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The law of Donation and the Market

Scottish, Portuguese and French perspectives

João Pedro de Sousa Assis

Submitted in Fulfilment of the Requirements for the Degree of PhD in Law

School of Law

College of Social Sciences

University of Glasgow

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Abstract

This thesis argues that donations are relevant in different contexts of life in society. It examines the way that donations have been connected with the family and argues that a comprehensive law of donation must also necessarily pay attention to donations made in different contexts of life, such as the market. Focusing on donations made in a market context, the present thesis will critically review the suitability of existing (national) laws of donation to regulate these donations. Three jurisdictions have been selected for this study: Scotland, Portugal and France. The choice of these three jurisdictions is based on the different policy considerations towards donation that helped to shape each one of them. In France, the protection of the family is of primary relevance to the law of donation; in Portugal, the law of donation is often set aside, gifts being instead regulated by non-legal normative rules (such as moral rules); and in Scotland, the law of donation exists as a complement to juridical acts primarily regulated by other laws (such as the law of warrandice or the law of promise). These national laws of donation will be critically reviewed in order to assess if they are fit to the purpose of regulating donations in the market context, in particular, by testing the protection conferred to a) the parties in the donation, b) third parties, and c) the community as a whole.

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Preface

« Les tolèrerait-on que, de toute façon, les mutations, passives ou actives, de l'ordre juridique sont dans la nature des choses. La mort, l'amour, la vie en fournissent les incontestables moteurs. La mort, parce qu'elle oblige fatalement à transmettre les biens du défunt à d'autres, ses héritiers. L'amour, parce qu'il conduit à cette attitude si pleinement humaine qu'est le don, de soi ou de ses biens. La vie, enfin, car il faut bien vivre, et par conséquent acheter, vendre, louer, prêter, confier en dépôt, voire obtenir réparation du dommage que l'on vous a injustement cause. »¹

Donation walks side-by-side with what makes us humans: the connection with others, the expression of love, gratitude, the beginning of a relationship or the end of a life. Donations may convey both love or a business opportunity, an almost unstated truth in today's legal writing. The primary motivation for writing a thesis on the law of donation is an attempt to understand why we give, and what motivates us as humans to benefit others, without the legal security of receiving something in return.

Considering that donation happens in multiple aspects of human life, I felt that some contexts where donations were being given, and received, were not being studied by scholarship. The market, in particular, where profit is an ever-present aim, was being disregarded by scholars and legal writers, who do not recognise that donation is part of everyday business. The present thesis therefore aims to add knowledge and, perhaps, set in motion a wider reflection of the role played by donation in all aspects of human life, starting by one of the most unspoken places where gratuitous transactions occur: the market.

¹ A Seriaux, Manuel de droit des successions et des libéralités (2003) p 9: "It is tolerated that, in any case, the passive or active mutations of the legal order are in the nature of things. Death, love, and life provide its incontestable motives. Death, because it fatally obliges the deceased to transfer his property to others, his heirs. Love, because it leads to this attitude so fully human that is the gift, of self or of one's assets. Life, finally, because one must live well, and therefore buy, sell, rent, lend, entrust to deposit, and even obtain compensation for damages unfairly caused".

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Aos meus pais, com todo o amor. Porque me ensinaram que amar é carinho, ternura e dedicação. Mais do que nunca compreendo que não interessa onde estamos, ou o que fazemos, o que interessa são aqueles que nos rodeiam. Mãe, Pai, amo-vos muito.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature _____

Printed name *João Pedro de Sousa Assis*

List of Abbreviations and Acronyms

CECL	Commission on European Private Law.
CJEU	Court of Justice of the European Union.
DCFR	Draft Common Frame of Reference.
DEC	Directive on Electronic Commerce.
EU	European Union.
FCC	French Civil Code.
MS	European Union Member State.
PCC	Portuguese Civil Code.
PECL	Principles of European Contract Law.
PICC	Principles of International Commercial Contracts.
SME	The Laws of Scotland: Stair Memorial Encyclopaedia.
TEU	Treaty on European Union.
TFEU	Treaty on the Functioning of the European Union.
Unidroit	International Institute for the Unification of Private Law.

Introduction

European society is ever evolving. Moving fast in an open Europe – where movements are freer than ever before² –, nationals from different European Union Member States (MS) enter into legal transactions, either gratuitous or non-gratuitous. The literature on the impact of non-gratuitous transactions and on the way in which MS deal with these transactions is vast: ranging from academic and opinion articles to monographs on European sales law³, competition law⁴ or banking law⁵, among others. However, the legal literature is not as comprehensive regarding the study of gratuitous transactions⁶. This gap in legal knowledge must be recognised and addressed. Thus, the present thesis aims to contribute to the study and debate of gratuitous juridical acts in Europe, by critically reviewing the suitability of national private laws to deal with the most paradigmatic gratuitous juridical act of them all: donation. The fact that gratuitous transactions happen in large number in the European

² J Groenewegen, W Schreuders, C Paridon, “Changing of the European economic reality – Changing Economic Order” (1991) *Journal of Economic Issues*, p 1169.

³ Among others, see G Alpa (e), *The proposed common European sales law: the lawyers' view* (2013); R Schulze (e), *Common European sales law (CESL): commentary* (2012); L Miller, *The emergence of EU contract law* (2011); C Twigg-Flesner (e), *The Cambridge companion to European Union private law* (2010); E Hondius (e), *Sales: (PELS)* (2008); W Guy-Martial, *Commercial agency and distribution agreements: law and practice in the member states of the European Community* (1989).

⁴ As examples, see K Hüschelrath, H Schweitzer (eds), *Public and private enforcement of competition law in Europe: legal and economic perspectives* (2014); or A Nuyts, N E Hatzimihail (eds), *Cross-border class actions: the European way* (2014).

⁵ G Scherf, *Financial stability policy in the Euro zone* (2014); VVAA, *European banking supervision taking shape: EBA and its changing context* (2014); G A Walker, *European banking law: policy and programme construction* (2007); VVAA, *European banking law: the banker-customer relationship* (1993); S Crossick, *European banking law: an analysis of Community and member state legislation* (1983); L Quaglia, *The European Union and global financial regulation* (2014); W Ringe, P M Huber (eds), *Legal challenges in the global financial crisis: bail-outs, the Euro and regulation* (2014); or T Lindblom, S Sjogren, M Willeson, *Financial systems, markets and institutional changes* (2014).

⁶ One of the few noticeable cases is the essay written by M Schmidt-Kessel, “At the frontiers of contract law: donation in European private law”, *European private law beyond the common frame of reference: essays in honour of Reinhard Zimmermann* (2008) p 77-96.

Common Market⁷, a common project which has been defined as the “most ambitious of all economic integration projects” in Europe⁸, must be acknowledged and critically analysed.

Donation may be found in multiple areas of life in society. The perceived success of the European Union (EU) for the promotion of peace and economic development⁹ is not synonymous with a full integration of an MS’s policies or laws regulating areas of life which are far away from the market, such as the regulation of family relationships. This obstacle to full integration is not just based on distrust towards the EU, leading to a referendum which has potentially decided the split between the United Kingdom and the EU (Brexit)¹⁰, but also on the respect for the cultural diversity of the MS¹¹ and compliance with the principles of conferral, subsidiarity and proportionality¹². Because donation is traditionally perceived as a gift between family members or persons with a previous relationship, it is often perceived as part of the individual MS’s cultural idiosyncrasies, and therefore, more obviously connected with the family than with the market¹³. But donation is more than an aid to social interaction. The purpose of the present thesis is to demonstrate that donation may be carried out with multiple motivations and aims, and between parties who did not know each other before the creation of the relevant donating relationship.

The present thesis will review three national laws of donation. Bearing in mind the above, this thesis will critically review different national laws of donation in Europe, using them as case studies to understand whether European laws of donation are ready to deal with the multiple areas where donation may be found. Contrary to the assumption that donation is often connected with the family context, these case studies will focus not on the family but on the market. By looking at how present national laws of donation regulate donations made

⁷ For detailed information, please see “An overview of philanthropy in Europe” of the Observatoire de la Fondation de France (CERPhi – April 2015), available at https://www.fondationdefrance.org/sites/default/files/atoms/files/philanthropy_in_europe_2015_0.pdf (assessed 28/10/2016).

⁸ L Kohr, “The History of the Common Market”, *The Journal of Economic History* (1969), p 441.

⁹ As an example, the EU has received the Nobel Peace Prize in 2012 “for over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe”, see https://www.nobelprize.org/nobel_prizes/peace/laureates/2012/ (assessed 28/10/2016).

¹⁰ Of which the most expressive case is the referendum in the UK, where a majority of voters has voted to leave the EU. See <http://www.electoralcommission.org.uk/> (assessed 28/10/2016) for more information.

¹¹ Art 3 TEU.

¹² Art 5 TEU.

¹³ An assumption that is starting to change. As a demonstration, the DCFR - C von Bar, E Clive, H Schulte-Nölke et al (eds), *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference* (2009) - has regarded donation as a market transaction, therefore being possible to be regulated by market-related legislation.

in a context where, at least one of the parties acts with a view to profit (often being a professional or a business), it will be possible to shed light on the fitness for purpose of laws of donation, to regulate donations in multiple areas of life. By looking at the market, it will be possible to assess if an area of life which is often perceived as distant from the family, context often associated with donation, is being effectively regulated by the relevant national law of donation, or if change is necessary. Three different jurisdictions will be used as case studies to demonstrate that the law of donation is an area where integration is far from complete. Scotland, Portugal, France have been selected as case studies due to the different policy considerations underlying their laws of donation, and the distinctive approaches they have to the regulation of donation in the different contexts of life, with emphasis on the market.

Why review Scots, Portuguese and French laws of donation? These three jurisdictions reflect different policy considerations towards donation. As will be discussed in the following chapters, Scots law of donation aims to enforce relevant expectation and reasonable reliance of the beneficiary¹⁴; Portuguese law of donation is concerned with not over-regulating acts which are already regulated under non-legal normative systems¹⁵; and finally the French law of donation, which aims to protect the family, and is primarily concerned with the protection of the donor and his family¹⁶.

Scotland. It will be argued in Chapter 3 that Scots law of donation acts as a “flavour” added to multiple juridical acts, acting as an extra set of rules for the regulation of gratuitous juridical acts defined as a donation in Scotland. This unique approach to donation contributes to the creation of legal security in all contexts where donations are made. As a demonstration, in Scots law, the power to revoke a juridical act classified as a donation must be reserved by the donor¹⁷. The donor only holds the right to revocation if both parties agree upon the existence of this right, or if the right was reserved by the donor. The firm use of the principle of irrevocability creates security because the donor cannot unilaterally revoke a valid

¹⁴ See Chapter 3 – Scotland, p 77.

¹⁵ See Chapter 4 – Portugal, p 139.

¹⁶ See Chapter 5 – France, p 197.

¹⁷ See 3.2.5 *Pure donations and donatons sub modo*, p 99.

donation. This principle is better respected in Scotland than in France, for example, where different revocation (legal) rights are available to the donor without being reserved¹⁸.

Portugal. As will be discussed in Chapter 4, Portuguese law has refrained from regulating acts which would otherwise be classified as donations, and therefore regulated under the law of donation, in order to allow non-legal normative orders to regulate them (such as sets of moral and/or religious rules). This principle is set under article 940 of the Portuguese Civil Code, which excludes from the concept of donation all gifts performed in accordance with social usages¹⁹, therefore establishing a difference between donations (*doações*), regulated by the law, and gift relationships (*dádivas*), not regulated under the law. To understand the definition of “social usage”, it is necessary to analyse the relationship between the parties, the social context of the act, and the object of the benefit. For example, if two friends exchange presents during the Christmas time, their actions are unlikely to be regarded in Portuguese law as a “donation”. Rather, their actions would be considered as part of the expression of friendship, and created as the result of the community’s social expectations.

France. It will be argued in Chapter 5 that French law of donation is designed to regulate donations made in a family context. Under French law, donation is deeply connected with the gratuitous circulation of real rights between family members, while other gratuitous juridical acts (which benefit the beneficiary by granting him a personal right or the discharge of a debt) are classified as “benevolent contracts”²⁰. Connecting donation with the gratuitous transfer of real rights has relevant consequences for the conceptualisation of donation and for the connection between donation and succession law (particularly in respect of collation)²¹. It is also worth mention that while French law distinguishes between contracts of donation and other benevolent contracts, there seems to be no distinct social function performed by these two types of contracts today, and the main reason for the existence of

¹⁸ See art 953 FCC.

¹⁹ Art 940 PCC.

²⁰ As defined by V Chauffour, *Le don* (1843) p 27: "Les contrats de bienfaisance par lesquels, sans se dépouiller proprement de sa chose, on procure cependant à un autre un avantage purement gratuit".

²¹ Art 912 to 930-5 FCC.

this distinction is the protection of the family patrimony against gratuitous acts of the donor²².

Different jurisdictions, different approaches. The Scottish, Portuguese and French laws of donation will be critically reviewed to assess whether they are fit to regulate donations in the market. The critical analysis of these three jurisdictions will rely on different sources, which are deemed as the most suitable to demonstrate the essential elements of donation in each jurisdiction. Therefore, while Chapter 3 – Scotland – relies on a critical analysis of the Institutional Writers, combined with court decisions and contemporary writers, for the critical review of donation in Scotland, Chapter 4 – Portugal – relies, instead, on a more ‘black letter’ approach, where the letter of the law (in particular the Portuguese Civil Code²³) is deemed of primordial relevance for this analysis. Chapter 5 – France – will primarily rely on the critical analysis of literature and philosophical ideas of French writers, considering that these sources are the most suitable to provide a better understanding of French law of donation as it is today.

Finally, the review of these national laws of donation will focus on the analysis of the law which regulates the rights and obligations emerging from donation only (in France and Portugal, the law regulating the contract of donation, mainly found in the Portuguese and French Civil Codes, and in Scotland, the law of donation). Other laws which may influence the relationship created by the donation will not be critically reviewed in the present thesis, such as collation, *action pauliana*, or unjustified enrichment, among others. The focus of the analysis in the laws of donation only aims to achieve a better understanding of how donation operates between the parties in each jurisdiction under review, avoiding the distractions of other areas of private law, which may be applicable to juridical acts which are never to be classified as a donations.

²² See Chapter 5 – France, p 197.

²³ As a civil law jurisdiction, court decisions do not set a precedent in Portugal, and equity may only be used by the courts within the limits set under art 4 PCC.

Chapter 1 - Revisiting the law of donation

1.1. Introduction

Based on the premise that the European society is ever evolving, this thesis will begin by introducing the reader to the challenges faced by the MS today, specifically those affecting areas of life traditionally connected with donation. Significant changes to the European legal and social context were made as a result of the European Union (EU), a political, economic and social project built upon the development of a common internal market to promote economic growth, social justice and solidarity among the MS²⁴. With a focus on the market, and also the human aspect of the market, the EU aimed to bring the MS ever closer together²⁵ and to create a cohesive European society, increasing the interaction between the people of different nationalities, cultures and backgrounds. Leaving aside the ongoing debate on the past, present and future merits of an economic and/or political union of states in Europe²⁶, a link between donation and personal and family relationships has been identified. This connection between family and donation will be critically reviewed to assess if donation may still be regarded as a family phenomenon or if the context where donation is typically used has changed. It will be argued that donation is present in different aspects of society in general, and in the European Common Market context in particular.

This chapter will demonstrate that donations are not restricted to family members and parties with past long lasting relationships, or those aiming to achieve one. On the contrary, it will be argued that (solitary) donations may happen between persons who do not have a previous relationship nor intend to maintain a relationship after the donation. This critical analysis is relevant for the assessment of the guiding rules towards an efficient law of donation and assessment of their fitness for purpose of regulating donations in multiple contexts. Finally, this preliminary chapter will be of fundamental relevance because it will prepare the ground for the enunciation of the different principles and objectives which, it is proposed, should be

²⁴ Art 3 TEU.

²⁵ Principle of the “ever closer union”, found in the Preamble of the 1957 Treaty and Preamble of the TEU.

²⁶ As examples, please see L Fabius, “The Future of the European Union”, *Challenge* (2001) p 5; G Wylie, “The Future of the European Union: What, How and Why?”, *Studies: An Irish Quarterly Review* (2002) p 125; J Santer, “A People’s Europe: The Future of the European Union”, *Harvard International Review* (1996) p 46; D Begg, “The Future of the European Union: Economic Growth, Social Cohesion and Sustainability”, *Studies: An Irish Quarterly Review* (2005) p 245-253; or M Burgess, “Introduction: Federalism and Building the European Union”, *Publius* (1996) p 1-15.

followed by a law of donation which is fit to regulate donations made in a market context. Having identified these principles, it will be possible to identify which jurisdictions are complying with the proposed objectives and which are not ready to face the challenges imposed by the EU and a continually evolving European market-orientated society²⁷.

1.2. Changes occurred

1.2.1. A united Europe

Important changes have been introduced by the EU in general, and by the European Common Market in particular, to the way in which the people of Europe live and interact with each other in society. The establishment of the EU started with the establishment of the European Coal and Steel Community (1951)²⁸ and the European Economic Community (1958)²⁹, and among other objectives, it aimed for the promotion of peace and economic development for its members³⁰. The Maastricht Treaty (1993) introduced the European Union as we know it today, as well as introducing European citizenship³¹. It is important to bear in mind that the European Union operates through a system of supranational institutions (such as the European Parliament, the European Commission, the Court of Justice of the European Union, the European Central Bank, among others)³² which have granted the EU competences that go beyond generic economic policy. The critical analysis conducted in the present thesis aims to contribute to a future debate on the development of the EU, as well as its areas of influence, by providing the elements to assess, in the future, if existing (national) laws of donation are fit for the purpose of regulating donations outside of the family context in general, and in the (EU) market in particular. The debate on this topic is more critical than ever before, and the continuing discussion proves the interest that exists in the topic at both the national³³ and European level³⁴. Furthermore, the debate on the suitability of the current law of donation raises the debate on the necessity for the development of a truly European

²⁷ G Clark, *A Farewell to Alms* (2007) Intr.

²⁸ Established by the Treaty of Paris (formally the Treaty establishing the European Coal and Steel Community).

²⁹ The Treaty of Rome (formally the Treaty establishing the European Economic Community).

³⁰ Please refer, in particular, to the Preamble of the Treaty of Rome.

³¹ Treaty of Maastricht on the European Union, Article B.

³² A Kaczorowska, *European Union law* (2nd ed 2011) p 128.

³³ As is the case of Scotland, where academics recently asked the question “should the law on donation be bigger or smaller?” in a conference of 4 December 2014, held at the University of Edinburgh. E Clive, “Should the law on donation be bigger or smaller?”, *European Private Law News* (2014).

³⁴ M Schmidt-Kessel, *Donation (Principles of European Law)* (2016 expected).

law of donation, and on how a unitary approach toward donation in Europe could be developed³⁵.

It is also important to mention that recent efforts were made to better understand and to build a European private law, which are based in the idea of continuous and further European integration³⁶, an integration based in the idea of a European common market³⁷. But the viability of this integration may now be in jeopardy due to the recent referendum on the withdrawal of the United Kingdom from the EU. In the referendum of June 2016, 52% of the British public voted to leave the EU³⁸, leading to a complex process of withdrawal under article 50 of the Treaty on European Union. The outcome of this referendum has consequences for the future of Scotland in the European Common Market (one of the jurisdictions under review in the present thesis), but as of yet these consequences are still unknown. Bearing in mind this uncertainty, it is still possible to argue that the arguments in the present chapter remain valid when determining what the needs of market donations are. This is because all jurisdictions under review in the present thesis are regarded as case studies of national laws of donation, and how these should evolve in a constantly evolving global market. Even if the Scottish jurisdiction leaves the EU, there will be ties and relevant commercial interactions between the Scottish market and the EU, and Scotland may remain in the European Common Market.

1.2.2. *The European Common Market*

The creation of a common market for the EU intended to “treat the EU as one territory where people, money, goods and services interact freely to stimulate competition and trade, and improved efficiency”³⁹. Considered by some as one of the EU’s greatest achievements⁴⁰, the European Common Market, has gradually eliminated restrictions and obstacles to the freedom of trade between MS. Furthermore, it is important to notice that not only the freedom of trade was brought by the European Common Market, but also the freedom of movement of people, goods, services and capital⁴¹. The European Common Market has also

³⁵ See Chapter 2, 2.2 European Private Law of Donation, p 54.

³⁶ Art 3 TEU.

³⁷ Beginning with the reviewing the Treaty of Rome in 1957.

³⁸ Official results may be accessed at: <http://www.electoralcommission.org.uk/> (assessed 28/10/2016).

³⁹ As described at the official page of the European Union, at <http://ec.europa.eu/> (assessed 28/10/2016).

⁴⁰ E Despres, “The European Common Market”, *Economic Digest* (1960) p 5.

⁴¹ Treaty of Maastricht on the European Union.

changed the way that imports and exports work within the EU, with new rules being set to facilitate transactions between buyers and sellers (either consumers or professionals) from different MS. This has been achieved both by generic policy measures of approximation between the different MS laws and by specific implementation of rules such as common tax rules⁴², the standardisation of competition practices⁴³ and the promotion of incentives to consumption within the European Common Market,⁴⁴ among others.

1.2.3. Changes for the family

The establishment of the EU and a European Common Market has led to faster and more frequent communication between persons from different nationalities, backgrounds and cultures in Europe. This interaction has taken place in multiple areas of society in novel ways. The development of the European Common Market and the freedom of movement of people brought changes not only to commercial trade but also to the development of new family realities - due to the freedom of movement, new families were created, where partners and their family members do not share the same nationality⁴⁵ (and therefore traditions and habits diverge). In a union of states where different languages co-exist and are “frequently paralleled by culture difference”⁴⁶, new mixed families were created where different nationalities, different backgrounds and different cultures contributed to the constant development of new family habits and social expectations. It may therefore be argued that families within the same MS can no longer necessarily be regarded as labouring under the same social expectations and rules, which makes the assessment of social usage harder than ever before. Different families – and donors and donees – within the same MS may follow different religions, different traditions, as well as different social and moral rules. The law of donation must be ready to deal with these differences, being able to regulate different cultural backgrounds under the same law and principles, and providing a common answer and regulation to families labouring under different moral, religious and social systems within the same community and/or MS. It is not argued here, however, that these differences must be overcome by applying economic, commercial or market based ideas to the

⁴² A Kaczorowska, *European Union law* (2nd ed 2011) p 82.

⁴³ J A Rahl, “European Common Market Antitrust Laws” (1971) *Antitrust Law Journal*, p 810-826.

⁴⁴ By raising consumer confidence in the market with the issue of consumer directives and other legislative acts which provide the European consumer with similar consumer rights and obligations. As example, see Directive 1999/34/CE, of 10th may; Directive 1999/44/CE, of 25th May; Directive 2000/31/CE, of 8th June; Directive 2005/29/CE, of 11th May; or Directive 2011/83/EU, of 25th October 2011.

⁴⁵ J D Medrano, “Social Class and Identity” (2011) *Sociology of the European Union*, p 39.

⁴⁶ K Knapp, “Common Market: Common Culture?” (1990) *European Journal of Education*, p 55.

regulation of donation. On the contrary, it will be suggested that the respect for these differences may only be found in an approach which is detached from religious or moralistic considerations, a legal regulation which respects the differences within the EU and within the relevant MS, and which is to be followed by everyone. An argument for a secular and equalitarian approach to donation will be made, and not one which follows market-based considerations. The study of donations made in a market context is therefore conducted, in the present thesis, in order to inquire if present national laws of donation are fit to regulate donation in multiple contexts, including in one of the contexts which is regarded as most distant from family: the market.

1.2.4. *Consequences of the changes*

Contrary to standard economic models⁴⁷, the transfer of goods and services in our society does not take place entirely by exchange. Gratuitous transfers, also referred to as the gift economy⁴⁸ or the third sector⁴⁹, are part of our economy. Furthermore, the changes brought by a united Europe have affected different areas of life in society, both connected and unconnected with the market. An inquiry into the consequences for donation of the changes that have occurred in Europe and a consideration of the best tools to deal with these consequences is therefore now relevant. This does not mean that the present (national) laws of donation necessarily need to change because changes have occurred. On the contrary, the following chapters aim to assess if present (national) laws of donation are ready to deal with a European society where principles such as equality and security are more than ever necessary to the implementation of the European project. It will be therefore argued that these principles are necessary for the promotion of confidence, as well as a healthy relationship between parties which may come from diverse backgrounds and/or do not know each other before donating to each other, therefore promoting a more effective regulation of these donations.

In respect of European private law in general, and European law of donation specifically, two opposite possibilities are available for the creation of regulation of private law in

⁴⁷ K J Arrow, "Gifts and Exchanges" (1972) *Philosophy and Public Affairs*, p 357.

⁴⁸ D J Cheal, *The gift economy* (1988).

⁴⁹ H K Anheier, W Seibel, *The Third sector: comparative studies of nonprofit organizations* (1990).

Europe: the creation of uniform rules, which are applicable in all EU equally⁵⁰; or EU withdrawal from this competence, leaving it for the different MS to regulate. The loudest (academic) voices are those which defend the creation of a true European private law, equal for all citizens of the EU. One of those voices is Ole Lando, who advocates the need for uniform rules, considering that one European private law will: (i) facilitate cross-border trade within Europe; (ii) strengthen the European single market; (iii) create an infrastructure for community laws governing contracts; (iv) enable the creation of guidelines for national courts and legislatures, thus creating a degree of uniformity in the application of private law throughout Europe; and (v) the construction of a bridge between civil law and common law⁵¹. The present thesis intends to add to this debate by assessing the fitness for purpose of present national laws of donation to regulate donations in multiple contexts. As mentioned before, the outcome of this critical analysis will contribute to this debate, by providing knowledge on the existing regulation of an area of private law.

1.3. Multiple dimensions of donation in Europe

1.3.1. Language and literature considerations

Donation is not a simple and unified concept, understood in the same way by all people. On the contrary, donation may signify different realities, both from a legal and from a non-legal perspective. This complexity is demonstrated by everyday language and by literature. In English, different words are used to signify donation. The word ‘gift’ may designate both the object of donation and the act of donating, usually connected with reduced pecuniary value gratuitous exchanges (alms, presents, and gratuities). The word donation, is an expression with Latin roots, being commonly used to designate the act of donation, rather than an object, usually connected with formal gratuitous transactions (and empirically perceived as of relevant pecuniary value). Both words are adequate legal terms to address the donating act – gift in England⁵² and donation in Scotland⁵³. Donation is also used, in both Scotland and England in its Latin form, when referring to gifts on death: *donatio mortis*

⁵⁰ O Lando, “Principles of European Contract Law: An Alternative to or a Precursor of European Legislation?” (1992) *American Journal of Comparative Law*, p 573; O Lando, “European Contract Law” (1983) *The American Journal of Comparative Law*, p 654.

⁵¹ O Lando, H Beale, *Principles of European Contract Law, Parts I and II* (2000) p xxi.

⁵² W Blackstone, *Commentaries on the laws of England* (facsimile of the 1st ed [1771] 1979) 1, p 20.

⁵³ W M Gordon, “Donation” (2011) *The Laws of Scotland: Stair Memorial Encyclopaedia (SME)*, p 8.

*causa*⁵⁴. Portuguese and French languages, mostly due to their strong Latin roots, separate the word used to describe the juridical act from the act's object. The word used to describe the juridical act, like the word donation, derives from the Latin word *donatio*, creating the words *doação* in Portuguese⁵⁵ and *donation* in French⁵⁶. For present purposes, “donation” is used to describe the juridical act; “gift” is used to refer to the object of the donation.

In all the above mentioned jurisdictions, the conceptualisation of donation shares common points, such as the existence of the act of giving by the donor and correspondent reception by the donee. In addition, it is possible to recognise that the act of donating is common in European jurisdictions and deeply connected with living in a community, undoubtedly present in these jurisdiction's culture, and therefore, in European culture as well. The connection between donation and life in community in Europe is so strong that it is not surprising that many examples of donation appear in European literature. The variety and frequency of examples of donation being used in European literature demonstrates the variety of dimensions and meanings inherent in the concept of donation. Among other examples, it is possible to identify descriptions of the act of donation in the works of famous European writers such as Aristotle⁵⁷; Francis Bacon⁵⁸; or Jane Austen⁵⁹.

From a sociological literature perspective, it is impossible not to mention the work of Mauss and his views on donation⁶⁰. Mauss' views on donation ascertain the idea that the normative order of morality recognises the superiority of the giver⁶¹ (empirically justifiable by the fact that in some languages the word used to express gratitude also refers to the moral obligation to reciprocate or the superiority of the giver/donor⁶²). Under a donation relationship/spiral

⁵⁴ W H Winder, “Delivery of a *Donatio Mortis Causa*” (1940) *The Modern Law Review*, p 310; or P S James, *Introduction to English Law* (5th ed 1962) p 422; and H MacQueen, M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 8.

⁵⁵ Art 940(1) PCC.

⁵⁶ Art 893 FCC.

⁵⁷ Aristotle, *Nicomachean Ethics*, chap 2: “for the magnificent man spends not on himself but on public objects, and gifts bear some resemblance to votive offerings”.

⁵⁸ F Bacon, *The Advancement of Learning*, chap VI: “by virtue of which grant or donative of God Solomon became enabled not only to write those excellent parables or aphorisms concerning divine and moral philosophy, but also to compile a natural history of all verdure”.

⁵⁹ J Austen, *Sense and Sensibility*, chap 12: “Marianne told her, with the greatest delight, that Willoughby had given her a horse, one that he had bred himself on his estate in Somersetshire, and which was exactly calculated to carry a woman”.

⁶⁰ M Mauss, “Essai sur le don. Forme et raison de l'échange dans les sociétés archaïques” (1925), p 30-186.

⁶¹ M Mauss, “Essai sur le don. Forme et raison de l'échange dans les sociétés archaïques” (1925), p 30-186.

⁶² For example, in the W Little, H W Fowler, J Coulson, C T Onions (e), *The Shorter Oxford English Dictionary on Historical Principles* (3rd ed 1973) 2162, the word “thank” expresses not only gratitude, but also means the “obligation to” or “consider or hold responsible”; in formal English, the expected reply to express gratitude is

of donation⁶³, the parties are not able to ‘exit the relationship’, and a reciprocal gift is and will always be expected in the future⁶⁴. Because the parties are not allowed to exit the relationship created, long lasting relationships are created, in opposition to what is traditionally expected from pure market relationships. It is therefore important to recognise that donation is a complex reality, comprising multiple aspects of life.

1.3.2. Legal considerations

From a legal perspective, “donation” is defined by various European civil codes as an agreement, by which a party (the donor) enriches another (the donee) gratuitously⁶⁵. Some of these civil codes even use the word “contract” to clarify that a donation emerges from a bilateral juridical act⁶⁶. Furthermore, donation has been historically regarded in Europe as one of the legal institutions able to transfer property⁶⁷, which does not signify that donation is only able to gratuitously transfer real rights. On the contrary, several European legal writers opine that any patrimonial right may be donated – so long as it can create a patrimonial benefit to the donee. Pothier offers one example, by defining donation as “an act by which a person deprives himself irrevocably, as a result of a liberality, of a thing in favour of someone who accepts”⁶⁸; and Ascoli, for whom a “donation is a contract by which the donor freely grants to the donee a non-accessory patrimonial right, or releases him from an obligation with the same nature, or waives on his behalf to acquire such a right”⁶⁹.

One of the main influences on the conceptualisation of donation in Europe is Savigny⁷⁰, who defines donation as any transaction with the following qualities: (i) a donation must be performed during the life of both parties, and cannot produce its effects after the death of the donor; (ii) the donation must cause an enrichment of the donee equal to the impoverishment of the donor; and (iii) the transaction must be entered with *animus donandi* of the donor, i.e.

“I am obliged”; and the same happens in other languages such as the Portuguese, where the word “obrigado” expressly means “I am obliged”.

⁶³ A never-ending circle of donations, which after being received, motivate new donations, creating a circular relationship where the parties are (morally or culturally) obliged to continue donating to each other.

⁶⁴ M Godelier, *L’Enigme du Don* (1996).

⁶⁵ According to art 940 PCC, art 618 of the Spanish Civil Code and art 894 FCC.

⁶⁶ As it is the case of the Portuguese Civil code (art 940).

⁶⁷ F C de Savigny, *Traité de Droit Romain* (2nd 1856).

⁶⁸ R J Pothier, “Traite des Donations Entre Vifs” (1830) *Oeuvres completes de Pothier*, p 54.

⁶⁹ A Ascoli, “Il Concetto della Donazione nel Diritto Romano con Richiami al Diritto Civile Italiano” (1893) *Studi e Documenti di Storia e Diritto*, p 249.

⁷⁰ F C de Savigny, *Geschichte des römischen Rechts im Mittelalter* (1816).

he must perform a donation with the purpose of creating a benefit to the donee. From Savigny's⁷¹ perspective, the point of departure for an analysis of the concept of donation is that donation is a transfer (usually of a real right) from the donor to the donee, creating a benefit for the donee and a correspondent loss for the donor; which means that, in the end, the enrichment of the donee should be in the exact same measure as the donor's impoverishment⁷².

