Promise and Donation in Louisiana and Comparative Law

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I. INTRODUCTION

The interaction between the concepts of promise and donation is an under-explored aspect of private law, and it is intended in this Article to attempt to remedy the relative neglect of the relationship between these two important pillars of the law. In particular, an answer will be sought to the fundamental question of whether donation can, and perhaps ought to be, characterised in promissory terms, or whether some other characterisation is more apposite. The answer, it will be suggested, is that, while promise and donation can both be characterised as unilateral juridical acts, it is possible to separate out promises to donate (obligations as to a future performance) and acts of donation (present acts of transfer), even if it is quite common in some legal systems to bring both within the heading of donation more widely conceived. It will also be suggested that, while many systems conceive of donation in

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contractual terms, this is unnecessary: donation is essentially a unilateral act, requiring only the act of will of the donor to facilitate the transaction. Contractual conceptions have developed in large part, it would appear, as a result of concerns that donations not be unconsidered and potentially illiberal and that they not be foisted upon unwilling recipients. However, protecting against unconsidered giving need not necessitate dressing up a unilateral act in bilateral clothing, and giving a donee a right of rejection is just as suited to preventing unwanted donations as is requiring the donee to accept.

There is, as the following discussion will show, quite a degree of jurisdictional divergence in the conception of, and requirements for, donations. The legal systems chosen for comparative study in this paper are a mix of civil, Common law and mixed systems: (1) Louisiana; (2),(3) two further mixed legal systems, Scotland and South Africa; (4) France; (5) Germany; and (6) England (with some reference to U.S. Common law also). The interrelationship of promise and donation in these systems is undertaken largely with *inter vivos* donations in mind.

A useful place to begin the comparative analysis is with an exploration of the meaning of the concepts of promise and donation.

A. The Concept of a Promise

A promise is a statement by which one person commits to some future beneficial performance, or the beneficial withholding of a performance, in favour of another person.[1] The simplest, and some might argue the purest,[2] form of promise is the unilateral promise, that is to say a promise which is intended by the promissor to be immediately binding upon him as soon as the promise is uttered (or committed to writing and delivered) and which therefore requires the act of will of the promissor alone to be constituted as an obligation. There is however nothing inimical to the idea of promise in a promise being conditional, in the sense that it may be intended only to bind the promissor when a condition is fulfilled by the promisee.[3] Such a conditional promise is apt to describe the reciprocal promises which contracting parties can be said

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1. There is a vast literature on the conceptual issues relating to promise. For citation of much of it, see M. HOGG, PROMISES AND CONTRACT LAW: COMPARATIVE PERSPECTIVES ch. 1 (Cambridge Univ. Press 2011). For a comparative critique of promissory solutions to some common transactions, see M. Hogg, *Promise: The Neglected Obligation in European Private Law*, 59 INT'L & COMP. L.Q. 461-79 (2010) [hereinafter Hogg, *Promise: The Neglected Obligation*].

2. The Scottish jurist James Dalrymple (Viscount Stair) described a unilateral promise as 'that which is pure and simple' (THE INSTITUTIONS OF THE LAW OF SCOTLAND I,x,4)

3. Such a condition is suspensive of the obligatory effect of the promise.

to make to each other in a mutual contract, or indeed the promise made by one party alone in a gratuitous contract (such promise being met only with an acceptance but no reciprocal promise), thus allowing contract to be described in promissory terms.[4]

In at least one of the systems studied (Scotland), there is a tradition of utilising the term promise in a legal context only in the narrower sense, for the reason that the unilateral promise is conceived of as a separate and valid species of voluntary obligation from the contract.[5] However, in the other systems studied one encounters use of the term promise to mean either a unilateral promise (which will only exceptionally constitute a valid obligation at law in those systems) or, as the context may suggest, a conditional promise of the type which is a component of a contract.

B. The Concept of Donation

Donation is a gratuitous transfer of ownership of a thing by one person to another.[6] In its simplest form, donation may be constituted by an immediate act of transfer, by which *A* donates something to *B* simply by handing over the thing or some symbolic token of the thing (title deeds to land for instance) to *B*.[7] In this simplest form of donation, it seems to make little sense to describe the act of donation in promissory terms: if *A* simply transfers ownership in something to *B*, he is not promising to do anything, as a promise relates to a future performance rather than a present act. *A* is donating the thing, rather than promising to donate it. If then there can be said to be any promissory aspect to a present act of donation, it can only lie in some supposed implied and secondary promises attendant upon the act of transfer.[8]

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4. Though some would dispute that promise is apt to describe the nature of contract, such debate is too involved for the present discussion. For the detail of the debate, see HOGG, *supra* note 1, ch. 2.

5. *See further* M. HOGG, OBLIGATIONS ch. 2 (Edinburgh: Avizandum Pub'g, 2d ed. 2006).

6. So defined, the concept excludes the gratuitous conferral of benefits other than ownership upon another, though on some jurisdictional definitions of donation such benefits are considered as falling within the rules on donation.

7. As discussed below, this simple conception of donation is that which is embodied in the French *Code civil*.

8. For instance, it may be that *A* is deemed, in the act of donation, to have impliedly warranted certain things about the thing transferred and to have impliedly promised, if such warranty turns out to be false, to make good the breach of warranty. Such fictional, implied promises may best not be described as promises at all however, and may be better seen as obligations resulting from default rules of law governing the transaction.

In a more extended case of donation, however, the juridical act of transfer may be preceded by a preliminary juridical act, such preliminary act being a commitment of the intending donor to undertake the act of donation at some specified future point. Such a commitment is most likely to be in contractual form, though it may conceivably, in systems where this is possible, take the form of a unilateral promise. This more extended case of donation thus includes two stages as components of the transaction: at point in time 1 (T_1), the intending donor undertakes to effect the gratuitous transfer of a thing to another at some later point in time (T_2)—this constitutes the first juridical act (J_1); at T_2, the donor effects the transfer to the donee, thereby conveying ownership of the thing transferred—this constitutes the second juridical act (J_2). Both juridical acts could theoretically be characterised as unilateral in nature, as both might conceivably (if the legal system in question were to so allow) be undertaken by the donor alone, without the involvement of the donee. In all legal systems, however, J_1 might alternatively be accomplished by way of a contract, a bilateral juridical act, and in many systems J_2 is also conceived of as a bilateral juridical act, either because the act of transfer is also described as a contract or, without being described in contractual terms, the (non-contractual) act of transfer nonetheless requires to be accepted before it is considered to have been validly undertaken. In these extended cases of donation, as in the simpler cases of donation, there is no need to see the act of transfer (J_2) as a species of promise, even if its occurrence is in fulfilment of a prior unilateral or contractual promise constituting J_1. The act of transfer is a present act by which ownership is transferred, one which is thus inapt for characterisation in promissory terms.

In the extended cases of donation, either the act of transfer alone,[9] or the act of transfer together with the preceding obligation requiring it, may be described as constituting the 'donation'. Where the preceding obligation is conceived of as forming part of the overall donative transaction, it may be styled as the 'contract of donation' to distinguish it from the later act of transfer; then again, in some systems where the act of transfer is itself conceived of as a contract, the term 'contract of donation' is used to encompass J_2. Such jurisdictional inconsistencies in characterisation of donation are apt to confuse.

9. This is the French position: see discussion below at Part II.B in the main text.

C. Definitional Problems

Further confusion is created for a comparative analysis of donation and promise through the ascription of different meanings to fundamental characteristics of juridical acts such as unilateral/bilateral and gratuitous/onerous. The problem is even greater when, within a single jurisdiction, there is disagreement among jurists as to the meaning of such characteristics. That latter type of infra-jurisdictional confusion can be minimised (though not always eliminated) in systems in which fundamental characteristics of such acts are given a definition in applicable legislation, as is the case with the Louisiana Civil Code, for instance.

As to the distinction between unilateral and bilateral (or multilateral), the fundamental disagreement lies in whether unilateral means (as it is suggested it ought to) an act which can be constituted by one party alone, or whether alternatively (or additionally) it relates to the number of parties coming under duties as a result of the constitution of the act in question. If the former meaning is exclusively maintained, then a promise constituted as an obligation by one party alone is evidently unilateral, whereas a contract must necessarily be bilateral, requiring the conduct of two (or more) parties to constitute it. On this meaning, donation might be unilateral if the involvement of the donee is not required to effect the donative transfer, whereas if a system requires the donee's co-operation the act would be bilateral in nature. If the latter meaning is maintained, then a promise legally constituted by the act of one party alone would again seem to be unilateral, given that no-counter performance could be compelled at the point of the obligation coming into being. On this second meaning, donation would be likely to be considered unilateral, unless a reciprocal duty of gratitude were considered to be imposed upon a donee, as is the case in some systems. Whichever of the two meanings of unilateral is signified in law is evidently a matter for particular jurisdictions. In Louisiana, for instance, which lacks a requirement of mutual consideration, the Civil Code provides for 'unilateral contracts', by which is meant a contract where one party's obligation lacks a reciprocal obligation;[10] in English law, which has a requirement of mutual consideration, a 'unilateral contract' in this sense should not be able to exist, though in fact certain unusual types of arrangement which receive legal recognition but which appear to lack reciprocal consideration are nonetheless described as 'unilateral

10. CC art. 1907: 'A contract is unilateral when the party who accepts the obligation of the other does not assume a reciprocal obligation'.

contracts';[11] in Scotland, the idea of unilateral denotes the first of the two senses described earlier, that is the number of parties required to constitute an obligation, so a contract can never be unilateral given that all contracts require the cooperation of two parties at least in order to be constituted. To complicate matters even further, some systems use the idea of unilaterality in both of the senses described: in South Africa, for instance, contract is always bilateral in the sense that it requires to be constituted by the conduct of two parties, but a particular contract may additionally be unilateral in the sense that it imposes only duties on one of the parties. The confusion inherent in such dual usage of terminology is undesirable and might be avoided by using an alternative term to unilateral to describe obligations imposing duties on only one of the parties.

