing, as in barter; the exchange of a particular thing for something universal, i.e. money, as in buying and selling; or the exchange of the use of a thing for some other thing or money, as in letting and hiring. Grotius does not specify the kinds of acts that are exchanged in contracts where I do that you may do but simply notes that their contents are diverse. Finally, a contract in which I do that you may give is essentially the exchange of my service for money (locatio operae) or the contract for wages.[41]

Gift and exchange are the two basic categories of contract established by separative acts. A contract may be either gift or exchange; it may also be partly gift and partly exchange, where, for example, I knowingly sell you my horse at a discounted price. Grotius calls a transaction that is part gift and part exchange a "mixed" transaction.[42] Since gift and exchange are the two basic categories of contract, any transaction which combines them in such a way that the distinctive character of

each is preserved must be intelligible as a contract.

In Grotius' view, there must be equality in the acts which precede and those which constitute the transaction, as well as in the matter with which the transaction is concerned. According to Grotius, such equality belongs to the essential nature of contract.[43] Inasmuch as the essential structure of contract is a transfer of right between two persons, it follows that equality must innere in the relation constituted by this transfer. Although Grotius himself did not analyse equality in contract with explicit reference to the structure of a completed perfect promise, we can conceptualize his discussion of equality in those terms and thereby integrate the chapters on promises and on contract. Accordingly, the equality which governs the acts and matter in contract is the equality immanent in a transaction constituted by the parties' combined acts of offer and acceptance, through which they mutually recognize each other as subjects having moral capacity to own. Since offer and acceptance refer respectively to the will to alienate and the will to receive a thing, there must be equality both in the relation of will to will and in the relation of thing to thing. Inequality with respect to either relation contradicts the idea of right in contract in the following manner.

First, there must be equality in the relation of will to will and, accordingly, a purported contract may be vitiated either by reason of an absence of will of at least one party or because of coercion exercised by one party against the will of the other. There is an absence of will where an apparent manifestation of consent is caused by a force external to the party, for instance if you move my hand against my will so that the physical movement cannot count as an expression of my self-conscious volition. Since contract is constituted by at least two acts of volition, absence of will precludes contractual formation, whether or not the stipulated terms are intrinsically equal.[44]

Because contract is a relation through which the contracting parties mutually recognize each other as abstract bearers of rights, an act by one party which constitutes a wrong against the other cannot count as a cause of the existence of the contract. To the extent that we must explain the decision of one party to enter the agreement on the basis of a wrong committed against him by the other party, the contract is liable to be set aside at the

request of the wronged party. With respect to the wills of the parties and independently of the intrinsic equality of the terms of their agreement, if a wrong done by one party to the other has resulted in the other's decision to contract, the wrongdoer cannot oblige the latter to fulfil the terms agreed upon; he must not be permitted to acquire a right through the commission of a wrong.[45]

For example, if one party but not the other knows that the real condition of the thing which is the object of the transfer of right is not what it appears to be so that the ignorant party will receive less than his due or be injured in what is already his own if he enters the contract, the first party is obliged - unless the contract expressly or by necessary implication limits his obligation - to inform the second of the relevant facts. An omission to do so is a fault or wrong and one party cannot through the instrumentality of a contract wrongfully cause another loss or injury.[46] If a party's decision to contract was occasioned by his ignorance of facts which the other party ought to have disclosed to him, the contract is liable to be set aside at the request of the innocent party and the wrongdoer may be responsible for the resulting loss or harm. However, where the facts do not relate to the loss or harm which a party has suffered on account of the thing itself that is contracted for, there is no implied obligation that the informed party make those facts known to the ignorant party. So, for example, if I know that future conditions will lower the market price of the horse which I have offered to sell you today at its present market value, I am under no duty by the natural law to point this out so that you can decide to wait until the later date when you may purchase a horse more cheaply. Although, as a matter of virtue, it may be praiseworthy to give such information, the failure to do so is not unjust because "it is not inconsistent with the right of the one with whom the contract is made."[47]

Second, equality is required in the principal acts which constitute a contract.[48] There must also be equality in the relation of thing to thing. Grotius observes that this form of equality is intrinsic to the very substance or matter of contract and that inequality between thing and thing, which does not reflect an intention to make a gift, must be corrected whether or not it has resulted from the fault of either party.[49] In gift, I cease to own something so that it may become yours; my impoverishment is correlative to your enrichment and therefore,

as far as our respective entitlements are concerned, we are not equal. In exchange, however, I cease to be an owner of something so that, through you, I may become the owner of another thing: both at the beginning and at the end of the transaction I am an owner of something. If the category of exchange is to be distinguished from that of gift, exchange cannot result in my impoverishment or your enrichment. What I receive through the exchange must be quantitatively equivalent to what I have alienated; although the object I receive is concretely different from the object I have alienated, they are identical insofar as both are equal in value. The intelligibility of an exchange, in contrast to that of a gift, presupposes that the things exchanged are equivalents.[50]