Finally, donation is commonly regarded in Europe as a legal institute able to provide the donee with a legal right he did not hold before - i.e. a donation will allow the donee to hold a right which is directly correspondent to an economical benefit. From a comparative perspective, it is also possible to identify common cardinal elements for the existence of a donation in the European jurisdictions under study: first, an intention, or *animus donandi*, which is shown by a juridical act performed by the donor or by both parties⁷³. This juridical act is, at the same time, the legal justification for the acquisition and retention of the benefit received by the donee⁷⁴. Second, the absence of a previous legal obligation is required, as the relevance of an *animus donandi* is excluded by the existence of a previous legal obligation to give⁷⁵. Third, there must be gratuity, where a benefit must be granted to the donee with no corresponding recompense⁷⁶. Finally, there must be consent, which means that the creation of a benefit to the donee must always be accepted or there is a presumption in law of acceptance⁷⁷. It is therefore possible to conclude that different legal definitions of donation exist across Europe, ranging from addressing donation as a contract, in Portugal

⁷¹ F C de Savigny, *Traité de Droit Romain* (2nd 1856), p 3: “je place la donation dans la partie générale du traite, a cote du contrat, avec lequel elle a tant d’analogie par la généralité de sa nature et la multiplicité de ses applications”.

⁷² As mentioned in J D Thomas, “Some Aspects of the Law of Donation” (1965) *Acta jurídica*, p 165; and A Ferrão, *Das Doações Segundo o Código Civil* (1911) p 7.

⁷³ A Ferrão, *Das Doações Segundo o Código Civil* (1911) p 24; C F Almeida, *Contratos III* (2012) p 27; H MacQueen, M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 16; W Gordon, “Donation” (reissue 2011) *SME*, p 55; J Maury, *Successions et libéralités* (8th ed 2012) p 139; R Hyland, *Gifts, A Study in Comparative Law* (2009) p 149-169; A G Chloros, “The Doctrine of Consideration and the Reform of the Law of Contract. A Comparative Analysis” (1968) *The International and Comparative Law Quarterly*, p 146.

⁷⁴ F C de Savigny, *Traité de Droit Romain* (2nd ed 1856) p 3.

⁷⁵ See in particular the discussion on the Chapter 3 – Scotland, Scottish Chapter, 3.2.2.3 *No previous legal obligation to give*, p 88.

⁷⁶ J Maury, *Successions et libéralités* (8th ed 2012) p 139; M Grimaldi (e), *Droit Patrimonial de la Famille* (2011) p 776.

⁷⁷ In the Portuguese and French jurisdictions, the donation is a contract, which means that acceptance is required. In what Scots law is concerned, acceptance is debatable, and will be analysed in detail below.

and France, to defining donation as a flavour of multiple juridical acts which may be unilateral or bilateral (in Scotland).

1.3.3. Considerations on the social function of donation

Gratuitous acts such as favours, privilege and everyday acts of kindness have systematically been used across Europe to establish or consolidate economic and social relationships⁷⁸. Rulers ascertain their power and dominion over others (either individuals or groups), by benefiting them with nobility titles, land domains and public positions – stratifying society and creating social debts and obligations⁷⁹. Small value gifts are exchanged between family and friends to celebrate special occasions such as birthdays, Christmas, Easter, or any other special religious or social events: they are the “cement” of social relationships⁸⁰. But not only physical persons participate in the gift-giving phenomenon. Companies and traders use forms of donation such as samples, promotion vouchers or “welcome gifts” as an incentive to promote sales⁸¹ or monetary gifts and others as “strategic corporate philanthropy”⁸². Both physical and legal persons are donating with multiple motivations and objectives. The idea that donation is something that “normally” occurs and is to be expected between physical people only is to be denied.

Different motivations lead to different types of donation. Contrary to authors such as Malaurie, who defend that donations never have the scope of profit⁸³, the motivation for donating may be, amongst others, to create a relationship with the donee which will bring profit to the donor in the future. It is therefore appropriate to distinguish between motivation and gratuity. While motivation represents the subjective will of the donor, the reason why he decided to donate, gratuity represents the benefit received by the donee, which is received without a correspondent legal obligation to benefit the donor. In fact, a genuine altruistic

⁷⁸ M L Santos, I Conde, “Mecenato Cultural de Empresa em Portugal” (1990) *Análise Social, Lisboa*, p 106.

⁷⁹ M L Santos, I Conde, “Mecenato Cultural de Empresa em Portugal” (1990) *Análise Social, Lisboa*, p 107.

⁸⁰ A Komter, W Vollebergh, “Gift Giving and the Emotional Significance of Family and Friends” (1997) *Journal of Marriage and Family*, p 747.

⁸¹ As evidenced by article 6 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (DEC), L 178/1.

⁸² J M Ricks, J A Williams, “Strategic Corporate Philanthropy: Addressing Frontline Talent Needs through an Educational Giving Program” (2005) *Journal of Business Ethics*, p 149.

⁸³ P Malaurie, *Les successions, Les Libéralités* (5th ed 2012) p 147.

“behaviour is not really all that common and the spirituality edifying notion of the ‘cheerful giver’”⁸⁴ does not fully reflect life in society.

Recognising that altruism or charity are not the only explanations for the existence of donation in the European society, several explanations have been proposed in the past to better understand the gift-giving phenomenon. These explanations have been mainly provided not by legal writers, but by anthropologists and sociologists, such as Derrida, Cannell, Weiner and Carrier⁸⁵. The most famous explanation is the one proposed by Marcel Mauss in his essays and studies on gift-giving⁸⁶. Mauss's essay focuses on the exchange of objects between groups aimed at the development of relationships between individuals. By undertaking the study of archaic societies, Mauss was able to find common practices centred on reciprocal exchange, and to demonstrate that obligations to give, to receive, and to reciprocate arise in these societies, furthermore transposing this idea to in western societies⁸⁷.

This section does not intend to prove that donations are made in Europe, instead, it aims to demonstrate that donation plays different social functions in society, being used not only by physical persons, but also by legal persons alike, with different objectives and promoting the establishment either short or long term relationships between the parties. Consequently, it is important to bear in mind that different motivations exist to donate, and that such different motivations must be acknowledged. If all of the different dimensions of donation are not taken into account, the law of donation will not efficiently regulate donations in Europe, and its goals and objectives, whatever they might be will not be accomplished.

1.3.4. Different contexts where donation may be found

Donation may be found in different aspects of life in society. For the purpose of this thesis, and as it will be demonstrated below, it is assumed that donation is found in the European society in at least two contexts: (i) the family context, where connected persons, usually members of the same family or friends donate to each other; and (ii) the market context,

⁸⁴ R Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition* (1996) p 477.

⁸⁵ J Derrida, *Given Time: I. Counterfeit Money* (1994) p 1; A N Weiner, *Inalienable possessions: the paradox of keeping-while-giving* (1992); F Cannell (e), *The anthropology of Christianity* (2006); and J Carrier, *Gifts and commodities: exchange and western capitalism since 1700* (1995).

⁸⁶ M Mauss, “Essai sur le don. Forme et raison de l'échange dans les sociétés archaïques” (1925), p 30-186.

⁸⁷ M Mauss, “Essai sur le don. Forme et raison de l'échange dans les sociétés archaïques” (1925), p 185.

where people who are not necessarily connected beforehand donate in the pursuit of profit. Following this division, only the donations in the market will be addressed in depth in the present thesis, in order to understand what are its particular needs and particularities. It is also important to clarify that the present thesis does not aim to propose that market-based ideas should reshape national laws of donation, on the contrary, the analysis conducted to the regulation of donations made in a market context aims to critically assess whether only family-related donations are being regulated efficiently, or whether the relevant law of donation is fit for the purpose of regulating donations in multiple contexts. Considering the above, donations made in a market context were selected as the benchmark for this assessment.

1.4. Donation in the family

1.4.1. *Generic considerations*

Beginning from the premise that donation may comprise a broad spectrum of gratuitous benefits to the donee, it is easy to understand why donation walks side by side with family, and why it is often associated with altruism and the pursuit of a long lasting relationship between donor and donee. Among other reasons, it is possible to identify three causes for this association: family members have a long lasting relationship with each other, often starting in the moment of birth and lasting to the moment of the death; the structure of the family in Europe has evolved, but the family cohesion has never been lost⁸⁸; and the relationships between family members are often connected to a steady stream of gift-giving exchanges⁸⁹, which often occur in celebratory periods or moments when presents are socially expected, such as weddings, birthdays or religious celebrations. Furthermore, property often circulates gratuitously between family members, a circulation of real rights which is often done by donation⁹⁰. Due to the donation's ability to circulate property gratuitously, the connection between donation and family has the following different dimensions:

First, the consequences of donation in the family wealth as a whole, and the frustration of the expectations to inherit equally by the individual members of the family in particular, are

⁸⁸ C Manzi, V Vignoles, C Regalia, E Scabini, "Cohesion and Enmeshment Revisited: Differentiation, Identity, and Well-Being in Two European Cultures" (2006) *Journal of Marriage and Family*, p 673-689.

⁸⁹ M Mauss, "Essai sur le don. Forme et raison de l'échange dans les sociétés archaïques" (1925), p 30-186.

⁹⁰ R Hyland, *Gifts, A Study in Comparative Law* (2009) p 10.

enunciated by legal writers across in Europe, with particular emphasis by those writing on French law⁹¹. The latter concern is dealt with by collation in the jurisdictions where frustration of the expectations to inherit is regarded as worthy of protection⁹², where forced heirship rights are created, in an attempt to contribute to family protection. Regarded with suspicion, donations are believed to allow one family member to dissipate (most of) the family's assets, an act with serious repercussions for the donor and all his family members. Those repercussions may be a lower social status, a poorer lifestyle or the frustration of the family members' expectations to hold and manage the relevant rights in the future. Only the family is protected against the negative effects of donation in this fashion, a reality which is one of the most prominent topics amongst legal writers, writing on the French law of donation today⁹³, due to the fact that the family is often considered in France as an indirect victim of the donor's generosity⁹⁴. Claims for the protection of the family against the generosity of its individual elements are a constant through European history⁹⁵ and will be dealt in length in the chapter on French law of donation⁹⁶.

Secondly, the connection between family and the gratuitous circulation of real rights leads to the presumption that property received by family members is done *animo donandi* – or without profit. The most obvious case occurs in Scots law, where the important principle *debtor non presumitur donare* is inverted because, in the words of Bankton, “delivery of goods by or to a merchant, will infer the ordinary price without any paction, and will not be presumed a gift, for he is in the exercise of his business, which is to buy and sell. But maintenance to children, either by father or mother, or other progenitor, is presumed to flow

⁹¹ See H Mazeaud, L Mazeaud, H Mazeaud, F Chabas, *Successions – Liberalites* (5th ed 1999) part IV.

⁹² One such case being Portugal, where the heirs must return all assets donated by the *de cuius* under art 2104 PCC and following. It is also worth mention that only descendants must return what was donated to them by the *de cuius*, meaning that the protection of the expectation not to be deprived of their inheritance is a protection against discrimination between children.

⁹³ P Malaurie, *Les successions, Les Libéralités* (5th ed 2012) p 143; P C Timbal, *Droit Romain et Ancien Droit Français, Régimes matrimoniaux, Successions – Libéralités* (1960) p 210; M G Pelissie de Castro, *Des donations entre époux en Droit Romain, Du don Manuel en Droit Français* (1884).

⁹⁴ J Levy, A Castaldo, *Précis d'Histoire du droit civil* (2002) p 1353.

⁹⁵ J Levy, A Castaldo, *Précis d'Histoire du droit civil* (2002) p 1357.

⁹⁶ See Chapter 5 – France, p 197.

from natural affection, and *ex pietate*, if the children have no considerable estate of their own to support them”⁹⁷.

In fact, one of the most distinctive singularities in Scots law of donation is the existence of a presumption against donation, which must be overcome by the donee. This means that the donee has the burden to prove (i) the *animus donandi* of the donor, and (ii) that the benefit was delivered⁹⁸. The presumption against donation is traditionally described as based in the Roman maxim *debitor non presumitur donare*⁹⁹, and is based on the distrust of benefits gratuitously created¹⁰⁰, because “no person is presumed to do what, in place of bringing him profit, must certainly be attended with some pecuniary loss”¹⁰¹. A donation therefore establishes a personal relationship in Scots law and it is presumed to be closely connected with the family life¹⁰². In other words, in Scots law, a donation is regarded as a normal occurrence between parties who are close and who know each other. Following Watson, while writing about Scots law of donation, it is clear that “in certain circumstances, the presumption against donation is overcome, or rather inverted. For example, advances made by a parent or one in *loco parentis*, are presumed to have been made *ex pietate*, in the absence of evidence to the contrary”¹⁰³.

1.4.2. Customary gifts and the family

The exchange of gifts is heavily regulated by a structured customary normative system¹⁰⁴, which pre-exists and often remains separated from the legal system. This separation is stronger when gifts or small donations are given within the family or in a socially expected context – such as social events and occasions where gifts exchanges are expected. This may include feasts such as Christmas, Easter, the new year, birthdays, leaving parties or

⁹⁷ Bankton, *Institutions*, I.IX.21 to I.IX.22.

⁹⁸ If the benefit is not delivered, the law of promise applies, and the promisee only holds a personal right to enforce delivery of the subject-matter of the donation. That is also why the donee may never receive, for example, a real right as promised, if the donor has validly disposed of the relevant right in a previous moment. See *Gauld v Middleton*, 1959 SLT (Sh Ct) 61.

⁹⁹ Stair, *Institutions*, I.8.2 and IV.35.17.

¹⁰⁰ Special treatment is given to gifts exchanged between parties where such exchange is socially expected; for example, the exchange of gifts between father and child, uncle and nephew, among others. *Nisbet’s Trs. V. Nisbet* (1868) 6 M 567; *Fairgrievies v. Hendersons* (1885) 13 R 98; *Wilson v. Paterson* (1826) 4 S 817; *Macalister’s Trs. V. Macalister* (1827) 5 S 219; and *Forbes v. Forbes* (1869) 8 M 85.

¹⁰¹ Erskine, *Institute*, III.9.32.

¹⁰² W Gordon, “Donation” (reissue2011) *SME*, p 6.

¹⁰³ G Watson (e), *Bell’s Dictionary and Digest of the Law of Scotland* (7th ed, 1890) [2012] p 298; *Forbes v Forbes* (1869) 8 M 85.

¹⁰⁴ R Hyland, *Gifts, A Study in Comparative Law* (2009) p 8.

weddings. For this reason, some small value or customary donations are regarded as not regulated under the law, instead being regarded as moral obligations¹⁰⁵.

It is possible to find examples of (gratuitous) moral obligations in all legal systems under study. One such case is Scotland, where “some [gratuitous] promises considered morally binding are not enforced by the law. Such might include promises made in social context, those reflecting duties of a family or religious nature, or those intended to have legal force but effected by some invalidating factor or want a proper form”¹⁰⁶. In France, the regulation of the law of donation to gifts in a social or family context is often dealt with under the umbrella of gifts of reduced value. Presuming that donations within the family or in a social context are donations of reduced value, their regulation under the law of donation is regarded as “absurd”¹⁰⁷ by some French legal writers. Such donations of reduced value – usually between family members – are instead regulated by non-legal normative systems such as moral or religion¹⁰⁸. But the most assertive position, on the placement of gifts/small donations between family members, is taken by the Portuguese law of donation, where donations and moral gifts are distinguished according to the social context where they occur. The Portuguese Civil Code establishes a difference between donations (*doações*) regulated by the law and gift relationships (*dádivas*) that are not regulated by the law of donation and which are not seen as true donations because they occur “according to the social usages”¹⁰⁹. This means that the Portuguese Civil Code (PCC) determines that gratuitous benefits, capable of being defined as a “social usage”, are not to be regulated under the law, but instead, are to be left to be regulated by other non-legal normative orders.

To understand the definition of “social usage”, as presented in Portuguese law, it is necessary to analyse the relationship between the parties, the social context of the act, and the object of the benefit. For example, if two family members exchange presents during Christmas time, their actions will not (most likely) be regarded by Portuguese law as a “donation”, but as the expression of a family relationship that is socially expected. The economic value of

¹⁰⁵ One such case being the Portuguese law of donation, which exclude social gifts from being regulated under Portuguese law of donation (art 940 PCC).

¹⁰⁶ M Hogg, *Promises and Contract Law – Comparative Perspectives* (2011) p 63.

¹⁰⁷ A Foubert, *Le don en droit* (2007) p 74. Foubert’s position is justified by the implications that the regulation of donations of reduced value would have on the institute of coalition – which would be able to catch all customary gifts, without discrimination of the pecuniary value or social context, given by the parents to their children.

¹⁰⁸ S Deville, *L’objet de la liberalite* (2012) p 159; H Meau-Lautour, *La donation déguisée en droit civil français. Contribution à la théorie générale de donation* (1985); M Grimaldi, *Successions* (1998) p 710.

¹⁰⁹ Art 940(2) PCC.

the transaction is also taken into consideration. The leading Portuguese writer on the subject, Ferreira de Almeida, lays down two tests which distinguish between donations and gifts entered into according to the social usages¹¹⁰. The first test is a positive one: it is necessary to understand if the gift can be considered as usual, by looking at, first, when it was made, second, the parties, third, the economic value of its object and fourth, the systematic correlation between them. Following this test, it is crucial to run a negative test: determining if any public law provision demands the qualification of the act as a donation. Ferreira de Almeida also provides the reader with an example of gift relationship that passes both tests: “a gratuitous promise with small economic value which is made between family members”¹¹¹. If both tests are passed, the relationship can no longer be defined as a donation, which means that the law (of donation) will not apply to this relationship¹¹².

On this basis, it is possible to conclude that donations are often associated with the circulation of real rights amongst family members¹¹³, and that moral rules concur with legal rules for the regulation of customary donations, determining a strong connection between the provision of gratuitous benefits and the family¹¹⁴. Connecting donation with the family has relevant consequences for the principles guiding the laws of donation. It is therefore important to understand that looking at donation as a ‘family reality’ may create challenges for the functioning of the law of donation when it is applied to other realities. On the contrary, the law of donation may remain efficient when donations are made outside of the family, this being one of the key questions to be addressed in this thesis.

1.4.3. Suspicion towards donation

Due to the connection between donation and family, some legal writers regard gratuitous acts as suspicious, where a donation is often associated with an act of love¹¹⁵. These writers further describe donation as guided by strong feelings such as “benevolence”, “illusions produced by one’s self-esteem”, the “seductions of the passion”, or “obsession”¹¹⁶. This

¹¹⁰ C F Almeida, *Contratos III* (2012) p 16.

¹¹¹ C F Almeida, *Contratos III* (2012) p 17.

¹¹² C F Almeida, *Contratos III* (2012) p 17.

¹¹³ The particular case of small value donations and donations according to “social usages” will be further discussed in Chapter 4 - Portugal.

¹¹⁴ R Hyland, *Gifts, A Study in Comparative Law* (2009) p 50.

¹¹⁵ One such case is A Caubet, *L’institution contractuelle ou donation de biens à venir* (1911) p 15.

¹¹⁶ M Colin, “Etude de jurisprudence et de législation sur les dons manuels” (1833) *Revue pratique de droit français*, p 194: “Lorsqu’il donne, en effet, l’homme ne cède pas toujours seulement aux « entraînements d’un

assumption that donations are often motivated by powerful feelings explains why many legal writers¹¹⁷ define donation as abnormal¹¹⁸, “dangerous, suspicious and fragile”¹¹⁹. Furthermore, it is common for those writers to define donations as acts which are (only) performed and/or expected within the family – i.e. only people with a common genetic heritage or otherwise linked by emotional bonds (friends) would enter into gratuitous agreements. One such case is Henri De Page, who states that a “pure” donation contradicts what he regards as “normal” in a social interaction¹²⁰.

The characterisation of donations as abnormal explains De Page’s claim that donation is an “extremely rare act”¹²¹. De Page further offers that a “liberality is inspired by other reasons [which are not benevolent], and is based in a will which is not the will to donate. It is nothing but a way” to achieve something else¹²². But he goes even further, by stating that “on the other side, even if a liberality is found in its pure form, i.e., it is only inspired by the will of the donor to gratify the donee, the liberality represents great danger”, and therefore protection needs to be conferred upon (a) the donor himself; (b) his family; and (c) his creditors¹²³.

Bearing in mind the above-mentioned prejudice against donation, it is possible argue that donation is classified as abnormal due to its association with strong feelings such as love and affection. But despite this association between donation and something which is not often regarded as normal¹²⁴, it is necessary to recognise that donation is a common occurrence in the social lives of individuals, as it is available to all, legal and individual people alike. The occurrence of donation is, in fact, widespread in European society, happens on a regular basis, and all individuals may be potentially in the position of either benefactor or

bon cœur », [mais aussi aux] « illusions de l’amour propre », aux « séductions des passions », et aux « obsessions » des gens intéressés”.

¹¹⁷ P Malaurie, *Les successions, Les Libéralités* (5th ed 2012) p 146: “Les libéralités exercent un rôle social très particulier, car étant à titre gratuit, elles ne sont pas, à la différence des actes à titre onéreux, muées par la recherche du profit.”; J Levy, A Castaldo, *Précis d’Histoire du droit civil* (2002); A Foubert, *Le don en droit* (2007); D Guével, *Droit des successions et des libéralités* (2nd ed 2010); G Pacilly, *Le Don Manuel* (1936); P Delnoy, *Les libéralités et les successions, Précis de droit civil* (3rd ed 2010); D Guével, “La gratuite intéressée: oxymore d’avenir ?” (2009) *Mélanges en l’honneur du professeur F. Goubeaux*. p 229 ; and C M Mazzoni, “Le don, c’est le drame. Le don anonyme et le don despotique” (2004) *RTD civ.*, p 701.

¹¹⁸ A Foubert, *Le don en droit* (2007) p 4.

¹¹⁹ J Levy, A Castaldo, *Précis d’Histoire du droit civil* (2002) p 1245.

¹²⁰ H De Page, *Traité élémentaire de droit civil belge* (3rd ed 1962) I, p 55.

¹²¹ H De Page, *Traité élémentaire de droit civil belge* (3rd ed 1962) I, p 56.

¹²² H De Page, *Traité élémentaire de droit civil belge* (3rd ed 1962) I, p 56.

¹²³ H De Page, *Traité élémentaire de droit civil belge* (3rd ed 1962) I, p 56.

¹²⁴ H De Page, *Traité élémentaire de droit civil belge* (3rd ed 1962) I, p 56.

beneficiary¹²⁵. As a direct consequence of its constant presence in the European society, gratuitous acts in general, and donations in particular, cannot be classified as abnormal.

Regarded with suspicion, donation is addressed by a substantial body of legal writers as a legal institution which must be heavily regulated by the law¹²⁶. As it will be further analysed in the French Chapter¹²⁷, this chain of thought is particularly evident in the works of legal writers devoted to the study of French law of donation¹²⁸, leading to a claim for a substantial regulation of donation. A regulation which is particularly concerned with the protection of the family (against the alleged ‘hazard’ of donation)¹²⁹. It may be argued that the law may therefore take two approaches to donations: (i) recognise donations as a normal act, therefore regulating its legal effects, while controlling its social repercussions; or (ii) abstain from regulating the legal effects (and correspondent social repercussions) of donations. The second option, where the law abstains itself from regulating donation, leaves the regulation of such social interactions to other normative systems such as morality and religion. Both routes should be regarded as a policy choice, which may change in time and space.

1.4.4. Regulation of the effects of donation in a family context

In addition to the evidence that laws of donation in Europe are influenced by family-related considerations, it is possible to identify in the jurisdictions under review – Scotland, Portugal and France - several protective rules which directly aim to regulate donations made in a family context. Among others, it is possible to identify the following rules: (i) rules on coalition¹³⁰, where equality between heirs is enforced by reducing relevant donations received by other heirs¹³¹; (ii) special regulation given to donations between spouses¹³²; (iii) rules which are applicable to donations motivated by family-related motivations, such as

¹²⁵ For this reason, it is studied by multiple Cross-European studies such as the study leading to the publication of the DCFR, as it will be demonstrated below.

¹²⁶ As a demonstration, see A Seriaux, *Manuel de droit des successions et des libéralités* (2003) p 11.

¹²⁷ See Chapter 5 – France, p 197.

¹²⁸ D Guével, “La gratuite intéressée : oxymore d’avenir ?” (2009) *Mélanges en l’honneur du professeur F. Goubeaux*, p 229; C M Mazzoni, “Le don, c’est le drame. Le don anonyme et le don despotique” (2004) *RTD civ.*, p 701.

¹²⁹ See Chapter 5 – France, p 197.

¹³⁰ See as examples, art 940 to 979 PCC and art 843 to 863 FCC.

¹³¹ In what Scots law is concerned, see D R Macdonald, *Succession* (3rd ed 2001) p 43, quoting *Coats’ Trs v. Coats*, 1914 SC 744; H Hiram, *The Scots Law of Succession* (2nd ed 2010) p 112, following Erskine, *Institute*, III.9.24 and Bell, *Principles*, s 1588; and A Barr, J Biggar, A Dalgleish, H Stevens, *Drafting Wills in Scotland* (2nd ed 2009) p 135.

¹³² Donations between married parties (or spouses) are regulated under art 1761 to 1766 PCC and art 960 FCC.

donations made in view of the wedding¹³³; (iv) rules providing special powers of revocation to the donor due to the birth of a new child for the donor¹³⁴; (v) rules providing enforcement or revocability powers to the family/heirs of the donor if the donee does not comply with the *modo* or obligations emerging from the donation¹³⁵; (vi) rules preventing the donee from payment aliments to the donor¹³⁶; (vii) rules providing the family or the heirs of the donor with revocability rights due to behaviours suggesting that the donee is ungrateful, these being found in particular in France and Portugal, where the heirs of the donor are able to revoke the donation if the donee is found guilty of murdering the donor¹³⁷; and, among others, (viii) a presumption of *animus donandi* when benefits are granted to blood relatives¹³⁸. It is therefore possible to argue that the national laws of donation under review extensively regulate donations in the family context. This acknowledgement is relevant because it will help us to better understand how the connection between donation and the family works in different European jurisdictions, as well as providing us with the necessary tools to analyse if this connection is prejudicial for the regulation of donation outside of a family context.

1.5. Donation in the market

1.5.1. Generic considerations

The family is traditionally regarded as the centre of the economy¹³⁹. But from a historical perspective, it is possible to identify new players in the world of donation and in the economy in general – the legal persons. Legal persons may be business organisations, with a view to profit, and non-business organisations, which have been created with other objectives. On one hand, different business organisations (whether inside the same group or not) might need to enter into gratuitous transactions in the ordinary course of the business. For example, a company that produces and sells popcorn might feel the need to lend one of its trucks, for free, to its supplier of corn, in order to optimise the delivery time of the raw materials. On

¹³³ Among others, see art 1753 PCC and art 963 FCC.

¹³⁴ See art 960 FCC and following.

¹³⁵ See as examples art 958 FCC and art 965 PCC.

¹³⁶ See art 955(1) FCC and following.

¹³⁷ See art 955(1) FCC and following and art 976 PCC.

¹³⁸ This presumption explicitly is found in Scots law of donation only. See Stair, *Institutions*, I.8.2: “Bonds, Assignations, or other Rights, in the names of Children *unforas familiat*, & unprovided, as presumed to be Donations, because of the Parents Natural Affection, and Natural Obligation to provide Children, *vid. l. 26 ff de Prob.* Which was extended to some Goods and Money of small value, delivered by a rich Brother who wanted Children, to his Brother who was no Merchant, which was presumed to be *animo doanndi*, and was not imputed, in part of an annual Legacy, left thereafter by that rich Brother to the other”.

¹³⁹ P Delnoy, *Les libéralités et les successions*, *Précis de droit civil* (3rd ed 2010) p 14.

the other hand, companies may want to use a tax relief that comes with donating to a charity; enter into patronage agreements, where donations are performed with the scope of promoting the name or brand of products which cannot be advertised to the general public (such as cigarettes or drugs); or they might want to give away free samples or provide consumers with free offers motivated by a sales promotion strategy.

Bearing in mind that not only physical persons participate in the gift-giving phenomenon, but also companies and other legal persons do so, these persons are often motivated by non-altruistic objectives. Among others¹⁴⁰, the desire for profit is one of these person's main motivations, and reason to be in the market, being possible to identify different donations which are motivated by a view of future profit, i.e. where at least one of the parties is a business or the motivation for the donation is the pursuit of profit. Many examples of donations in view of profit may be found, however, those which are most common and easily identifiable are donations made by businesses for the promotion of their products or services. These gifts are often referred to as samples, promotional vouchers or "welcome gifts", and are traditionally given to consumers by businesses for the purpose of promotion of sales¹⁴¹. The recognition that some donations are made with the scope of profit might lead to these donations being labelled as suspicious, on the basis that they do not fit with the prejudice that altruism or concern about the well-being of a donee is the motive why donors donate¹⁴². On the contrary, donations are not solely or even primarily motivated by altruism¹⁴³ and their motives may be altruistic or non-altruistic, where market relations are included¹⁴⁴. As will be studied next in the next chapter, because donations made in a market are of crucial relevance today, academic studies have been conducted at a European level on the law of

¹⁴⁰ Such as corporate social responsibility. Defined as the involvement of companies or business in socially responsible activities, writers often represent this social phenomenon as "hard to determine what intentions motivate them to do so", J Witkowska, "Corporate Social Responsibility: Selected Theoretical and Empirical Aspects" (2016) *Comparative Economic Research*, p 1. See also N C Cicioc, R Gabrea "Corporate Social Responsibility - Integral Part of Modern Organizational Culture" (2014) *Valahian Journal of Economic Studies*, p 2; M Sánchez Fernández, "Responsabilidad social empresarial: gobernanza corporativa, empresa y ONG" (2012) *Oñati Socio-Legal Series*, p 3; among others.

¹⁴¹ As evidenced by art 6 DEC.

¹⁴² S Shavell, "An Economic Analysis of Altruism and Deferred Gifts" (1991) *The Journal of Legal Studies*, p 401.

¹⁴³ A Farnsworth, "Promises to Make Gifts" (1995) *The American journal of comparative law*, p 359.

¹⁴⁴ R Hyland, *Gifts, A Study in Comparative Law* (2009) p 39.

donation, mainly aiming to study and regulate donations connected to the European Common Market¹⁴⁵.

It is therefore possible to identify multiple examples of donations, where either the donor or the donee is a business, donating or receiving donations with either an altruistic or a business orientated motivation. These donations should be regarded as made in a market context, considering the market is where companies and businesses interact with other persons. Several examples of donations in the market will be critically reviewed below.

1.5.2. Donations with the scope of sales promotion

It is easy to identify examples of donations with the scope of sales promotion in our everyday life: from the free sample of cheese given by the local grocery store or supermarket to the large donation of funds given by multinationals to our local theatre. It is important to mention that due to their often reduced pecuniary value, and impact on the market, donations with the scope of sales promotion are often classified as donations, but in practice, “the legal relevance of those transactions is normally confined to the rules on unfair commercial practices (unfair competition (basic principles); unfair competition (consequences; unfair competition and freedoms of movement)”¹⁴⁶. It is understandable why donations with the scope of sales promotion are regulated by rules on unfair commercial practices and unfair competition. On one side, they are transactions able to disrupt the market, by creating a disproportional benefit to one company, and therefore obstructing free competition in the European market – for example, one company may decide to provide the consumer with free products resulting in sales below the cost of production, and therefore creating a case of dumping¹⁴⁷. On the other side, defective products with the potential to cause harm to consumers could be given to them, with the business donor benefiting from reduced liability

¹⁴⁵ Please see below the considerations on the DCFR.

¹⁴⁶ M Schmidt-Kessel, *The Max Planck Encyclopedia of European Private Law* (2012) I, p 499.

¹⁴⁷ L Davis, “Ten Years of Anti-Dumping in the EU: Economic and Political Targeting” (2009) *Global Trade and Customs Journal*, p 213-232.

– which he would not have if the product was provided to the consumer by a non-gratuitous juridical act¹⁴⁸.

1.5.3. Patronage

Patronage is often confused with sponsorship. In fact, several legal writers are of the opinion that patronage and sponsorship should be treated as the same reality, considering the similarity of their effects in practice¹⁴⁹. The confusion between the two figures is promoted by economic writers referring to both as “expenses of the company” or “expenditure on communication”¹⁵⁰. This confusion is based on the impact of sponsorship and patronage in the promotion of sales¹⁵¹. But patronage and sponsorship should represent two distinct realities. On one side, sponsorship¹⁵² will be used in the present thesis as a service provided by the sponsored to the sponsor, where a product or a service is associated with an event or a person¹⁵³. Sponsorship will therefore be used to signify a form of commercial advertising which “aims to disseminate a message persuading people to buy products or use services”¹⁵⁴. This means that sponsorship consists in an onerous agreement reached by sponsor and sponsored, where both rights and obligations, emerge to both parties: the sponsor has the right to control the information provided to the public/consumers¹⁵⁵, and the obligation to pay a price; while the sponsored has the duty to advertise the brand or name of the sponsor, and has the right to be paid for doing so. On the other side, patronage¹⁵⁶ must be defined as a donation given to a person or a group of persons, often charities, with the scope of benefiting the community. The donor / patron has traditionally no control over the donee on how the information that a donation was given is provided to the public. Both patronage and

¹⁴⁸ Product liability as it is today was first introduced by Directive 85/374/EC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

¹⁴⁹ B Gros, “Sponsoring des Athlètes – Relations Contractuelles avec les Sponsors et Droit à l’Image” (2005) *Revue de droit Suisse*, p 384.