Such an alternative way of describing an obligation imposing duties on only one party could be found through use of the term 'gratuitous'. Thus, a 'gratuitous contract' could be characterised as one imposing duties on only one party, the opposite being an onerous contract (one imposing duties on both parties). However, matters are complicated by debates as to whether the idea of a gratuitous transaction is one under which *A* cannot compel any counter-performance from *B*, or whether it relates to the factual question of whether *A* has received any counter-performance, whether or not it might have compelled such performance from *B*.[12] Gratuitousness is generally judged from an objective perspective—what matters is that the party undertaking the act receive no reciprocal benefit—though in some systems the idea of the subjective intention of the party undertaking the act also forms a part of the definition.[13] Thus, in Louisiana, a gratuitous contract is defined by reference both to the liberal motivation of the first party (it must be one which is undertaken 'for the benefit of the latter') as well as its effect in

11. In English law, some instances of what are called unilateral contracts are bilateral juridical acts, characterised by both offer and acceptance (such as offers of reward, the performance of the stipulated conduct required for the reward being considered the acceptance), while others appear to be unilateral juridical acts, not requiring acceptance to be constituted, such as the unilateral contract which was the subject of *Harvela Investments Ltd. v. Royal Trust Co. of Canada* [1986] AC 207.

12. This question is an unresolved one in Scots Law: see further HOGG, *supra* note 5, paras. 1.16-.17, 2.06-.11.

13. German law, as will be seen below, has a quite distinctive approach to testing the gratuitous nature of donation, focussing on the agreement of the parties that the transaction be gratuitous: see discussion in the main text, Part III.

fact (it is undertaken 'without [the first party] receiving anything in return').[14]

Lest it be thought that legal Codes resolve all such definitional problems, it might be noted that even in Louisiana, as a result of the definitions adopted in the Civil Code, there remains a debate as to whether a gratuitous contract and a unilateral contract are really one and the same thing, merely described from a different point of view,[15] or whether, while all gratuitous contracts are unilateral, not all unilateral contracts are gratuitous.[16]

The plethora of definitional permutations described above make comparative discussion of the nature of promise and donation a complicated affair. In an ideal comparative world, all Western legal systems would agree terms for such fundamental descriptors of the nature of an obligation; without such agreement, comparative analysis of donation is rendered more difficult. Such an ideal world is some way off, however.

D. Donation in Roman Law

The roots of modern legal conceptions of donation lie in Roman law, albeit that a full development of the potential which donation held for effecting the gratuitous conferral of benefits upon others required further development by the scholastics and canonists.

In classical Roman law, donation had no special form of its own: it was a *causa*, or reason for a legal act, rather than a type of legal act itself. Rather than a single form of donation, a number of different types of juridical act could be used to effect a transfer which was donative in character (in classical terms, one which was intended to confer a gratuitous benefit upon another party, not necessarily ownership of a thing). Thus, a present and immediate gratuitous transfer of property requiring a formal conveyance could be accomplished using the form of *mancipatio*; a promise of a future donation could be achieved through use of a *stipulatio* ('Do you promise to give me your cow gratuitously?' 'I promise'). The general point to note is that, while a mere informal agreement to donate could not (at least in classical Roman law) be enforced, any one of a number of valid forms could be used to effect donation: what linked all acts classifiable as donation was the *animus*

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14. CC art. 1910: 'A contract is gratuitous when one party obligates himself to another for the benefit of the latter, without receiving anything in return'.

15. On such a view, the focus in the idea of a gratuitous contract is the motivation for the undertaking, whereas the focus in the idea of a unilateral contract is the effect produced.

16. On this view, gratuitous contracts are merely a subset of unilateral ones.

donandi (intention to donate), and, so long as such donative intention might be achieved using a specific legal form, that form could be utilised to give the intention legal effect. Originally, an intended donee who was the mere recipient of an informal promise to donate (or, for instance, the promisee under an improperly constituted *stipulatio*) acquired no right to the thing donated unless and until delivery of the thing was effected, though the necessity for delivery could be avoided in later Roman law through registration of an instrument of donation.[17]

Despite the freedom to donate suggested by the multiplicity of forms which a donation might conceivably take, this very freedom was in part responsible for suspicions concerning donation in Roman society. What appeared to be one thing, might in reality be something else. An apparent gratuitous promise might conceivably be a bribe; a seemingly unobjectionable gift by husband to wife might be made in favour of an undesirable spouse, one perhaps of lower social standing than the donor and of whom the donor's family disapproved, thus conceivably transferring wealth from one family to another; a transaction might dilute an heir's inheritance by transferring property to other beneficiaries. In consequence, classical Roman law came to restrict the use of donation by, for instance, prohibiting, at the commencement of the Imperial era, donations between spouses.[18] In time, however, Roman law became more disposed towards donation, especially under the reign of the Emperor Constantine, whose Christian faith informed a favourability on his part towards charitable donations.[19]

One innovation of Constantinian law was to see donation as a bilateral act, immediately executed and instantly transferring ownership from donor to donee:[20] donation on this view had begun to move beyond a mere *causa* towards something of the form of a specific legal transaction, one conceived of as comprising a one stage juridical act rather than the alternative J_1 and J_2 model discussed earlier. Donative transfers had to be undertaken in written form, the document narrating the name of the donor, the title, and the description of the property,[21] and the thing to be donated had to be delivered to the donee before witnesses.

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17. As to registration of instruments of donation, see discussion in the main text below.

18. *See* R. ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 482-90 (Oxford Univ. Press 1996). This rule lingered long into the modern law in some places: in South Africa it was not abolished until 1984 (see the Matrimonial Property Act, Act 88 of 1984, § 22). See, for the rule against marital donations, D. 24.1.64, 65, 67.

19. ZIMMERMANN, *supra* note 18, at 491.

20. *Id.* at 492.

21. C. Th. 8.12.1; C. 8.53.25.

The instrument of donation had to be registered.[22] These requirements of form and constitution were designed to facilitate proof of donations as well as to act as a form of safeguard against unconsidered giving. One can trace legal restrictions on donation in some of the modern systems discussed below to such Constantinian regulation of donation, residual suspicion against acts of donation often manifesting itself in the modern law either in a presumption against an act having a donative character or at least in restrictive rules for the constitution or registration of donations.[23]

By the time of Justinian there had been a conceptual separation of the act supporting the donation and the act of transfer: donation had become a two-stage transaction. Informal agreements by which a party undertook to make a donation became enforceable,[24] Justinian confirming such undertakings as a valid type of contractual relationship. This development may be seen in the mention in a Justinianic text from the Codex of 'contracts of sale, exchange, or donation'.[25] The registration requirement was relaxed for small value donations (those of 500 *solidi* or less, which did not require writing either[26]) and for some other categories of donation.[27] A further noteworthy development was that the *pollicitatio* (a type of unilateral promise in favour of a municipality) came to be treated as a type of donation,[28] this providing a further historic basis (in addition to the form of *stipulatio* mentioned earlier) for later conceptions of donation as a form of promise. The motive of donors came to be emphasised as crucial in determining whether donation had occurred: had the donor acted from motives of liberality and generosity?[29] While a laudable concept, this sowed the seed of uncertainty and subjectivity in the law, as it was not always clear why donors acted, some perhaps acting out of mixed motives. For this reason, some modern codifications (though not the French) have moved away from enshrining the motive for a donation at the heart of the concept.

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22. C. Th. 8.12.1. Eventually, registration was taken to preclude the need for witnesses (C. 8.53.31), hence the omission of any such requirement in the interpolated text of C. 8.53.25. But for donations not in writing and not registered, witnesses were still required in later Roman law.

23. For a fuller discussion of the historical reasons for such suspicion of donation, see R. HYLAND, GIFTS: A STUDY IN COMPARATIVE LAW (Oxford Univ. Press 2009).

24. INST. II,7,2.

25. C. 4.21.16.

26. C. 8.53.29.

27. As to such exceptions, see C. 8.53.34.

28. D. 39.5.19 pr.

29. D. 39.5.1 pr. A remunerative gift, for past services rendered, was however also considered a donation: D. 15.3.10.7.

The history of the Roman law of donation is one of shifting attitudes towards the desirability of donation, of changing rules regarding delivery and registration, as well as of differing analyses of donation as either a one or two stage transaction and as founded upon a 'contract of donation' or not. The various modern legal systems considered below did not uniformly transpose a single position adopted by Roman law at any one point in its history; rather, a number of different positions adopted along the historical arc of the development of Roman law are reflected in the rules of the modern law of the various systems studied, though the specific present day position adopted by each is the result not just of the direct absorption of Roman law but of a later legal development (in which Roman legal influence played a role of varying importance) which will not be considered in any depth in this paper.[30] As will be seen however, one Roman rule that most (though not all) later systems continued to maintain was the need for some formality in the constitution of, or registration of, donations.[31]

II. BASIC ELEMENTS OF DONATION IN MODERN LAW

In the modern law, comparative analysis indicates that the elements typically required for donation are that:

(i) the transfer must be gratuitous (a requirement of variable, and somewhat imprecise, content), or at least (in some systems) predominantly gratuitous;
(ii) the donor must intend to undertake a donation (that is, must possess *animus donandi*), or there must be an agreement that the transfer is a donation;[32]
(iii) the nature of what is transferred or created must (in most systems) be a patrimonial right rather than, for instance, the performance of services or some contractual right;[33] and

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30. It has, for instance, been convincingly shown how, after the rediscovery of Aristotle in medieval Europe, the Aristotelian idea of liberality—giving the right amounts, to the right people—was used to justify legal restrictions such as the formalities often imposed upon gratuitous transactions like donation: see JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (Oxford Univ. Press 1991).