The idea of an unequal exchange is therefore intrinsically unintelligible: to qualify as intelligible, the transaction must be mixed, i.e. partly gift and partly exchange. However, there is no presumption that the relatively impoverished party intended to make a partial gift. It is not to be assumed that "whatever either party has promised in excess [of what he will receive] should be considered a donation... Whatever, in fact, the parties promise or give, they should be believed to promise or give on an equality with the thing which is about to be received, and due by reason of that equality."[51] Unless there is clear evidence that the difference in values was intended as a gift or that there was an assumption of risk with regard to this outcome, there immediately arises a right to restitution on the part of the party who has received less as against the party who has obtained more.[52]

Factors such as mistake, ignorance or need may be relevant as indicating the absence of a true donative intent. When any of these factors is coupled with an "exchange" of unequal values - for example, where there is a hidden defect in the subject matter or where there has been a mistake as to price - the excess can neither be explained as a gift nor be viewed as part of an exchange. But gift and exchange are the two categories of a transfer of right. Consequently, the excess that has been physically acquired by one party is not his by right: because he is not entitled to the excess, he cannot retain it. In this way, the required equality between thing and thing is preserved.[53]

Aristotle called this form of equality "arithmetic" and the form of justice, which orders transactions in accordance with it,

"corrective."[54] Just as the parties' equality as subjects having the moral capacity to own abstracts from their particular characteristics and aims, so the equality between thing and thing as objects being quantitatively equivalent in value abstracts from their concrete aspects and uses. The presupposition of the right in contract thus finds its immediate and adequate material realization in the exchange of equivalents, which is accordingly a content penetrated throughout by the form of contract. The significance of equality in exchange is that, unless it is intrinsically conceivable, there can be no adequate material embodiment of the abstract equality entailed in a transfer of right. In gift, at no point are the two parties simultaneously owners; in exchange, however, both are owners throughout the transaction and, more exactly, are owners of quantitative equivalents or of things which are abstractly equal embodiments of the same value. The idea of equality in exchange is necessary, insofar as the unity of form and content in contract - of which its inherent intelligibility consists - will be incomplete and must therefore be superseded so long as the unity is not realized as a content that is adequate to its form.[55]

Although Grotius' account of contract required equivalence in exchange, he never elaborated this explanation of its necessity. The history of the natural law of contract suggests that such an explanation in terms of right required that the existence of an essential and intrinsic connection between the faculty of rational will and the equal moral capacity to own be demonstrated: it was necessary to show that the will, as the ground of right, must be embodied externally under the form of property and that abstract value in exchange can count as an adequate embodiment of the will. While the plausibility of Grotius' account of right rests upon a particular conception of human action as well as upon a stated connection between the will and the capacity of rights, he did not establish the rational necessity of this connection. Its adequate formulation had to await the elaboration of the notion of moral personality in the practical philosophy of Kant and Hegel.[56]

Footnotes

1. Citations in English are from The Law of War and Peace trans. F.W. Kelsey, Oxford University Press, 1925. Citations in French are from the classic translation by Barbeyrac. This paper is part of a longer essay treating Grotius' conception of the natural law of contract.

2. Grotius, supra n.1, BK II, Ch. XI, I i-iii. Puffendorf, On the Law of nature and nations, BK. III, Ch. V, 9-11.

3. Ibid. BK. II, Ch. VI, I-II; Ch. X; Ch. XI; Ch. XII; Ch. XVII, I-II.

4. In Grotius' Treatise, the analysis of the idea of right precedes the analysis of the idea of wrong. The former comprises, first, right that is entailed in original acquisition or ownership alone (BK. II, Ch. II, I; Ch. III, I; Ch. V; Ch. X) and, secondly, right that arises through derivative acquisition and promises (BK. II, Ch. VI; Ch. XI; Ch. XII); the latter is divided into civil wrong (BK. II, Ch. XVII) and punishable wrong (BK. II, Ch. XX)

5. Ibid. BK II, Ch. XI, III.

6. Here, I am disagreeing with Charles Fried's construal of moral autonomy as it relates to contractual obligation. There are two distinct and mutually irreducible forms of self-determination, namely autonomy of will as expressed in juridical legislation and autonomy of will as expressed in ethical legislation. Whereas Fried grounds contractual obligation on the latter, Kant explicitly bases it on the former. Fried, Contract as Promise, Ch.2 and Kant, The Metaphysical Elements of Justice, trans. J. Ladd, pp.20-1.

7. Kant, supra n. 6, p.44; Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465 (H.L. (E.)).

8. Fried, supra n.6, p. 43.

9. Corbin makes this distinction. See Corbin on Contracts: One Volume Edition, Sec. 55.

10. Thomas Aquinas, Summa Theologica, trans. Fathers of the Dominican Province (1949) Pt. II-II Q. 88, Art. 2

11. Grotius, supra n. 1, BK. II, Ch. XI, IV, ii.

12. Ibid.

13. Ibid. BK. II, Ch. XII, I-III.

14. I have used the Barbeyrac translation here because it most accurately reproduces the meaning of the text. Grotius, supra n. 1, BK. II, Ch. XI, I, iii.