¹⁵⁰ M P Maicas, *La Nueva Filantropía y la Comunicación: mecenazgo, fundación y patrocinio* (1994) p 21.

¹⁵¹ J I Portables, *El Contrato de Patrocinio Publicitario en el Derecho Español* (1998) p 61.

¹⁵² Sponsor is defined by *The Oxford English Dictionary* (1989) XVI, p 306 as “One who pays, or contributes towards, the cost of a broadcast programme or other spectacle, *spec.* in return for commercial advertisement”.

¹⁵³ R Bagehot, *Sponsorship, Endorsement & Merchandising – A Practical Guide* (1990) p 3; A Pereira, “Do Patrocinio Desportivo” (2005) *Desporto & Direito*, p 350; A Pereira “Contratos de Patrocinio Publicitário” (1998) *Revista da Ordem dos Advogados*, p 330.

¹⁵⁴ L Correia, *Direito da Comunicação Social* (2005) p 153.

¹⁵⁵ L Correia, *Direito da Comunicação Social* (2005) p 155.

¹⁵⁶ Patronage is defined by *The Oxford English Dictionary* (1989) XI, p 352 as “the financial support given by customers in making use of anything established, opened, or offered for the use of the public, as a line of conveyances or steamers, a hotel, store, shop, or the like”.

sponsorship may have a non-altruistic scope, such as the promotion of sales, but they remain distinct in the legal effects produced, particularly in the volume and extent of obligations placed on the beneficiary.

As mentioned above, due to the proliferation of both sponsorship and patronage, the distinction between these two institutions is often difficult, and several legal writers have attempted to draw a clear distinction between them. The most relevant criteria for the distinction between sponsorship and patronage as provided in the past are¹⁵⁷: (i) the distinction which looks at the parties in the contract; (ii) by looking at the scope of the agreement – in the case where one of them is a charity, then there is no sponsorship but only patronage agreement – whether the agreement was reached or not with the intention of sales promotion; and (iii) by looking at the letter of the agreement and to how it was defined by the parties. It is posited that it would be more accurate to look at the *animus* – assessing the existence or absence of an intention to give gratuitously - and to the rights and obligations emerging from the sponsorship / patronage agreement. Therefore, if obligations emerge to the beneficiary, and the benefactor is given control over the form by which his name is associated with the person or event, then the agreement must be classified as sponsorship; on the contrary, if no or few obligations emerge to the beneficiary – allowing the classification of the agreement as gratuitous -, then the agreement may be classified as patronage – because only then may it be classified as a donation.

Donations to the third sector or patronage¹⁵⁸ may also be defined as the “action, organised activity, either ongoing or occasional, by which a physical person, a business or other legal person, contributes economically, often under a contract, for the benefit of a creditor, an artist, an interpreter, a writer or another public or private institution, for the organisation of a cultural, civic, educative or scientific event”¹⁵⁹. Multiple examples of these donations may

¹⁵⁷ C G Novoa, “Régimen Fiscal del Sponsor” (2001) *Fundaciones y mecenazgo – Régimen fiscal*, p 83.

¹⁵⁸ Recently classified as contracts of patronage in Portugal by J Assis, *O Contrato de Patronato* (2009).

¹⁵⁹ Translated from M P Maicas, *La nueva Filantropía y la Comunicación Social: Mecenazgo, Fundación y Patrocinio* (2nd ed1994) p 33.

be found in the jurisdictions under consideration herein, from the charitable donations given at the entrance of church to what is often referred to as “strategic corporate philanthropy”¹⁶⁰.

1.6. Solitary donations

1.6.1. Long-term relationships

Donations are often regarded by European legal writers as gratuitous transactions entered into between persons who have a previous relationship or who wish to pursue a close relationship in the future. That is one of the reasons why donation is classified as a personal relationship¹⁶¹ and presumed to be closely connected with family life¹⁶², after all, family relationships are presumed to be long-term relationships – from birth to death. The assumption that donations are entered into by two parties who are close, and who wish to pursue a closer relationship in the future, may also explain why legal authors such as Bell state that in Scots law, where a strong presumption against donation exists, this presumption may be overcome or even inverted in the case of donations within the family¹⁶³.

It is therefore necessary to inquire if a donation must always be aimed at the creation or maintenance of a long-term relationship. This consideration will have important consequences on the objectives to be pursued by an efficient law of donation, because if the maintenance of a long-term relationship is one of the cardinal elements of donation, then the national laws of donation under review must be able to promote a long-term relationship between donor and donee. Most legal literature is silent in this regard, and voices are only found describing donation as socially beneficial and aimed at the improvement of life in society. One of the legal writers who express this idea is Hyland, who states that “the customary gift is designed to improve social relations, to make life in society more cordial and affectionate”¹⁶⁴. His opinion is based in arguments which are withdrawn from an economic analysis of donation. Hyland’s economic analysis of donation intends to explain the donor’s behaviour as well as his motivation to donate, which is separated into the

¹⁶⁰ When the benefit given to the community is recognized by form of tax benefit or by any other means. Expression used in J M Ricks, J A Williams, “Strategic Corporate Philanthropy: Addressing Frontline Talent Needs through an Educational Giving Program” (2005) *Journal of Business Ethics*, p 149.

¹⁶¹ M Gordon, “Donation” (reissue 2011) *SME*, p 6.

¹⁶² P Malaurie, *Les successions, Les Libéralités* (5th ed 2012) p 147.

¹⁶³ G Watson (ed), *Bell’s Dictionary and Digest of the Law of Scotland* (7th ed, 1890) [2012] p 298; *Forbes v Forbes* (1869) 8 M 85.

¹⁶⁴ R Hyland, *Gifts, A Study in Comparative Law* (2009) p 164.

following four different motivations: altruism (“warm glow altruism”); the symbolic utility of the donation in a community which grants the donor with social approval; the fostering of future market relations (establishment of a relationship with trading partners); and the (previous) commitment of the donor¹⁶⁵.

Out of the four explanations provided for the motivation of the donor by Hyland, only two of them (the symbolic utility of the donation in a community which grants the donor with social approval and the fostering of future market relations) may be directly linked to the motivation towards the development of a long-term relationship between the parties. Nevertheless, altruism is the one which is mentioned the most in economics and sociological studies¹⁶⁶ and social approval is the motivation for donation often referenced in economy studies¹⁶⁷. Even though altruism and social approval are often mentioned in economy studies on gratuity in the market, these two motivations are difficult to be used in the market context because of the anonymity of the market institutions, which does not allow donors to disclaim their “good deeds” in a market context¹⁶⁸. Despite these considerations, altruism and social approval may be found in sociological and psychological studies, where they “play the same part there as money does in economics”¹⁶⁹, and donations may be easily found in countries with a strong market economy¹⁷⁰.

1.6.2. Short-term relationships

Bearing in mind the above, drawing a clear distinction between the motivation to give in general and the motivation to foster a long-lasting relationship in particular, is of extreme relevance. A donation is often described as a juridical act where all parties agree to the result and juridical consequences of the act, and where each party assumes different risks¹⁷¹. But

¹⁶⁵ R Hyland, *Gifts, A Study in Comparative Law* (2009) p 39.

¹⁶⁶ As examples, please see E Bertacchini, W Santagata, G Signorello, “Individual Giving to Support Cultural Heritage” (2011) *International Journal of Arts Management*, p 41-55; D R Lichtenstein, M E Drumwright, B M Braig “The Effect of Corporate Social Responsibility on Customer Donations to Corporate-Supported Nonprofits” (2004) *Journal of Marketing*, p 16-32; L Ray, “Why We Give: Testing Economic and Social Psychological Accounts of Altruism” (1998) *Polity*, p 383-415; D Bar-Tal, “Altruistic Motivation to Help: Definition, Utility and Operationalization” (1986) *Humboldt Journal of Social Relations*, p 3-14.

¹⁶⁷ R Hyland, *Gifts, A Study in Comparative Law* (2009) p 39.

¹⁶⁸ Doubt also expressed by R Hyland, *Gifts, A Study in Comparative Law* (2009) p 41.

¹⁶⁹ J van de Ven, “The demand for Social Approval and Status a Motivation to Give” (2002) *Journal of Institutional and Theoretical Economics* (2002) p 465.

¹⁷⁰ C Gregory, “Gifts” (1989) *The New Palgrave Social Economics*, p 109.

¹⁷¹ C F Almeida, *Contratos III* (2012) p 18; and C F Almeida, “Contratos de liberalidade: em especial os contratos para o uso de coisas corpóreas e incorpóreas” (2011) *Estudos em Homenagem ao Prof. Doutor J. L. Saldanha Sanches*, II.

this classification does not describe the true complexity of the donating act, where juridical effects are produced immediately and upon completion of the relevant juridical act, and where a relationship is created between the parties and regulated by legal norms¹⁷². It is also important to bear in mind that a personal relationship is connected with the identity of the parties, not the length of time during which the parties are in a relationship, nor does it foresee the establishment of new relationships in the future between those parties. It is therefore possible to find examples of donations which are given by the donor to strangers with whom the donor has no intention to create a future long lasting relationship.

Two of the most common types of solitary donations are charitable donations¹⁷³, which are given as the result of a religious, moral or altruistic motivation (for example the alms given to a charity, humanitarian cause, or public institution); and donations given by business to consumers aimed at encouraging them into a commercial transaction in the immediate future¹⁷⁴. It is therefore possible to argue that donations may have as their objective the maintenance of long term relationships or the creation of new long term relationships, but a donation may also adopt the form of a solitary donation, where the donor has no interest in pursuing a long-term relationship with the donee.

1.7. Interim conclusion

Duality of social function. Bearing in mind the above, it may be argued that donations involve social interaction in a world where values of love, affection, friendship and gratitude are tied to the pursuit of personal advantage. Therefore, donation has developed two different functions in European society: (i) one that is motivated by the search for a moral recompense, where a donating act is entered into by the donee with the expectation of receiving a non-legally binding counterpart from the beneficiary; and (ii) another that is not motivated by the pursuit of a benefit. The duality of social functions developed by donation has had a strong impact on how the laws of Europe address this reality. That explains why it is so difficult to

¹⁷² C Larroumet (e), *Les Obligations, Le Contrat* (5th ed 2003) III, p 25.

¹⁷³ Commonly defined as a gift or a donation to a charitable institution; for example see Anonymous, "Trusts. Charitable Donation. Gift or Trust?" (1940) *Columbia Law Review*, p 550-554.

¹⁷⁴ As an example, donations with the scope of sales of products which will not be purchased by the same consumer in a foreseeable future such as real estate, donations with the scope of sales promotions towards tourists or visitor which are not expected to engage in another commercial exchange in the future, among others.

find a complete definition of “donation”, as different European countries have dealt with the idea of donation in private law in different ways¹⁷⁵.

Donation exists in multiple areas of life in society. Although donation is often regarded as a family phenomenon, that is not necessarily always the case, and it is possible to observe donations in different areas of life in society: from gifts exchanged between friends and family, to donations situated in a market context, made with the scope of sales promotion. By recognising that donation is present in other areas of life besides the family, it is possible to argue that donation needs flexibility in order to adapt itself to multiple realities. Furthermore, it is also important to notice that many legal writers have addressed donation mainly regarding it as within the family, and this prejudice has consequences for the rules guiding donation – which might not be suitable to address donations made outside of the family bubble¹⁷⁶.

A comprehensive concept of donation. It is also possible to conclude that changes have occurred in Europe, in particular changes which have a European dimension, due to their connection to the creation of a European Common Market, where people, goods and services move freely within the single market. More than ever in Europe, nationals from different MS enter into legal transactions with each other aiming to establish short or long term relationships. These relationships may be of two types: gratuitous or non-gratuitous. While the consequences of non-gratuitous relationships entered into by European citizens are already being widely researched, there is little consideration of how the EU and the European Common Market affected gratuitous relationships in general, and donations in particular. It is that issue which will be considered in the following chapters through the study of three selected European jurisdictions. Finally, and as mentioned before in the introduction, laws such as collation, *action pauliana*, or unjustified enrichment, will not be critically reviewed in the present thesis. The focus of the analysis is placed on the laws of donation only, aiming a better understanding of how donation operates between the parties in each jurisdiction under review.

¹⁷⁵ R Hyland, *Gifts, A Study in Comparative Law* (2009) p 127.

¹⁷⁶ See Chapter 5 – France, p 197.

Chapter 2 European contributions to the law of donation

2.1. Introduction

It was established in Chapter 1 that donation has multiple dimensions. These different dimensions make it clear that donation, although a well-established legal institution in Europe¹⁷⁷, is also an elusive concept, due to the existence of contrasting definitions across Europe¹⁷⁸. As an example, different conceptualisations of donation create a different terminology being used in different MS, as well as different underlying policy considerations, which vary from one jurisdiction to another¹⁷⁹. In addition, the EU developed the national markets, by enlarging them to an effective European Common Market. In this European Common Market, people with different cultures, religions and backgrounds interact with each other. Because people from different cultures and religions should be treated the same, national social norms are no longer able to regulate the areas left unregulated by the law. This point is particularly relevant when the market is concerned: the law regulating market donations no longer can withdraw, and rely instead on social norms to regulate the relationship created by the parties. It may be therefore argued that the different ways of looking at donation and the new challenges brought by a European Common Market create a level of uncertainty in the market because they lead to doubt and feelings of insecurity for the market players. In order to promote certainty, it is therefore necessary to understand what are the (common) challenges faced by donations in the market, so that an efficient law of donation may efficiently regulate them.

The present chapter aims to critically analyse the European contributions (broadly constructed) to the law of donation. This analysis aims to develop the principles to be followed and the objectives to be pursued by a law of donation which is fit to regulate donations made in a market context. It is expected that by looking at the European contributions to the development of the law of donation, further evidence will be found that donation is present in multiple contexts, while reinforcing the idea that donation has an

¹⁷⁷ E Hondius, "Principles and the Law" (2012) *European Review of Private Law*, p 289-294.

¹⁷⁸ Different definitions of donation will be compared in the following chapters, with particular emphasis to the definitions of donation in Scots, Portuguese and French law of donation.

¹⁷⁹ J Basedow, K J Hopt, R Zimmermann (eds), *The Max Planck Encyclopedia of European private law* (2012) I, p 498.

important place in the commercial market. Finally, the present chapter is expected to identify examples to be used in the construction of guidelines for a law donation which is fit to regulate market donations. A tool which in turn is necessary to undertake the analysis on the following chapters. Examples will be identified, mainly from the DCFR, for the construction of these guidelines, which in turn will be used in the critical analysis of the jurisdictions under review in Chapters 3 to 5.

At a conceptual level, the present chapter aims to demonstrate that the European projects¹⁸⁰ and in particular the EU increased focus of private lawyers on the market, a fundamental switch for the law of donation. The European contribution in terms of substantive law will also be reviewed with particular focus on the legislation passed by the EU and the ECJ's intervention. Although small, considering the boundaries of the EU competence on private law, this contribution will be analysed for the definition of the above mentioned guidelines. Therefore, the present chapter aims to establish the conceptual basis which will be used to assess, in future chapters, the suitability of relevant European national laws of donation for the purposes of regulating donations in a market context.

2.2. European private law of donation

Legal writers have long departed from the idea that the validity of all law depends on the state¹⁸¹, now recognising as sources of law (and its validity) supra-national sources. The most relevant of these sources, with regard to the law of donation for Europe, is the EU. The granting of legislative powers to the EU has created a gradual emergence of European private law. Furthermore, the study of private law emerging from EU sources, and not from the MS legislative organs, is a topic which has attracted the attention of legal writers in recent years¹⁸². In fact, the impulse for the development of a European private law is one of the most significant legal developments of our time¹⁸³. The present section will begin by introducing the different institutions able to influence the development of the law of donation in Europe, from a supra-national perspective. Some of the supra-national entities and organisations under review here may hold legislative powers and therefore can influence the

¹⁸⁰ As an example of these projects, see the Eurozone, EFTA, the Schengen Area, among others.

¹⁸¹ N Jansen, R Michaels, "Private Law and the State: Comparative Perceptions and Historical Observations" (2007) *Journal of Comparative and International Private Law*, p 347.

¹⁸² R Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002) I.

¹⁸³ R Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002) I.

law of donation by creating legally binding rules. Others do not hold legislative powers, but are nevertheless able to influence the development of the present and future law of donation in Europe through other means.

2.2.1. Institutions and competence of the European Union

Lawyers have looked at private law beyond the state with both interest¹⁸⁴ and distrust¹⁸⁵. Notwithstanding, the EU may pursue its objectives either by creating law or by following a soft law approach¹⁸⁶, such as issuing non-legally binding statements or funding projects which aim to promote the development of (private) law in Europe. The EU legislative competences are based on the principle of conferral¹⁸⁷, as defined under article 5(2) TEU¹⁸⁸. Under the principle of conferral, the competences held by the EU legislative bodies have once been held by the MS, and have now been delegated to the EU¹⁸⁹. The division of legislative competence between the EU and the MS became clearer with the signature of the Treaty of Lisbon¹⁹⁰, and article 2 TFEU now identifies three types of legislative competence conferred to the EU: (i) exclusive competence; (ii) shared competence; and (iii) supporting, coordinating or supplementing competence¹⁹¹.

The competences conferred to the EU are primarily market-related, reflecting the importance of the development of a coherent common-market, while other areas, such as the family, have been mainly left to be regulated by national law. Building on the perspective that EU market-related areas are better developed by a united EU policy, the market-connected competences to legislate have been conferred to the EU by being listed in the Treaties as of exclusive competence of the EU, as listed under article 3 TFEU. Policy areas not mentioned in articles 3 and 6 TFEU and connected with the internal market, among others, fall within

¹⁸⁴ R Zimmermann, “The Present State of European Private Law” (2009) *The American Journal of Comparative Law*, p 479: “all areas of private law should become the subject of genuinely European, as opposed to national, scholarship but that none of them is ready to be cast into an official European Instrument, whether under the name of Code, or Common Frame of Reference.”

¹⁸⁵ R Michaels, N Jansen, “Private Law beyond the State? Europeanization, Globalization, Privatization” (2006) *The American journal of Comparative Law*, p 843-890.

¹⁸⁶ E Korkea-Aho, “EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?” (2009) *Maastricht Journal of European & Comparative Law*, p 272.

¹⁸⁷ R Schutze, *European Constitutional Law* (2012) p 153.

¹⁸⁸ Art 5(2) TEU: “competences not conferred upon the Union in the Treaties remain with the Member States”.

¹⁸⁹ L Woods, P Watson, *Steiner & Woods EU law* (12th ed 2014) p 51.

¹⁹⁰ As signed by the EU member states on 13 December 2007, and entered into force on 1 December 2009. See the Official Journal of the European Union, C 115, of 09 May 2008.

¹⁹¹ L Woods, P Watson, *Steiner & Woods EU law* (12th ed 2014) p 57.

the category of shared competence of the EU. The EU policies are then pursued by different mechanisms such as regulations, directives, decisions, recommendations or opinions, all regulated under article 288 TFEU.

2.2.2. *EU competence on donation*

While the EU's exclusive competences, as listed by article 3 TFEU, are limited in areas connected with private law, when compared with the MS's national parliaments, article 4(1) TFEU enunciates that "the Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6". In addition, article 4(2) determines the areas where a shared competence between exists between the EU and the MS. Each competence is granted to the EU within the boundaries of the principles of conferral and subsidiarity, as mentioned above. Furthermore, the Court of Justice also plays an important role in ensuring the uniform application of EU rules in all MS. In order to do so, the Court develops definitions and concepts, therefore standardising definitions across the EU¹⁹².

The European harmonisation of areas distant from the market is often regarded with concern¹⁹³ and therefore restricted by the principles of subsidiarity and proportionality¹⁹⁴. The Treaty of Lisbon was relevant for the expansion of EU legislative competence and for the growth of EU influence in such areas, with the EU gaining considerable influence through 'soft law', policy development and co-ordination. This growth of influence is often associated with the "much greater emphasis on values, especially those which value the human as a political and social animal rather than as an economic actor"¹⁹⁵.

Aiming for economic growth, peace and social prosperity, the European project has created a united economic area, where common regulation is regarded as necessary in order to standardise trading practices and to further develop a common market¹⁹⁶. Bearing in mind the different levels of industrialisation, specialisation and economic development of the different MS, it was also deemed as necessary a central organisation which would not only

¹⁹² Following art 345 TFEU and art 167(5) TFEU.

¹⁹³ L Woods, P Watson, *Steiner & Woods EU Law* (12th ed 2014) p 158.

¹⁹⁴ L Woods, P Watson, *Steiner & Woods EU Law* (12th ed 2014) p 158.

¹⁹⁵ L Woods, P Watson, *Steiner & Woods EU law* (12th ed 2014) p 344.

¹⁹⁶ L Woods, P Watson, *Steiner & Woods EU Law* (12th ed 2014) p 341.

standardise practices, but also actively promote equality between the different MS¹⁹⁷. This centralising action is taken by the EU institutions, acting on the competences provided to them by the Treaties¹⁹⁸. Article 114(1) TFEU on the “approximation of laws” is central¹⁹⁹ to the definition of harmonisation, and together with art 115 TFEU²⁰⁰ confers competence to the EU organs to legislate in areas connected with the establishment and functioning of the European Common Market²⁰¹, in a way that standardises practices and develops a unitary approach in all MS to the same problems.

2.2.3. Regulation of donations

The EU, it might be argued, only has competence to regulate aspects of donation connected with the market, without reference to other dimensions of donation, such as those which are family-related. In addition, the principle of subsidiarity²⁰² seems a particularly powerful tool at the disposal of the MS in order to protect their cultural diversity, and therefore, the EU does not have competence to regulate the whole law of donation. Furthermore, the idea that what is better regulated at national level should be regulated at national level²⁰³ is essential for the preservation of all non-market related areas in the hands of the MS’s legislative organs. The use of the principle of subsidiarity, as well as the argument that the EU is not fully competent to regulate the law of donation, helps MS to protect their (legal, social, historical, cultural, etc.) identity and diversity from a harmonisation process which is deemed as disruptive of diversity. In short, it may be argued that harmonisation movements may endanger the (legal and non-legal) cultural diversity of the MS. Bearing in mind the danger, the principles of subsidiarity and proportionality restrict the powers of the EU, by governing the way in which the EU exercises its competencies.

However, and as it will be discussed below, the EU has recognised that donations are often used in a market context and has begun to regulate donations in the market under article 3 TFEU²⁰⁴, as a shared competence. Therefore, donation should not be regarded as a topic to

¹⁹⁷ L Woods, P Watson, *Steiner & Woods EU Law* (12th ed 2014) p 346.

¹⁹⁸ In particular, art 2, art 3(1) and art 4 TFEU.

¹⁹⁹ L Woods, P Watson, *Steiner & Woods EU law* (12th ed 2014) p 341.

²⁰⁰ Laying down the competence of the Council in what harmonisation is concerned.

²⁰¹ Art 114(1) TFEU.

²⁰² The principle of subsidiarity is defined in art 5 TEU.

²⁰³ Art 5(3) TEU.

²⁰⁴ Under art 3 TFEU, the EU has exclusive competences in the areas connected with: (a) the customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) the monetary policy (for the MS in the euro zone); (d) the conservation of marine biological resources under the

be solely regulated by the relevant MS, considering that the regulation of aspects connected with the market may be found under article 3 TFEU. In short, because donations may be made in a market context, this aspect of the law of donation falls within the competence of the EU. Only if donation were to be regarded as completely separated from the market²⁰⁵ would it be possible to defend the EU having no competence whatsoever on the regulation of the law of donation. This perspective was dismissed in Chapter 1, where it was argued that donation may occur in multiple contexts of life in society, being the market one of them²⁰⁶. It is therefore possible to argue that the EU is competent to determine the policy to be followed by donations made in a market context. This argument is strengthened by the fact that the EU has already used its legislative competence in what the law of donation is concerned. This will be demonstrated below, in particular where a consumer is the donee²⁰⁷.

2.3. EU law of donation

2.3.1. Legislation

The first relevant impulse towards the regulation of donation under EU law occurred in 2000, with the enactment of the Directive on Electronic Commerce²⁰⁸ (DEC). The provisions of the DEC are applicable to donations where the donee is a consumer, and they aim to protect the consumer-donee, who is regarded as the weaker party in the relationship²⁰⁹. In particular, the DEC has regulated the quality of the communications between donor and donee when a donation is entered into with the scope of sales promotion and when the relationship between donor and donee is classified as a consumer relationship.

Furthermore, under article 6(c) DEC, on the quality of the initial declaration(s) of the trader-donor in an electronic commerce context, the trader-donor cannot establish a relationship with the consumer-donee which is advertised as gratuitous, if an actual gratuitous benefit is not granted to the consumer-donee. It is not forbidden, however, for the trader-donor to

common fisheries policy; and (e) the common commercial policy. Furthermore, under art 3(2) TFEU, the EU “shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope”.

²⁰⁵ As defended by P Viollet, *Histoire du droit français* (3rd ed 1966) p 918.

²⁰⁶ See Chapter 1 – Revisiting the law of donation, 1.3. *Multiple dimensions of donations in Europe*, p 31.

²⁰⁷ Following art 12 TFEU.

²⁰⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *OJ L 178*.

²⁰⁹ C F Almeida, *Direito do Consumo* (2005) I.

donate first, with the scope of sales promotion, and to enter afterwards into a contract of sale of goods with the consumer. Freedom of contract is protected, however, the consumer-donee cannot be misled by the trader-donor. It is therefore possible to say that article 6(c) DEC presupposes the possibility of a donation made in a market context. This relationship is presumed to take place in a market context, where the parties may be strangers. The subject-matter of the DEC was further developed by Directive 2005/29/EC on unfair business-to-consumer commercial practices²¹⁰. The clarification was placed in Annex I of Directive 2005/29/EC (commercial practices which are in all circumstances considered unfair), paragraph 20, determining that there are several duties of good faith and fair dealing to the donee²¹¹. The necessity for this provision is debatable. Under the principle of freedom of contract²¹², the parties are free to agree on multiple legal effects, however, once agreement is reached, and defined as binding by the Law, the parties must comply with the terms set by the agreement. Considering the above, it is possible to conclude that European law has established a principle which protects the consumer-donee from being deceived by a trader-donor.

2.3.2. *The European Court of Justice*

It is in the area of tax law that the European Court of Justice (ECJ) has mainly considered donation and other gratuitous benefits. It is important to notice that most of the court decisions dealing with donation do not conceptualise the notion of donation, on the contrary, they accept without further questioning that the gratuitous transfer of rights over land or money is within the boundaries of donation²¹³. One case of particular relevance to the debate on a law of donation for Europe is, *EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs*²¹⁴. In this case, the ECJ defined the concept of “samples” and “gift of

²¹⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, *OJ L 149*, p 22-39.

²¹¹ Article 1 n 2(a) of the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ L 171*, forbids “describing a product as “gratis”, “free”, “without charge” or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item”.

²¹² As found at the Communication from the Commission to the European Parliament and the Council - A more coherent European contract law - An action plan, COM/2003/0068 final, p 1 to 4.

²¹³ Eg Judgment of the Court (Fourth Chamber) n. C-10/10, *European Commission v Republic of Austria* of 16 June 2011; and Judgment of the Court (Third Chamber), joined cases C-578/10 to C-580/10, *Staatssecretaris van Financiën v LAC van Putten* (C-578/10), *P Mook* (C-579/10) and *G Frank* (C-580/10) of 26 April 2012.

²¹⁴ Judgment of the Court (Third Chamber) n. C-581/08, *EMI Group Ltd v The Commissioners for Her Majesty's Revenue and Customs* of 30 September 2010.

small value”, as used in article 5(6) of Council Directive 77/388/EEC²¹⁵. This decision is of particular importance because it makes clear that, in order to define concepts such as “samples” and “gift of small value”, the MS must apply criteria which regard the benefit received by the donee(s), and not the disposition or cost incurred by the donor.

Having this authority in mind, it is possible to argue that the operative part of this decision starts by recognising “a certain discretion” as regards to the interpretation of the concept of “samples” and “gift of small value” made by each of the MS²¹⁶. In the reasoning of this decision it is possible to identify the principle of subsidiarity²¹⁷. This recognition has the objective of allowing MS to define the concept of donation by looking at the pecuniary value of the benefit received by the donee, with complete disregard for the (possible) cost incurred by the donor.

2.4. Non-legislative endeavours

Although widely used in European society, donations have not been studied by European legal writers in the same length as non-gratuitous transactions. European legal writers have overlooked gratuitous juridical acts, which led to the comparison of the study of donation with a sleeping beauty which waits to be awakened²¹⁸. But the sleeping beauty is starting to wake up, and as it will be demonstrated below, it is possible to find an ever-growing academic movement towards the study of the law of donation in Europe, both from a national and from a European perspective. The most relevant private endeavours²¹⁹ for the development of a European private law in general, and a law of donation for the market in particular, are therefore going to be reviewed in order to better understand the developments made, up to now, towards the study and development by research and scholarship of the law

²¹⁵ Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, *OJ 1977 L 145*, p 1.

²¹⁶ Paragraphs 42, 44 and 45.

²¹⁷ Art 5(3) TEU.

²¹⁸ S Grundmann, “Zur Dogmatik der unentgeltlichen Rechtsgeschäfte” (1998) *Archiv für die civilistische Praxis*, p 457.

²¹⁹ Experts in their field who work independently, whether individually or who are organized in groups, acting outside the umbrella of a public institution with legislative powers, such as academics or groups of academics, think tanks, among others.

of donation. The private endeavours listed below are either privately funded, or pushed forward by the EU.

2.4.1. Principles of International Commercial Contracts

The International Institute for the Unification of Private Law (Unidroit) is an independent intergovernmental organisation created in 1926 as an auxiliary organ of the League of Nations, and re-established in 1940²²⁰. Based in Rome, its purposes are identified in article 1 of the Unidroit Statutes: “to examine ways of harmonising and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law”²²¹. Following this objective, and considering the noticeable European and world trend towards globalisation and harmonisation of the markets²²², the Unidroit first published in 1994 the Principles of International Commercial Contracts (PICC)²²³, and further developed them in 2004 and 2010²²⁴.

No direct reference is made to the regulation of donations in the market by the PICC, however, the absence of concepts such as “donation” or “gift” has not stopped the introduction in 2004²²⁵ of article 5.1.9 (release by agreement), which regulates the agreement by which an obligee may (gratuitously) release his rights²²⁶. Article 5.1.9 of the PICC is important because it establishes a principle which is relevant, and directly applicable, to donations in the market: by declaring that no offer to release a right shall produce juridical effects if not accepted by the beneficiary. This article clarifies that all benefits, including those provided gratuitously, must be accepted. Thus, it may be argued that acceptance should be regarded as key for the protection of the interests of the donee. Article 5.1.9 goes even further, and creates a presumption of acceptance by the beneficiary of a gratuitous benefit.

²²⁰ Available at <http://www.unidroit.org/english/presentation/statute.pdf> (assessed 28.10.2016).

²²¹ See <http://www.unidroit.org/english/presentation/statute.pdf> (assessed 28.10.2016).

²²² M J Bonell, “The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?” (1996) *Uniform Law Review*, p 229-246.

²²³ PICC was published in 1994.

²²⁴ Changes occurred in 2004 and 2010.

²²⁵ Maintained in the 2010 edition.

²²⁶ Art 5.1.9: “(1) An obligee may release its right by agreement with the obligor. (2) An offer to release a right gratuitously shall be deemed accepted if the obligor does not reject the offer without delay after having become aware of it”.

In conclusion, under the PICC, in case of silence of the beneficiary, the benefit is presumed as accepted.

2.4.2. Principles of European Contract Law

The Principles of European Contract Law (PECL) are the result of the work of the Commission on European Private Law (CECL), chaired by Ole Lando. The CECL was formed in 1980 and the work began in 1982²²⁷. The CECL began as a non-governmental body of lawyers from 15 MS with the intention to find general principles which would bring a “systematic harmonization of the contract law in those countries”²²⁸. The work of this commission is based on the need felt by the members of the Commission on European Private Law for common European model rules for (i) the facilitation of cross-border trade within Europe; (ii) the strengthening of the single European market; (iii) the creation of an infrastructure for community laws governing contracts; (iv) the provision of guidelines for national courts and legislatures; and (v) the construction of a bridge between the civil law and the common law²²⁹. These generic principles do not directly refer to the regulation of donation in Europe, however, they have introduced the idea that gratuitous transactions are relevant in what European contract law is concerned, without attempting to analyse gratuitous contracts following a consideration or *causa* doctrine. The background set by the PECL is therefore relevant for the development of the Draft Common Frame of Reference (DCFR), which has directly reviewed the law of donation, in particular in what it concerns to donations made in a market context.

2.4.3. The Draft Common Frame of Reference

In contrast to other private endeavours, the DCFR may be qualified as an important step towards the creation of a European private law in general, and a EU law of donation in particular. Originating in an initiative of European legal scholars²³⁰ and under the stimulus of the EU institutions²³¹, the DCFR was created in the hope it would “promote knowledge

²²⁷ O Lando, “How the Principles of European Contract Law (PECL) Were Prepared” (2006) *European Journal of Legal Reform*, p 477.

²²⁸ O Lando, “The Common Core of European Private Law and the Principles of European Contract” (1997-1998) *Hastings International & Comparative Law Review*, p 810.

²²⁹ O Lando, H Beale, *Principles of European Contract Law, Parts I and II* (2000) p xxi.

²³⁰ DCFR, Intr. 4.