31. Though some exceptions came to be commonly accepted, for instance donations to charitable causes and gifts in consideration of marriage (these were both discussed by, among others, the Spanish Scholastic Molina: see his work DE IUSTITIA ET JURE, disp. 279, nos. 2 and 7), as well as so-called 'remunerative donations' (Molina, disp. 279, no. 6). The concept of the 'remunerative donation' is retained in the Louisiana Civil Code, as the discussion in the main text below indicates. Louisiana also maintains special rules relating to donations for charitable purposes (see La RS 9:2271) and by third parties in contemplation of an intended marriage (CC art. 1734).

32. The latter approach is that of German Law: see discussion below, Part III of the main text.

(iv) the donation must (in most systems) be in a particular form or be accompanied by notarial attestation.

As will be seen, as in later Roman law, most modern systems view donation as a contract, and employ the language of promise (if at all) only in the sense of a 'contractual promise' to donate, Scotland being the exception where a unilateral promise is a separate species of obligation thus making it possible unilaterally to promise to make a donation. While in most systems, there is an understanding that any preceding obligation to donate (J_1) and the succeeding act of transfer (J_2) can be distinguished, the consequence of this division is sometimes under-explored in national jurisprudence, and in a number of systems both juridical acts are considered component parts of an overall transaction referred to in the round as 'donation'.

A. The Mixed Legal Systems: Louisiana, Scotland and South Africa[34]

1. Louisiana

In the jurisprudence of Louisiana, a donation has been described as a 'gratuitous or predominantly gratuitous juridical act whereby one person (the donor) disposes of a thing (the donatum) in favour of another (the donee)'.[35] More particularly, though the Civil Code does not provide a general definition of a donation, it does provide a definition of donation *inter vivos*, that being: "a contract by which a person, called the donor, gratuitously divests himself, at present and irrevocably, of the thing[36] given in favour of another, called the donee, who accepts it."[37] Given the requirement that the donor divest himself 'at present' of the thing, it would seem that strictly speaking any preceding undertaking to

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33. South Africa is an exception here, where the gratuitous cession (assignment) of rights is considered a form of donation.

34. On the nature of mixed legal systems, see K. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5 (2003).

35. J. RANDALL TRAHAN, LOUISIANA CIVIL CODE: DONATIONS AND SUCCESSIONS, A COURSEBOOK 5 (3d ed. 2004).

36. The thing disposed under a contract of donation must be either ownership or some other real right (there is no concept of the donation of services in Louisiana).

37. CC art. 1468. The requirement that the donor must divest himself 'at present' does not exclude donations subject to suspensive conditions from being valid donations, because, although the condition may not be fulfilled for some time, the donor immediately divests himself of the power to recall the obligation (see further 10 LOUISIANA CIVIL LAW TREATISE § 8.1). By an 'irrevocable' act is meant one in terms of which the will of the donor to effect the donation is irrevocably given (thus the donor may not retain the power to revoke the donation at will); however, the donative transfer may be revoked for failure of a specified cause, for ingratitude, for non-fulfilment of a suspensive condition, or upon the occurrence of a resolutive condition (see CC art. 1556).

effect an *inter vivos* donation at some future point (rather than presently) would not qualify as a component part of the *inter vivos* donation, but would be a separate preceding transaction, albeit one concerning an intended *inter vivos* donation. However, as in other systems, an act of donation in Louisiana can occur without reference to any prior duty to effect the donation.

It was only in a change made to the Code effective as of 1st January 2009 that donations *inter vivos* were explicitly characterised as contracts. Prior to that, the relevant article used the word 'act' rather than 'contract' to describe such donations, although in any event the received view had been that donations were by nature contractual.[38] The contractual characterisation of *inter vivos* donation would seem to apply not just to the present act of transfer which is the subject of the above-quoted provision, but, given the lack of any codal provision providing for enforcement of unilateral promises, to any preceding undertaking to effect a donation in the future. The Louisiana characterisation of *inter vivos* donation as contractual derives from French law, as later discussion of the French position will indicate.

As to the gratuitous, or predominantly gratuitous, nature of donation, whilst, as noted earlier, gratuitous contracts are defined in the Civil Code both by reference to the benevolent intent of the donor and the objective absence of a reciprocal benefit, because donation need only be 'predominantly gratuitous' the codal provisions on donation provide a specified arithmetic rule for testing such a predominance of gratuitousness: a transaction cannot fall within the donative provisions of the Code if it is burdened with an obligation imposed on the donee that results in a material advantage to the donor of two-thirds or more of the value of the thing donated.[39] The result is two subclasses of transaction, each falling within the donative provisions of the Code: what may be called 'pure' donations (those which are entirely gratuitous in nature), and what are styled 'onerous donations' (those which impose a burden on the donee which does not result in a material advantage to the donor of more than two-thirds of the value of what is donated).[40] The two-thirds of value rule

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38. See, for instance, the comment in 10 LOUISIANA CIVIL LAW TREATISE § 9.1 (1995) that a 'donation *inter vivos* is a contract between the parties. . . acceptance by the donee of the object offered is required.' The contractual nature of donation in Louisiana Law is discussed at some length by RANDALL TRAHAN, THEORETICAL AND PRACTICAL COMMENTARY ON DONATIONS (2000) (commentary on CC art. 1468 (*inter vivos* donations)).

39. CC art. 1526 (prior to 2009, the stipulated proportion was only one half).

40. Confusingly, transactions which fall foul of this two-thirds value rule are still called 'onerous donations' even though they fall, in consequence, outside the scope of the donation regime of the Code. There would seem to be much sense in dispensing with the use of the term

also applies in respect of donations given as payment for services rendered by the donee, these constituting a third subclass of donations styled 'remunerative donations'.[41] The result of the 'predominantly gratuitous' rule is therefore that a transfer can involve a reasonably considerable reciprocal benefit to the donor and still be considered donative under Louisiana law. As to other features of donation apart from their gratuitous nature, under the Code they may be conditional[42] or revocable,[43] but may not relate to future property.[44]

The general rule is that an *inter vivos* donation must be 'made by authentic act under the penalty of absolute nullity, unless otherwise expressly permitted by law',[45] such authentic act being 'a writing executed before a notary public or other officer authorized to perform that function, in the presence of two witnesses, and signed by each party who executed it, by each witness, and by each notary public before whom it was executed'.[46] Such an act will usually state the identity of the donor, the donee, and the thing donated, in it.[47] Strictly, the act of donation could be signed by the donor alone, and then notarised.[48] However, because a valid donation requires that the donee must actively accept the donation before the donation takes effect,[49] such acceptance is also usually stated in the act of donation by means of a notarised signature of the donee. However, the donee might conceivably accept in writing at some later point.[50] If immovable property is donated, not only

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donation for such transactions altogether: see further on this point, TRAHAN, *supra* note 38, pt. B ('Lack of proper systematization'), who suggests that an approach similar to that of the Roman law's category of mixed sale with donation (*negotium mixtum cum donatione*) would make for a more appropriate description for transactions which are not wholly gratuitous.

41. CC art. 1527.

42. *Id.* art. 1528. The condition, however, may not be one the fulfilment of which depends solely on the will of the donor: *id.* art. 1530.

43. *Id.* art. 1532. If no stipulation as to revocability is made, then revocation for ingratitude is possible, though this is strictly curtailed to cases where the donee has attempted to take the life of the donor, or if he has been guilty of cruel treatment, crimes, or grievous injuries in respect of the donor: *see id.* art. 1557.

44. *Id.* art. 1529.

45. *Id.* art. 1541. An exception from the requirement of an act of donation is made in respect of the donation of incorporeal moveables evidenced by a certificate, document, instrument, or other writing, and transferable by endorsement or delivery (*id.* art. 1550), where compliance with any formalities for the transfer of such property is required but not the notarised act normally required for donations.

46. *Id.* art. 1833(1).

47. *Id.* art. 1542.

48. The codal provisions concerning donations by third parties in contemplation of a marriage require the instrument of donation to be signed by the donor and by both of the prospective spouses, though no express acceptance of the donation is required (*id.* art. 1735).

49. *Id.* art. 1551.

50. *Id.* art. 1544.

must a valid act of donation be undertaken,[51] but the executed act must be recorded in the records of the Parish where the property is located.[52] In the case of corporeal moveable property, an authentic act of donation is not required: delivery of the thing by donor to donee is sufficient to effect the donation, such delivery both substituting for the notarised document[53] as well as constituting acceptance of the donation.[54]

The contractual conception of *inter vivos* donations in Louisiana means that any unilateral promissory description of the nature of such donations would be both inappropriate and inaccurate. Even donations *mortis causa*, which are conceived of in Louisiana as unilateral juridical acts,[55] have not been described in the Louisiana jurisprudence in promissory terms, though such a description might, in an ideal world, be apposite for them.