15. Ibid. BK. II, Ch. VI, I, i. Grotius is quoting from Aristotles's Rhetoric I, v.

16. Ibid. BK. II, Ch. VI, I-II.

17. Ibid.

18. Ibid. BK-II, Ch. XI, XIV.

19. Ibid. BK. II, Ch. XI, XIV.

20. Kant, Doctrine du Droit, trans. A. Philonenko, pp. 149-152.

21. Ibid., p. 152.

22. Grotius, supra n.1, BK. II, Ch. IV, III; Ch. VI, I; Ch. XI, XI.

23. The analysis of a completed immediate gift would be fundamentally the same.

24. Kant, Metaphysical Elements of Justice, supra, n.6. p.51. Barbeyrac makes the same distinction in his commentary on Grotius' Treatise contained in his translation of that work: "Autre chose est le droit, autre chose la jouissance du droit; autre chose est le Contrat, & autre chose son exécution. Pour transférer le droit il ne faut que la volonté du Propriétaire; et cette volonté, à en juger par la simplicité du Droit Naturel a son plein effet dès le moment que le Contrat de vente est conclue; à moins qu'on n'en convienne autrement." (BK. II, Ch. XII, XV, footnote 5).

25. This is Hegel's formulation. Encyclopedia para. 494.

26. A gift also displays this essential form in that it entails a transfer of right to one thing between two persons who mutually recognize each other as subjects having the moral capacity to own. Hegel, Propédeutique Philosophique: Doctrine du Droit, para. 15.

27. Grotius, supra, no. 1, BK. II, Ch. XII, I-II.

28. Ibid. BK. II, Ch. XII, VIII.

29. Thomas Aquinas, supra n. 10. Pt. II-II, Q.61, Art. 3, Respond.

30. Ibid. Pt. II-II, Q.62, Art. 5, Respond.

31. Grotius, supra n. 1, BK. II, Ch. XI, I.

32. Ibid. BK. II, Ch. XII, II.

33. Ibid. BK. II, Ch. XI, IV, i.

34. Ibid. BK. II, Ch. XII, XV.

35. Thomas Aquinas, supra n. 10, Pt. II-II, Q.57, Art. 1.

36. The rationalized natural law classification was formulated first by Kant and then by Hegel. See Kant, Doctrine du Droit supra n. 20, pp. 163-166 and Hegel, Philosophy of Right, trans. T.M. Knox, para. 80.

37. Grotius, supra n. 1, BK. II, Ch. XII, IV & XXIV-XXVI.

38. Aristotle, Nicomachean Ethics V. 3: Hegel, Encyclopedia para. 539.

39. This paragraph summarizes an argument that is made in P. Benson and E.J. Weinrib, "The Intelligibility of Action in Natural Law" (forthcoming).

40. Grotius recognizes equality of standing as integral to the idea of right in distributions: II, XVII, III. It was Hegel who explicitly grounded the right to equal consideration in distributions upon the imperative of free personality and explained the basis of the rule of law in terms of the latter: Encyclopedia, para. 539.

41. This classification of gift and exchange is essentially the same as that formulated by Kant and Hegel.

42. Grotius, supra, n.1, BK. II, Ch. XII, V.

43. Ibid. BK. II, Ch. XII, VIII.

44. Ibid. BK. II, Ch. VI, I; Ch. XI, V. Aristotle, Nicomachean Ethics, III, i.

45. Ibid. BK. II, Ch. XI, VII; Ch. XII, X. Also: Hegel, Philosophy of Right, para. 40.

46. Ibid. BK. II, Ch. XII, IX. Also: Thomas Aquinas, supra n.10, Pt. II-II, Q. 77, Art. 3.

47. Ibid.

48. Ibid. BK. II, Ch. XII, XI.

49. Ibid. BK. II, Ch. XII, XII.

50. Ibid. BK. II, Ch. XII, XII, i.

51. Ibid. BK. II, Ch. XII, XI.

52. Ibid. BK. II, Ch. XII, XII.

53. This interpretation of equality is, it is suggested, the rational basis of the Common Law's construal of the effects of unconscionability and of the Civil Law's understanding of the consequences of vitiated consent. For a fuller discussion, see P. Benson, "The Idea of Right in Contract" (forthcoming). The Common Law approach is most adequately stated by Lord Denning M.R. in Lloyd's Bank v. Bundy [1974] 3 ALL ER 757 (C.A.). An excellent analysis of German and French Civil Law is found in J. Gordley, "Equality in Exchange" (1981) 69 California Law Review 1587 at 1590-1637.

54. Aristotle, Nicomachean Ethics V. 4.

55. This paragraph summarizes an argument initially presented in P. Benson "Grotius' Contribution to the Natural Law of Contract" (unpublished paper given at Legal Theory Workshop Series, Faculty of Law, University of Toronto, January 12, 1984. No. WSVI-5.) Its systematic justification is developed in P. Benson and E.J. Weinrib, "The Intelligibility of Action in Natural Law" (forthcoming) as well as in P. Benson, "The Idea of Right in Contract" (forthcoming). The classic and complete statements of the argument are in Hegel, Philosophy of Right, para. 72-77 and Encyclopedia, para. 493-4.

56. The further elaboration of this point constitutes a section of a longer essay treating Grotius' conception of the natural law of contract.