²³¹ Following the position of A Keirse, “European impact on contract law – A perspective on the interlinked contributions of legal scholars, legislators and courts to the Europeanization of contract law” (1996) *Utrecht*

of private law in the jurisdictions of the European Union. In particular, it will help to show how much national private laws resemble one another and have provided mutual stimulus for development”²³². The DCFR may also be regarded as a toolbox primarily designed to ensure consistent terminology for EU legislation and has therefore given birth to both model rules and principles of European private law, which are being used at present by national courts and national entities with legislative powers²³³. The relevance of the DCFR for the development of EU law of donation must therefore be taken into consideration and will be used as a source for the discovery of principles and objectives that could guide a modern law of donation for Europe.

The DCFR has gathered knowledge from multiple sources, including the work of the Study Group on a European Civil Code and the Research Group on Existing EC Private Law (also known as the *Acquis* Group)²³⁴. The DCFR has therefore received influences from at least two relevant sources: it has benefited from the work of comparative research of the different European jurisdictions, while tracking an *acquis communautaire*, the principles that are found across the EU, either present in their national law by action of history or acquired by the action of the legislative powers of the EU. Despite criticisms that the DCFR does not take the European integration process in full account²³⁵, it is important to recognise its use as a framework for the activity of lawmakers, courts and academic endeavours across Europe²³⁶.

2.4.3.1. The DCFR and donations in the market

Unlike PECL and the PICC, the DCFR addresses donation (in the market) directly. Donation is regulated in particular under Book IV of the DCFR. Historic and cultural considerations have influenced the content of the model rules and principles comprised within the DCFR. The DCFR drafters however also view themselves as creators of a manual for future law reform and this also seems to have played an important role in the shaping of its

Law Review, p 38 and the *Second Progress Report of the Commission on The Common Frame of Reference of Reference* of 25 July 2007, COM (2007) 447 final.

²³² DCFR, Intr 7.

²³³ K Purnhagen, “Principles of European Private or Civil Law? A Reminder of the Symbiotic Relationship Between the ECJ and the DCFR in a Pluralistic European Private Law” (2011) *Centre for the Study of European Contract Law Working Paper Series*, 2011/04.

²³⁴ DCFR Intr 1.

²³⁵ H Micklitz, F Cafaggi (eds), *European Private Law after the Common Frame of Reference* (2010) I, p x.

²³⁶ DCFR Intr 7.

provisions²³⁷. In the case of donation, the DCFR has pursued principles and objectives connected with safety, efficiency and minimal substantive restrictions in the market²³⁸. This action has been taken, it can be argued, with the clear intention of regulating donations in a market context. This intent is clearly demonstrated by the scope of the model rules comprised in Book IV, Part H.

The first indication of the desire to regulate donations in a market is found under article IV.H. – 1:102(2), which mentions the word “manufacture”, an expression traditionally used in English language in respect of “a manufacturing establishment, or business; a factory”²³⁹. By referencing a reality which is empirically connected with the idea of market (goods are manufactured, in order to be placed in the market, so that they can be traded), it is possible to argue that the DCFR wishes to regulate donations which are presumed to be made in a market context, or which are, at least, connected to the market. Furthermore, article IV.H. – 1:203(2)²⁴⁰ regulates a business practice that walks side-by-side with donation in the market: the practice of promotions and offers given to the consumers for the purpose of sales promotion. In this case, the DCFR has defined “intent to benefit” as a legal intention to confer a benefit on the donee. These particularities are relevant because they demonstrate that the DCFR regards donation and the market as two intertwined realities, which co-exist and must, therefore, be regulated together. Due to this connection between donation and the market, it may be argued that the DCFR has intended to provide a unitary (European) framework for the regulation of donation in a market context. The principles set by the DCFR therefore constitute a model against which it is possible to judge national laws of donation, in order to determine if they are fit for the purpose of regulating donations in the market.

2.5. Principles and objectives of donations in the market

2.5.1. Introduction

The DCFR is particularly relevant when addressing the regulation of donations in the market because, as argued above, the DCFR is a comprehensive study which is concerned with the

²³⁷ DCFR Intr.

²³⁸ DCFR, Princ 6.

²³⁹ J Simpson, E Weiner, *The Oxford English Dictionary* (2nd ed 1989) IX, p 341.

²⁴⁰ Art IV.H.–1:203 DCFR defining the scope of the intent to benefit of the donor: “A donor may be regarded as intending to benefit the donee notwithstanding that the donor: (a) is under a moral obligation to transfer; or (b) has a promotional purpose”.

regulation of all transactions in the market, either onerous or gratuitous ones. The DCFR is also the most comprehensive study of what features should be part of a future law of donation for Europe and the European Common Market. A comprehensive inquiry into the principles to be followed, and the objectives to be achieved by a law of donations fit to regulate donations in the market should be based on the premise that multiple players interact in a market context, where cultural and religious diversity must be respected²⁴¹. The comprehensive study on donations and the market conducted by the DCFR, resulting in rules guiding donation²⁴², makes the DCFR the most comprehensive source of principles on donations in a market context in general, and in a European Common market context, in particular.

The present section aims to formulate guidelines suitable to the regulation of donations made in a market context. The needs of donations in the market will be critically reviewed with the intention of allowing us to assess, in future chapters, if present national laws of donation are fit for the purpose of regulating donations in the market. The word “guidelines” is used here to signify both, principles to be followed, and objectives to be achieved by the relevant national law of donation under review. These guidelines are to be extracted from multiple sources, but particular emphasis is to be given to the DCFR²⁴³, due to its relevance in the formulation of model rules directly applicable to donations in the market.

2.5.2. Principles identified by the DCFR

Looking at the DCFR, it is possible to identify generic principles applicable to donation, as well as proposed substantive regulation (model rules) from which donation-specific principles may be extracted. Considering that among the different sources of guidance towards a law of donation for Europe, only the DCFR comprises a comprehensive study on donation in Europe²⁴⁴, the DCFR is deemed as the most suitable source of guidelines guiding an efficient law of donation. The DCFR enunciates four principles as structural principles to be followed by a European private law in general and, therefore, by the law of donation in

²⁴¹ Europe is diverse. The Treaty on the European Union is based on this assumption and therefore, it states in its preamble that one of the desires of its signatories is “to deepen the solidarity between their peoples while respecting their history, their culture and their traditions” (TEU, preamble).

²⁴² DCFR, Part H. Donation.

²⁴³ C von Bar, E Clive, H Schulte-Nölke et al (eds), *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference* (2009) (DCFR).

²⁴⁴ J Basedow, K J Hopt, R Zimmermann (eds), *The Max Planck Encyclopedia of European private law* (2012) I, p 502.

particular. These principles are (i) freedom; (ii) security; (iii) justice; and (iv) efficiency²⁴⁵. These four principles actively contribute towards the objectives of stability of the market and the relationship between the parties.

2.5.2.1. Freedom

The principle of freedom, as defined by the DCFR, is a liberal approach towards private law, where one of the main concerns is to allow the parties to determine their own rules for their relationships. This principle has different dimensions because “freedom can be protected by not laying down mandatory rules or other controls and by not imposing unnecessary restrictions of a formal or procedural nature on peoples’ legal transactions”²⁴⁶. The principle of freedom is therefore regarded as very important in the EU context. It is of prime relevance to the EU because it prevents an “unlawful invasion of their rights and interests or indeed by any unwanted disturbance of the *status quo*”²⁴⁷. The principle of freedom also has multiple dimensions and may be applied in different areas of law. The DCFR has established that the different aspects to be taken into consideration are: contractual security²⁴⁸, the right to enforce performance²⁴⁹, the binding force of the agreement²⁵⁰ and the fact that parties must respect the situation created by the juridical act and may rely on that situation²⁵¹. In a market context, the freedom of contract includes the possible existence of a *modo* or counter-performance by the donee and the freedom to choose the identity of their counterparties – a rule which is particularly relevant in a context of open market and free competition²⁵².

2.5.2.2. Security

The protection of the parties’ expectations is particularly relevant in all cases when a donation is made between strangers. Due to the eventual imbalance in a donating relationship caused by the gratuity aspect of donation, different laws of donation protect the donor, as

²⁴⁵ DCFR, Princ 1.

²⁴⁶ DCFR, p 2.

²⁴⁷ DCFR, p 16.

²⁴⁸ DCFR, p 17.

²⁴⁹ Art III. – 3:301 and III. – 3:302 DCFR.

²⁵⁰ DCFR, Princ 20, with regard to art II. – 1:103, III. – 1:108 and III. – 1:109 DCFR; and following art 0-201(1) (Binding Force) and 0-103 (Freedom of the parties to modify or terminate the contract) of the *Principes directus*.

²⁵¹ DCFR, p 18.

²⁵² P Nihoul, *Freedom of Choice - The Emergence of a Powerful Concept in European Competition Law* (2012) available at <http://dx.doi.org/10.2139/ssrn.2077694> (assessed 10/08/2016).

will be demonstrated in the following chapters. This protection is often created by legal rights of revocation provided to the donor²⁵³, rights which may cause uncertainty for the donee or his creditors. The principle of security comprised in the DCFR protects the donee's expectations, so that he is not deprived, as a rule, of the benefit (gratuitously) received. This security is also extended to the protection of third parties' expectations, such as the donee's creditors or heirs, who expect him not to be arbitrarily deprived of benefits received either gratuitously or non-gratuitously. Furthermore, the protection of the binding force of the donation should be regarded as a crucial part of the principle of security²⁵⁴. That said, it is important to mention that the DCFR recognises that in "extreme circumstances it may be unjust to enforce the performance of contractual obligations that can literally still be performed according to the original terms" if circumstances change dramatically²⁵⁵. Finally, following the principle of security means that an effective remedy is provided to those who have the right to a benefit, regardless of whether this benefit is provided by a gratuitous or onerous juridical act²⁵⁶.

2.5.2.3. Justice

The principle of justice, as defined by the DCFR, is based on the protection of the vulnerable party and on the prevention of gross unfair advantages²⁵⁷. Bearing in mind that donation is created by a gratuitous juridical act²⁵⁸, the principle of justice must be adapted in order to only intervene in carefully specified circumstances, such as "if the party was dependent on

²⁵³ Such as happens in Portugal and France, see Chapter 4 - Portugal, 4.5.2. *Protection of the parties*, p 188; and Chapter 5 – France, 5.5.1. *Protection of the parties*, p 224.

²⁵⁴ Following DCFR, Princ 20, with regard to art II. – 1:103, III. – 1:108 and III. – 1:109 DCFR; and following arts 0-201(1) (Binding Force) and 0-103 (Freedom of the parties to modify or terminate the contract) of the *Principes directeurs*.

²⁵⁵ DCFR, Princ 21.

²⁵⁶ Art III. – 3:301 and III. – 3:302 DCFR.

²⁵⁷ DCFR, Princ 40 and following.

²⁵⁸ Where the parties are presumed to freely agree with its contents and legal effects.

or had a relationship of trust with the other party, was in economic distress or had urgent needs, or was improvident, ignorant, inexperienced or lacking in bargaining skills”²⁵⁹.

2.5.2.4. Efficiency

The principle of efficiency has two dimensions, a micro-dimension, where it intends to promote efficiency to the parties, and a macro-dimension, where efficiency is promoted for “wider public purposes”²⁶⁰. Furthermore, the principle of efficiency, as described by the DCFR, has the objective of establishing the “minimum formal and procedural restrictions”²⁶¹. This is not necessarily applicable to donation, where formalities confirm the validity of the juridical act. These formalities are required in order to create legal security – ritualistic formalities ensure that the will of the party (in particular, the donor’s will to donate) was formed freely²⁶². Certainty created by legal formalities is relevant not only to protect the donor, but also to protect the donee and his creditors (they can trust that, if the formalities for the validity of the juridical act were observed, then the act is valid and cannot be revoked).

2.5.3. *Principles to be followed in the regulation of market donations*

Bearing in mind the relevance of the principles enunciated by the DCFR in what the regulation of market donations is concerned, these principles will be used in the following chapters when assessing the regulation and protection conferred upon the parties by the relevant national laws of donation. This means that each national law of donation under review will be critically reviewed with regard to the following elements: (i) the protection of the parties directly involved in the donation; (ii) the protection of third parties (or parties

²⁵⁹ DCFR, Princ 43.

²⁶⁰ DCFR, Princ 54.

²⁶¹ DCFR, Princ 55.

²⁶² On the new formalistic trends see D V Snyder, “Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct” (2001) *SMU Law Review*, p 617-654.

who are not directly involved in the donation); and (iii) the protection of the community as a whole.

2.5.3.1. Protection of the parties

By recognising that donations occur in the market, it is necessary to provide the parties with the freedom to enter into gratuitous transactions with both, connected persons and strangers alike. The principle of freedom aims to empower the parties to define the terms of their own donations and to freely choose their counterparties. Therefore, a national law of donation that complies with this principle should only intervene when the terms of the donation are considered as unfair or when the identity of the counterparty is not deemed as appropriate²⁶³. The parties must be free to select the parties with whom they intend to establish donating relationships. This freedom of choice must be provided by the law of donation.

The protection of the parties' expectations is particularly relevant in all cases when a donation is made between strangers. A law of donation in line with the principles found in the DCFR must therefore provide the donee with the right to enforce performance²⁶⁴ and the right to rely on the situation created by the donation²⁶⁵. The right to enforce performance creates security in donations between strangers because strangers may not share the same moral codes of conduct. A national law of donation which is fit for the purpose of providing security to parties from different cultures or backgrounds is a law of donation that protects the parties' expectations that the agreed terms of the donation will be respected and, if not, enforced by the law. This rule should not, however, be taken to its extreme and, as acknowledged by the DCFR, a dramatic change in circumstances should impact on donation²⁶⁶. Therefore, the law of donation must also be flexible when pursuing the principle

²⁶³ As example, it is possible to identify art IV. H. – 2:104 DCFR on unfair exploitation.

²⁶⁴ Art III. – 3:301 and III. – 3:302 DCFR.

²⁶⁵ DCFR, Princ 18.

²⁶⁶ DCFR, Princ 21.

of security. If the circumstances are predictable at the time of donation, then they could have been presumed by the parties, and appropriate measures could have been taken²⁶⁷.

Finally, considering that donations are made by both physical and legal persons alike, the law of donation must be guided by the principles of equality and justice. Equality because the law of donation should not discriminate, in principle, between physical and legal persons. Justice because both physical and legal persons alike, may need to be protected against donations which bring gross and unfair disadvantages to them²⁶⁸. Furthermore, and bearing in mind the different dimensions of donation, a law of donation which follows the principle of justice must not discriminate between one-off donations and those which are used to maintain long-term relationships. Donations made in the market may occur as a one-off juridical act between the parties, and no longer necessarily be part of a long-standing relationship between the parties (or that will not be maintained in the future). A fair law of donation takes into consideration a possible short-term relationship between the parties as well. A law of donation which is fit for the purpose of regulating donations in the market must therefore protect the vulnerable party and prevent gross unfair advantages in both cases²⁶⁹, when the relationship between the parties is maintained in the future, and when it is not.

2.5.3.2. Protection of third parties

Security is essential for the promotion of confidence in all areas of life, but it is of particular relevance in the market, where security leads to an increase of commercial transactions. This is particularly true in market transactions where consumers are one of the parties involved – if consumers trust that their rights will be respected and enforced, they will consume more²⁷⁰. A law of donation fit to regulate market donations in national, European and global contexts, where one of the primary goals is the promotion of cross-national transactions²⁷¹, must therefore provide security to the parties involved. This security is achieved by making sure that, once made, donations are not going to be unilaterally revoked, or otherwise

²⁶⁷ For example, it is predictable for a healthy young person to have a child in the future. If this fact is easily predictable at the time of the donation, then it should not be allowed as a justification for the revocation of a valid donation in the market.

²⁶⁸ DCFR, Princ 40.

²⁶⁹ DCFR, Princ 40.

²⁷⁰ C F Almeida, *Direito do Consumo* (2005); C F Almeida, *Os Direitos dos Consumidores* (1982).

²⁷¹ J Noll, “Community & E-Commerce: Fostering Consumer Confidence” (2002) *Electronic European Law Review*, p 207.

discretionarily annulled by the donor alone. Security also means that moral and religious rules are separated from the legal regulation of donation, because only then parties with different backgrounds or which follow different religions, will be able to know and rely on a communal regulation for their relationship. Very often, moral considerations are intertwined with donation because donation is directly associated with the family. Donations used in the family context are heavily regulated by non-legal rules, such as moral and religious norms²⁷². It is therefore important to keep these considerations separated from the law of donation, allowing the law of donation to regulate the effects of a donation, without interfering with the internal rules of one particular group in society²⁷³. Bearing in mind that security should not be solely about markets, it is important to note that in market concerns, such as the protection of third parties, respect for party autonomy and for individual self-determination, the promotion of security is essential to the healthy increase of market transactions. Security is therefore of fundamental relevance in a market context. It is for this reason that security is so highly valued in the present review, undertaken in this thesis, of donations made in a market context.

2.5.3.3. Protection of the community

Diversity in Europe in particular, and in a globalised world in general, means that different communities coexist and trade with each other. These different communities are no longer closed within themselves and, on the contrary, they interact with each other outside and in the market. Different communities potentially follow diverse moral and religious norms. This means that they are regulated under the same law, but may guide their lives by different codes of conduct. A law of donation which upholds the principle of justice must therefore be able to respect distinct cultures and heritages, while providing security, meaning that all parties, with disregard for their religion or background, are treated equally under the (same) law. This equality also complies with article 3 TEU²⁷⁴. Reached here, it is necessary to recognise that the legal regulation of donation is the outcome of a political choice, and therefore, may change according to the composition of the relevant legislator. But this political choice may still be able to inform all subjects of the law on the common

²⁷² For further development of the topic, see in particular Chapter 1, 1.4. *Donations in the family*.

²⁷³ Moral considerations seem to have, nevertheless, reached the DCFR. See art IV. H. – 4:201 DCFR (ingratitude of the donee); art IV. H. – 4:202 DCFR (impoverishment of the donor); and art IV. H. – 4:203 DCFR (Residual right to revoke).

²⁷⁴ Art 3(3) TEU.

dispositions, which must be followed by all parties involved, guiding the relationship created by the donation. Therefore, and as an example, by defining principles such as equality or efficiency, the TEU and the DCFR laid down a consensus, on what is fair and what should be followed accordingly by all relevant parties.

In order to comply with the principle of efficiency, in particular, the law of donation must set a number of formalities which are able to create procedural efficiency in respect of market transactions, while also providing security in the market. The balance between security and efficiency means to create procedures which accomplish a high level of security without creating unnecessary obstacles to trade. For this reason, the DCFR has established that donations (of goods) need to be made by writing²⁷⁵, allowing exceptions to this rule if the donation is made by a business or if the donor has made the undertaking in a public statement²⁷⁶. The principle of efficiency applied to donations in a social context means the formalities should be kept to a minimum²⁷⁷. Formalities are required in order to create legal security, however, for donations between friends and family, whose interactions are heavily regulated by moral (and often religious) rules, the law of donation may choose to reduce the formalities required for the validity of the donation or reduce the regulation of the donation by the law. The same does not happen in the market, where donations are not expected to be as heavily regulated by non-legal normative systems (such as moral and religion), the law plays an important role in settling disputes arising from it. A law of donation which follows the principle of efficiency should, therefore, establish a “minimum formal and procedural restrictions”²⁷⁸, in order to facilitate the maintenance of the relationships.

2.5.4. Objectives to be pursued by the law of donation

Bearing in mind the above, it is possible to argue that the law of donation often assumes the existence of an imbalance in the donating relationship, where one party needs to be protected against the other²⁷⁹. These considerations are extracted by several legal writers from donations made in a family context, where donation is regarded with suspicion²⁸⁰. The

²⁷⁵ Art IV. H. – 2:101 DCFR (form requirements).

²⁷⁶ Art IV. H. – 2:102 (b) and (c) DCFR (exceptions to the form requirements).

²⁷⁷ DCFR, Princ 55.

²⁷⁸ DCFR, Princ 55.

²⁷⁹ As a demonstration, see D Guével, *Droit des successions et des libéralités* (2nd ed 2010) p 26 or A Ferrão, *Das Doações Segundo o Código Civil Português* (1911) p 24.

²⁸⁰ As a demonstration, see A Seriaux, *Manuel de droit des successions et des libéralités* (2003) p 11.

imbalance in the “economic rationality” of donations linked to the family is regarded by legal writers as unnatural, an unnatural transaction that is only justified by the “liberal intention” of the donor²⁸¹. Departing from this perspective, because donations made in a market context are able to be explained by economic rationality, the presumption that there is an imbalance for the parties no longer applies. Both parties assume that the gratuitous transaction entered by both of them (the market donation) is often made in view of a non-legally enforceable (future) profit. By assuming that donations in the market may be explained by economic rationality, and that they are no longer compelled by powerful feelings such as love or affection²⁸², it may be argued that the law of donation no longer needs to intervene in order to correct a presumed imbalance created by the strength of the above-mentioned feelings.

In donations made in a market context, the parties may be treated as equals because both parties are aware that the donation may be made in view of profit, even if this future profit cannot be legally enforced or demanded by the business-donor. But treating the parties as equals does not mean that the law of donation should not regulate donations made in a market context, on the contrary, the law of donation should be able to intervene whenever this balance is threatened²⁸³. Arguing for equality in the market means that both parties must be in possession of the relevant information for the correct development of their will. Information duties must therefore be in place for an effective equality between the parties, creating a climate of confidence and security in the market²⁸⁴. Bearing in mind that donations are often regarded as juridical acts made between family members, and as such, physical persons who donate and receive donations, the law of donation should detach itself from this prejudice, considering that not only physical persons, but also legal persons are able to donate and to receive donations. From a family perspective, only natural persons are perceived as relevant as donor and/or donee, a perspective which does not correspond to

²⁸¹ S Lambert, *L'intention libérale dans les donations* (2006) p 16.

²⁸² A Caubet, *L'institution contractuelle ou donation de biens à venir* (1911) p 15.

²⁸³ DCFR, Princ 43.

²⁸⁴ DCFR, Princ 58.

donation today. The law of donation must therefore be able to efficiently regulate donations made and received by legal persons and physical persons alike.

Trust is of particular relevance for the existence of a market transaction²⁸⁵. This means that the law of donation should promote confidence and security in the market. This objective can be achieved following different routes, including the right to enforce performance and the right to expect fair dealing. These rights come together to promote confidence in the market and in transactions entered into by strangers and connected people alike. This confidence is particularly relevant when strangers from different backgrounds and different nationalities enter into a relationship. If confidence is not promoted by the law, strangers will refrain from entering into transactions they perceive as dangerous or with a high degree of associated risk. As examples, they may fear that their donations may be revoked against their will, the *modos* may not be complied with by the donee and they may not be able to enforce it, the motive why the donation was made may fail without any repercussions, among others.

2.6. Interim conclusion

The European legal contributions to the development of the law of donation, both legislative and non-legislative, add to our understanding of donation by clearly recognising its placement in the market. This recognition strengthens the argument enunciated in Chapter 1, where it was argued that donations are not just found in a family-related context, but may also be found in other areas of life, one of them being the market. The DCFR was presented as the most relevant contributor to the development of the law of donation in Europe, and therefore, the principles enunciated by the DCFR were used to construct guidelines. These guidelines (principles to be followed and objectives to be fulfilled by the law of donation) will be used in the following chapters to assess the fitness of relevant national laws of donation to regulate donations made in a market context. In short, the study of the European contributions has demonstrated that, at a conceptual level, donations are made in a market

²⁸⁵ E Posner, "Altruism, Status and Trust in the Law of Gifts and Gratuitous Transfers" (1997) *Wisconsin Law Review*, p 578.

context, and in terms of substantive law, that little contribution has been provided by the EU legislative bodies to the development of the law of donation in Europe.

EU legislative competence is restricted in respect of donation. Considering the limited competence of the EU for the regulation all areas of law which are closely related to the family, and that donation is often associated with the family, it is possible to conclude that the EU legislative competence is here restricted by the Treaties²⁸⁶. While this competence is presumed to be conferred by the MS²⁸⁷, the EU may only take action in what the law of donation is concerned, where it has legal competence – the market. This relatively limited competence highlights the current split between family and the market, in what the law of donation is concerned. In addition, it is necessary bear in mind that the EU has considerable influence in multiple areas through “soft law” and co-ordination, or generic policy development. A distinction is drawn between the legislative competence of the EU to create EU law in all areas connected with the market and family, which is regulated at national level, because the EU was not vested with the competence to regulate it. In opposition, the European project (broadly defined) has given rise to various initiatives looking at European private law/harmonisation, leading to the treatment of the law of donation (and its placement in the market) by the DCFR.

Donations in the market have special needs. It was further argued that the EU has a shared competence for the regulation of donations in the market. By disconnecting donations from the family context it is possible to recognise that donation exists outside of a circle of connected people, as explained in Chapter 1. If a gratuitous relationship is entered with a stranger, there is no reason why this relationship should not be regulated under the law of donation. In today’s European Common Market, people from different cultures and religions come together to trade (and donate), which means that national social norms are no longer adequate to regulate the relationship between them, where the law has not done so. It is further argued that non-legal normative orders cannot play a role in the regulation of donation. Religion, in particular, must be separated from the regulation of donations in the market, considering that the principle of freedom of religion²⁸⁸ (which includes the right to be free from religion) prevents it. It is therefore possible to argue that a law of donation fit

²⁸⁶ In particular, the TEU and TFEU (the Treaties).

²⁸⁷ Art 3(6) TEU: “The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties”.

²⁸⁸ See the European Convention on Human Rights and the Human Rights Act 1998.

to regulate donations in the market must be a secular one, guided by secular principles and objectives.

The DCFR as benchmark. This need for a secular law of donation led to the review of different European inputs to the law of donation. The DCFR was chosen as the most relevant source of guidelines to be pursued by a law of donation in the market. This choice was made regarding the fact that the DCFR has respected the different European jurisdictions, their principles and particularities, while creating a comprehensive set of principles and model rules aiming to regulate donations from a European Common Market perspective. The comprehensive study of the law of donation in Europe conducted by the DCFR cannot, therefore, be ignored, and it must be regarded as the main source of guidance for a future law of donation in Europe.

The DCFR enunciates four principles as structural principles to be followed by a European private law in general and, therefore, by the law of donation in particular. These principles are (i) freedom²⁸⁹; (ii) security²⁹⁰; (iii) justice²⁹¹, and (iv) efficiency²⁹². These four principles actively contribute towards the objectives of stability of the market by promoting confidence. They should therefore be used as the operative principles to a critical analysis of national laws of donation, in order to assess if they are ready to cater for the necessities of donations in the market. *Freedom* is regarded as necessary for the empowerment of the parties in the market context. *Security* is regarded as necessary to prevent one of the parties from unilaterally revoking or changing the terms of the donation (therefore protecting the expectations of all parties and promoting confidence). *Justice* recognises that donations are made by legal persons and physical persons alike. Finally, *efficiency* is achieved by clear formalities, which ensure the binding legal force of donations in the market.

Principles and objectives to be followed by a law of donation for the market. The above-mentioned principles are embodying several objectives, the most relevant being: (i) the protection of the vulnerable party when a grossly unfair advantage was created²⁹³; (ii) the promotion of information duties which not only benefit the parties but also promote

²⁸⁹ See 2.5.2.1. Freedom, p 66.

²⁹⁰ See 2.5.2.2. Security, p 67.

²⁹¹ See 2.5.2.3. Justice, p 68.

²⁹² See 2.5.2.4. Efficiency, p 68.

²⁹³ See 2.5.2.1. Protection of the parties, p 69.

confidence in the market²⁹⁴; (iii) equality of treatment for legal and physical persons²⁹⁵; and (iv) the promotion of confidence, by granting the donee the right to enforce performance and the right to expect fair dealing²⁹⁶. These different principles and objectives are going to be used in the following chapters to critically review national laws of donation, and assess their fitness for the purpose of regulating donations made in a market context.

²⁹⁴ See 2.5.2.1. Protection of third parties, p 71.

²⁹⁵ See 2.5.4. Objectives to be pursued by the law of donation, p 74.

²⁹⁶ See 2.5.4. Objectives to be pursued by the law of donation, p 73.

Chapter 3 - Scotland

3.1. Introduction

The present chapter will critically review the Scots law of donation with the objective of assessing its suitability to regulate donations made in a market context. To better understand the Scots law of donation, a critical review of the existing law will be conducted in the first part of the chapter, followed by the placement of the law of donation within the taxonomy of Scots Private law. This will be followed by the second part of the chapter, which will assess the fitness for purpose of Scots law of donation for the regulation of donations in a market context.

Following Chapter 2, where the needs of donations made in a market context have been reviewed²⁹⁷, the present chapter aims to address a dual perspective: a perspective where only the Scottish market is concerned, and, presumably, both parties – donor and donee – are familiar with Scots law of donation; as well as a cross-border perspective, where the parties – donor and donee – have different nationalities and backgrounds, and may need to be protected against rules which risk an imbalance in the contractual/legal autonomy of the parties. On one side, from a national market perspective, the concerns addressed by the law of donation are often connected with the regulation of transactions between parties who know each other before a donation is made, or who reinforce or establish a personal relationship with the donation²⁹⁸; while on the other side, from a supra-national perspective,

²⁹⁷ See Chapter 2 – European contributions to the law of donation, 2.5.2. *Principles to be followed in the regulation of market donations*, p 69.

²⁹⁸ Often being associated with family life or the strength of personal or business relationships. As examples, it is possible to find gifts to children, bequests, samples, the gift of an engagement ring, among many others. This connection with an ongoing personal relationship between the parties may be found in legal Scottish writings, one such case being Stair, *Institutions* I.8.1: “Bonds, Assignations, other Rights, in the names of Children *unfor as familias*, & unprovided, are presumed to be Donations, because of the Parents Natural Affection”.

the concerns addressed by the law of donation must span the areas of safety and security in transactions²⁹⁹.

The Scottish jurisdiction is at present one of the jurisdictions composing the EU (and the European Common Market)³⁰⁰, but which may soon stand outside of it in the context of the recent Brexit referendum³⁰¹. In this referendum, 51.9% (against 48.1%) of those voting had expressed their wish for the United Kingdom to leave the EU³⁰². As part of the United Kingdom, Scotland may soon leave the EU (despite a 62.0% Scottish vote expressing their wish to remain part of the EU³⁰³), and the consequences of exiting the EU are still unknown. It is not certain if the United Kingdom (and Scotland) will leave the European Common Market as well, or if they will remain part of the single market, but outside of the EU³⁰⁴. Despite this uncertainty, the present study remains valid, considering that its aim is to understand if present Scots law of donation is suitable to create security for parties donating in a market context, a context where persons from different backgrounds enter into relationships regulated under the law.

3.2. Review of Scots law of donation

Beginning with a review of the development of the Scots law of donation is important because it will allow us to understand why the present law of donation has adopted its current shape. After these elements have been provided, they will be used to critically assess the definition of donation in Scotland, with particular emphasis on the impact of classifying an act as a donation in a market context. Furthermore, by looking at the opinions of relevant legal writers, it is possible to better analyse the roots of donation in Scotland, therefore better

²⁹⁹ G Ribeiro, “The Influence of Human Rights and Basic Rights in Contract Law” (2016) *The Influence of Human Rights and Basic Rights in Private Law*, para 16.2.2: “in the majority of cases, fundamental rights are mediated by general clauses, except in situations where the contractual legal relationship presupposes a relationship of subordination or one of the parties is protected by law”.

³⁰⁰ Bearing in mind the several EU treaties, with particular emphasis to the Treaty establishing the European Economic Community, EEC Treaty, signed in Rome in 1957, later incorporated in the European Union (EU) by the Treaty on the Functioning of the European Union.

³⁰¹ See <http://www.parliament.uk/business/publications/research/eu-referendum/> (assessed 28.10.2016).

³⁰² See <http://www.parliament.uk/business/publications/research/eu-referendum/> (assessed 28.10.2016).

³⁰³ See <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/upcoming-elections-and-referendums/eu-referendum/electorate-and-count-information>. (assessed 28.10.2016).

³⁰⁴ See, among others, <http://www.reuters.com/article/us-britain-eu-wrapup-idUSKCN0ZB090> (assessed 28.10.2016).

understanding the origin of particular rules which distinguish between donations and other (onerous) acts in the market.

3.2.1. Definition of donation

The definition of donation has long divided lawyers in Scotland³⁰⁵. While a single definition of donation in Scots law cannot be found, it is true that contemporary legal writers and Scottish courts have been heavily influenced by the “Institutional Writers”³⁰⁶. It may be argued that these Institutional Writers may be divided into two main groups when addressing the topic of donation: those who see donation as a defence against the rules of unjustified enrichment; and those who see donation primarily as part of the law of voluntary obligations.

One of the early Institutional Writers, Stair, sees donation as a *modus acquirendi*, which justifies the conservation of the benefit by the donee³⁰⁷. For Stair, donation is deeply connected with a benevolent intervention of the donor and it is seen as an expression of the natural law principle of gratitude³⁰⁸. This perspective keeps Stair away from classifying donation as a juridical act *per se*, from which obligations arise, instead regarding the donating phenomenon as a natural law justification (under God’s protection) for the maintenance of the benefit by the beneficiary/donee. Bankton broadly followed Stair in his definition of donation, defining it as a “grant of anything, to which one could not be compelled by law”³⁰⁹. But it may be argued that Bankton has further contributed to the shaping of the law of donation as it is today, by clarifying that donation is “perfected, to the greatest extent by bare promise or agreement”³¹⁰. This means that Bankton recognised that,

³⁰⁵ W Gordon, “Donation”, (reissue2011) *SME*, 6, para 3: “indeed, there is no single ‘right’ place for the law of donation.”