Louisiana has some quite extensive provisions relating to the interaction of donation and succession rights,[56] including requirements that *inter vivos* donations may have to be 'collated' in order to ensure a proper apportionment of an estate among the heirs, but discussion of those provisions is outside the scope of this Article, particularly as they do not give rise to any promissory issues that are not already covered by the above discussion of Louisiana law.

2. Scotland

Scotland is perhaps the jurisdiction where it is easiest to undertake validly to donate something. That is so by virtue of a number of features of the law: (1) no specific formalities relate to a juridical act of transfer constituting a donation (J_2) in Scotland, so that donation can be constituted orally, if desired, and proved by witness testimony alone—significantly, there is no requirement of writing or notarisation; (2) such a juridical act of transfer (J_2) is viewed as a unilateral act, not requiring (as in Louisiana) the consent of the donee; and (3) any prior obligation to effect a future donation (J_1) need not be in the form of a contract, but may also be undertaken unilaterally, in the form of a unilateral promise (some

51. *Id.* art. 1550.
52. LA. REV. STAT. 35:199.
53. CC art. 1543.
54. *Id.* art. 1544.
55. *Id.* art. 1469.
56. See the title of the Civil Code on Successions (*id.* arts. 871 ff), especially ch. 2 (on collation, *id.* arts. 1227 ff).

such promises requiring to be in subscribed written form, but others requiring no more than oral constitution).[57]

Despite the relative ease with which donation can be achieved in Scotland, there is still, as in most other systems, a residual suspicion of donations. This suspicion was certainly established by the time Viscount Stair wrote his seminal work *The Institutions of the Laws of Scotland*. Stair, writing in the late seventeenth century, noted that it is 'a rule in law, *donatio non praesumitur*; and therefore, whatsoever is done, if it can receive any other construction than donation, it is constructed accordingly.'[58] A further interesting feature of Stair's treatment of donation is that it is found in his discussion of 'obediential' (or involuntary) obligations, rather than as one might have expected of voluntary obligations. This was due to the fact that Stair saw donation as giving rise to an involuntary duty of gratitude on the part of the donee; if such gratitude was not forthcoming, the donation was invalidated and the donee obliged to return it.[59] In the late eighteenth century, donation began to be linked with promise (though any promise to donate (J_1) was conceived of separately from the act of transfer effecting the donation (J_2)),[60] however modern treatments of the law usually confine promise to works on contract and donation to works on property, there being little by way of unitary treatment of the promissory and transfer aspects of donation.[61]

It is clear that in the modern law both any unilateral promise of donation, as well as the donative act of transfer are conceived of as unilateral juridical acts, requiring only the active participation of the donor to effect them. They are also both gratuitous acts, in that the donor can compel nothing in exchange for the promise of donation or the transfer of the property in question (gratitude by the donee is no longer compelled). Each act, however, may be made conditionally (*sub*

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57. Business promises require no formality of constitution, and, while it may seem less likely that donations would occur in a business context, one can think of examples of such promises. Thus, a whisky manufacturer might unilaterally promise to the organisers of a charity raffle to donate a bottle of whisky to the raffle, or a company might, without any prompting, promise to another company in its group that it will donate to the latter certain equipment which it no longer requires. These undertakings, most naturally viewed as unilateral promises, would be enforced in Scots law. As to the formalities required for obligations, including unilateral promises, see the Requirements of Writing (Scotland) Act 1995, § 1.

58. INST. I,viii,2.

59. *Id.*

60. ERSKINE, INSTITUTE, III,iii,90.

61. For a forthcoming discussion which does link the two aspects of donation, see M. Hogg & H.L. MacQueen, *Donation in Scots Law*, *in* M. Schmidt-Kessel (ed.), DONATION IN EUROPEAN LAW (forthcoming).

conditione), in which case the obligation or transfer is not binding until fulfilment of the condition, or for a specific purpose (*sub modo*), as for instance in the case of a gift of a wedding present.

What is absent in Scotland is any treatment of donation in contractual terms. While there is nothing to prevent a contract of donation being drawn up, given the existence of a separate obligation of unilateral promise and the conception of that species of promise as a gratuitous obligation, it is perhaps unsurprising that prior undertakings to make a donation have most often been conceived of as unilateral promises and not contracts, given that they often predominantly reflect the will of one party. Neither has the act of transfer effecting a donation been conceived of in contractual terms: there is no tradition in Scots law of seeing the disposition of property, whether gratuitous or for consideration, in contractual terms, even if there is a preceding contract binding the transferor to make the disposition. A contractual conception of the transfer of property has been unnecessary given that the recipient of a transfer is not conceived of as having positively to accept the transfer; instead, a right of rejection exists (unless the recipient has previously bound himself to receive the property).[62] However, unlike unilateral promises, which may be made in favour of parties not yet in existence, a donative act of transfer cannot be made in favour of such a party: a transfer of property requires an extant transferee, even if the consent of such transferee is not required to effect the transfer.[63]

As to a unilateral promise to donate, the ordinary requirements for the formation of such a promise are applicable, principally that (1) there must be a disclosed intention on the part of the promissor to be bound at law to the stipulated promise, and (2) the promise must be in writing, if not undertaken in the course of business.[64] In respect of the act of transfer, the donor must clearly and unequivocally possess an intention to effect the act of donation (*animus donandi*).[65] Until 1920, there was a strong presumption against donation between spouses, but this particular presumption was abolished by statute.[66] Indeed, since 1920 other

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62. *See* STAIR MEMORIAL ENCYCLOPAEDIA OF THE LAWS OF SCOTLAND vol. 8, para. 611.

63. *Id.* para. 614.

64. Requirements of Writing (Scotland) Act 1995, § 1(2).

65. The requirement of a clear and unequivocal *animus donandi* has been stated in a number of cases: *British Linen Co. v. Martin* (1849) 11 D 1004 at 1008, per Lord Fullerton and at 1011 per Lord Jeffrey; *Heron v. M'Geoch* (1851) 14 D 25 at 30 per Lord Fullerton; *Sharp v. Paton* (1883) 10 R 1000 at 1006, per Lord President Inglis; *Callander v. Callander's Executor* 1972 SC (HL) 70. The requirement has often been justified as necessary to overcome the presumption against donation.

66. Married Women's Property (Scotland) Act 1920, § 6.

statutory rules have almost created a presumption in favour of the marital donation,[67] a notable contrast to classical Roman law. In addition to *animus donandi*, delivery of the property must take place, either actual physical delivery or, in the case of land or incorporeal property, some written document in terms of which ownership is transferred. No notarisation of the transfer, or the preceding promise, is required, though if the transfer relates to land the relevant act of transfer (the 'disposition') must be subscribed by the transferor[68] and, in order to effect the transfer of the real right of ownership, registered in the Land Register. As noted earlier, the donee is not required to accept the donation; however, the donee has the right of rejection, in which case the donation is treated as void.[69] In the modern law, revocation of an *inter vivos* donation, even on grounds of ingratitude, is not permitted, unless power to revoke was retained by the donor. Donations made by mistake or for a purpose which fails are remediable in unjustified enrichment, using either the *condictio indebiti* or the *condictio causa data causa non secuta*.[70]

The relative ease with which donations may be effected in Scotland (without the need for any specific form or for notarisation) is noteworthy. If one explanation may be offered, it would appear to be that the unilateral and gratuitous transfer which is at the heart of a donation is consistent with the Scottish approval of both gratuitous contracts and unilateral promises. The history of how that approval developed, under the influence of the canon law, has been traced elsewhere.[71]

3. South Africa

In South Africa, donation must be entered into out of 'pure liberality' or 'disinterested benevolence',[72] any reciprocal benefit to the

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67. Family Law (Scotland) Act 1985, § 26. This rule created a rebuttable presumption that money derived from any allowance made by either spouse for joint household expenses or similar purposes, or any property acquired out of such money, belongs to each spouse in equal shares. The rule therefore changed the common law presumption that such sums are provided for the purposes of household administration rather than as a personal donation. The new rule has been extended to civil partners also: Civil Partnership Act 2004, § 261(2) and sched. 28, pt. 2, para. 29.

68. Requirements of Writing (Scotland) Act 1995, § 1(2)(a)(i).

69. STAIR MEMORIAL ENCYCLOPAEDIA OF THE LAWS OF SCOTLAND, *supra* note 62, vol. 8, para. 611.

70. There is an ongoing debate as to whether positive proof of error by the pursuer is still a requirement for a claim brought under the heading of the *condictio indebiti*. If it is, then such a requirement would favour a defender who claimed that the payment was a donation, something which sits uneasily with the apparent presumption against donation in Scots law.

71. *See, e.g.*, HOGG, *supra* note 1, esp. ch. 3.

72. *Avis v. Verseput* 1943 AD 331 at 345, 377; *CIR v. Estate Hulett* 1990 (2) SA 786 (A) at 797H-J; *Welch v. Commissioner for the South African Revenue Service* 2005 (4) SA 173.

promissor negating its nature as a donation.[73] Donation must therefore in South African law be an entirely (and not merely predominantly) gratuitous act. Unlike in many other systems, donation is conceived of as including the transfer not just of real but also of personal rights, the latter being affected by means of a gratuitous cession (assignment).