³⁰⁶ Following N Whitty, “Civilian Tradition and Debates on Scots Law” (1996) *The Journal of South African Law*, p 235.

³⁰⁷ Stair, *Institutions*, I.13.14.

³⁰⁸ Stair, *Institutions*, I.8.1.

³⁰⁹ Bankton, *Institute*, I.9.I.2: “a Gift or Donation is the liberal grant of anything, to which one could not be compelled by law”.

³¹⁰ Bankton, *Institute*, I.9.3.

in Scots law, donations may be created by either unilateral (promises) or bilateral (agreements) juridical acts³¹¹.

Subsequent legal writers, writing about Scots law of donation, followed suit, having placed the subject primarily in the context of the law of obligations³¹². It is worth mentioning that Stair's approach was disputed by Erskine, who is referred to as the first Institutional Writer to treat donation as a juridical act in its own right³¹³. Erskine clarifies that there is a distinction in Scots law between an obligation to donate, as created by a juridical act, and the moment when the donee holds a benefit he did not hold before³¹⁴. Erskine³¹⁵ has based his writings on the novel approach towards donations taken by Bankton³¹⁶, who first detached donation from a solely benevolent 'God-protected' perspective of donation taken by Stair³¹⁷. Taking Bankton's approach as a starting point, Erskine has further drawn a clear distinction between the obligation to donate and performance³¹⁸. This distinction is one of the fundamental distinctions of Scots law of donation³¹⁹, being essential for determining the existence of a donation in Scotland today.

It is also relevant to mention that some contemporary legal writers have classified donation primarily as "a gratuitous transfer of property which is intended to take effect *inter vivos*"³²⁰. A property-based law of donation walks side-by-side with the vision of donation as a transfer of pre-existent (real) rights. The difficult task to place the law of donation in Scots private law is nevertheless recognised by one of the main voices linking donation to the transfer of real rights in Scotland, Gordon, who declares that "although 'donation' refers primarily to a transfer of property (or to the creation of an obligation to transfer property,

³¹¹ Bankton, *Institute*, I.9.10.

³¹² Scottish Law Commission, *Review of Contract Law, Discussion Paper on Third Party Rights in Contract* (2014) p 16; H MacQueen and M Hogg, "Donation in Scots Law" (2013) *Juridical Review*, p 1; among others.

³¹³ H MacQueen and M Hogg, "Donation in Scots Law" (2013) *Juridical Review*, p 1.

³¹⁴ Erskine, *Institute*, III.3.37.

³¹⁵ Erskine, *Institute*, III.3.90.

³¹⁶ Bankton, *Institute*, I.9.

³¹⁷ Stair, *Institutions*, I.8.1.

³¹⁸ Erskine, *Institute*, III.3.90.

³¹⁹ The relevance of this distinction is recognised in K Reid, *The Law of Property in Scotland* (1996) paras 606-618; D Miller, D Irvine, *Corporeal Moveables in Scots Law* (2nd ed 2005) paras 8.06-8.11, among others.

³²⁰ W Gordon, "Donation" (reissue 2011) *SME* 6, para 1; W Morton, *Manual of the Law of Scotland* (1896) p 303; among others.

which can itself be considered a form of incorporeal property), the term is sometimes used of any gratuitous act³²¹.

3.2.2. Cardinal elements

Despite the multiple definitions of donation provided by legal writers in Scotland, it is still possible to identify some cardinal elements, which are ever-present in the definition of donation in Scots law. These cardinal elements may be defined as the different elements of a juridical act which allow the lawyer or the judge to “discover” the existence of a donation. By establishing all the ever-present elements of donation under Scots law, it is possible to look at a relevant juridical act and determine if the relevant juridical act is, or it is not, to be qualified as a donation in Scots law.

Writers on the Scots law of donation, often state the need for the existence of a subjective will to donate, an *animus donandi*, which is mainly assessed by reference to the donor. As a demonstration, we may find Erskine, who defines donation as “the obligation which arises from the mere liberality of the giver”³²², or Stair, for whom a donation is characterised by a benefit given with *animo donandi* which “induces an obligation to be thankful but does not bind to the like Liberality”³²³. Erskine, for example, distinguishes the source of the donation (the juridical act, which creates the obligation to give), from the delivery of the subject matter, regarding the will of the donor as the source of donation (or the “obligation which arises from the mere good will and liberality of the granter”³²⁴). The idea that the *animus donandi* is a cardinal element of donation is further defended by MacQueen and Hogg³²⁵,

³²¹ W Gordon, “Donation” (reissue 2011) *SME* 6, para 1.

³²² Erskine, *Institute*, III.3.88.

³²³ Stair, *Institutions*, I.8.2. Furthermore, it is important to pointing out that, for Stair, the effect of something being a donation is on the obligations of the donee (an obligation of gratitude, no obligation to restore the benefit) rather an on the obligations created to the donor.

³²⁴ Erskine, *Principles*, III.3.36.

³²⁵ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 16.

who declare that at least the donor must be “actively involved” in the juridical act in order to produce legal effects³²⁶.

Donation is also unanimously understood in Scots law as gratuitous in general, and as an act which is not motivated by a previous legal obligation to give. This perspective is espoused by Erskine, who defined donation as the liberal grant of a right or a thing which could not be compelled by law³²⁷, Bell who has connected donation with the provision of a gratuitous benefit³²⁸, or Bankton, who states that “the receiver, donatary, because the [donor] gets no valuable consideration for it”³²⁹. Professor Gordon has clearly defined gratuity as the absence of a previous legal obligation to give³³⁰. Hogg has also defined donation as the creation of a gratuitous benefit, a benefit which is received by the donee without a reciprocal benefit being created to the donor by the relevant juridical act³³¹.

Finally, the creation of a benefit to the donee by means of a juridical act which takes effect *inter vivos* is also commonly defined as a cardinal element of donation in Scots law. Despite the variety of juridical acts categorised as a donation, it is also necessary for these juridical acts to produce their effects *inter vivos* to be classified as a donation by the above mentioned legal writers. Stair, for example, classified different juridical acts as donations. When referring to acts which may be regulated whether by the law of trust or donation, he provides as examples the following: “bond, assignation, disposition, or other right in another man’s name”³³². Erskine’s position will be further discussed below, but considering that he defines donation as an obligation, having placed it systematically under the heading “Of obligations arising from consent & C.”³³³, Erskine has indicated that if donation creates an obligation, then this obligation must be born of an act of the will, an act which may be described, in other words, as a juridical act. Furthermore, Erskine has studied in detail the hard boundaries between donations and legacies, associating the production of the legal effects *inter vivos* with the irrevocability of donation (contrary to legacies, which are, by definition, revocable)³³⁴. The production of effects *inter vivos* is further defined as a cardinal element

³²⁶ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 5.

³²⁷ Bankton, *Institute*, I.9.2.

³²⁸ Bell, *Commentaries*, II.II.2; Bell, *Commentaries*, III.I.5.

³²⁹ Bankton, III.III.23, when referring to “escheats granted by the barons of exchequer in the right of the crown”.

³³⁰ W Gordon, “Donation” (reissue 2011) *SME*, 6, p 55.

³³¹ M Hogg, *Promises and Contract Law – Comparative Perspectives* (2011) p 46.

³³² Stair, *Institutions*, I.8.1.

³³³ Erskine, *Principles*, III.3.

³³⁴ Erskine, *Principles*, III.9.2.

of Scots law of donation by Professor Gordon, who states that “donation is the preferred term in Scots law for a gratuitous transfer of property which is intended to take effect *inter vivos*”³³⁵, a perspective which is followed by MacQueen and Hogg³³⁶.

In short, the relevant cardinal elements, to be found, leading to its classification as a donation under Scots law are the following: (i) the *animus donandi*; (ii) the gratuity of the transaction (comprising the absence of a previous ‘legal’ obligation to give); and (iii) the creation of a benefit (produced *inter vivos*) by action of a juridical act. The cardinal elements for the application of Scots law of donation will be critically reviewed below and there will be particular emphasis on the clarification of the boundaries of each individual element of donation.

3.2.2.1. *Animus donandi*

It may be argued that the Scottish courts use two tests to assess if all above-mentioned cardinal elements are present in a relevant juridical act, leading to the qualification of the juridical act as a donation under Scots law³³⁷: the first, and perhaps most important test, consists of assessing if the subjective will of the donor, as demonstrated by his words or actions, contains the subjective elements *animus donandi* and gratuity; the second test consists of assessing if the donee was effectively vested in the benefit and if this performance was made *inter vivos* (often regarded as the discharge of an obligation undertaken by the donor, and referred to as “delivery” or “performance” by the Scottish courts³³⁸). Therefore, it is possible to say that Scottish courts demand the existence of a subjective element (the *animus donandi* of the donor) and an objective one (the performance) for the existence of a donation under Scots law. It is further accepted that a (subjective) intention to benefit

³³⁵ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 2; W Morton, *Manual of the Law of Scotland* (1896) p 303; among others.

³³⁶ H MacQueen and M Hogg, “Donation in Scots Law”, *Juridical Review* (2012) p 16.

³³⁷ As examples, see *Macpherson's Executrix v Mackay*, 1932 SC 505, where both were balanced, being argued that “even if there was sufficient evidence of *animus donandi*, the evidence was still insufficient to establish that Miss MacLean intended the benefit conferred to take the form of a donation *mortis causa*”; *Graham's Trustees v Gillies*, 1956 SC 437; among others.

³³⁸ See *Grant's Trustees v M'Donald*, 1939 SC 448, where it was accepted that “the real evidence constituted by the delivery of these two documents, and the oral evidence as to the circumstances surrounding that transaction, clearly establish (a) the delivery, and (b) the presence of *animus donandi*, so as to establish the *inter vivos* and *de presenti* gift of the contents of the deposit-receipt”; *Aiken's Executors v Aiken*, 1937 SC 678, where Lord Ordinary stated that “I find a sufficient relation to an expectation of death in the form in which the gift is made and in the condition under which the gift is to be enjoyed. If anything further be required, the circumstances to which your Lordships have referred are sufficient to demonstrate that this was typically an example of a donation made *mortis causa*”; *Graham's Trustees v Gillies*, 1956 SC 437, among others.

gratuitously constitutes an effective will to create a benefit to the donee and that this intention is not tainted by concurrent non-charitable intentions, or the pursuit of what is perceived by the donor as a moral or religious obligation to benefit the donee³³⁹. Conversely, if no subjective intention to gratuitously benefit the donee exists, the fact that the transaction is objectively gratuitous will not suffice. One such case is the discharge of a pre-existing legal obligation by the donor/benefactor to pay/benefit the donee. As it will be explained in length below, the existence of a previous legal obligation to benefit the donee is presumed, in Scots law, to destroy what is regarded as the subjective will to give (gratuitously) and leads to the failure of the first test, or in other words, a benefit provided to a beneficiary in the fulfilment of a previous legal obligation to give exempts the juridical act from being qualified as a donation under Scots law³⁴⁰.

When looking at donation from a market perspective, it is necessary to be aware that for some Scottish legal writers “no person is presumed to do what, in place of bringing him profit, must certainly be attended with some pecuniary loss”³⁴¹. This assumption must not be regarded, however, as contradictory to the existence of donations made in a market context, in particular those which are made with the intention of sales promotion or to receive a future gain. On the contrary, if the donor aims to promote his sales in the future, his intentions do not necessarily collide with a contemporary free will to give gratuitously. This means that the intention to gain in the future is not opposed to the existence of an *animus donandi*. It is therefore necessary to distinguish between the will to give gratuitously, which may be tainted by a previous legal obligation to give, and the motivation which leads to the donation (which may be a charitable donation, or the uncharitable intention to receive a future gratuitous benefit or favourable publicity and correspondent sales promotion). It is for this reason that *animus donandi* is regarded as “intention and not motive”³⁴² in Scotland.

In order to consolidate the idea that a will to give (gratuitously) is different from the motivation with which the donation was made, and that such will may be tainted by the pre-existence of an obligation to give, we may look at the case of a consumer who is provided with a new product, free of charge, in the fulfilment of his legal right to have a faulty product

³³⁹ Bankton, *Institute*, I.9.1.

³⁴⁰ As a demonstration, see Lord Deas’s opinion, “where a debtor pays a sum to his creditor there is always the presumption that it was so paid to account of the debt” in *Spence v. Paterson’s Trs.*, 1873 1 R. 46.

³⁴¹ Erskine, *Institute*, III.9.32.

³⁴² *Forrest-Hamilton’s Trustee v Forrest-Hamilton’s*, 1970 SLT 338 (Lord Thomson) para 28.

replaced or repaired³⁴³. In this particular case, the consumer bought a product that is not working according to the specifications of the contract, or that does not perform as it is expected for such type of product. Under the Consumer Rights Act³⁴⁴ the consumer has the right for the product to be repaired or replaced, which means that by providing a new product to the consumer, in replacement of the old one, the trader is merely discharging a previously existing legal obligation. The trader may wish to replace the product motivated by benevolence, however, this act may never be classified as a donation under Scots law, because the trader is not acting *animus donandi*. In this particular case, the trader does not have the intention to gratuitously provide a benefit to the consumer, and even if he has, under Scots law, his *animus donandi* was presumed to be tainted by a pre-existent legal obligation to replace the product. It is clear that the trader may benefit his consumers with a donation, if he wishes so, but it is also clear that whenever the trader is complying with his obligation to replace a faulty item, he is not donating a new item to the consumer, on the contrary, he is merely complying with the contract celebrated between trader and consumer, regulated under the Consumer Rights Act³⁴⁵.

Considering that *animus donandi* must exist for a juridical act to be classified as a donation in Scots law, this intention to benefit the donor is often identified as a will to provide the benefit to the donee in the present, and not in an uncertain future moment³⁴⁶. For example, MacQueen and Hogg suggest that not only an intention to give gratuitously is necessary to create a legally relevant *animus donandi*, but that a further intention to confer a present benefit (“now”)³⁴⁷, and not in the future is required for the creation of a donation in Scots law³⁴⁸. It may be argued that MacQueen and Hogg have adopted a more stringent concept of *animus donandi* aiming at better distinguishing between promise and donation in Scots law, but by doing so, they have also restricted the concept of donation in Scots law, by declaring that gratuitous promises are not to be classified as a source of donations, but that they coexist instead, side-by-side, with donation. Following Stair³⁴⁹ and Bankton’s³⁵⁰ approach, MacQueen and Hogg seek to “re-unite the law of gratuitous obligations (especially

³⁴³ Under the Consumers Rights Act 2015, s 23 (Right to Repair or Replacement).

³⁴⁴ Consumers Rights Act 2015, s 23.

³⁴⁵ Consumers Rights Act 2015, s 23.

³⁴⁶ See *Wight’s Trustees*, (1870) 8 M 708; *Taggart v Higgins’ Executor*, (1900) 37 SLR 843; *Graham’s Trustees v Gillies* 1956 SC 437; and *Gray’s Trustees v Murray* 1970 SC 1.

³⁴⁷ Following the spirit of the court decisions *Wight’s Trustees* (1870) 8 M 708; *Taggart v Higgins’ Executor* (1900) 37 SLR 843; *Graham’s Trustees v Gillies* 1956 SC 437; *Gray’s Trustees v Murray* 1970 SC 1.

³⁴⁸ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 8.

³⁴⁹ Stair, *Institutions*, I.8.

³⁵⁰ Bankton, *Institute*, I.9.

unilateral promises) and donations”³⁵¹, however, it is possible to argue that they have instead restricted the concept of donation, by associating donation with the transfer of property in Scotland³⁵². This association between donation and the gratuitous transfer of property has created a firm separation between the laws of donation and promise in Scots law, in a way that the only effective reconciliation made by MacQueen and Hogg between the two laws is found in their (surprisingly) firm assertion that “promises and donations are clearly both unilateral juridical acts and gratuitous ones”³⁵³.

The restrictive approach of MacQueen and Hogg is contradicted by the broader approach taken by Scottish courts to the discovery of *animus donandi*. Scottish courts do not require donations to be “unilateral juridical acts”, they only request the existence of an *animus donandi* followed by the creation of an irrevocable benefit to the donee³⁵⁴ for the creation of a donation in Scotland. This requisite is in line with the second test conducted by the Scottish courts, where they assess if the donee is effectively vested in the benefit and if this performance was made *inter vivos*³⁵⁵. It may be argued that by detaching performance from the concept of *animus donandi per se*, it is possible to bring the laws of donation and (gratuitous) promise together under Scots law, considering that both may be qualified as a donation, but some are to be regulated, in particular, by the particularities of the law of promise (gratuitous promise being classified as a sub-type of donation in Scots law). In other words, the concept of *animus donandi*, in what the Scots law of donation is concerned, should not be constrained by the need for a subjective intention to confer a benefit “now”³⁵⁶. This perspective is in line with the study on cardinal elements of donation conducted so far, resonating in particular with “the need for the creation of a benefit produced *inter vivos* by action of a juridical act”, which may also be referred to under Scots law as performance³⁵⁷.

³⁵¹ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 4.

³⁵² Following a restrictive interpretation of Professor Gordon’s words: “a gratuitous transfer of property which is intended to take effect *inter vivos*” (1992) *SME*, 8, para 601.

³⁵³ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 3.

³⁵⁴ *Wight’s Trustees*, (1870) 8 M 708; *Taggart v Higgins’ Executor*, (1900) 37 SLR 843; *Graham’s Trustees v Gillies* 1956 SC 437; and *Gray’s Trustees v Murray* 1970 SC 1.

³⁵⁵ See *Grant’s Trustees v M’Donald*, 1939 SC 448; *Graham’s Trustees v Gillies* 1956 SC 437, among others.

³⁵⁶ Following the spirit of the court decisions *Wight’s Trustees* (1870) 8 M 708; *Taggart v Higgins’ Executor* (1900) 37 SLR 843; *Graham’s Trustees v Gillies* 1956 SC 437; *Gray’s Trustees v Murray* 1970 SC 1.

³⁵⁷ Performance used in the sense given to it by the Scottish Law Commission, *Review of Contract Law* (1999) Discussion Paper on Remedies for Breach of Contract, Discussion Paper no 109.

Performance, conferring a benefice to the donee must therefore follow the donor's *animus donandi* for the creation of a donation under Scots law of donation.

3.2.2.2. Gratuity

The unanimous acceptance that donations are gratuitous transactions under Scots law³⁵⁸ leads to the definition of “gratuity” as one of the cardinal elements necessarily present for the definition of a juridical act as a donation in Scots law. Gratuity is also often defined as a benefit which is provided without correspondent payment³⁵⁹. This is the view taken by Hogg who, while writing on Scots law of promise and contract, has linked gratuity in Scots private law to one of three different situations: (i) something done without the legal right to compel a counter-performance; (ii) something done without the hope or expectation of a counter-performance; or (iii) something done with no (legal) reciprocal counter-performance *de facto*³⁶⁰. A relevant observation to be made is that the first and third definitions of gratuity above are detached from the motivation, or reason, as to why the party/parties entered into the juridical act. But Hogg defines gratuity in Scots (private) law when he suggests that “gratuitousness is best judged by whether or not the party undertaking the obligation can or cannot compel a counter-performance at the time he undertakes the obligation”³⁶¹. It is therefore possible to argue that under Scots law of donation, no payment is, in principle, to be requested by the donor to the donee³⁶². Although some forms of counter-performance are accepted in the Scots law of donation, these conditions do not provide the donor with the right to enforce the counter-performance. These conditional donations only allow the donor to suspend his performance until the occurrence of the condition³⁶³.

Finally, and adding to the discussion above on the presumption against donation, the provision of “gratuitous” benefits is not often regarded by Scottish legal writers as a normal occurrence in society, in particular in a society such as Scotland, where a presumption

³⁵⁸ Scottish Law Commission, *Review of Contract Law* (2014) Discussion Paper on Third Party Rights in Contract, Discussion Paper no 157, p 16.

³⁵⁹ G Watson (e), *Bell's Dictionary and Digest of the Law of Scotland* (7th ed, 1890) [2012] p 323.

³⁶⁰ M Hogg, *Promises and Contract Law – Comparative Perspectives* (2011) p 26.

³⁶¹ M Hogg, *Promises and Contract Law – Comparative Perspectives* (2011) p 28.

³⁶² Stair, *Institutions*, I.8.2 à *contrario*.

³⁶³ As a demonstration we may find H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review* p 5, who declare that while donations are gratuitous because the donor may not compel any counter-performance in return for the promise or act of donation, donations may be conditional in the sense that performance may be suspended until the occurrence of a relevant event (this event being the counter-performance performance by the donee).

against donation (often referred to as *debitor non praesumitur donare*³⁶⁴) may be found. The presumption against donation in Scotland was expressed by Stair in the following terms: “any deed done by the debtor is either presumed to be in security, or in satisfaction of his debt (...) unless the deed express it to be a donation, or done for love and favour. Yea, trust is rather presumed than donation”³⁶⁵. Following this dichotomy, it is necessary to notice that gratuity was defined in different ways by Scottish legal writers, the following being the most relevant definitions: (i) the lack of equivalence, where the donor provides a benefit to the donee without receiving a correspondent³⁶⁶; and (ii) the freedom to give, or absence of a legal obligation or duty to give³⁶⁷. Donations are, therefore, gratuitous juridical acts under Scots law. In other words, as stated by Lord Justice-Clerk, donations are juridical acts where the donee may receive “advances as pure donations which laid him under no obligation of repayment”³⁶⁸. Considering the above argument that the absence of a previous obligation to give is connected with the formation of the will of the donor, and is therefore better discussed when dealing with the concept of *animus donandi*, the present study aligns itself with the first definition of gratuity, where a gratuitous juridical act is the one where a benefit is provided by the donor without receiving a correspondent payment.

3.2.2.3. No previous legal obligation to give

The presumption against donation found in Scots law³⁶⁹ may be regarded in two different lights, those being: a presumption against the donor’s will to donate, and a generic presumption against the classification of the juridical act as a donation. Legal writers, who attempted to define donation in Scotland, often mention the absence of a previous obligation to give as a necessary element for the creation of a donation as part of the cardinal element of gratuity in donation. For instance, Black defines donation as a “free gift *inter vivos* of any subject by one who is not under an antecedent legal obligation to give it”³⁷⁰; Mackenzie states that donation “is in law defined to be a *mere liberality proceeding from no previous*

³⁶⁴ Stair, *Institutions*, I.8.2.

³⁶⁵ Stair, *Institutions*, I.8.2.

³⁶⁶ Bankton, *Institute*, I.9.15: “gifts are voluntary; but when made, Recompense is due, and is founded in the natural obligation to gratitude (...) but, on the other hand, the giver cannot in law demand it; nor is it commendable to gift with such views: for a donation with a prospect of the equivalent, is no gift in the intention if the giver, but rather the effect of a sordid mercenary disposition, which ought not to be encouraged”.

³⁶⁷ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 1: “Donation is the free gift *inter vivos* of any subject by one who is not under an antecedent legal obligation to give it”.

³⁶⁸ *Forbes v Forbes*, (1869) 8 M 85, p 90.

³⁶⁹ Stair, *Institutions*, I.8.2.

³⁷⁰ A C Black, “Donation” (1928) *Encyclopedia of the Laws of Scotland*, 6, para 105.

*compulsion*³⁷¹; and Bankton concurs that “a gift or donation is the liberal grant of anything to which one could not be compelled by law”³⁷². All definitions of donation presented above therefore demand the absence of any previous compulsion to give. At this point it is necessary to understand what a previous compulsion to give means for these legal writers.

Generically speaking, a compulsion to give may be defined as any external force pushing a benefactor to give or to refrain from impoverishing the beneficiary. But not all compulsions matter for Scots law of donation. This compulsion must be legally relevant in order to taint the *animus donandi*. As mentioned above, the *animus donandi* may be defined as the will of the donor to give gratuitously, a will which may have different motivations, such as charity motives, the pursuit of future profit, the discharge of social and religious obligations, among others. All of these motivations are allowed and do not taint the will of the donor – i.e. they are not and should not be regarded by the law as causes for the will of the donor not to be free. Directly opposing these motivations, it is possible to find the discharge of a legal obligation. If the donor discharges a legal obligation, he is not giving as a consequence of his free will. On the contrary, it is his duty to do so. Because it is his (legal) duty to do so, the donor is never giving *animus donandi*, the donor is merely following a legal command which tells him to do or abstain from doing something. This is the reason why Gordon declares that “donation is the free gift *inter vivos* of any subject by one who is not under an antecedent legal obligation to give it”³⁷³.

Bearing in mind that the demand for the absence of a previous obligation to give in Scots law of donation is rooted in the Roman maxim *debitor non presumitur donare*³⁷⁴ (a debtor is not presumed to donate), which is alive and operative in Scotland³⁷⁵, it is possible to argue that the existence of a previous obligation to give matters when assessing the will (*animus*) of the donor, and it is not relevant at the level of the gratuity of the transaction. This presumption denies the existence of a donation in Scots law whenever the donor is subject to a previous obligation to give to the donee, unless proved that the donor has acted with *animo donandi*, and not with *animo solvendi*. In other words, someone who is under the

³⁷¹ Mackenzie, *Institutions*, III.3.30.

³⁷² Bankton, *Institute*, I.9.2.

³⁷³ W M Gordon, “Donation” (reissue 2011) *SME*, 8, p 54.

³⁷⁴ Stair, *Institutions*, I.8.2 and IV.35.17.

³⁷⁵ If the benefit is not delivered, the law of promise applies, and the promisee only holds a personal right to enforce delivery of the subject matter of the donation. That is also why the donee may never receive, for example, a real right as promised, if the donor has validly disposed of the relevant right in a previous moment. See *Gauld v Middleton*, 1959 SLT (Sh. Ct.) 61.

obligation to give is presumed to wish to discharge this obligation, and not to remain in debt in the future. As a demonstration, Stair concurs that “any deed done by the debtor is either presumed to be in security, or in satisfaction of his debt (...) unless the deed express it to be a donation”³⁷⁶.

For this reason, I would argue that the presumption against donation in Scots law is a presumption against the donor’s will to donate, and not against the gratuity of the act, considering that this presumption classifies the donor’s will as *animus solvendi* (the donor wishes to discharge his obligation/debt) and no longer as *animus donandi* (to give gratuitously) if a previously existent obligation is held by the donor to benefit the donee. Furthermore, and bearing in mind the principles of freedom of contract and free will in Scots law³⁷⁷, it is possible to argue that this presumption never “taints” the true will of the donor, on the contrary, it merely gives rise to a presumption that the debtor’s intention was to discharge his obligation, and not to donate. In other words, if the donor’s intention/will is to donate, and if this will is freely formed, then Scots law does not stop him from donating. Even if a previously existing debt between donor and donee exists, and the donor does not wish to discharge his obligation, wishing instead to give gratuitously to the donee, he may do so, and his previous debt towards the donee remains intact or unpaid. Therefore, the intention of the donor is the most relevant aspect in the assessment of his *animus donandi*³⁷⁸, where a presumption against his will to donate exists to create legal stability, providing courts and lawyers with a tendentiously objective way to assess the will of the donor. While *animus donandi* represents the freely formed will to give, gratuitously, to the donee, the *animus solvendi* is the will of the debtor to discharge a legal obligation, for the benefit of the creditor³⁷⁹.

Dot Reid actively contributes to the present discussion, by evidencing the existence of presumptions against donation in Stair’s writings. Her findings build on Aquinian and Aristotelian ideas, in order to argue that, in Stair, donation is characterised as an unequal relationship where “justice requires a rebalancing of those positions, and the mechanism for

³⁷⁶ Stair, *Institutions*, I.10. 1.

³⁷⁷ The Law Commission, Scottish Law Commission, *Unfair Terms in Contracts, a Joint Consultation* (2002) 119, p 7; “The laws of contract of all the UK jurisdictions accept the basic principle of freedom of contract: the parties should be free to agree on any terms that they like provided that their agreement is not illegal or otherwise contrary to public policy because it infringes some public interest”; and in particular for the Scottish jurisdiction see W McBryde, *The Law of Contract in Scotland* (2nd ed 2001) chapter 19.

³⁷⁸ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 15.

³⁷⁹ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 61.

doing so is restitution”³⁸⁰. Bankton has also concurred that when a donor is the debtor of the donee, a donation “is never presumed, because everyone is understood to mind his own interest most; and therefore, whenever the deed can receive any other interpretation than that of a gift, it is construed accordingly: this debtor [as a rule] is not presumed to gift his creditor”³⁸¹. It is possible to find other examples of Scottish legal writers who claim that donations are not to be presumed in Scots law, such as Barclay³⁸², who declares that donations are never presumed if the juridical act which creates the donation “admits other constructions” and the debtor is never to be presumed³⁸³, or Morton, who clearly states that a donation from the debtor to his creditor is “in *dubio* presumed to be not a donation, but a settlement of the debt or obligation”³⁸⁴. The presumption against donation must be overcome by the donee, in order for the juridical act to be classified in court as a donation. This means that the donee is the one who has the burden to prove that the *animus donandi* of the donor is not negated by a previous legal obligation to give³⁸⁵.

The reasons why a previous legal duty to give raises a presumption against donation, but not moral or religious duties, which are fully disregarded as cause for a presumption against donation in Scots law, is not often explained in depth by Scottish legal writers. This may be explained by the enrichment model of donation present in Scots law, or by the fact that legal writers do not feel the need to analyse these non-legal duties because an operative presumption solely against previous legal obligations exists in Scots law of donation. As mentioned before, the presumption against donation is traditionally described as based in the Roman maxim *debitor non presumitur donare*³⁸⁶, and is one of Scots law of donation’s most significant rules. According to the presumption against donation, which must be overcome by the donee, the donee has the burden to prove (i) the *animus donandi* of the donor, and (ii) that the benefit was delivered³⁸⁷. In other words, Scots law distrusts benefits gratuitously

³⁸⁰ D Reid, “Thomas Aquinas and Viscount Stair: the Influence of Scholastic Moral Theology on Stair’s Account of Restitution and Recompense” (2008) *The Journal of legal History*, 29, 2, p 205.

³⁸¹ Bankton, *Institute*. I.IX.20.

³⁸² H Barclay, *A Digest of the Law of Scotland* (4th ed, 1880) p 330.

³⁸³ H Barclay, *A Digest of the Law of Scotland* (4th ed, 1880) p 330.

³⁸⁴ W Morton, *Manual of the Law of Scotland* (1896) p 304.

³⁸⁵ Stair, *Institutions*, I.8.2 and IV.35.17.

³⁸⁶ Stair, *Institutions*, I.8.2 and IV.35.17.

³⁸⁷ If the benefit is not delivered, the law of promise applies, and the promisee only holds a personal right to enforce delivery of the subject matter of the donation. That is also why the donee may never receive, for example, a real right as promised, if the donor has validly disposed of the relevant right in a previous moment. See *Gauld v Middleton*, 1959 SLT (Sh. Ct.) 61.

created³⁸⁸, under the assumption that “no person is presumed to do what, in place of bringing him profit, must certainly be attended with some pecuniary loss”³⁸⁹. This means that, in Scots law, a donation is not regarded as a normal occurrence³⁹⁰.

3.2.2.4. Performance

When investigating the “gratuity” element of donation in Scots law, it is commonplace to read that the mere statement of an intention to give, or even the sole existence of an *animus donandi*, does not constitute a donation in Scots law³⁹¹. Conversely, if an intention to create a gratuitous benefit exists, and the required formalities are followed, the benefactor will undertake an obligation to give, a gratuitous obligation which is legally enforceable in Scots law. This means that making a benefit available to the donee, often referred to as delivery or performance in Scots law³⁹², should be regarded as a constant element in donation in Scots law. It is important to notice that, contrary to their French colleagues³⁹³, Scottish legal writers do not traditionally require the benefit to be granted to the donee in an “irrevocable”³⁹⁴ manner. One historical case of this lack of need for irrevocability was the donation *mortis causa*, now abolished by the Succession (Scotland) Act 2016, s 25(1), which used to be represented by legal writers as one case of donation, even if this donation was by definition revocable³⁹⁵. On the contrary, under French law, irrevocability is one of the cardinal elements of donation under the definition provided by the majority of French legal writers and French courts³⁹⁶. Considering that the customary donation *mortis causa* is now abolished

³⁸⁸ Exceptions exist with regard to donations that are not given in a market context, such as donations given between family members or where an exchange of gifts is socially expected, such is the case of father and child, uncle and nephew, among others. See *Nisbet’s Trs. v. Nisbet* (1868) 6 M 567; *Fairgrievies v. Hendersons*, (1885) 13 R 98; *Wilson v. Paterson* (1826) 4 S 817; *Macalister’s Trs. V. Macalister* (1827) 5 S 219; and *Forbes v. Forbes* (1869) 8 M 85.

³⁸⁹ Erskine, *Institute*, III.9.32.

³⁹⁰ An exception to this rule exists for donations in a family context. This exception will be addressed below.

³⁹¹ See *Alison v Anderson* (1907) 15 SLT 529; *McGregor v Hepburn* 1979 SLT 87; *Countess of Cawdor v Earl of Cawdor* 2007 SC 285; among others.

³⁹² *Gauld v Middleton*, 1959 SLT (Sh Ct) 61.

³⁹³ P Malaurie, *Les successions, Les Libéralités* (5th ed 2012) p 147

³⁹⁴ P C Timbal, *Droit Romain et Ancien Droit Français, Régimes matrimoniaux, Successions – Libéralités* (1960) p 205.

³⁹⁵ *Gray’s Trustees v Murray*, 1970 SC 1, para 19.

³⁹⁶ Among others, D Guevel, *Droit des sécessions et des libéralités* (2nd ed 2010) p 205.

in Scotland, an extra argument is created in defence of Scottish donations as irrevocable by principle, as will be discussed in 3.5. Regulation of market donations, below.

In any case, the concept of performance has been developed by the Scottish courts. The need for the subject matter of the donation to be made accessible by the donor to the donee is so widely requested by the Scottish courts that any proof produced towards the evidence of intention to give (*animus donandi*), however strong, does not dispense with the requirement of performance for donation to be final. This principle is followed in *Gray's Trustees v Murray*³⁹⁷, where a testator directed his trustees to make payments as directed by any writings under his hand. At his death, it was necessary to determine if there had been performance or not, i.e. if the gratuitous juridical act made by the testator would be classified as a legacy or as a (final) donation under Scots law. Lord President (Clyde)³⁹⁸ answered this question by laying down the essentials which used to constitute a donation *mortis causa* in Scots law:

“Three essentials must occur in order to constitute a donation *mortis causa*: (1) the donor must act in contemplation of his death; (2) the subject of the donation must be delivered to the donee; and (3) the donor must manifest his intention to make in favour of the donee *a de praesenti* gift, subject to the double condition that the subject reverts to the donor if the donee predeceases the donor, or if the donor revokes the gift. It is this which distinguishes a donation *mortis causa* from a legacy or bequest.”

This donation was therefore distinguished from legacy by the time when the benefit was vested in the beneficiary – if the benefit was vested before the death of the donor, then the juridical act may be qualified as a donation, on the contrary if the benefit is only to be vested after the death of the *de cuius*, then the relevant juridical act could never be qualified as a donation. Furthermore, it is also important to notice that several of the above-mentioned court decisions have distinguished between the moment when the obligation to donate was

³⁹⁷ *Gray's Trustees v Murray*, 1970 SC 1.

³⁹⁸ *Gray's Trustees v Murray* 1970 SC 1, para 19.

undertaken by the donor, i.e. the creation of the donation, and the moment when the subject matter of the donation is held by the donee³⁹⁹.

Considering the above, it is possible to argue that as far as the Scots law of donation is concerned, performance must be qualified as a cardinal element of donation, in a sense that the benefit must be vested in the donee, but this delivery/performance cannot be defined as mere transfer. On the contrary, it must be defined broadly as granting the donee access to the benefit. This broad definition of delivery, in relation to the law of donation, means that the donee holds a new right he did not hold before: he may now access in the present or in a future moment (depending on the type of donation) the subject matter of the donation, and this access cannot be prevented by the donor in the future. In other words, and following Gordon, performance is defined in the present thesis as a “compendious term to cover completion of the gift by constitution of an obligation to give or by conveyance of the subject of the donation to the donee”⁴⁰⁰. Performance therefore equals irrevocable access to the benefit granted by the donor to the donee, this being granted by the constitution of an obligation (and correspondent personal right being vested in the donee) or by conveyance of the subject matter of the donation (and correspondent real right being vested in the donee).

The broad definition of performance defended in the present thesis also follows the view of Erskine on the different juridical acts which may be qualified as a donation in Scots law, where he argues that the subject matter of the donation may be made available to the donee upon the constitution of the donation, or not, in which case the relevant donation still “may be justly ranked among obligations; and it is that obligation which arises from the mere good will and liberality of the granted”⁴⁰¹. Because the concept of performance must be defined widely in what the law of donation is concerned, Erskine further declares that some donations do not vest the donee with the real right to the subject matter of the donation right away. On the contrary, they may only grant the donee with a personal right, allowing him to access the subject matter of the donation in a posterior moment, those particular types of donations being called promises⁴⁰². Therefore, in respect of the Scots law of donation, performance must be broadly defined as the vesting of the donee with a right he did not hold before, this right being a real right to the subject matter of the donation, or a mere personal

³⁹⁹ With particular emphasis to *Gauld v Middleton* 1959 SLT (Sh Ct) 61.

⁴⁰⁰ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 28.

⁴⁰¹ Erskine, *Principles*, III.3.36.

⁴⁰² Erskine, *Principles*, III.3.36: “the special sort of donation, which is constituted verbally, is called promise”.

right. This broad definition is therefore able to encompass promise within the concept of donation. In this sense, promise is to be regarded as a constitutive act, where donation is to be defined as performance.

At this point it is important to notice that it is undisputed that, in Scots law of donation, the will to donate needs to be effective and present at the moment of the donation. This is true even for legal writers who concede that the constitution of the benefit happens in a subsequent moment⁴⁰³. For the same reason, it may be argued that donations in Scots law may be of two types: immediate donations, where the subject matter of the donation is made available to the donee immediately, or non-immediate undertakings, where two different acts are necessary for the formation of the final donation: a gratuitous act followed by the constitution of the benefit⁴⁰⁴. Considering that donations may be conditional in Scots law, it is possible to have a validly formed donation in Scotland⁴⁰⁵, whose legal effects are postponed to a future event/time. Furthermore, it may also be argued that a distinction may be drawn between the formation of the obligation and the reception of the benefit by the donee. For this reason, *animus donandi* must be regarded as *the* essential element behind both types of donation, while the constitution of the gratuitous benefit is to be regarded as a consequence of donation. In conclusion, and following Erskine⁴⁰⁶, it is therefore possible to argue that delivery is not necessary for the application of the rules on donation (or for the juridical act to be classified as a donation), but instead, performance is needed, in the form of a juridical act which empowers the donee to access the benefit.

In conclusion, it is true “that more than a state of mind is required to complete a donation”⁴⁰⁷, however, it is argued supra that this does not mean that donation may only be completed by the transfer of a real right from the donor to the donee. On the contrary, performance, in Scots

⁴⁰³ One such case being Erskine, Institute, III.3.88: “Most of what hath been hitherto said of obligations and contracts is applicable only to such as are onerous, where mutual engagements are entered into *hinc inde* by the several contracting parties. We may therefore in this place shortly explain the doctrine of gratuitous obligations, otherwise called donations, in so far as their nature, properties and effects differ from the other”.

⁴⁰⁴ This distinction is relevant because it does not exist in Portugal or in France. If a gratuitous promise is made in both jurisdictions, this promise is never to be converted into a donation, on the contrary, a new contract (a donation contract) needs to be subsequently celebrated between the parties. As it will be demonstrated below, in Portugal and France a contract of promise to donate needs a subsequent contract to be entered between the parties to create a donation – a contract of donation. On the contrary, in Scotland, it is possible to create a donation by delivering what was gratuitously promised.

⁴⁰⁵ *Macfarquhar v M'Kay* (1869) 7 M 766, as discussed in Gordon, “Donation” (reissue 2011) *SME*, para 4. See also H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 4.

⁴⁰⁶ Erskine, III.3.36.

⁴⁰⁷ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 20.

law of donation, may encompass multiple realities, such as: (i) the actual disposition of the subject matter of the donation⁴⁰⁸, one such case being the physical separation of a calf from the herd, and the donee is given possession of the calf and vested in correspondent real right; (ii) unilateral or bilateral gratuitous promise⁴⁰⁹, where a calf is promised to the donee, vesting in him a personal right he did not hold before, and that he may use to access the subject matter of the donation; (iii) intimation to a third party⁴¹⁰; intimation to the grantee⁴¹¹ or any other equivalent. For the same reason, it is argued that by detaching performance from the concept of *animus donandi per se*, it is possible to bring the laws of donation and (gratuitous) promise together under Scots law. This means that the concept of *animus donandi*, according to the Scots law of donation, should not be constrained by the need for a subjective intention to confer a benefit “now”⁴¹², as long as the benefit is produced *inter vivos*⁴¹³. In short, the law of donation may be called to regulate gratuitous obligations validly constituted, and because performance is the constitutive element of voluntary obligations, performance must be regarded as one of donation’s cardinal elements.

3.2.2.5. Juridical act

The DCFR defines juridical acts as “any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral”⁴¹⁴. Following this definition, it is possible to argue that, in Scotland, all donations are juridical acts, but not all juridical acts are donations. Under Scots law, donations are acts of will, or a state of mind conveyed by an act recognised by the law as producing of juridical effects⁴¹⁵. The conveyance of the will or intention of the donor or parties “in general requires no formalities other than those which the nature of the subject matter may make necessary”⁴¹⁶, while a pure donation which immediately transfers property

⁴⁰⁸ See *George Hann (AP) v Jennifer Rosalyn Spence Howatson* (2014) CSOH 69, para 11; and *Forrest-Hamilton's Trustee v Forrest-Hamilton*, 1970 SLT 338, para 16.

⁴⁰⁹ *Gauld v Middleton* 1959 SLT (Sh Ct) 61.

⁴¹⁰ *Linton v Inland Revenue* 1928 SC 209.

⁴¹¹ *Henderson v M'manus* 1981 SC 233, para 37.

⁴¹² Following the spirit of the court decisions in *Wight's Trustees* (1870) 8 M 708; *Taggart v Higgins' Executor* (1900) 37 SLR 843; *Graham's Trustees v Gillies* 1956 SC 437; *Gray's Trustees v Murray* 1970 SC 1.

⁴¹³ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 5, who declare that while donations are gratuitous because the donor may not compel any counter-performance in return for the promise or act of donation, donations may be conditional in the sense that performance may be suspended until the occurrence of a relevant event (this event being the counter-performance performance by the donee).

⁴¹⁴ DCFR, II. – 1:101: Meaning of “contract” and “juridical act” (2).

⁴¹⁵ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 20.

⁴¹⁶ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 5.

by delivery may be proved parole⁴¹⁷. Therefore, no particular formalities, such as writing, are traditionally required by Scots law for the creation of a donation, except if the donation is constituted by a unilateral juridical act, in which the written form is the norm⁴¹⁸, under the Requirements of Writing (Scotland) Act 1995⁴¹⁹.

This discussion follows what is said above on the need for an *animus donandi* for the existence of a donation under Scots law, leading to the qualification of this subjective element as one of donation's cardinal elements in Scotland⁴²⁰. Following this line of argument, one could defend the position that the concept of donation, in Scotland, is limited to juridical acts alone. For example, if an error occurs in a banking app, and one person transfers money to another person's account, without intending to do so, not only does this act lack *animus donandi*, but it may not also be classified as a juridical act. Even though the *de facto* enrichment of the person who received the money in their bank account has occurred, this fact cannot be classified as a juridical act, and subsequently, cannot be classified as a donation – because it lacks the necessary intention or will for the relevant legal effects to be produced. The respect and empowerment of the will of the part(ies) is a core principle of Scots law, and therefore, an enrichment made without intention to benefit

⁴¹⁷ W Gordon, "Donation" (reissue 2011) *SME*, para 5.

⁴¹⁸ The main exceptions to the rule may be found in Requirements of Writing (Scotland) Act 1995, s 1(2)(a)(ii) and consist of the following: (i) Gratuitous obligations undertaken by unilateral juridical act in the course of business – these obligations do not need to be made in writing; (ii) Gratuitous obligations undertaken by unilateral juridical act in any other form other than in writing may be enforced in court if they led the donee to act (or refrained from acting) in reliance on the promise, this with the promisor's knowledge or acquiescence; (iii) Gratuitous obligations undertaken by unilateral juridical act in any other form other than in writing may be enforced in court if they were made to the public; (iv) The rule of freedom of form for donations created by bilateral juridical act is dismissed when the subject matter/benefit of the donation is the creation, transfer, variation or extension of an interest in land - these donations need to be made in writing; and (v) In the case when the subject matter of a donation is a real right on a moveable good, transfer of possession of the good indicates transfer of property.

⁴¹⁹ Requirements of Writing (Scotland) Act 1995, s 1(2)(a)(ii).

⁴²⁰ See cardinal elements above.

would be regulated under the law of unjustified enrichment and all that was received is to be returned⁴²¹.

3.2.3. Types of donations

It was argued that multiple juridical acts may be classified as donations under Scots law, however, some institutions⁴²² may share similarities to donation, leading to potential confusion between these institutions and donation. First, the traditional types of donations will be reviewed. This will be followed by the confrontation between donation and similar institutions. In Scots law, it is common to find references to different types of donations⁴²³, the most common types being: (i) donations *inter virum et uxorem*; (ii) donations *propter nuptias*; (iii) donations *mortis causa*⁴²⁴; (iv) pure donations⁴²⁵; and (v) donations *sub modo*, or imposing obligations upon the donee⁴²⁶.

But it is possible to argue that a better distinction is the one which separates between those donations which are pure⁴²⁷, in that no obligations arise in respect of the donee, and those which vest the donee either with obligations he did not hold before or which impose a condition for their validity (such as a resolutive condition). This will be referred to as donations *sub modo* from this point on. By distinguishing between pure donations and those which impose an obligation upon the donee, it is possible to better understand the legal effects produced by different types of donations under Scots law, and the different remedies

⁴²¹ H MacQueen and M Hogg, "Donation in Scots Law" (2012) *Juridical Review*, p 6.

⁴²² The word "institutions" is used in the present study to signify different juridical acts, which are regulated by tendentiously autonomous laws (or common rules to all juridical acts of the same type and category) under Scots law, such as the trust, legacy, marriage, among others.

⁴²³ G Watson (e), *Bell's Dictionary and Digest of the Law of Scotland* (7th ed, 1890) [2012] p 295.

⁴²⁴ See W Gordon, "Donation" (reissue 2011) *SME*, 6, para 4.

⁴²⁵ A Smith, H Henderson, *Glossary, Scottish Legal terms and Latin Maxims and European Community Legal Terms* (1992) p 27.

⁴²⁶ H MacQueen and M Hogg, "Donation in Scots Law" (2012) *Juridical Review*, p 5 on conditional donations.

⁴²⁷ A Smith, H Henderson, *Glossary, Scottish Legal terms and Latin Maxims and European Community Legal Terms* (1992) p 27.

which may be found to deal with the different problems emerging from the diverse relationships created between donor and donee.

3.2.4. *Classic types of donations*

3.2.4.1. Donations *mortis causa*

Donations *mortis causa* were recently abolished by the Succession (Scotland) Act 2016, s 25(1), but they will be referred to here in order to demonstrate that all donations, including those which used to be described as *mortis causa*, produce their legal effects while all parties are alive. It has been argued that “donations *mortis causa* fall between outright gifts and legacies in that they share some features of each”⁴²⁸. As stated in *Lord Advocate v Galloway*, contrary to the name, donations *mortis causa* are not conditional upon death *per se*. On the contrary, they are made in contemplation of the death⁴²⁹ of the donor, but the donee always receives a benefit during the life of the donor. Because the death of the donor was the motivation leading to the donation, this motivation was protected by the law and two resolutive conditions were implied when this type of donation was made: (i) the donation could be revoked if the donor survives the (life threatening) reason why the donation was made; and (ii) the donation would be recalled if the donee predeceases the donor⁴³⁰. Furthermore, because donations *mortis causa* were motivated by the impending death of the donor, and were therefore conditional, donations *mortis causa* were to be regarded as a sub-type of donations *sub modo*. Donations *mortis causa* were therefore conditional donations whose maintenance used to depend on the death of the donor. In addition, it is important to notice that donation *mortis causa* is now explicitly classified by the Succession (Scotland)

⁴²⁸ Scottish Law Commission, *Report on Succession* (2009) 215, p 115.

⁴²⁹ *Lord Advocate v Galloway* (1884) 11 R 674.

⁴³⁰ See G Watson (e), *Bell's Dictionary and Digest of the Law of Scotland* (7th ed, 1890) [2012] p 323, where it is stated that “the characteristic of such donations is, that the donor prefers the donee to his heir, but prefers himself to both; and such right not being effectual during the granter's life, his creditors are preferable to the grantee”. See also *Morris v Riddick* (1867) 5M 1036.

Act 2016, s25(2) as one, among other donations *sub modo* (in the wording of the 2016 Act, one among other “conditional gift[s]”).

3.2.4.2. Donations *inter virum et uxorem* and donations *propter nuptias*

Donations *inter virum et uxorem* were defined in Scots law as donations between spouses, ordinarily contained in antenuptial contracts, where one spouse grants a benefit to the other⁴³¹. Traditionally, donations between spouses were classified as donations *sub modo*. This is because the motivation for the donation is based on a legally relevant fact, specifically the marriage between donor and donee. As a result, this donating relationship was specifically regulated under Scots law of donation, and power to revoke the donation was given to the donor, who could unilaterally revoke the donation at any time during his life⁴³². The relevance of donations between spouses has, however, disappeared entirely, considering that the special regulation applicable to donations between spouses (and the correspondent revocation right conferred upon the donor) was abolished in 1920⁴³³. Following a similar route taken by donations between spouses, donations *propter nuptias* may be defined as the provisions made by one spouses to another “in consideration of the” wedding⁴³⁴. It may be argued that the relevance of donations *propter nuptias* as an independent type of donation has also disappeared, considering that no relevant decision has been issued by the Scottish courts since 1943⁴³⁵, dealing with these specific donations. Therefore, they should not be treated as an independent type of donation, but should be, instead, subject to the generic regulation applicable to other donations *sub modo*, where the motivation that lead to their existence is legally relevant, therefore being able to produce legal consequences.

3.2.5. *Pure donations and donations sub modo*

Donations may be said to be pure when no obligations or duties are imposed on their beneficiary. Because pure donations provide an unconditional benefit to the donee, it is presumed that it is in the best interest of the donee to accept them, and therefore, pure donations “do not require acceptance to complete the grant”⁴³⁶. Conversely, donations may

⁴³¹ H Barclay, *A Digest of the Law of Scotland* (4th ed 1880) p 330.

⁴³² H Barclay, *A Digest of the Law of Scotland* (4th ed 1880) p 330.

⁴³³ Married Women’s Property (Scotland) Act 1920, s 6.

⁴³⁴ G Watson (e), *Bell’s Dictionary and Digest of the Law of Scotland* (7th ed, 1890) [2012] p 263.

⁴³⁵ *Fortington v Lord Kinnaird* (1943) SLT 24.

⁴³⁶ H Barclay, *A Digest of the Law of Scotland* (4th ed 1880) p. 330.

vest in the donee a duty or obligation, while being “regarded as gratuitous although there is some remote possibility of consideration”⁴³⁷. All donations are gratuitous transactions under Scots law⁴³⁸, but this does not necessarily mean that the benefit granted by donation needs to be absolute. On the contrary, this benefit only needs to be provided “at least without an adequate consideration”⁴³⁹. Bankton has stated this idea in a clear manner, by declaring that a donation may be “made with certain burdens and conditions, [and] it is called a donation *sub modo*, i.e. for certain ends and purposes”⁴⁴⁰. In other words, although a duty or obligation arises to the donee, the relevant juridical act may still be qualified as a donation in Scots law as long as all cardinal elements are present. This means that Scots law accepts the classification of juridical acts, which are not completely gratuitous, as donations⁴⁴¹. Donations *sub modo* are therefore donations where a correspondent obligation is undertaken by the donee or which are made for a reason regarded as relevant by the law. The classic example in Scots law of a donation *sub modo* is the obligation to get married, where an engagement ring is to be returned if the betrothal is broken off before the wedding⁴⁴².

This *modus* may be a promise to do something or to abstain from doing something, or even a pecuniary obligation imposed to the donee. It is not a novelty to state that a donation does not need to be completely gratuitous under Scots law⁴⁴³, all the while defending that gratuity is one of the cardinal elements of donation in Scotland. This idea is supported by the majority of Scottish legal writers, including MacQueen and Hogg, who sustain that in such cases, it is still not appropriate for a juridical act to be classified as onerous if the juridical act was entered into with *animus donandi*⁴⁴⁴; Gordon, who has stated that “the better view would appear to be that what amounts to a donation is to be decided according to the context in which the question arises”⁴⁴⁵; or Bankton, who has declared that donations may be “made with certain burdens and conditions”⁴⁴⁶. A donation *sub modo* is therefore able to signify either the undertaking of a pecuniary obligation by the donee – such as paying for someone’s

⁴³⁷ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 4, citing *Beattie’s Trustees v Beattie* (1884) 11 R 846.

⁴³⁸ Scottish Law Commission, *Review of Contract Law* (2014) Discussion Paper on Third Party Rights in Contract, Discussion Paper no 157, p 16.

⁴³⁹ G Bell, *Principles of the Law of Scotland* (4th ed 1839 reissue 2010) p 34.

⁴⁴⁰ Bankton, *Institute*, I.9.17.

⁴⁴¹ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 40.

⁴⁴² Stair, *Institutions*, I.8.7; Bankton, *Institute*, I.8.21; Erskine, *Institute*, III.1.9.

⁴⁴³ W Gordon, “Donation” (reissue 2011) *SME* 6, para 40.

⁴⁴⁴ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 4.

⁴⁴⁵ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 3.

⁴⁴⁶ Bankton, *Institute*, I.9.17.

groceries – or the undertaking of a non-pecuniary obligation by the donee⁴⁴⁷ – one such case being the obligation to get married, where an engagement ring is returned when the betrothal is broken off before the wedding⁴⁴⁸. Furthermore, contemporary legal writers continue to state that, in cases where an *animus donandi* exists, even if the juridical act is *sub modo*, it is still not appropriate for the relationship created to be classified as onerous⁴⁴⁹, therefore remaining gratuitous and, therefore, a donation.

As far as the formation of a donation *sub modo* is concerned, the undertaking of a duty or acceptance of a condition by the donee may be achieved by one of two routes: (i) by entering into a bilateral juridical act with the donor, where both parties agree upon the terms and conditions of the donation agreement; or (ii) by a second unilateral juridical act of the donee, where the donee (unilaterally) undertakes the relevant obligation⁴⁵⁰. It is necessary to mention, at this point, that it may be argued that donations *sub modo* may be further subdivided into two different categories in Scotland: donations which are conditional, i.e. where revocation rights are reserved by the donor based on a condition, or where a condition is accepted by the donee for the production of legal effects of the donation; and donations made for a purpose, which always produce their effects immediately, but where the failure of their purpose may compromise the validity of the donation. In the first case, where a donation is conditional, the benefit may be suspended until the occurrence of a certain future event, which may include a counter performance by the donee⁴⁵¹. In the case of donations made for a purpose, the motive or reason why the donation was made, is protected by the law, which grants revocation right to the frustrated donor. These two sub-categories of donations *sub modo* will be reviewed below.

It is therefore possible to conclude that it is widely accepted in Scotland that imposing a *modo* does not stop the relevant juridical act from being classified as a donation. With regard

⁴⁴⁷ Please bear in mind that obligations are not typically defined as “undertaken” by the parties under Portuguese or French law, on the contrary, they “emerge” to the parties from the relevant juridical act, i.e. obligations are one of the possible legal effects/consequences of a valid juridical act. This difference on the conceptualisation of how an obligation works may cause consistency problems in future chapters.

⁴⁴⁸ Stair, *Institutions*, I.8.7; Bankton, *Institute*, I.8.21; Erskine, *Institute*, III.1.9.

⁴⁴⁹ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 4, following Gordon’s remarks on non-pure donations, where he states that “the better view would appear to be that what amounts to a donation is to be decided according to the context in which the question arises”, W Gordon, “Donation” (reissue 2011) *SME*, 6, para 3.

⁴⁵⁰ R Black, “Obligations” (1996) *SME*, 15, para 657.

⁴⁵¹ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 4, referring to *Macfarquhar v M’Kay* (1869) 7 M 766, as discussed by Gordon, *Donation* (reissue 2011) *SME*, para 4; McBryde, *Contract*, para 2.26-2.27; and M Hogg, *Promises and Contract Law: Comparative Perspectives* (2011) p 30-35.

to the Scots law of donation, this imposition on the donee does not taint the *animus donandi* of the donor. As long as the donation is intended to create a benefit to the donee and does so (even if a small benefit, considering the *modo*), the relevant juridical act may still be classified as a donation under Scots law, as long as all cardinal elements are present, and as long as the *modo* does not taint the *animus donandi* in a way that changes the relationship between the parties to a relationship where an exchange of benefits is deemed as more relevant than the creation of a benefit to the donee.

3.2.5.1. Conditional donations

Multiple conditions may be imposed by the donor under Scots law of donation, one such case being a payment to be made by the donee to the donor or to a third party, the obligation to do well at school, to marry someone, among many others. These conditions are often regarded as resolutive conditions, which are able to reverse the juridical effects of an otherwise valid donation, the classic example given by Scottish legal writers being the donation *mortis causa*⁴⁵². As mentioned above, in a donation *mortis causa*, Scots law of donation presumes that the donor has reserved the right to revoke the relevant donation until the moment of his death and, for this reason, the benefit vested in the donee becomes irrevocable “if the donee outlives the donor”⁴⁵³. In this particular case, the donor has not imposed a condition upon the donee – nothing is expected from him –, however, the reason or motive why the donor decided to donate is deemed relevant by law, and a revocation right is provided to the donor should he survive. As a rule, Scottish legal writers have defended in the past that a donation could be revoked under Scots law in three cases: (i) by ingratitude of the donee⁴⁵⁴; (ii) subsequent birth of children⁴⁵⁵; and (iii) when a donation is entered

⁴⁵² Scottish Law Commission, *Discussion Paper on Third Party Rights in Contract* (2014) 157, p 16.

⁴⁵³ Scottish Law Commission, *Discussion Paper on Third Party Rights in Contract* (2014) 157, p 16.

⁴⁵⁴ By revoking a donation, the donor recalls a benefit gratuitously granted to the donee. Bankton has defended that: “upon high ingratitude in the grantee, by our law, in particular circumstances, in respect of the relation of the parties, as gifts proceeding from parents to children, if they become ingrate by atrocious injuries, the fame may be revoked and voided, as was the case, by the civil law, on various occasions”, see Bankton, *Institute*, I.9.9; following Stair, *Institutions*, I.8.2; and II.4.18. However, the courts are yet to grant a right to revoke based on the ingratitude of the donee, if this right was not reserved by the donor. Therefore, I would argue that this right does not exist in Scots law of donation. This position is indirectly taken by W Gordon, “Donation” (reissue 2011) *SME*, 6, para 45.

⁴⁵⁵ The right of revocation legally provided by subsequent birth of children was accepted by few legal writers in past, one such case is Bankton, *Institute*, I.9.6. It is worth mention that this institute has also been regarded as out dated by the Scottish Law Commission in its report on Succession has recommended that it should be abolished, see The Scottish Law Commission, *Report on Succession* (2009) 215, para 6-21. In addition, it is also worth mention that the rule of law known as the *conditio si institutus sine liberis decesserit* was abolished by the Succession (Scotland) Act 2016, s 29(1).

*propter nuptias*⁴⁵⁶. All three cases are not recognised by present Scots law of donation⁴⁵⁷. It is therefore possible to argue that, in Scots law, a rule exists stating that in the case of a conditional donation, a revocation right is provided to the donor only if this right has been reserved by the donor. In this sense, under present Scots law of donation, the donor only holds the right to revoke a donation in two cases: either where both parties agree upon the existence of this right, or if the relevant right was reserved by the donor when a donation emerges from a unilateral juridical act.

3.2.5.2. Donations made for a purpose

A different case is when a condition is not imposed upon the donee, and he is not expected to actively do or abstain from action, but a strong motivation has led the donor to donate. It was argued above that, in case of conditional donations, if the condition is not fulfilled by the donee, the donor may sue him. But in case of a donation made for a purpose, and the purpose fails, it is not clear if the frustration of the purpose may be regarded as reason for the revocation of the donation⁴⁵⁸. Most Scottish legal writers have avoided answering this question, however, it is important to understand if donations for a purpose may vest (or should vest) a right of revocation in the donor when the purpose or outcome is frustrated, or not.

Different answers may be given to the question: what happens if a donation, which is made for a purpose, does not fulfil its purpose? Scots law of donation does not provide a clear answer to this question, and different arguments may be used in an attempt to shed light on

⁴⁵⁶ Donations *propter nuptias* are commonly defined as “the provisions made by the husband to the wife, in consideration of the” wedding (see G Watson (e), *Bell’s Dictionary and Digest of the Law of Scotland* (7th ed, 1890) [2012]) p 263). However, the relevance of the concept has largely if not entirely disappeared, and no relevant decision has been issued by the Scottish since 1943 (i.e. *Fortington v Lord Kinnaird* (1943) SLT 24), dealing with provisions in consideration of the wedding.

⁴⁵⁷ As mentioned in previous footnotes, a right of revocation to the donor based on the ingratitude of the donee is not granted by the Scottish courts to the donor if this right was not reserved by him; an idea which follows the writings of W Gordon, “Donation” (reissue 2011) *SME*, 6, para 45.

⁴⁵⁸ With disregard for the rule of law *condictio causa data causa non secuta*, located outside Scots law of donation, and therefore, outside the scope of the present analysis. Furthermore, it is also worth pointing out that qualifying the grant as a donation is not a requirement for the existence of a *condictio causa data*.

the answer. Bankton is one of few legal writers who has written on the frustration of the motives in respect of a donation, declaring that:

“If the end to which the donation was to be applied cannot be precisely attained, or would be useless, then it may be employed to the like purpose, always observing the primary intention of the donor; but if the use to which the mortification was destined, tho’ lawful at the time, is thereafter condemned by law, the right of course falls to the kind, as being caduciary and vacant, which was the case of popish foundations at the reformation”⁴⁵⁹.

Bearing in mind the above, it is possible to argue that Bankton agrees that a donation must fulfil the “primary intention of the donor”, even if the benefit received by the donee is not used for its original purpose. It is therefore implied that, if the donation does not fulfil the primary intention of the donor, it cannot be used to any other purposes. In any case, according to Bankton, the benefit should return if its use is deemed illegal. This perspective empowers the will of the donor (or the parties) by looking at the motivation behind the donation. Following this perspective, it is possible to argue that a donation, which does not fulfil the purpose for which it was made, should return to the donor. Consider the example where a child is lost, and donations are given to his or her parents with the purpose of contributing to finding the child, but it is later found that the parents knew where the child was from the beginning. Following the logic above, the benefits received by the parents must return to the donors, in view of the fact that the purpose for which the donations were made cannot be achieved. A different case would be if a donor gives a certain amount to the parents of a child so that they can buy their child new books. Instead of using the money to buy books, the parents pay her academic fees instead. In this second example, even though the subject matter of donation was not used for the purpose intended, it nonetheless complies with the primary intention of the donor, which was to contribute to the child’s education. In this sense, the purpose of the donation is not frustrated and remains fulfilled.

Another way to answer to this question was to use, by analogy, the rules in place to deal with similar realities or specific rules regulating particular donations made for a purpose. Following this idea, and until 2016, donations *mortis causa* could be qualified as donations made for a purpose, considering that a *causa* (motive or purpose) has been instrumental for

⁴⁵⁹ Bankton, *Institute*, II.10.26.

the formation of the *animus donandi* of the donor: his death⁴⁶⁰. In this particular case, Scots law of donation used to provide the donor with a revocation right, because it considered the motive for the formation of his will to be of extreme relevance. Due to the relevance of the purpose why the donation was given, Scots law of donation protects the expectations of the donor by providing him with the right to revoke the donation while alive, and the benefit received by the donee only becomes irrevocable “if the donee outlives the donor”⁴⁶¹. Considering that, under the Succession (Scotland) Act 2016, s 25(2), it is clear that other conditional donations are enforceable under Scots law, then the same argument used for donations *mortis causa* in the past may be used in the present for the regulation of donations made for a motive or a purpose.

These two sources of answers both indicate that Scots law of donation protects, up to a certain degree, the purpose why the donation was made, and provides tools to the donor to deal with its frustration. But it is necessary to bear in mind that solely valuing the intention of the donor when assessing the validity of the donation may compromise the security of the donee or third parties, who believed and trusted in the validity of an otherwise apparent valid donation. This security is particularly relevant for donations made in the market context. It is for this reason that it may be argued that, while Scots law of donation protects the donation’s purpose or “primary intention of the donor”⁴⁶², not all donations may be revoked by a donor who argues that the purpose of the donation was frustrated. On the contrary, a donation must be presumed valid and untainted unless the law provides the donor with a right to revoke the donation, in case of frustration of the purpose why the donation was made, or this right is reserved by the donor. Therefore, the same rule followed above for the revocation of conditional donations must be followed when dealing with donations for a purpose: donations are always irrevocable unless the donor holds a right to revoke the donation provided to him by the law, by agreement or if he has reserved the right of revocation if the donation was created by a unilateral juridical act.

3.2.6. *Confrontation with similar institutions*

Donation has been defined in the present chapter as a set of rules which apply to multiple juridical acts, both unilateral and bilateral, as long as all cardinal elements are found in

⁴⁶⁰ Scottish Law Commission, *Report on Succession* (2009) 215, p 115.

⁴⁶¹ Scottish Law Commission, *Discussion Paper on Third Party Rights in Contract* (2014) 157, p 16.

⁴⁶² Bankton, *Institute*, II.10.26.

them⁴⁶³. In order to better understand the concept of donation, as well as to consolidate its boundaries, donations will be compared and distinguished from other legal institutions in Scots private law. This comparison aims to demonstrate that Scots law of donation has hard boundaries, and that by acknowledging these boundaries it is possible to recognise which rules apply to market donations, and which do not.