In some descriptions of donation in South African Law, the characterisation of contract is reserved for any obligation to effect a donation (J_1), but not the succeeding act of transfer (J_2). Thus, Jansen JA said of donation that "it must be remembered that a contract of donation and the performance thereof, viz the delivery of the article donated, are two separate juristic acts: the one directed at creating an obligation and the other at transferring possession (and *dominium*)."[74]

Such a view seems to suggest that only (J_1) is a contract, (J_2) being a juristic act of a non-contractual nature by which ownership is transferred (the same view of J_2 as is taken in Scots law). By contrast, some commentators have described South African law as adopting a contractual analysis of both (J_1) and (J_2): thus, in one popular work on contract law, donation is described as comprising a preliminary contract establishing the duty to donate (J_1) as well as a second contract effecting delivery of the subject of donation (J_2). The second contract is described in the same work as operating both as a bilateral agreement discharging the original contractual obligation, as well as a so-called 'real agreement' effecting the transfer.[75] This dual contractual analysis seems unnecessarily complicated, imposing upon a juridical act of a property law character a further contractual aspect which is unnecessary to its proper functioning. It is suggested that Jansen JA's conception of J_2 in non-contractual terms is the preferable view. As is the case in other systems, an immediate act of donation, one not preceded by any obligation to donate, may occur, and is perfectly valid, even in the absence of the form discussed below for contracts of donation. In donations by means of a cession of rights, the donation is complete

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73. A donation made as recompense for past services or benefits, though styled a 'remunerative donation' is not subject to the restrictive rule on donations: see *Avis v. Verseput* 1943 AD 331.

74. Jansen JA in *Mankowitz v. Loewenthal* 1982 (3) SA 758 (A), at 765A.

75. *See* S. VAN DER MERWE ET AL., CONTRACT LAW: GENERAL PRINCIPLES 6 (Cape Town: Juta & Co. 2007, 3d ed.). Other treatments of donation simply describe donation in the round as a contract (singular): *see, e.g.*, WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW (Cape Town: Juta & Co. 2007, 9th ed.).

simultaneously with the cession, there being no subsequent act of transfer.[76]

Given that a contract to donate imposes a duty only on the donor, it is (in South African terms) a so-called 'unilateral contract', though also (being a contract) a bilateral juridical act.[77] Though it is sometimes stated that the donor under such a contract makes a 'gratuitous promise' to the donee, any such idea of promise is clearly of a contractual promise, one requiring acceptance before it can bind. In this respect, one may note the comments of Van Zyl J in *Commissioner for the South African Revenue Service v. Marx* that the donor's intention must be 'expressed as a promise (offer) to donate, which promise (offer) must be accepted by the donee before a binding contract of donation comes into existence'.[78]

A contract of donation must be in the form of a written document signed by the donor and witnessed by two witnesses.[79] This requirement of form for a unilateral contract of donation is not that dissimilar to the formal requirement for non-business unilateral promises in Scotland (though in Scotland only one witness is required). Though this could be argued to be a good example of how the form of contract law can be manipulated by a legal system to accommodate what is in essence a unilateral promissory undertaking,[80] it cannot be overlooked than in South African law the donee is required to accept the donation, even if not strictly required to sign the donor's deed of donation (though such signature often happens), before the contract of donation is complete, so that South African law is insistent upon the agreement of donee.

It used to be said in South Africa that contracts for the benefits of third parties were a type of donation, the promissor being viewed as making a donation of the stipulated benefit to the third party. This view was however disapproved of in *Hees v. Southern Life Ass'n Ltd.*[81] The case raised the question of how the nomination of a third party beneficiary under a life insurance contract ought to be characterised, the court holding that it was in the nature of a *stipulatio alteri*. The judgment

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76. *See* Botha J in *Weiner NO v. The Master & Others NNO* (1) 1976 (2) SA 830 (T), 842B-D.

77. *See* VAN DER MERWE ET AL., *supra* note 75, at 9. It was suggested earlier that it is preferable to reserve the term unilateral to juridical acts which are constituted by the actions of one party alone, but the South African tradition differs from this suggestion.

78. [2006] ZAWCHC 9, 2006 (4) SA 195 (C), per Van Zyl J, para. 24 of his judgment.

79. *See* General Law Amendment Act No 70 of 1968, § 43; General Law Amendment Act 50 of 1956, § 5.

80. I have argued elsewhere that it would benefit legal coherence to recognise unilateral promises for what they are, rather than force them to wear contract's borrowed clothing: *see* Hogg, *Promise: The Neglected Obligation*, *supra* note 1, at 461-79.

81. 2000 (1) SA 943 (W), 952-4.

further held that, even if it might be argued that the circumstances could be classed as an act of donation, given the characterisation of the act as a *stipulatio alteri*, it was the legal requirements for that type of transaction which should determine the conditions under which the benefit could be claimed and not the rules on donation. The judgment thus effectively results in the position that a *stipulatio alteri* is not to be seen as a type of donation in South African law.

B. French Law

In the *Code civil*, an *inter vivos* gift is said to be 'a transaction by which the donor divests himself now and irrevocably of the thing donated, in favour of the donee who accepts it.'[82] The French Civil Code does not expressly state that donations must be gratuitous, but donation is treated as one type of gratuitous legal act (*acte à titre gratuit*), gratuitousness being generally understood by French jurists to mean that which is given without some equivalent or corresponding transfer being received in return.[83] Thus, as Champeux puts it, to 'make a gratuitous disposition means transferring property to another without receiving anything in its place'.[84] As this statement, as well as the section of the Civil Code quoted above, makes clear, the focus in donation in French law is on the act of transference of the property in question: it is this which is conceived of as the donation. The donor must intend to make the donation,[85] and the donee must accept it, before the donation has any legal effect.[86]

Inter vivos donation in French Law is a contract: on this point both the *ancien régime* and nineteenth century French writers agreed.[87] Such a contract of donation might, in theory, be preceded by a prior promise to effect the donation at a subsequent point in time, but such a promise would again require acceptance to be a valid obligation and would have

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82. *Code civil* art. 894.

83. 5 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS no. 9.

84. J. CHAMPEUX, ETUDE SUR LA NOTION JURIDIQUE DE L'ACTE À TITRE GRATUIT EN DROIT CIVIL FRANÇAIS (Mâcon: Buguet-Comptour 1931).

85. The courts have insisted upon the presence of donative intent: *see* Civ. 1 June 1977, BULL. CIV. I no. 259; mere gratuitousness (i.e., lack of equivalence in French jurisprudence) is not enough: Civ. 14 Feb. 1989, BULL. CIV. I no. 79.

86. *Code civil* art. 932.

87. See, for instance, both Domat and Pothier to this effect: JEAN DOMAT, LES LOIS CIVILES DANS LEUR ORDRE NATURAL 1.1.10.1.1, *in* J. Remy (ed.), OUEVRES DE DOMAT vol. 1, at 310 (1835) ('The donation *entre vifs* is a contract that is made by reciprocal consent between the donor . . . and the donee . . . .'); Robert Pothier, *Traité des Donations Entre-vifs*, prelim. art., *in* Antoine-Philippe Merlin (ed.), OEUVRES DE POTHIER vol. 5 (1831) ('The donation *entre vifs* is a convention. . . .').

to be in the same notarial form as required for the donation itself.[88] In French law, therefore, although the contract of donation is 'unilateral' in the French codal sense of being gratuitous, it does not make sense to speak of a 'unilateral act' or 'unilateral promise' of donation even though one can by contract bind oneself to make a donation in the future.

French law shares the suspicions of classical Roman law about donations, and maintains what, to outside eyes, look like absurdly restrictive rules on the constitution of *inter vivos* gifts or promises of *inter vivos* gifts. Article 931 of the *Code civil* provides, "All acts containing an inter vivos gift shall be executed before *notaires* in the ordinary form of contracts; and there shall remain the original of them, on pain of annulment."[89] Such notarial execution involves the appearance of donor and donee, usually before two notaries. The instrument of donation is read aloud, before the parties and notaries sign it. The instrument is then also copied in to the public record. The strict requirement of article 931 is backed up by article 1339, which provides that no defects in *inter vivos* gifts can be cured after the event: a defective gift remains void, and has to be undertaken again in the correct form. The contrast with other systems, where often no formal involvement of the donee is required, and/or where delivery may cure defects, is marked.

The restrictive rule of article 931 is widely avoided in one of two ways. First, moveable property can be validly gifted simply through a manual transfer of the subject of the donation. This position prevails as a result of court decisions, even though it flies in the face of the all-encompassing wording of the article.[90] Incorporeal moveable property is included in the exception, and in such a case relevant documentation represents the thing to be transferred (for instance, share certificates).[91] More troublingly for the intended scope of article 931, sham or disguised gifts have also been exempted from its provisions. This exception stems from a decision of the *Cour de Cassation* of 1800, holding that a gift disguised in a false document dressing it up as a sale was valid, though

88. Unless the promise could be treated as a promise to fulfil a natural obligation, rather than one to make a donation: as to this, see further below.

89. The somewhat stilted English is in the official translation promulgated by the French Government.

90. *See* JOHN DAWSON, GIFTS AND PROMISES 71 (1980).