3.2.6.1. Legacy

Considering what was said regarding the irrevocability of donation in Scots law, in particular what was said regarding the now abolished donations *mortis causa*, a distinction between donation (*mortis causa or not*) and legacy is produced by looking at the moment when the benefit is received by the beneficiary⁴⁶⁴. In a donation, the legal effects are created during the lifetime of both parties, and cannot be freely revoked by the donor. In a legacy, the benefit is only received by the beneficiary upon the death of the benefactor⁴⁶⁵ and it may be revoked at any time by the *de cuius* during his lifetime, following the rules of Scots succession law. This means that, in juridical acts *mortis causa*, the *de cuius* indicates, through a unilateral juridical act, usually a testament provision or a legacy, the person(s) who will receive his patrimony (rights and correspondent obligations) after his death. But, the provision of this benefit may be stopped during the *de cuius*' life, i.e. it is a simple projection of the future. A donation, on the contrary, creates an irrevocable benefit to the donee upon completion of the donating act. The gratuitous receipt of a benefit *mortis causa* is not, therefore, a donation "in the proper sense, because nothing passes effectually to the receiver, while the giver is on life"⁴⁶⁶. This means that, even if the cardinal element of the *animus donandi* is present in a legacy, the cardinal element of delivery (during the parties' lives) is not. The absence of one

⁴⁶³ See the definition of donation in Scots law above (3.2.1. *Definition of donation*, p 79).

⁴⁶⁴ When donations are due upon the death of the donor, only the first step of a donation exists: the donor undertook an obligation to give in the future. Therefore, if a donation is due upon the death of the donor, we are not facing a donation, but a mere gratuitous promise instead.

⁴⁶⁵ G Watson (e), *Bell's Dictionary and Digest of the Law of Scotland* (7th ed, 1890) [2012] p 297.

⁴⁶⁶ Bankton, *Institute*, I.9.16.

of the cardinal elements of donation therefore leads to the impossibility of classifying the relevant juridical act as a donation.

3.2.6.2. Grants and others

It is clear that not all benefits received may be classified as donations, such as “situations in which the issue of donation may arise incidentally, as in the distribution of assets on divorce or dissolution of a civil partnership, are not in principle considered”⁴⁶⁷ because they lack the cardinal element of *animus donandi*. Also lacking this element are all gratuitous benefits provided by the State or other institutions which are commanded to provide gratuitous benefits by the law. In the case of subsidies and scholarships provided by charities and the State, which are due to be received by the public under the law, a pre-existent obligation to give exists. This means that even if an *animus donandi* exists, leading to the provision of gratuitous benefits to the public, this will is tainted by a pre-existent obligation to give.

3.3. Taxonomy

This section will be divided into two subsections: a) an historical discussion of the evolution of the law of donation in Scotland; and b) an analytical discussion of the existence of a “law of donation” in Scotland, aiming to contribute to the discussion regarding the classification of donation by Scots law as an autonomous juridical act of its own right, or if Scots law sees donation as a mere “quality” or “flavour” of multiple juridical acts; in both cases being clear that a(n independent) law of donation applies to the relevant juridical act.

3.3.1. *Historical perspective*

Scots law of donation is often described as an adaptation of Roman law rules on donation⁴⁶⁸. But it is clear that Scots law of donation is an ever evolving set of rules which has been in constant mutation. In order to fully understand this change, as well as the different ways in which donation was and is still perceived in Scotland, we must look first at the Institutional

⁴⁶⁷ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 1.

⁴⁶⁸ In particular Justinian, *Institutes*, II.7. For more on the topic, see Stair, *Institutions*, I.8.pr; Bankton, *Institute*, I.9.18; Erskine, *Institute*, III.3.pr; or W Gordon, “Donation” (reissue 2011) *SME*, 6, para 1.

Writers⁴⁶⁹, culminating with the perspective of today's law of donation, as regarded by contemporary legal writers. Among the different Institutional Writers, Stair, Bankton and Erskine are the ones who have influenced the definition of donation in Scots law the most⁴⁷⁰, followed by Bell⁴⁷¹.

3.3.2. Institutional writers

3.3.2.1. Stair

As mentioned above⁴⁷², amongst the Institutional Writers who regard donation mainly as a defence against the rules of unjustified enrichment it is possible to find Stair, who has addressed donation under the heading "Recompense or Remuneration"⁴⁷³, and who regards donation as a justification for the donee to hold any benefits received gratuitously. In Stair's opinion, any benefit given with *animo donandi* "induces an obligation to be thankful but does not bind to the like Liberality"⁴⁷⁴. The need to be thankful, as defined by Stair, is characterised by a "tacit consent" given by the donee that he will be thankful⁴⁷⁵ and built

⁴⁶⁹ The institutional Writers still have an ever-present impact on Scots law today. Their writings are often used to clarify Scots law and reinforce arguments in court, as demonstrated above (see 3.2.1. *Definition of donation*, p 79).

⁴⁷⁰ In particular Stair, Bankton and Erskine have influenced Scots law of donation. According to N Whitty, "Civilian Tradition and Debates on Scots Law", *The Journal of South African Law* (1996) p 235: "the main Institutional writings relating to civil (i.e. non-criminal) law [in Scotland] are Dalrymple, *Stair Institutions of the Law of Scotland* (1681; 2nd and last personal ed 1693); McDouall, Bankton *Institute of the Laws of Scotland* (only personal ed 1751-1753); Erskine *Institute of the Law of Scotland* (first and posthumous ed 1773); Home, Lord Kames *Principles of Equity* (1760: 4th and last personal ed 1800); Bell *Principles of the Law of Scotland* (1829; 4th and last personal ed 1839); *idem Commentaries on the Law of Scotland* (1800-1804; 5th and last personal ed 1826). *Baron Hume's Lectures 1821/22* (6 vols, 1939-1957) (Stair Society vols 5, 13, 15, 17, 18 and 19) have Institutional status in all but name and show Scots law at its apogee before Anglicisation significantly affected its character".

⁴⁷¹ See, among others, the definition of donation in G Watson (e), *Bell's Dictionary and Digest of the Law of Scotland* (7th ed, 1890) [2012] p 323.

⁴⁷² See early discussion on 3.2.1. *Definition of donation*, p. 79.

⁴⁷³ Stair, *Institutions*, I.8.

⁴⁷⁴ Stair, *Institutions*, I.8.2.

⁴⁷⁵ Stair, *Institutions*, I.8.2: "Positive Law, and tacit consent, as a Condition implied in the Gift: so also in every Gift, there is a correspondent Duty of Gratitude".

upon Roman law teachings on the need for slaves to be thankful to their previous masters, once free⁴⁷⁶, the customary rule on donations between spouses⁴⁷⁷.

But considering the abolition of slavery and emancipation of women, leading to the revocation of the rules guiding donations between spouses in Scotland⁴⁷⁸, it is possible to argue that Stair's teachings on the donee's duty to be thankful have lost their relevance in today's Scots law of donation. Because Stair's argument was built on Roman law teachings, and they are no longer followed by today's Scots law of donation, Stair's views on the revocation of donation should also be disregarded for the construction of present Scots law of donation. The examples given by Stair are rooted in categories of persons which were regarded as inferior, or belonging to a lower class in society – such as slaves and women⁴⁷⁹. Their inferior position in society was therefore an argument towards the demand for them to be thankful. Considering that all persons are equal before the law today⁴⁸⁰, arguments based on the need to be thankful cannot be accepted anymore. If they were, the basis of such a duty should be anchored in normative orders that are separated from the law, such as morality or religion, and for this reason, should not play a role in the legal debate.

Stair also elaborates on the distinction between juridical acts done in *animo donandi*, and those which are not done with a liberal intent, by looking at donation as a justification for the donee to hold the benefit received. In order to separate them, Stair uses the presumption *debitor non presumitur donare*, according to which a donation made by a debtor is either presumed to be in security or satisfaction of his debt, unless he expressly qualifies it to be a donation, or “done for love and favour”⁴⁸¹. It is also necessary to mention that this presumption is overturned by the personal relationship between the parties: “yet these Rules have their Limitations, As first, Bonds, Assignations, or other Rights, in the names of Children *unfor as familais*, & unprovided, are presumed to be Donations, because of the

⁴⁷⁶ Stair, *Institutions*, I.8.2: “in few cases; as Master, gifting Liberty, upon this ground did put an Obligation upon the Servant, who thereby became free”.

⁴⁷⁷ Stair, *Institutions*, I.4.18: “Donations between Man and Wife, *stante Matrimonio*, are Revocable by the Giver, during Life; which our Custom hath taken from the Civil Law, where this reason is rendred”.

⁴⁷⁸ Revoked under the Married Women's Property (Scotland) Act 1920, s 6.

⁴⁷⁹ Stair, *Institutions*, I.8.2 and I.4.18.

⁴⁸⁰ As defined by the European Convention on Human Rights and the Human Rights Act 1998.

⁴⁸¹ Stair, *Institutions*, IV.45.15: “It is a common Presumption, that *Debitor non presumitur donare*. This is a *Species* of the former, and stronger than other Presumptions of that kind: For the Donor being Debitor, it is strongly presumed, that he doth not Dispose or Deliver to Gift, but to Pay”. This rule applies, under Stair, unless a donation expressed it to be a donation, or done for “love and favour”.

Parents Natural Affection, and Natural Obligation to provide Children”⁴⁸², which Stair extends to gifts of reduced pecuniary value, such as goods or money of small value⁴⁸³.

Finally, it is relevant to notice that, according to Stair, donations in Scots law may take the form of different juridical acts such as “Bond, Assignation, Disposition, or other Right in another Man’s name”⁴⁸⁴. This means that Stair does not qualify donations as one particular type of juridical act, instead recognising the existence of a donation in multiple gratuitous juridical acts, which follow the rule of being granted *animo donandi* and/or which have not been caught by the presumption *debitor non presumitur donare*.

3.3.2.2. Bankton

As mentioned above, while Stair discusses Scots law of donation comprehensively yet succinctly, Bankton has elaborated extensively on the topic⁴⁸⁵. Also contrary to what was written by Stair, who uses the word “donation” when referring to gratuitous benefits provided by the donor to the donee, Bankton often refers to these transactions as “gifts”⁴⁸⁶. Bankton reserves the use of the word donation to refer to specific types of donations, such as: donations between spouses (or between husband and wife)⁴⁸⁷; patronage agreements⁴⁸⁸; or donations which effects are to be produced upon the death of the donor, such as legacies⁴⁸⁹.

Following Stair’s footsteps, Bankton has contributed to the development of Scots law of donation by associating donations with multiple gratuitous transactions. Following this line of thought, Bankton defined the following juridical acts as donations: escheats, as long as they are “granted by the barons of exchequer in the right of the crown, as they see expedient,

⁴⁸² Stair, *Institutions*, I.8.2.

⁴⁸³ Stair, *Institutions*, I.8.2: the concept of donation is “extended to some Goods and Money of small value, delivered by a rich Brother who wanted Children to his brother who was no Merchant, which was presumed to be *animo donandi*, and was not imputed in part of an annual Legacy, left thereafter by rich Brother to the other, November 23, 1679 Anderson contra Anderson, yea, an Assignation on to ones nearest of Kin, Mortis causa, was found a Donation, and not in satisfaction of a Debt due to that Party, June 16, 1665, Crookshank contra Crookshank. And Bonds of Provision to Children, are not interpreted in satisfaction of prior Bonds, but to be a further Addition; and so are any other Rights taken in the name of Children, especially if *unforas familias*”.

⁴⁸⁴ Stair, *Institutions*, I.8.2.

⁴⁸⁵ See above 3.2. *Review of Scots law of donation*, p 77.

⁴⁸⁶ Bankton, *Institute*, III.III.23, when referring to “escheats granted by the barons of exchequer in the right of the crown”.

⁴⁸⁷ Bankton, *Institute*, III.V.46.

⁴⁸⁸ Bankton, *Institute*, II.VIII.56.

⁴⁸⁹ Bankton, *Institute*, III.VIII.44.

to persons applying for them”. In this case, “the grant is termed a Gift, and the receiver, donatary, because the king gets no valuable consideration for it”⁴⁹⁰; “forfeiture, which comprehends not only lands, but likewise the moveable of the party may be in the same signature”⁴⁹¹; and assignation⁴⁹².

But Bankton’s greatest contribution to Scots law of donation is his exposition on what happens to donations when the motives why they were made by the donor are not met, or do not exist. For example, if a donor donates 30.000€ to a charity for the purchase of books for children in Africa, and instead, this money is entirely used for the purchase of a new car to be used by charity’s CEO. In this particular case, the donor wished to donate gratuitously (with *animo donandi*), he wished to donate 30.000€ (the right amount), and he wished to do it to this charity in particular (there is no error with regard to the person or qualities of the person of the donee), for the objective of providing books for kids in Africa. This means that the will of the donor was formed correctly, and the donation is not granted by any error, however, the subject matter of the donation was not used in a way which fulfilled the motives that led the donor to donate in the first place.

This frustration of the motives – or the intention of the donor – happened in a moment posterior to the production of legal effects of the juridical act which created the donation. Should the frustration of the motives allow the donor to revoke the donation? This is not an easy question to be answered in Scotland, but Bankton has decisively contributed towards its answer. According to Bankton, “if the end to which the donation was to be applied cannot be precisely attained, or would be useless, then it may be employed to the like purpose, always observing the primary intention of the donor; but if the use to which the mortification was destined, tho’ lawful at the time, is thereafter condemned by law, the right of course falls to the kind, as being caducuary and vacant, which was the case of popish foundations at the reformation”⁴⁹³. It is therefore possible to argue that, according to Bankton, the primary intention of the donor must be respected, even if the use given to the subject matter of the donation was not used as specified by the donor. Following the example above, this means that, if the car purchased for the use of the charity’s CEO is deemed as contributing to distribute books to African children, then the donation remains untainted, but if the use of

⁴⁹⁰ Bankton, *Institute*, III.III.23.

⁴⁹¹ Bankton, *Institute*, III.III.39.

⁴⁹² Bankton, *Institute*, III.I.48.

⁴⁹³ Bankton, *Institute*, II.10.26.

the subject matter of the donation is deemed as not following the intention of the donor, then this gift may be called back by the donor under Bankton.

Following Bankton's perspective, and while looking at this particular case, different consequences may be related to the direct or indirect contribution of the use of the subject matter to observe "primary intention of the donor"⁴⁹⁴. Strictly following Bankton's defence of the "primary intention of the donor", it may be argued that if the use of the subject matter of the donation may be directly linked to the fulfilment of the motives why the donation was made, then under Scots law the donation is never tainted. On the contrary, if the use of the subject matter of the donation cannot be defined as contributing directly to the observation of the intention of the donor, then the relevant donation is tainted by not fulfilling the objectives why it was made in the first place. The protection of the "primary intention of the donor" must be, however, balanced with the principle of security, and the protection of the expectations of the donee (and his creditors). This security is therefore particularly relevant in what donations in the market are concerned, where donor and donee may be strangers, interacting for the first time. For this reason, a stricter position was argued above, where revocation rights may only be granted to the donor if this right was reserved – and the relevance of the donor's motivation was conveyed to the donee⁴⁹⁵.

3.3.2.3. Bell

Bell often associates donations with the provision of gratuitous benefits between family members. As examples, Bell has reviewed Scots law of donation in the following cases: when elaborating on donations between spouses⁴⁹⁶; when describing the tools provided by the law for the reduction of the heirs' prejudice⁴⁹⁷; when discussing the antenuptial marriage contract; and in other instances⁴⁹⁸. It is possible to argue that, in Bell's opinion, the proximity

⁴⁹⁴ Bankton, *Institute*, II.10.26.

⁴⁹⁵ Considering the relevance of this topic, please see the arguments on security at 3.2.5.2. *Donations made for a purpose*, p 103.

⁴⁹⁶ Bell, *Commentaries*, II.II.2.

⁴⁹⁷ Bell, *Commentaries*, II.III.2: "The creation of Burdens and Securities are truly alienations, and are reducible if to the heir's prejudice; as for raising a fund to benefit the younger children or others. The following cases may be distinguished: (...) If the money be borrowed while the borrower is on deathbed, and dissipated, or given in donation to younger children or strangers, still the security would seem to be effectual to the lender; but the heir, as before, would have redress against those who have been benefited."

⁴⁹⁸ Bell, *Commentaries*, III.I.5; "By antenuptial marriage contract, the *jus mariti* may be excluded with regard to any particular subject belonging to the wife, although it cannot be excluded *per aversionem*. Thus lands may be let and the rents conveyed to the wife, for her and her children's aliment, excluding the *jus mariti*; or an annuity may be purchased to the wife for her aliment, with an exception of the *jus mariti* (...). These provisions,

between donation and family life is explained by the fact that donation is, in Scots law, a personal juridical act. If a donation takes the form of a gratuitous contract, the “error in the person affects the substantials of the contract, if personal identity is of importance, and may be supposed to have entered essentially into the view of the contract”⁴⁹⁹. For this reason, “in marriage, in donation, in the hire of labour (as of that of an artist), a mistake as to the person will annul consent”⁵⁰⁰. It is therefore possible to argue that Bell not only regards donation as connected with family life, but also that he classifies donations as multiple juridical acts which are sources of obligations, placing the law of donation within the chapter of “General Principles of Obligations and Contract”, and clearly enunciating that donations may be created by contract under Scots law⁵⁰¹.

Bell has further elaborated on the personal aspect of donation, bringing the personal relationship created between donee and donor, as the result of a donation, to the area of error and consent. He therefore declares that on one side, the personal identity of the parties is always important for the formation of the juridical act “in marriage, in donation, in the hire of labour (as of that of an artist), [where] a mistake as to the person will annul consent”⁵⁰². On the other side, error as to the quality of the subject matter of the donation may or may not be sufficient to annul consent⁵⁰³, depending on it being defined as an essential quality or not, in a way which would have “prevented the bargain”, therefore invalidating the juridical act⁵⁰⁴.

3.3.2.4. Erskine

Erskine reviews Scots law of donation under the heading “Of obligations arising from consent & C.”⁵⁰⁵, which may be understood as Erskine regarding donations as one, among many *genera* of contract or juridical acts. This is further evidenced by the way Erskine separates the source of the donation (the juridical act, creator of the obligation to give), from delivery of the subject matter, further defining donation as the “obligation which arises from

however, cannot be effectually made by a postnuptial deed, which not having the character of an onerous contract, the provision, though made during solvency, is revocable as a donation, and is held by the contraction of debts to be revoked.”

⁴⁹⁹ Bell, *Commentaries*, III.I.5.

⁵⁰⁰ Bell, *Commentaries*, III.I.5.

⁵⁰¹ Bell, *Commentaries*, III.I.5.

⁵⁰² Bell, *Commentaries*, III.I.3.

⁵⁰³ Following *Scott v Littledale* (1858) 27 LJ (QB) 201.

⁵⁰⁴ Bell, *Commentaries*, III.I.5.

⁵⁰⁵ Erskine, *Principles*, III.3.

the mere good will and liberality of the granter”⁵⁰⁶. For this reason, Erskine is described as the first Institutional Writer to distinguish between the obligation to donate and the transfer of the benefit. This distinction is regarded as fundamental in Scots private law, in particular when associated with the transfer of property⁵⁰⁷. For the same reason, in Erskine’s view, a donation which has not been fully completed is a “special sort of donation, which is constituted verbally, is called a promise”⁵⁰⁸. In line with previous work on the subject, Erskine also defined the intention of the donor to donate as one of the cardinal elements of donation in Scots law. For this reason, and following Stair, Erskine revisits the presumption against donation in Scots law, arguing that this presumption does not blindly apply to all transactions. On the contrary, Erskine argues that it is necessary to look at the pre-existing relationship between donor and donee, and if the parties are creditor and debtor and “donation be not expressed, is presumed to be granted in security or satisfaction of the debt”⁵⁰⁹. The opposite is also true, and if a close relationship between the parties exists (one such case being “paternal affection”⁵¹⁰), then the presumption may be disregarded.

Following Erskine, the pre-existing or ongoing relationship between the parties is also relevant for revocability purposes, such as in the case of donations between spouses⁵¹¹ or remuneratory donations⁵¹². Under Erskine, it is relevant to distinguish between the above-mentioned types of donations because different rules of revocation apply to them. The generic rule is that a donation cannot be revoked, and even though they “imply no warrandice but from the future facts of the donor. They are hardly revocable by our law for ingratitude, though it should be of the grossest kind”⁵¹³. But different rules on revocation apply for these types of donation: donations between spouses were freely revocable by the donor in the past

⁵⁰⁶ Erskine, *Principles*, III.3.36.

⁵⁰⁷ K Reid, *The Law of Property in Scotland* (1996) paras. 606-618; D Carey Miller, D. Irvine, *Corporeal Moveables in Scots Law* (2nd ed., 2005) paras. 8.06-8.11; M Hogg, ‘Promise and donation in Louisiana and comparative law’ (2011) *Tulane European and Civil Law Forum*, p 174.

⁵⁰⁸ Erskine, *Principles*, III.3.36.

⁵⁰⁹ Erskine, *Principles*, III.3.38.

⁵¹⁰ Erskine, *Principles*, III.3.38.

⁵¹¹ Erskine, *Principles*, I.6.18. The rules on revocation are no longer applicable to donations between husband and wife / between spouses in Scots law of donation.

⁵¹² Erskine, *Principles*, I.6.18.

⁵¹³ Erskine, *Principles*, III.3.36.

⁵¹⁴, and remuneratory donations are fully protected against revocation⁵¹⁵. Erskine declares that only truly gratuitous donations may be subject to unilateral revocation by the donor because these donations are defined as “mutual grants [that] are made in consideration of each other, [...], except where an onerous cause is simulated, and a donation truly intended”⁵¹⁶. Bearing in mind this division of different pre-existing relationship to the donation, between donor and donee, it is possible to argue that the identity of the parties was of prime relevance to Erskine, in what Scots law of donation is concerned. Not only the juridical act from with the donation originates, but also the relationship between donor and donee must, therefore, be regarded as relevant for the application of the different rules guiding Scots law of donation.

Finally, it is important to notice that Erskine has studied in detail the boundaries between donations, legacy and donations *mortis causa*. He thus regards donation as a macro category of gratuitous juridical act, under which legacies and donations *mortis causa* are to be found. For this reason, Erskine has stated that “a legacy is a donation by the deceased, to the Legacy, paid by the executor to the legatee”⁵¹⁷, while donations *mortis causa* “are of the nature of legacies, and like them revocable; consequently, not being effectual in the granter’s life, they cannot compete with any of his creditors, not even with those whose debts were contracted after the donation. They are understood to be given from a personal regard to the donee, and therefore fall by his predecease”⁵¹⁸.

3.3.3. Contemporary writers

As mentioned above, contemporary legal writers often regard donation as a gratuitous transfer of a (real) right⁵¹⁹. One such case is Gordon, who states that “donation is the preferred term in Scots law for a gratuitous transfer of property which is intended to take

⁵¹⁴ Erskine, *Principles*, III.3.36: “those betwixt man and wife are revocable by the donor, even after the death of the donee”; Erskine, *Principles*, I.6.18: “All donations, whether by the wife to the husband, or by the husband to the wife, are, both by the Roman law and ours, revocable by the donor”. As mentioned above, present Scots law of donation, however, does not discriminate between donations between spouses and others, no longer providing the donor-spouse with the right to revoke donations made to his/her spouse.

⁵¹⁵ Erskine, *Principles*, III.3.36: “Those betwixt man and wife are revocable by the donor, even after the death of the donee; but remuneratory grants, not being truly donations, cannot be revoked”.

⁵¹⁶ Erskine, *Principles*, I.6.18.

⁵¹⁷ Erskine, *Principles*, III.9.2.

⁵¹⁸ Erskine, *Principles*, III.3.37.

⁵¹⁹ See above 3.2.1. *Definition of donation*, p 79.

effect *inter vivos*”⁵²⁰. This *inter vivos* transaction may encompass the transfer of any right or any property capable of being transferred, as long as the donor is not under the legal obligation to give, and where acceptance is not a requisite to complete donation⁵²¹. This broad definition of donation is, however, further restricted by Professor Gordon by the imposition of two conditions: (i) delivery, where the donor divests himself of the subject matter of donation by putting it beyond his control, and (ii) an *animus donandi*, where the will of the donor to donate must be freely formed and cannot be tainted by a previous obligation to deliver the relevant subject matter⁵²².

Also mentioned above, and following on from the work of Professor Gordon, MacQueen and Hogg have produced the most recent and comprehensive study on Scots law of donation⁵²³. They regard donations and promises as “unilateral juridical acts and gratuitous ones”⁵²⁴. Both promises and donations are therefore defined as unilateral by reference of the participation of the parties for the production of juridical effects. In other words, according to MacQueen and Hogg, only one of the parties (the promisor/donor) is a “actively involved” in the juridical act, promising or donating, an act which is defined as final for the production of the legal effects⁵²⁵.

It may be argued that the above-mentioned logic is only possible because the unilateral juridical act which results in a donation, under Scots law, is deemed as final without any need for acceptance. But a logic where acceptance is never needed lacks substance when applied to donations entered into by an agreement reached between donor and donee, where a *modo* may be imposed to the donee. In a bilateral donation, the donor is able to compel counter-performance to the donee in return for the benefit granted by donation⁵²⁶. Therefore, Scots law admits the imposition of a *modus* or counter-performances to the donee, a fact which does not impair the definition of donation as gratuitous. On the contrary, these

⁵²⁰ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 2; followed by W Morton, *Manual of the Law of Scotland* (1896) p 303; among others.

⁵²¹ W Gordon, “Donation” (reissue 2011) *SME*, 54.

⁵²² W Gordon, “Donation” (reissue 2011) *SME*, 55.

⁵²³ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 3.

⁵²⁴ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 5.

⁵²⁵ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 5.

⁵²⁶ As a demonstration, we may find H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 5, who declare that while donations are gratuitous because the donor may not compel any counter-performance in return for the promise or act of donation, donations may be conditional in the sense that performance may be suspended until the occurrence of a relevant event (this event being the counter-performance performance by the donee).

donations are still defined as gratuitous juridical acts in Scotland⁵²⁷, considering the *animus donandi* or intention of the donor to benefit the donee⁵²⁸. Finally, it is also important to notice that MacQueen and Hogg accept that donations may be made for a purpose, as long as the purpose is an enforceable term of the transfer rather than merely the motive for donating⁵²⁹. Concurring with Stair, they use the institute of unjustified enrichment to return to the donor a benefit which was transferred by a donation which purpose was not fulfilled⁵³⁰.

Due to their approach to donation, MacQueen and Hogg argue that the cardinal elements to be proved in the assessment of the existence of a donation in Scots law are: (i) the existence of a present intention to donate (or *animus donandi*)⁵³¹, and (ii) the delivery of the subject matter of the donation⁵³². While the need for an intention to donate may be defined as the subjective element of donation, under MacQueen and Hogg's definition, delivery is regarded as an objective constitutive element of donation, meaning that "more than a state of mind is required to complete donation"⁵³³.

Hogg has further clarified his position on Scots law of donation writing on his own⁵³⁴, where he associated donation with the transfer of property rights in Scotland, rather than contractual rights⁵³⁵. In addition, Hogg states that "one may promise to make a donation in the future"⁵³⁶. It may therefore be argued that, in his opinion, a dissociation in Scots law between the moment when the obligation to give is created and the moment when this benefit is actually received by its beneficiary is possible. In other words, by creating a binding promise to donate in the future, the promisor has started a process which will be concluded by a donee holding a benefit he did not hold before.

Considering the above, it is possible to argue that, in Scots law, a donation may be created by what would otherwise be defined as a promise. For example, if Alasdair promises to donate £10 to Britany in the future following the relevant formalities⁵³⁷ under Scots law, he

⁵²⁷ H MacQueen and M Hogg, "Donation in Scots Law" (2012) *Juridical Review*, p 5.

⁵²⁸ H MacQueen and M Hogg, "Donation in Scots Law" (2012) *Juridical Review*, p 6 in what concerns to donations *mortis causa*.

⁵²⁹ H MacQueen and M Hogg, "Donation in Scots Law" (2012) *Juridical Review*, p 6.

⁵³⁰ H MacQueen and M Hogg, "Donation in Scots Law" (2012) *Juridical Review*, p 6.

⁵³¹ H MacQueen and M Hogg, "Donation in Scots Law" (2012) *Juridical Review*, p 16.

⁵³² H MacQueen and M Hogg, "Donation in Scots Law" (2012) *Juridical Review*, p 15.

⁵³³ H MacQueen and M Hogg, "Donation in Scots Law" (2012) *Juridical Review*, p 20.

⁵³⁴ As a demonstration, see M Hogg, *Promises and Contract Law – Comparative Perspectives* (2011).

⁵³⁵ M Hogg, *Promises and Contract Law – Comparative Perspectives* (2011) p 47.

⁵³⁶ M Hogg, *Promises and Contract Law – Comparative Perspectives* (2011) p 47.

⁵³⁷ Described under the Requirements of Writing Scotland Act s 1(2).

is obligated to donate in the future. However, a full donation is only achieved (i.e. the final benefit is only held by the beneficiary) after Alasdair actually gives the promised £10 to Britany. In this sense, it is possible to argue that different juridical acts may be regarded as donations under Scots law, as long as they fulfil the different cardinal elements of donation. These cardinal elements were studied in detail above and are relevant for the classification of a juridical act as a “donation” under Scots law, considering that specific rules on donation will apply to the relationship created by them.

3.3.4. Concluding remarks

In short, Stair, has addressed donation under the heading “Recompense or Remuneration”⁵³⁸, defining donation as a justification for the donee to hold the benefit received. Following a different approach, but with similar consequences, it is possible to find Bankton who regards donations mainly as gratuitous obligations. In this sense, Bankton defines donation as “the liberal grant of anything to which one could not be compelled by law”⁵³⁹, while interchangeably using the concepts of donation and “gratuitous obligation”⁵⁴⁰. Bell has not addressed the issue of donation in a clear, straightforward fashion. However, his association between donations and the provision of several gratuitous benefits to family members may be regarded as a call for the application of the law of donation to multiple juridical acts such as gifts between spouses⁵⁴¹ or antenuptial marriage contracts⁵⁴², among others.

Erskine may be regarded as the distinct voice in the study of Scots law of donation⁵⁴³, by defining donation as “the obligation which arises from the mere liberality of the giver”⁵⁴⁴, conferring “on the donee a *jus ad rem*, a right of suing for performance, it gives him no right in the thing itself”⁵⁴⁵. In other words, Erskine regards donation as the juridical act reached between donor and donee where the donor undertakes an obligation to give gratuitously, and which is regulated by a separated law – the law of donation. These two perspectives are not evident in contemporary writings, where (contemporary) legal writers, often regard donation as a gratuitous transfer of a (real) right. One such case being Gordon, who states that

⁵³⁸ Stair, *Institutions*, I.8.

⁵³⁹ Bankton, *Institute*, I.9.2.

⁵⁴⁰ Bankton, *Institute*, I.9.8.

⁵⁴¹ Bell, *Commentaries*, II.II.2.

⁵⁴² Bell, *Commentaries*, III.I.5.

⁵⁴³ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 3.

⁵⁴⁴ Erskine, *Institute*, III.3.88.

⁵⁴⁵ Erskine, *Institute*, III.3.90.

“donation is the preferred term in Scots law for a gratuitous transfer of property which is intended to take effect *inter vivos*”⁵⁴⁶.

In conclusion, it is possible to argue that Stair, Bankton and Bell define donation in Scots law as a flavour which can be found in many gratuitous juridical acts. In this sense, it is argued that Scots law of donation may be regarded as an extra regulation, applicable to all juridical acts defined as donations, which contributes to the regulation of the relationship created, considering its special characteristics. Therefore, donation is not to be perceived as a distinct class of juridical acts (such as promise or transfer), but instead being regarded as a reality which covers diverse juridical acts (of various types), which are able to be characterised as donations - this classification as a donation having consequences for the rules that apply to them. A juridical act is therefore to be regulated under Scots law of donation when that relevant juridical act is classified as a donation. As a dissident voice, it is possible to find Erskine, who defines donation as a *genus* of contract, i.e. as one identifiable juridical act, with tendentiously clear boundaries which distinguish them from other juridical acts. But it is also possible to argue that the Institutional Writers regard donation as an obligation between donor and donee⁵⁴⁷.

3.3.5. Taxonomy placement of donation in Scots law

The historical discussion showed us that “indeed, there is no single ‘right’ place for the law of donation”⁵⁴⁸. Thus, it is necessary to enquire if a donation in Scotland may be defined as one juridical act, to which the law of donation applies alone or if, on the contrary, a donation may be regarded as a quality of multiple juridical acts that gather all relevant cardinal elements of donation.

Bearing in mind that while the legal (and practical) effect of a donation in Scots law is to justify the reception (and maintenance) of the benefit by the donee⁵⁴⁹, this benefit is still created by a juridical act – an act which is regulated under the law, and which is able to

⁵⁴⁶ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 2; followed by W Morton, *Manual of the Law of Scotland* (1896) p 303; among others.

⁵⁴⁷ Scottish Law Commission, *Discussion Paper on Third Party Rights in Contract* (2014) 157, p 16.: “Donation was classically seen in Scots law as first an obligation between donor and donee and only second as a transfer of ownership of property from donor to donee completed by delivery of the thing donated.”

⁵⁴⁸ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 3.