91. See cases mentioned by Dawson, *id.* at 73.

not in compliance with the rule on the form of *inter vivos* gifts.[92] The decision was, after some debate, decisively upheld in 1824.[93]

The use of such sham transactions has become so widespread that the genuinely notarised gift is a rarity.[94] The maintenance of this line of jurisprudence by the French courts (and the tolerance of such by the legislature) seems remarkable: if the terms of article 931 are considered too harsh, then it would seem sensible to review them legislatively. Continued encouragement of the recitation of false statements in legal documents hardly seems conducive to the fostering of honesty and transparency in the legal system.

Another tendency which has marginalised the application of article 931 is that a genuine contract of donation is classified as a contract of benevolence, that is to say it is one by which one of the parties procures a purely gratuitous advantage to the other.[95] The jurisprudence of the French courts has developed a test of whether or not a contract is genuinely benevolent based upon the intention of the parties. In other words, as in Roman law, what matters is whether or not there is *animus donandi*.[96] They have held that a contract undertaken from mixed motives, that is, only for partly benevolent reasons, does not count as donation: if the donor intends even some advantage to be gained by making the transfer, it is not a gift. The *Cour de Cassation* has previously held in one case that the obtaining of personal pleasure and satisfaction from promising funds constituted mixed motives, and so prevented the promise from being one of donation.[97] However, more recent case law has sought evidence of a genuine economic benefit to the party making the transfer before it can be held not to be donative.[98] That seems a logical conclusion, as there can be few cases of donation where the donor will not obtain some pleasure from undertaking the donative act.

Another way in which the provisions of article 931 are avoided in some cases is that a unilateral promise to perform a natural obligation is

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92. The decision is reported in P. SIREY, RECUEIL GÉNÉRAL DES LOIS ET DES ARRÊTS, AVEC NOTES ET COMMENTAIRES 1802.3.1.20.

93. A similar approach has been adopted in Belgium: see authorities cited by DAWSON, *supra* note 90, at 77 n.25.

94. *See id.* at 82.

95. Art. 1105.

96. *See* DAWSON, *supra* note 90, at 84 f.

97. D.P. 1863.1.402 (1863).

98. See, for instance, Trib. gr. inst. Nanterre 4 July 2000, RÉP. NOT. DEFRÉN. 2002 art. 37454 at 3, which decided that a number of small gifts to a religious organisation were not deprived of the character of donations merely because the donors might have derived some moral satisfaction from making them. *See also* J. GORDLEY, THE ENFORCEABILITY OF PROMISES IN EUROPEAN CONTRACT LAW 27 (Cambridge Univ. Press, 2001).

not treated as a donation, but rather as effecting a transformation of the natural obligation into a valid civil one. Thus, for instance, where *A* promises to pay for harm which he has caused to *B*, but which is not the subject of a legal duty to pay damages but only a natural duty to do so, he would by so promising be treated (according to the French jurisprudence) as having transformed the natural obligation to pay damages into a civil one, and thus one actionable by *B*. So, what might appear to be the promise of a gift by *A* is in fact treated as an act which transforms a natural right possessed by *B* into a civil one. The same analysis would be used of a promise to pay a debt which was no longer legally due (because it had prescribed, or been discharged in bankruptcy, for instance). The *Cour de Cassation* thus held a promise by a lottery winner to share his winnings with a friend who had completed the lottery entry form as transforming a natural duty to share the winnings in to a civil one to do so.[99]

Though an oral gift of land is, like all other oral gifts, void under article 931, there is case authority to the effect that if the donor has allowed the donee to live on the land and has voluntarily created false hopes of ownership on the part of the donee, the donee will be liable in damages in delict under article 1382.[100] Such a remedy is evidently a far cry from enforcement of the oral act of donation, such occurring, for instance, in Scotland (albeit that in Scotland a signed disposition of the property would in any event have to be delivered by the transferor as a pre-requisite for transferring ownership).

C. German Law

In modern German law, donation is dealt with mostly under the extensive provisions of §§ 516-534 of the German Civil Code (BGB), as well as by reference to a few other provisions.[101] Donation is defined under the BGB as a disposition, agreed by the parties to be gratuitous,[102]

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99. D 1997, Chr 85, note Molfessis.

100. *See* Aix 11 Jan 1983, DS 1985, 169 n, Légier.

101. For instance, § 1624 BGB, which regulates, *inter alia*, promises of donations made by parents to their children in contemplation of the children's marriage.

102. In German law, a gratuitous obligation is one which is not linked with another obligation, that is, it is not mutual in nature (see HYLAND, *supra* note 23, para. 283). Thus, if the party making the transfer believes that it is being made to extinguish an obligation, even a natural obligation, then it is not made gratuitously: RG 17 Jan 1902, RGZ 50, 134; H. Kolhosser, *in* MÜNCHENER KOMMENTAR, BGB § 516 no. 16. In a case where a promise was made by a man to a woman to pay her a sum of money should he marry, the RGH held that the circumstances indicated that the parties had not agreed that the promise was gratuitous, but rather had understood that it was a commitment made to compensate the woman for the many sacrifices she

by which *A* enriches *B* out of *A*'s assets.[103] As this distinctive approach to the idea of the gratuitous nature of donation focuses on the agreement of the parties, any further requirement relating to the motive or *animus donandi* of the giver, as exists (for instance) in French law, is superfluous. The reference to *A*'s assets precludes services from being the subject of donation, and the notion of a disposition excludes cases where *A* is not permanently deprived of his assets (gratuitous contracts of mandate, loans for use, and deposit, are dealt with elsewhere in the Code).[104] There must be a demonstrable loss to the donor and a demonstrable gain to the donee, though the gain to the donee may flow only indirectly from the donor, as occurs for instance if the donor discharges a debt owed by the donee to a third party.[105]

As in other systems, donation may occur without any prior obligation requiring the donation (as, for instance, in the case of the unexpected or impromptu gift) or it may be preceded by a contract of donation. It has been suggested[106] that, to distinguish these two situations, the former may usefully be called a 'manual gift' (*Handschenkung*) and the latter a 'promissory gift' (*Versprechensschenkung*), though these precise terms are not used in the BGB, which instead talks of a disposition (the act of transfer) and a promise or contract of donation.[107]

The act of transfer itself—the disposition (*Die Zuwendung*)—either occurs by actual concurrence of the will of the parties, or it may occur without reference to the will of the donee ('*ohne den Willen des anderen*', as § 516(2) puts it) so long as the donor makes the disposition together with a request that it be accepted within a specified reasonable period of time, and the donation is not rejected within that time (this has the effect that the donation is deemed to be accepted by the donee, thus confirming the donative disposition). In essence then, acceptance of the donation (whether actual or implied) by the donee is always necessary,

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had made for him and the many contributions she had made to his life: *see* RG 23 Feb 1920, RGZ 98, 176.

103. As defined in § 516(1). Both property and contract rights are included, as are the release of a debt and a waiver of rights. Payment of the donee's debt to a third party may also be an act of donation.

104. For mandate, see § 662 f; for loans for use, see § 598, and for gratuitous deposits, see § 690.

105. The similarity of the elements required for a claim in unjustified enrichment—though evidently with the distinction that the *animus donandi* provides the justification for retention of the enrichment—is noticeable.

106. H. Kollhosser, *in* MÜNCHNER KOMMENTAR, BGB § 518, no. 2.

107. Section 518 is entitled *'Form des Schenkungsversprechens'* (Form of the promise of donation), but the terms of the section speak of a 'contract' rather than a promise. *Id.*

even if in the case of presumed acceptance it is highly fictional. One may question the positive requirement that the transfer be accepted: if the concern is that donees do not become the unwilling or unwitting owners of assets which are forced on them, then it would seem perfectly possible (as is the case in Scotland) simply to give the donee a right to reject the asset, rather than positively require him to accept it, such rejection having the effect of *ex tunc* nullity of the transfer.

Contracts of donation require notarial recording of 'the promise' (as the relevant section styles the commitment to donate) in order to be valid,[108] though failure to meet this requirement can be cured by rendering performance under the donation.[109] This reference to 'promise' is telling: as the provision is designed to provide protection for the donor, it means that technically it is only its declaration of donative intent which requires to be notarised, even if in practice, if both parties have signed a contract of donation in any event, the declaration of both is likely to receive notarial recording.[110] An exception to the notarial requirement is the donation in favour of a third party by virtue of a third party contractual right, for instance the beneficiary under a life insurance policy, [111] which brings German law some (though not all) of the way towards the South African position of exempting gratuitous third party rights from classification as donations.

But what is the status in German law of a mere unilateral promise, rather than a contract, to make a donation? For example, what is the position if *A* states to *B* 'I promise to give you €1,000 on the 1st of next month', and nothing else (specifically, no acceptance of the promise) happens for the present? In such a case, there would appear as yet to be no contract of donation, and thus no concluded obligation on the part of the donor. However, it could be that such a promise might be treated as an offer, which in German law would by default remain open for acceptance by the offeree (the intended donee) for a reasonable time (such time, one would assume, would have to have expired prior to the time specified for payment). When an acceptance to this offer was forthcoming, a contract of donation would come in to being, though as a donative promise to pay it would require to be in writing and to be notarised.[112] To non-German eyes, this contractual explanation seems a

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108. *Id.* § 518(1).

109. *Id.* § 518(2).

110. If, however, notarisation of both parties' declarations was required by another provision, as for instance with land contracts, then that requirement would have to be met.

111. Kollhosser, *supra* note 106, § 518 nos. 6–7.

112. §§ 518(1), 780 BGB.

somewhat roundabout and thus not entirely satisfactory way of holding a donor to his clearly expressed unilateral declaration of will. A more direct means of enforcing the unilateral undertaking would surely reflect the reality of what is going on and show greater respect for the will of the intending donor.

Unlike in modern Scots and English law, in German law ingratitude on the part of the donee can found a right on the donor's part to revoke the donation, so long as 'the donee is guilty of gross ingratitude by doing serious wrong to the donor or a close relative of the donor',[113] such provision being a remnant of Roman law. But, other than this exceptional provision, references to liberality or magnanimity on the donor's part in the definition of donation itself were stripped from German law during the course of the nineteenth century and did not make it in to the BGB.[114] What is important for defining donation in present day German law is the gratuitous nature of the transaction, not its preceding cause.

Donations may be made conditionally,[115] and if the condition is not fulfilled the donor is entitled to demand the return of the gift.[116] Such conditions often relate to the way in which, or the purposes for which, the assets donated may be used. However, where the condition might conceivably be of benefit to the donor, the difficulty arises of how to distinguish between a permissible conditional donation and a contract of exchange (which clearly cannot be a donation in German law, by virtue of not being strictly gratuitous). If any benefit which accrues to the donor as a result of the condition might alternatively be characterised as a diminution in the value of what has been transferred, the German courts have been willing to treat the case as one of conditional donation. Thus, for instance, a condition in a donation of land that the donor be allowed to remain on the land for the rest of his life was held to be a subtraction from the value of the gift, and did not make the relationship one of exchange.[117] It will be evident that such a nice distinction (avoided in many cases in Louisiana by the requirement that donation be only 'predominantly gratuitous') is difficult to apply in practice.

A related issue with which the German courts have had to struggle is how to characterise a promise which, without being conditional, appears to have a mixed nature, partly donative and partly remunerative

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113. *Id.* § 530(1).
114. ZIMMERMANN, *supra* note 18, at 502; DAWSON, *supra* note 90, at 137-39.
115. § 525 BGB.
116. *Id.* § 527.
117. NJW 1949, 788.

(the 'remunerative donation' of Louisiana law). For instance, if *A* promises *B* the sum of €1,000, in part to repay a loan of €500 but also in order to gift the remaining €500, what is the nature of the promise made: is it a gift by *A*, or is it undertaken to remunerate *B* for a benefit already received by *A*? If it is a promise of a gift, then of course it requires proper notarisation to be valid. The courts have held that the mixed natures of such a transaction ought to be examined separately.[118] This however is not necessarily enough to save the remunerative portion of the promise from being invalid, because § 139 BGB provides that, if part of a legal transaction is void, the entire transaction is void, unless it can be assumed that the transaction would still have been undertaken without the void part. In the case of the example given, such an assumption would not hold, as *A* would not have undertaken to pay €1,000 merely to discharge a debt of €500. So, while in German law a promise may be seen as having a mixed character, partly donative and partly of exchange, the consequences of the invalidity of one of those natures is taken to affect the whole transaction.

D. The Common Law

The Common law, like Roman law before it and indeed other modern legal systems, is suspicious of donation, or 'gift' as the gratuitous transfer of property is usually called in English law. As Harman LJ put it, '[t]he English law of the transfer of property, dominated as it has always been by the doctrine of consideration, has always been chary of the recognition of gifts.'[119]

In the Common law, in contrast with many of the other systems studied, gift is not characterised as a contract. This is unsurprising, given that contracts (except those undertaken in deed form) require to be supported by mutual consideration in order to be valid, while a gift is by definition a gratuitous act[120] by which *A* transfers to *B* property in certain subjects. The concepts of consideration and gift thus seem to be irreconcilable opposites. How, despite this conceptual problem, the Common law is able, in some cases, to enforce *de facto* promises to make gifts is discussed below.

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118. 148 RGZ 236.

119. *In re Cole* [1964] Ch. 175, at 185; [1963] 3 All ER 433, 435.

120. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, II,xxx,1 (§ 440). For U.S. law, see RESTATEMENT (THIRD) OF PROPERTY (Wills and Other Donative Transfers) § 6.1 cmts. d-e (2003), which states that gratuitousness requires not only that the transfer take place without consideration, but also that it not be done in satisfaction of a legal obligation.

In English law, a gift may be validly effected by an immediate transfer of the property which is the subject of the gift, either by the handing over of the property[121] or some symbol of it (for instance, the title deeds to land[122]). There is no requirement for a written, subscribed document embodying an immediate donation,[123] or for notarisation. Though a gift must be accepted, such acceptance is presumed unless and until dissent is demonstrated by the donee.[124] Apart from such an immediate manual transfer of the subjects or a symbol of them, gift may also be undertaken by deed (discussed further below) or via trust.[125]

Given both the need for mutual consideration for a valid contract and the conflicting feature that donation is by nature gratuitous, how might one contractually bind oneself to make a gift in the future? The answer to the conundrum is that undertakings to give something of value to another can be supported by esoteric consideration, so that what is in effect a gift, made for nominal consideration, can be put into enforceable contractual form. Such esoteric but perfectly valid consideration allows enforcement of the contract (albeit that the contract is not technically a donation, given that the relationship is not gratuitous), as long as the consideration is rendered on condition of the promise. This solution means that certain transactions which in civilian systems would be treated as cases of donation can be enforced in the Common law as bargains on account of deemed adequate consideration.

This approach is made easier in England by the English courts' attitude that the adequacy of consideration will not be looked in to; while the U.S. courts have also adopted this view as a general rule,[126] they are willing to open up an investigation into the adequacy of consideration in cases of gross disparity between what is offered by each party.[127] In England, the courts have, for instance, held that a promise to pay someone a sum of money may find good consideration simply by the promisee's undertaking to come and collect the money.[128] Likewise, *A*'s

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121. *Cochrane v. Moore* [1890] 25 QBD 57 (CA).

122. Law of Property Act 1925, § 52(1).

123. Although the requirement for a deed is imposed in relation to transfers of ownership in land, whether for value or not: Law of Property Act 1925, § 52.

124. 'It was settled as long ago as the time of Lord Coke that the acceptance of a gift by a donee is to be presumed until his dissent is signified, even though the donee is not aware of the gift'. Per Lindley LJ, *London & County Banking Co. v. London & River Plate Bank* (1888) 21 QBD 535, 541.

125. *See further* HALSBURY'S LAWS vol. 20(1), para. 2.

126. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. c.

127. *See Parker v. Dodge*, 98 S.W.3d 297, 301–02 (Tex. App. 2003).

128. This position was settled early on in *Gilbert v. Ruddeard* (1608) 3 Dy 272b, 73 ER 606.

promise to make *B* a gift of £10,000 if *B* marries is a valid promise if supported by *B*'s reciprocal promise to marry, the promise of *B* being deemed adequate consideration for *A*'s promise. There is precedent for finding such a counter promise to marry even where the facts seem on their face to disclose no more than a gift made in prospect of the donee's marriage.[129] Things are, on the face of it, a little trickier in U.S. Common Law, where, despite the general rejection of an inadequate consideration rule, nominal consideration is often held not to be valid out of a concern that such consideration can be used as an attempt to clothe what would otherwise be unenforceable unilateral promises as sham bargains.[130] Such an attitude has the potential to be problematic for attempts to clothe some gifts as bargains. Nonetheless, the American courts have shown willingness to recognise non-pecuniary consideration as valid (for instance, love and affection or a pledge of marriage), a view which allows recognition of the validity of affective gifts. Additionally, where a promise of donation may also be characterised as having been made, in part, for some counter consideration, the American courts have treated the whole promise as being supported by consideration and thus as not requiring the stricter form required for gifts.[131] This may be contrasted with the approach of the German courts, discussed earlier, which have held that the mixed natures of a promise should be separated out by a court. Lastly, of course, the development in the United States of the doctrine of promissory estoppel has permitted the enforcement of promises of gift where the intended beneficiary has relied upon the promise, even if it was not supported by valid consideration or made in conformity with necessary formalities.[132]

Because English law also recognises that conditional promises may be the foundation of a bargain, some transactions which might have been classed as invalid gifts have instead been classed as conditional promises accepted by the promisee, often by conduct, and thus valid contracts. Thus, for instance, a promise to transfer a house to promisees if and when they paid all the mortgage payments on it was considered not as an

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129. *Shadwell v. Shadwell* [1860] 9 CB 159.

130. The problem is discussed by all commentators: *See, e.g.*, FARNSWORTH, CONTRACTS § 2.11 (4th ed.). Section 71 of the Restatement (Second) of Contracts is generally considered to have hardened the attitude against such sham bargains (see Illustration 5 to the article; see also commentary to that effect in E. Polubinski, *The Peppercorn Theory and the Restatement of Contracts*, 10 WILL & MARY L. REV. 201-11 (1968)).

131. *See, e.g.*, *Hamer v. Sidaway* 124 NY 538, 27 NE 256 (1891); RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c.

132. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90.

invalid gift but as a unilateral contract accepted by the conduct of the promisees in making the mortgage instalment payments.[133]

The treatment of the English and American courts of some transactions as contracts which would elsewhere be classed as gifts represents an imaginative approach to the difficulty which the doctrine of consideration poses to the validity of promises to donate. A less fictional and strained treatment would, of course, be achieved by a general recognition of gratuitous transactions: gifts will undeniably find a more comfortable niche in the Common law if and when the doctrine of consideration is abolished. Until such time, genuine promises of donation will be able to be made validly in England only by way of deed, that is, in writing expressing the intention that it be treated as a deed, signed by the donor, witnessed, and delivered to the donee,[134] or through the creation of a trust; in the United States, where trust is also a possible means to confer a gift, some states still maintain the formality of the seal, though some have abolished it, with the result that, where the seal has been abolished, either the gift must be put into the form of a so-called 'deed of gift' (a signed and witnessed instrument of gift) or else consideration or delivery is necessary to validate the promise of the gift.

III. PROPOSALS FOR HARMONISATION OF EUROPEAN LAW

At the present time, a great deal of scholarly analysis is being undertaken of the basis for a possible harmonised European private law set out in the Draft Common Frame of Reference (DCFR).[135] The provisions of the DCFR relating to donation (Part H of Book IV) merit consideration. Do they represent a desirable harmonised approach for European (and perhaps wider) law?

The opening sentence of the first article of the DCFR provisions concerning donation explains the intended primary field of application of the donation provisions: 'This Part of Book IV applies to contracts for . . . donation . . .'.[136] Importantly, however, a later article adds that the

133. *Errington v. Errington* [1952] 1 KB 290 (CA).

134. Law of Property (Miscellaneous Provisions) Act 1989, § 1. Under the Law of Property Act 1925, a legal estate in land may only be transferred by way of deed: this includes donations of land (§ 52(1)).

135. C. von Bar & E. Clive (eds.), PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN CONTRACT LAW: DRAFT COMMON FRAME OF REFERENCE 6 vols. (Oxford Univ. Press 2010).

136. Art. IV.H.-1:101(1). This Article further makes it clear that the primary province of the DCFR donation provisions is conceived of as being the donation of goods, but art. IV.H.-1:103 provides that other matters (money, electricity, incorporeal property, and rights in information or data) are also included. Immovable property or rights in such property are, however, excluded (art. IV.H.-1:103(2)), which evidently creates a large gap in the DCFR

provisions are to apply with appropriate adaptations to cases where a donor unilaterally undertakes to donate, as well as to immediate donative transfers.[137] The framework of the DCFR provisions thus encompasses both unilateral promises and contracts to donate (J_1) as well as acts of transfer by which donation is effected (J_2), whether or not the latter are preceded by any obligation to donate. Given the divergent jurisdictional treatments of donation, this approach to the concept of donation seems a commendably inclusive one to have adopted.

Donation is defined as a gratuitous transfer of ownership by the donor to the donee, with the intention of benefiting the donee.[138] Unlike the approach of, for instance, German law, this definition includes not only the element of an objective transfer of value but also a requirement of *animus donandi*.[139] Transactions can have a mixed donative/ remunerative character and still constitute a donation, and, unlike Louisiana law, no precise proportions are stated for the donative/non-donative ratio: transactions will be treated as donative as long as there is an intention *inter alia* to benefit the donee and the values conferred by each party are regarded by them as not substantially equivalent.[140] An undertaking subscribed by the donor (either in hard copy or electronic form) is required to effect donation,[141] except in the case of immediate transfers, donations by a business, or in defined circumstances where the undertaking is contained in a public broadcast.[142] It is noteworthy that the donee's signature is not a required part of the form, which suggests that any acceptance of a contract of donation might be by other means and might, perhaps, even be implied in the circumstances (though the text of the articles does not make this clear). Clearly, if it is a unilateral promise to donate which is at issue, no acceptance (whether express or implied) is necessary.

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coverage of donation. On the other hand, donations of rights to claim performance of an obligation (for instance, a service) are included in the regime (art. IV.H-1:103(d)), which makes it broader in one respect than some national donation regimes.

137. Art. IV.H.-1:104.

138. *Id.* art. IV.H.-1:102. The undertaking to transfer is gratuitous if 'done without reward' (art. IV.H.-1:201), which focuses on the factual question of a reciprocal benefit rather than the ability to compel any such benefit.

139. Intention to benefit is not given an exhaustive definition, the DCFR merely explaining that such intention may be present even if the donor is under a moral obligation to effect the transfer or has a promotional purpose in effecting it: *id.* art. IV.H.-1:203.

140. *Id.* art. IV.H.-1:202.

141. *Id.* art. IV.H.-2:101.

142. *Id.* art. IV.H.-2:102.

Donation is presumed to be irrevocable,[143] unless a power to revoke is conferred under the contract (or unilateral promise to donate)[144] or in the provisions of the DCFR (one such specified case is, as in German law, on account of the donee's gross ingratitude).[145] As in many of the systems studied, the transfer (J_2) must be accepted (and delivery taken) by the donee.[146] This requirement is an additional requirement to any acceptance which must be made of an offer to donate under a contract of donation (J_1).

The DCFR model is commendable in the clear distinction it makes between the juridical act which is an obligation to effect a donation (J_1) and the juridical act by which the gratuitous transfer of ownership is effected (J_2). It sensibly avoids characterising the act of transfer as itself contractual or promissory in nature, saving such characterisations for possible ways by which an obligation to donate may be constituted. Its mixed characterisation of the nature of donation by reference to both the objective effect of the transaction and the *animus donandi* is reminiscent of the approach of Louisiana law. Its willingness to allow the unilateral promise to play a role in donation—as one means by which to undertake an obligation to donate—is reminiscent of Scots law, and demonstrates a realisation of the flexible and beneficial uses to which the unilateral promise might be put in a future harmonised private law. Unfortunately, such a realisation appears not yet to have penetrated into existing EU legislation, where it would seem that a contractual conception of donation remains the single model, with the result that non-contractual manifestations of donation appear not to be caught by some legislation.[147]

IV. CONCLUSIONS

As the foregoing discussion discloses, the treatment of donation in the various legal systems studied varies dramatically, albeit that there are some features common to a number of legal systems. There is spectrum of ease by which donation may be undertaken, from Scotland at one

143. *Id.* art. IV.H.-4:101.

144. This would seem to be one of the 'appropriate modifications' of the provisions of the articles envisaged by art. IV.H.-1:104. *Id.*

145. On revocation for ingratitude, see *id.* art. IV.H.-4:201.

146. *Id.* art. IV.H.-3:301.

147. So, for example, Regulation (EC) No. 593/2008 (implementing the Rome I Convention on the Law Applicable to Contractual Regulations) seems to apply to contractual forms of donation only, even though, for instance, Recital 9 of the Proposal for a Regulation (on instruments of succession) contained within COM (2009) 154 Final states expansively that Reg. 593/2008 covers the 'validity and effects of gifts'. It would appear that the EU Commission has not fully appreciated that gifts can be in non-contractual form, and that such non-contractual gifs are therefore not covered by Reg. 593/2008.

extreme where, despite a presumption against donation, contracts or unilateral promises to donate may quite readily be undertaken, and where only *animus donandi* is necessary to effect transfer of the property, to England at the other extreme, where it is very hard to give obligations to donate valid legal form without resorting to esoteric conceptions of consideration, albeit that immediate donations can be effected manually without any formality. It is typical of civilian systems, and is also the position of Louisiana law, to insist upon formalities in respect of acts of donation (notarisation being a requirement in German, French and Louisiana law), as well as to adopt a contractual conception of undertakings to donate, and sometimes of the act of transfer also (though here, while an acceptance is usually looked for, this does not always denote a contractual acceptance). On such an approach, the role of promise is somewhat limited. Where donation is said to have a promissory aspect to it, this is predominantly in relation to the juridical act obliging a donation (J_1) rather than the act of transfer by which ownership is conveyed (J_2). Even then, promise is usually meant in a contractual sense: the intending donor offers (thus, conditionally promises) to effect the donation, an offer which the intending donee must accept. Scotland is the obvious exception, where it is quite possible unilaterally to promise to effect a donation, subject to a requirement of written form in the case of non-business promises. That seems a valuable possibility, one endorsed in the permissive approach of the DCFR, because, as stated towards the beginning of this paper, there is no reason why donation should not be seen as, at heart, a unilateral act, both as regards any duty to donate as well as regards the act of conveyance of the property. There is no over-riding need for the co-operation of the donee to effect a donation, albeit that it seems right that the donee be able to reject the donated property. The unilateral promise, as one type of unilateral juridical act, seems well suited to capture the nature of at least *some* undertakings to donate, even if not the act of transfer by which ownership is transferred, given the nature of such an act of transfer as a present conveyance of ownership rather than a pledge of future performance. To allow a role for unilateral promise in the law of donation is to permit certain instances of donation to take a form which most accurately mirrors their nature and the intentions of donors. That is surely a good thing, as it reflects the values of honesty and transparency in a legal system.

I have previously suggested[148] that unilateral promise might play a much wider role not just in donation but in private law more generally, a field of law in which, in some systems, unilateral transactions are too often forced into the ill-fitting framework of bilateral contracts. However, it is only the impetus for harmonisation of national legal systems which is likely to result in such a desirable outcome, as well as the further desirable outcome of a common, cross-jurisdictional understanding of basic concepts such as gratuitousness and unilaterality. Until such outcomes are achieved, a comparable approach to donation in the several legal systems examined will remain a future hope rather than a present reality.

148. Hogg, *Promise: The Neglected Obligation*, *supra* note 1, at 461-79.