⁵⁴⁹ Stair, *Institutions*, I.8.1.

create rights and obligations for both, the donor and the donee. Furthermore, adding to the discussion is the idea that multiple “gratuitous obligations [are] otherwise called donations”⁵⁵⁰, and that both, unilateral and bilateral juridical acts, have been described as able to create a donation in Scots law⁵⁵¹. It is therefore possible to argue that a donation may emerge from different juridical acts in Scotland. The existence of different routes to achieve a donation is the result of a wide definition of donation in Scots law⁵⁵², where the concept of donation is able to encompass not only the simple transfer of real rights, but also other institutions such as the creation or transfer of personal rights, or the forgiveness of an obligation, which allows the donee to retain a benefit of which he would have been otherwise deprived.

This flexibility of Scots law of donation does not contradict legal writers, such as Gordon, who argue for a close link between donation and the gratuitous transfer of real rights in Scots law⁵⁵³. On the contrary, both perspectives may coexist, considering that even those legal writers recognise that “although ‘donation’ refers primarily to a transfer of property (or to the creation of an obligation to transfer property, which can itself be considered a form of incorporeal property), the term is sometimes used of any gratuitous act”⁵⁵⁴. Following this idea, and as a principle, “any subjects which can be acquired can be the subjects of a donation”⁵⁵⁵. It is for the same reason that not only the transfer of a real right (property) may be defined as a donation under Scots law, but that many other juridical acts may be defined as a donation as well. Among others, the following juridical acts may be defined as a donation in Scotland: the gratuitous assignation of delictual claims⁵⁵⁶; the creation of a personal right to hold real rights in the future, made by trust⁵⁵⁷; the donation of cash⁵⁵⁸; the gratuitous assignation of rights in a bank account⁵⁵⁹; the discharge of a trust⁵⁶⁰; or a donation made by a father to his son of a cheque to meet the cost of shares in a company, where the

⁵⁵⁰ Erskine, *Institute*, III.3.88.

⁵⁵¹ Promise, assignation, transfer of real rights, among others.

⁵⁵² One such case is Bell in G Watson (e), *Bell’s Dictionary and Digest of the Law of Scotland* (7th ed, 1890) [2012] p 323.

⁵⁵³ As mentioned above, W Gordon, “Donation” (reissue 2011) *SME*, p 6, and H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 1-24.

⁵⁵⁴ W Gordon, “Donation” (reissue 2011) *SME* 6, para 1.

⁵⁵⁵ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 15.

⁵⁵⁶ *Purdon’s Curator Bonis (Cole-Hamilton) v Boyd* 1962 SC 247.

⁵⁵⁷ *Scott v. Scott* 1930 SC 903.

⁵⁵⁸ *Potter v Lord Advocate* 1958 SC 213.

⁵⁵⁹ *Forrest-Hamilton’s Trustee v Forrest-Hamilton* 1970 SLT 338.

⁵⁶⁰ *Keanie v Keanie* 1940 SC 549.

cheque was drawn in favour of the company and the shares were allotted to the son⁵⁶¹, among others⁵⁶².

Considering the above, and the flexibility of Scots law towards the definition of donation, as well as the wide range of benefits classified by the Scottish courts as the subject matter of a donation, even Gordon, who believes that “‘donation’ refers primarily to a transfer of property”, cannot deny that donation “is sometimes used of any gratuitous act”⁵⁶³. It is therefore possible to argue that different juridical acts are able to create a donation in Scots law. The existence of a donation and the correspondent call for the law of donation to regulate the relationship happen when the cardinal elements of donation are found in the relevant juridical act.

3.4. Effects of donation

3.4.1. Typical effects

The classification of a juridical act as a donation under Scots law bears consequences: the production of typical juridical effects. These legal effects are: (i) a right is granted to the donee, this being a right the donee did not hold before (including the right not to be deprived of the right he holds); (ii) an obligation to provide the donee with the subject matter of the donation is undertaken by the donor, or in case of an immediate donation, an obligation of simple warrandice is undertaken by the donor, where the “donor guarantees that he or she will not do anything to defeat the donee's right in the future”⁵⁶⁴; (iii) in case of a donation

⁵⁶¹ *Potter v Lord Advocate* 1958 SC 213.

⁵⁶² Additionally, it is also important to mention that only rights (both personal and real rights) defined as ‘*in commercio*’ may be the subject matter of a donation. This means that rights which cannot be transferred, created or waived by the benefactor, cannot be the subject matter of a donation. Many examples may be offered of rights *extra commercio*, which are de facto intransferable and inalienable rights (See M Brown, *A Treatise on the Law of Sale* (1821), para 140, who further specifies that there are goods which cannot be disposed: “those things which were termed *res publicae*, such as seas, navigable rivers, highways, and other things of a similar nature”). Within these rights, we may find real rights which cannot be granted by donation, such as those held by the National Trust of Scotland (regulated under the National Trust for Scotland (Governance etc.) Act 2013) or others protected for public purposes (see *Wadell v Stewartry District Council* 1977 SLT 35). Other personal rights cannot be waived or alienated for the benefit of a donee and some rights cannot be alienated by his holder. One such case is the right to live: no one may waive his right to live, granting the donee with the right to kill him/her; or some body parts and fluids (now heavily regulated and cannot be regarded as property. See N Whitty, *Rights of Personality, Property Rights and Human Body in Scots Law* (9th ed 2005) p 194; *Human Tissue (Scotland) Act* 2006 s 53; *The Human Medicines Regulations* 2012, s 3; *The Human Tissue (Quality and Safety for Human Application) Regulations* 2007 s 12, etc.).

⁵⁶³ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 2.

⁵⁶⁴ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 39, following Bankton, *Institute*, I.9.7; and Erskine, *Institute*, III.3.90.

sub modo, the donee undertakes the obligation to comply with the condition or *modo* imposed by the donor⁵⁶⁵; and (iv) whenever applicable, the donor is liable if the subject matter of the donation is likely to cause harm to the donee or others⁵⁶⁶. In order to structure the analysis of these effects, the following sub-section will look at three different moments in the life of a donation: before delivery occurs (and the correspondent right to enforce delivery); after delivery occurs (right not to be deprived of the benefice); and after all legal effects are produced (protection of the confidence and other market considerations).

3.4.1.1. Right to enforce delivery

In order for a donation to exist in Scotland, the donee must hold a right he did not hold before, which includes the right not to be deprived of something. By looking at the example of transfer, where the donor benefits the donee by transferring a right he did not hold before, it is possible to argue that the effect of the donation is not the creation *per se* of an obligation to transfer the benefit. On the contrary, transfer is one of the *modus constitutionis* of donation⁵⁶⁷. In this case, the legal effect of donation (created by the gratuitous transfer of a right to the donee) is the enrichment of the donee by the transfer. As mentioned before, vesting a right in the donee which he did not hold before is necessary for the existence of donation in Scotland⁵⁶⁸, meaning “that more than a state of mind is required to complete a donation”⁵⁶⁹. This enrichment of the donee may be achieved following different routes, such as by disposition⁵⁷⁰, intimation (to a third party⁵⁷¹ or to the grantee⁵⁷²), or any other act which results in the donee holding a right he did not hold before.

In immediate donations, such as donations *quod constitutionem* of corporeal movables⁵⁷³ where the subject matter of the donation is instantaneously held by the donee, delivery

⁵⁶⁵ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 39.

⁵⁶⁶ As examples of liability arising to the donee from donations which subject matter proved to be dangerous, it is possible to find several examples on fathers who were deemed liable for the harm caused by guns (mainly rifles) gifted to their infant children. See *Donaldson v McNiven* (1952) 96 SJ 747; and *Muir v Wood* 1970 SLT (Notes) 12.

⁵⁶⁷ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 28.

⁵⁶⁸ See 3.2.2.4 *Performance*, p 92.

⁵⁶⁹ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 20.

⁵⁷⁰ See *George Hann (AP) v Jennifer Rosalyn Spence Howatson* (2014) CSOH 69, para 11; and *Forrest-Hamilton's Trustee v Forrest-Hamilton* 1970 SLT 338, para 16.

⁵⁷¹ *Linton v Inland Revenue* 1928 SC 209.

⁵⁷² *Henderson v M' Manus* 1981 SC 233, para 37.

⁵⁷³ As following from a steady line of decisions such as *Sharp v Paton*, 10 R 1000; *Thomson v Aktien Gesellschaft fur Glasindustrie* (1917) 2 SLT 266; *Aiken's Executor's v Aiken*, 1937 SC 678; or *Gauld v Middleton* 1959 SLT 61.

happens simultaneously with the undertaking of the obligation to donate, by transferring the right to the relevant corporeal movable. The same happens in a valid waiver of a debt, where the donor delivers the benefit to the donee by exempting the donee from impoverishment (by payment). In respect of donations made by unilateral juridical act, the donating relationship is marked by two separated moments: the moment when the obligation is constituted, and subsequent delivery of the subject matter of donation. One such case is the promise to donate (unilateral undertaking), where the donor undertakes the obligation to provide a benefit, followed by delivery of the subject matter of the donation to the donee at a future moment. The particularities of these donations are regulated by the law of promise⁵⁷⁴, however, a donation is constituted from the moment when the donee was vested with the right to receive the subject matter of the donation. By effect of the promissory donation, the beneficiary was given a right he did not hold before; the right to access the subject matter of the promissory donation at a future moment.

3.4.1.2. Right not to be deprived of the benefit

The Scots law of donation acts as a supplement to the law of warrandice by providing the donee with the right not to be deprived of the benefit. Gretton and Reid define warrandice as a “guarantee, expressed or implied, of good and unencumbered title”⁵⁷⁵. They further clarify that there are three degrees of warrandice: simple, fact and deed, and absolute warrandice⁵⁷⁶. It is also noted that where there is no warrandice clause, “the law will imply one”⁵⁷⁷. Donation follows this rule, where when no warrandice clause exists, the law presumes that the benefit was granted to the donee with simple warrandice, meaning that the donor undertakes the obligation that he will do nothing to subsequently prejudice the title of the donee⁵⁷⁸. The right not to be deprived of the benefit received by a donation is not enforced or justified by Scots law of donation. On the contrary, other laws (such as warrandice or promise) provide title to the donee. It is possible to see this phenomenon in respect of the

⁵⁷⁴ See *Graham's TRS. v Graham And Others* 1957 SLT 43, among others.

⁵⁷⁵ G Gretton, K Reid, *Conveyancing* (4th ed 2011) p 321.

⁵⁷⁶ G Gretton, K Reid, *Conveyancing* (4th ed 2011) p 321.

⁵⁷⁷ G Gretton, K Reid, *Conveyancing* (4th ed 2011) p 322.

⁵⁷⁸ G Gretton, K Reid, *Conveyancing* (4th ed 2011) p 321.

law of warrandice where, once the law of donation is called to regulate the relationship created by the relevant gratuitous juridical act, it restricts the warrandice as mentioned above.

It is also worth mentioning that in general, in respect of onerous juridical acts, a party cannot unilaterally revoke the juridical act, with the aim of invalidating the legal effects produced by the relevant juridical act. Such a unilateral power would create extreme uncertainty in the legal trade, in particular in what the market is concerned. It is therefore necessary to distinguish between generic protection given to any juridical acts and the protection specific to donations. The most noticeable of all is the protection conferred upon certain types of donation, where the right to revoke the donation is granted to the donor in certain circumstances. As a general rule, and except in limited circumstances, donations are not revocable under Scots law of donation unless the power to revoke is reserved by the donor, and therefore, known to the parties⁵⁷⁹.

3.4.2. Effects for the market

In a market context, donations may be given between parties who do not have a previous relationship and who may not know each other. This fact raises trust issues, which are often dealt with by legislation concerning the quality of the object. In respect of the quality of the object, it is important to notice that in Scots law of donation, the donor is liable for all his acts (or omissions) that defeat the donee's right to access the benefit⁵⁸⁰. But the donor is not responsible for the "good quality" of the subject matter of the donation. That is to say that, if the subject matter of the donation is tainted by heritable securities or any other real rights or obligations affecting it⁵⁸¹, they pass attached to the subject matter of the donation as it is. As a demonstration, it is possible to see the very recent authority laid down by *Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc.*⁵⁸², where it was held that the donor must comply with the terms of the donation and that the courts are not able to equitably adjust a contract on the basis of its performance, not even if this contract is based on

⁵⁷⁹ Erskine, *Institute*, III.3.91; and *Christian Mary Carmichael or Ritchie v Sir David Ross and Others (Ritchie's Trustees)* (1874) 1 R. 987; and *Hutton's Trustees v Hutton's Trustees* 1916 SC 860.

⁵⁸⁰ W Gordon, "Donation" (reissue 2011) *SME*, 6, para 39.

⁵⁸¹ See *Johnstone's Trustees v Johnstone* (1896) 23 R 538.

⁵⁸² *Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc.* [2013] UKSC 3.

gratuitous payments⁵⁸³. Furthermore, the donor also incurs liability when the donee or third parties suffer damages where a gift is likely to cause danger⁵⁸⁴.

3.5. Regulation of market donations

The present section will review whether Scots law of donation is fit for the purpose of regulating donations in a market context. This review will be conducted by looking at the protection conferred upon the parties directly involved in the donation (protection of their lawful expectations), third parties (protection against unlawful harmful direct or indirect consequences of a donation) and the community as a whole (from the perspective of the security of transactions and promotion of trade and social peace), as well as the requirements of the market, where a discussion of topics such as capacity will allow for these to be critically reviewed. As stated in Chapter 2, in order to be efficient and well suited to the regulation of today's market demands, a law of donation must depart from the idea of imbalance between the parties answering to concerns connected with the protection of the family, and focus on the promotion of efficiency and security⁵⁸⁵.

3.5.1. Protection of the parties

3.5.1.1. Protection against mistake

The protection of the donor in case of mistake extends to all donations, including donations in a market context. As a rule, the donor may therefore avoid the donation if this donation was concluded because of a mistake. This mistake may refer to the lack of intention to benefit the person who has received the benefit; the qualities and identity of the subject matter of the donation; and if the donor was acting under the mistaken belief that he was legally obliged to donate. If the mistake is proven, several remedies are available to the donor, the most relevant being the *condictio indebiti*, “a term which is still commonly used in Scotland

⁵⁸³ *Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc.* [2013] UKSC 3, para 47, where Lord Hope DPSC (with whom Lord Reed and Lord Carnwath agree) has declared that “the proposition that the court can equitably adjust a contract on the basis that its performance, while not frustrated, is no longer that which was originally contemplated is not part of Scots law. To hold otherwise would be to undermine the principle enshrined in the maxim *pacta sunt servanda* which lies at the root of the whole of the law of contract”.

⁵⁸⁴ See *Muir v Wood And Another* (1970) SLT (Notes) 12, and the conclusions drawn by Lord Kissen based on the liability of a parent to a person who was injured by a gun he gave to his son. The relevant cases are: *Donaldson v. McNiven* [1952] 1 All ER 1213, *Newton v. Edgerley* [1959] 3 All ER 337, and *Gorely v. Codd* [1966] 3 All ER 891.

⁵⁸⁵ See above 2.5.2.2. *Security*, p 67.

to denote an action having for its object the recovery of money paid under the mistaken belief that it was due⁵⁸⁶. Consequently, it is possible to find authority specifically on the provision of a gratuitous benefit mistakenly given to one person, when it was intended to benefit someone else. One such case is *Costin v Hume*⁵⁸⁷, where money was sent in error to one person, when it was intended to benefit another. In this case, it was held that the real beneficiary had a title to sue the receiver of the gift, in order to recover the benefit.

3.5.1.2. Protection against unfair exploitation

When entering into a donation, each party must have full capacity to act by himself or for his own benefit. However, there are certain limitations on the contractual capacity to donate⁵⁸⁸. These limitations are specific to the law of donation, due to the ability of donation to impoverish the donor. The central principle holds that there should be no intervention in the affairs of an adult, but in the case of persons labouring under mental derangement or adults with incapacity⁵⁸⁹, their actions are not regarded as valid unless validated by a responsible person⁵⁹⁰. In respect of corporate bodies and legal persons, one of the main players in the market, the capacity to make (and/or receive) donations depends on the constitutional documents of the relevant corporate body or legal person. The purpose for which the legal body or legal person has been constituted is also relevant when evaluating their capacity to enter into gratuitous juridical acts, as well as the extent of the powers provided to them in the moment of incorporation⁵⁹¹.

The limitations imposed on relevant categories of relationship between donor and donee are mainly concerned with cases where the donee is in a ‘position of trust’. If the donee is in a position of trust, the irrevocability of the donation is tainted, and the donor holds the right to seek reduction of the donation. It is presumed by Scots law that, if a donee is in a position of trust towards the donor, he may have been unfairly influenced to donate. The main focus of this rule is placed on the action of persons such as doctors or clergymen⁵⁹². In respect of

⁵⁸⁶ W Gloag, *The Law of Contract* (2nd ed 1929) p 60.

⁵⁸⁷ *Costin v Hume* 1914 SC 134.

⁵⁸⁸ W Gloag, *The Law of Contract* (2nd ed 1929) p 91.

⁵⁸⁹ The Adults with Incapacity (Scotland) Act 2000, s 1(6) defines “adult” as the person who has attained the age of 16, and “incapable” as someone that is “incapable of (a) acting; or (b) making decisions; or (c) communicating decisions; or (d) understanding decisions; or (e) retaining the memory of decisions”.

⁵⁹⁰ Adults with Incapacity (Scotland) Act 2000, s 1(7).

⁵⁹¹ Companies Act 2006 s 42.

⁵⁹² W Gloag, *The Law of Contract* (2nd ed 1929) p 256, refers to “persons, such as doctors and clergymen who are in a position to exercise a controlling influence”.

commercial influence on the decisions of the donor, the influence of persons who may abuse their status and influence an otherwise non-willing donor to donate for their benefit, is yet to be tested in court. Finally, it is also worth mentioning that some relationships give rise to a right for the donor to seek reduction of the donation. These relationships are not exhaustively listed in Scots law, but donations to other persons deemed in a ‘position of trust’ (or in “a fiduciary or quasi-fiduciary relationship”⁵⁹³) are deemed potentially tainted by the abuse of a position of trust⁵⁹⁴, and are therefore capable of being reduced.

3.5.1.3. Right to enforce delivery

In Scots law, the right to enforce performance is regulated under the general rules for enforcing the performance of obligations, as guided by the principle *ubi jus ibi remedium* (wherever there is a right there is a remedy)⁵⁹⁵. This same principle applies to obligations constituted by bilateral or unilateral gratuitous juridical act, where the discharge of an obligation to give in the future may be enforced in court. The right to enforce the delivery of a gratuitous obligation is one of the cornerstones of the protection provided by Scots law to donations in the market context – it provides security to the donee, who knows that if delivery does not occur, he is able to enforce it in court.

It is worth highlighting that, in Scotland, courts have refused to enforce or to award damages for the breach of an agreement which is directly connected with a purely social or family matter. This behaviour may be explained by the essence of family relationships, where family members often interact with each other without the intention to legally bind themselves⁵⁹⁶, and therefore, courts avoid having to provide the pursuer with a legal remedy for the breach of an agreement which was not intended by the parties to be legally binding.

⁵⁹³ Expression used in more recent decisions, one such case is *Forbes v. Forbes Trustees* 1957 SLT 346, para 350.

⁵⁹⁴ One such case is the Lord Ordinary’s (Maxwell) opinion, as expressed in *Rodgers v Sharp* 1979 SLT 177, para 227, where he declares himself “quite out of keeping with the general approach of our law to confine the principle to some artificial list of relationships and I see no reason why, nowadays, when so much work, which was in former times done by law agents as general “men of business”, has been taken over by specialist advisers such as accountants, the principle should not be applied to them”. This declaration follows a line of other authoritative decisions such as *Johnston v Goodlet* (1868) 6 M 1067; and *Ross v Gosselin’s Executors* 1926 SLT 239.

⁵⁹⁵ Lord Carloway, “Court of Session Practice” (reissue 2006) *SME*, 3, para 56.

⁵⁹⁶ R Black, “Obligations” (1996) *SME*, 15, para 657, referring to *Forbes v Eden* (1865) 4 M 143; *Aitken v Associated Carpenters and Joiners of Scotland* (1885) 12 R 1206; *Skerret v Oliver* (1896) 3 SLT 257; *Anderson v Manson* 1909 SC 838; *Drennan v Associated Ironmoulders of Scotland* 1921 SC 151; and *Bell v Trustees* 1975 SLT (Sh Ct) 60.

The relevance of the above-mentioned decisions, where the courts have refused to recognise the interest to sue, are not directly connected to donations. Instead, they are connected with rights under the rules of voluntary associations of different kinds (such as clubs, trade unions or churches). This means that the application of this authority to donation is yet to be tested in court. But it is possible to argue that, even if tested in court, these exceptions would not be applicable to donations made in a market context. This opinion is based in the fact that the reason for non-enforcement of the gratuitous obligations in *Forbes v Eden*⁵⁹⁷, *Anderson v Manson*⁵⁹⁸, or *Bell v Trustees*⁵⁹⁹, has been justified by the context where they were made: as part of the intimate or private lives of the parties.

3.5.2. Protection of third parties

When operating in the market, it is also relevant to bear in mind that donors and donees maintain trading relationships with third parties. Due to the gratuitous character of donation, third parties are potentially affected by the gratuitous dissipation of the donor's patrimony, with potential risk to their rights of credit. From the perspective of third parties associated with the donee, any patrimonial gains by the donee may be regarded as desirable, and securing their rights in credit towards the donee-debtor. Recognising the relevance of the third parties' expectations, the Scots law of donation will be reviewed, in order to understand if it may permit the fulfilment of rights held by third parties connected with the donating parties, which may be endangered by the donation.

Under Scots law of donation, the donee takes the subject matter of the donation *cum onere*. This means that the benefit granted to the donee is subject to any rights or obligations affecting it, such as heritable securities⁶⁰⁰. Therefore, all third party rights or claims secured by heritable securities⁶⁰¹, mostly connected with donations whose subject matter is the

⁵⁹⁷ *Forbes v Eden* (1865) 4 M 143.

⁵⁹⁸ *Anderson v Manson* 1909 SC 838.

⁵⁹⁹ *Bell v Trustees* 1975 SLT (Sh Ct) 60.

⁶⁰⁰ Exclusive of personal debts, see *Ballantyne's Trustees v Ballantyne's Trustees* 1941 SC 35.

⁶⁰¹ As defined by the Heritable Securities (Scotland) Act 1894.

transfer of real rights, will be valid. Furthermore, other third party rights based on succession law, such as provisions relating to the legitim⁶⁰² or insolvency rules⁶⁰³, will also apply.

The legitim, collation, and insolvency rules are applicable to donations in a market context. However, this thesis is concerned with the answers provided by national laws of donation to issues concerning third parties being affected by market donations which are potentially detrimental to their rights in credit. This protection exists in Scotland, being embodied by the presumption against donation⁶⁰⁴. As mentioned above, the presumption against donation is one of the most distinctive particularities of Scots law of donation. It must be overcome by the donee, in order for the juridical act to be classified in court as a donation. This means that the donee has the burden to prove (i) the *animus donandi* of the donor, and (ii) that the benefit was delivered⁶⁰⁵. The presumption against donation is traditionally described as based in the Roman maxim *debitor non presumitur donare*⁶⁰⁶, and is one of Scots law's particularities⁶⁰⁷. Scots law therefore distrusts benefits gratuitously created in the market context⁶⁰⁸, because "no person is presumed to do what, in place of bringing him profit, must certainly be attended with some pecuniary loss"⁶⁰⁹. This presumption is particularly strong in the market context, where at least one of the parties in the donating relationship is acting with a view to profit.

A donation establishes a personal relationship in Scots law and it is presumed to be closely connected with the family life⁶¹⁰. This means that, in Scots law, a donation is regarded as a normal occurrence between parties who are close and who know each other. The existence

⁶⁰² As defined by Part II of the Succession (Scotland) Act 1964, in particular s 11-13.

⁶⁰³ As regulated by the Companies Act 2006; Insolvency Act 1986 (as amended); Insolvency Rules (Scotland) 1986; Bankruptcy (Scotland) Act 1985; Enterprise and Regulatory Reform Act 2013; Insolvency (Scotland) Amendment Rules 2002; Insolvency (Scotland) Amendment Rules 2003; Insolvency (Scotland) Amendment Rules 2010; Insolvency (Scotland) Regulations 2003; and Insolvency (Scotland) 2016, coming into force in the 30th of November 2016.

⁶⁰⁴ Stair, *Institutions*, I.8.2 and IV.35.17.

⁶⁰⁵ If the benefit is not delivered, the law of promise applies, and the promisee only holds a personal right to enforce delivery of the subject matter of the donation. That is also why the donee may never receive, for example, a real right as promised, if the donor has validly disposed of the relevant right in a previous moment. See *Gauld v Middleton* 1959 SLT (Sh Ct) 61.

⁶⁰⁶ Stair, *Institutions*, I.8.2 and IV.35.17.

⁶⁰⁷ In direct opposition to what happens in Portugal or France, where there is no presumption in favor or against donation.

⁶⁰⁸ Exceptions exist in what concern to donations that are not given in a market context, such as donations given between family members or where an exchange of gifts is socially expected, such is the case of father and child, uncle and nephew, among others. See *Nisbet's Trs. V. Nisbet* (1868) 6 M 567; *Fairgrievies v. Hendersons* (1885) 13 R 98; *Wilson v. Paterson* (1826) 4 S 817; *Macalister's Trs. V. Macalister* (1827) 5 S 219; and *Forbes v. Forbes* (1869), 8 M 85.

⁶⁰⁹ Erskine, *Institute*, III.9.32.

⁶¹⁰ W Gordon, "Donation" (reissue 2011) *SME*, 6, para 8.

of the assumption that donations are entered into by two parties who are close has the effect of tempering the burden of proof placed on the donee's shoulders when the donation is made in a market context. For example, Watson, while writing about Scots law of donation, states that "in certain circumstances, the presumption against donation is overcome, or rather inverted. For example, advances made by a parent or one in *loco parentis*, are presumed to have been made *ex pietate*, in the absence of evidence to the contrary"⁶¹¹. It is therefore possible to conclude that Scots law of donation is fit to protect the expectations of third parties associated with the donor because of the presumption that, if a donor is acting in a market context, he is acting in the pursuit of profit. Therefore, a gratuitous juridical act which is potentially able to impoverish him is unlikely to occur. If such gratuitous act is to occur, then the burden of proof is on the donee, who has to prove that the donation was made with *animus donandi* and that the benefit was delivered.

Furthermore, the expectations of third parties associated with the donee are that he will be allowed to keep the subject matter of the donation. This expectation is particularly strong when the third parties hold rights in credit, to be paid by the donee, which may be enforced against the benefit gratuitously received. In order to provide security to this class of third parties, the donee cannot be arbitrarily deprived from the benefit received under the donation. In other words, donations need to be irrevocable, and may not be revocable at the discretion of the donor. If a donation is allowed to be discretionarily revoked by the donor, the third party-creditor is deprived of access to the benefit received by the donee-debtor, now called back by the donor.

3.5.3. *Protection of the community*

The protection of the community reflects the fitness for purpose of national laws of donation to regulate both, donations made in a national market context and in the European Common Market context. The EU, as well as the development of the European Common Market, brought people from different nationalities, different backgrounds and, in essence, different communities together. Consequently, persons from different corners of Europe may now donate to each other with the purpose of sales promotion or similar motivation, often

⁶¹¹G Watson (e), *Bell's Dictionary and Digest of the Law of Scotland* (7th ed, 1890) [2012] p 298; following Stair, *Institutions*, I,8,2.; and *Forbes v Forbes* (1869) 8 M 85.

connected with the pursuit of profit in the Common Market. As argued in Chapter 2⁶¹², the different backgrounds, religions and cultural references of parties interacting in the European Common Market demands a law of donation which promotes equality to all parties involved. For this reason, the present part of the chapter will review the security provided by Scots law of donation for the promotion of: (i) the security of gratuitous transactions in the marketplace, and (ii) for the promotion of transactional clarity.

3.5.3.1. Security

The presumption against donation and distrust of gratuitous transactions is particularly relevant when dealing with donation in the market context, and it may be argued that this presumption actually adds efficiency to the market because it eliminates the instability and insecurity brought by the subjective element of the motivation/intention of the donor. Because parties interacting in a market context are expected to act in view of profit, this provides courts and other legal actors with a tool capable of objectively evaluating the donor's will. Therefore, by looking at the existence or absence of a previous *legal* obligation, the presumption against donation helps to create a more egalitarian and fair application of the law. Furthermore, if Scots law would allow moral and/or religious rules to determine the legal outcome of a juridical act, this would demand either social and/or religious uniformity within the jurisdiction (with religious law being the law of the land) or it would create high levels of uncertainty and inequality, because similar issues arising from similar transactions would be treated differently by the courts. On the contrary, because only legal obligations matter, the same problems are subject to the same rules by the courts, leading to the promotion of confidence, and to the same problems being treated in the same way, with complete disregard to the morality or religious background of the parties⁶¹³.

Legal writers often describe donation as establishing a personal relationship between the donor and donee due to its presumed connection with family life⁶¹⁴. Therefore, in Scots law, a donation is regarded as a normal occurrence between parties who are close and who know each other at the time of the donation. This explains why, in certain circumstances, the above-mentioned presumption against donation existent in Scots law “is overcome, or rather

⁶¹² See above 2.5.3.2. *Protection of the parties*, p 69.

⁶¹³ This topic will be further developed in the French chapter, due to the particular relevance of the topic among French legal writers, see Chapter 3 - France.

⁶¹⁴ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 6.

inverted. For example, advances made by a parent or one *in loco parentis*, are presumed to have been” with the intention to benefit⁶¹⁵. Looking at donations as a familiar phenomenon also explains why Scots law does not demand heavy formalities for the creation of a donation. On the contrary, “in general requires no formalities other than those which the nature of the subject matter may make necessary”⁶¹⁶. Furthermore, “a donation in the sense of the actual transfer of property by delivery could be proved parole”⁶¹⁷. That is to say that no particular formalities, such as writing, are traditionally required by Scots law for the creation of a donation, as long as delivery and the intention to donate (*animus donandi*) are proved.

In respect of donations in a market context, their security is guarded primarily by reliance on the formalities adopted by the juridical act creating the donation. Compliance with formalities provides security to the parties. They are often able to demonstrate the subjective element of donation (the *animus donandi*) while fulfilling the legal requirements for the production of legal effects. Bearing in mind that donations in Scots law may be achieved by both unilateral and bilateral juridical acts, it is necessary to assess which rules guide both types of donating act.

Until 1995⁶¹⁸, the undertaking of a unilateral gratuitous obligation by the donor could follow any form, including the oral form. However, these obligations could only be proved by writ or oath of the person undertaking the obligation⁶¹⁹. This means that, theoretically, an obligation to donate could be created unilaterally and orally, but could not be enforced in court without evidence produced by the benefactor himself. It may be argued that this redundant rule of evidence defeats the idea that freedom of form existed for the creation of gratuitous unilateral juridical acts in Scots law (before 1995), considering that, if the benefactor did not want to comply with a gratuitous obligation orally created, he was able to do so by not acknowledging the benefit in written (or by confession). The best renowned authority on this restrictive approach to the proof of formation of gratuitous obligations is the classic decision *Smith v Oliver*⁶²⁰. In this case, a church was built based on an oral

⁶¹⁵ G Watson (e), *Bell's Dictionary and Digest of the Law of Scotland* (7th ed, 1890) [2012] p 298; *Forbes v Forbes* (1869) 8 M. 85.

⁶¹⁶ H MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 5.

⁶¹⁷ W Gordon, “Donation” (reissue 2011) *SME*, 6, para 5.

⁶¹⁸ Until the Requirements of Writing (Scotland) Act 1995.

⁶¹⁹ MacQueen and M Hogg, “Donation in Scots Law” (2012) *Juridical Review*, p 13.

⁶²⁰ *Smith v Oliver* 1911 SC 103.

gratuitous promise made by one of its followers, stating that she would pay for building the church. Upon her death, the church was not able to claim the money against her estate because she had not left any written acknowledgment of the obligation to pay.

This rule was abolished by the Requirements of Writing (Scotland) Act 1995, the legislation which regulates the formalities to be undertaken by donations in Scotland today. It is therefore relevant to notice that, under the same Act⁶²¹, the written form is no longer necessary to prove the undertaking of a unilateral gratuitous obligation. On the contrary, the written form is now required for the undertaking/creation of the unilateral gratuitous obligation itself.

Under the Requirements of Writing (Scotland) Act 1995, section 1(1), “writing shall not be required for the constitution of a contract, unilateral obligation or trust”. However, it is also clear under section 1(2) that a written document is necessary for the constitution of any “gratuitous unilateral obligation except an obligation undertaken in the course of business”⁶²², as well as any gratuitous (or onerous) creation, transfer, variation or extinction of real rights in land⁶²³. Considering that donations made in a market context are likely to be made in the course of business, it is possible to argue that the written form is not required for the undertaking of a high number of market donations.

A written document is not, however, necessary for the constitution of: (i) gratuitous obligations undertaken by unilateral juridical act in the course of business⁶²⁴; (ii) gratuitous obligations undertaken by unilateral juridical act in any other form other than in writing may be enforced in court if they led the donee to act (or refrain from acting) in reliance on the promise, this with the promisor’s knowledge or acquiescence⁶²⁵; (iii) gratuitous obligations undertaken by unilateral juridical act in any other form other than in writing may be enforced

⁶²¹ Requirements of Writing (Scotland) Act 1995, s 1(1).

⁶²² Requirements of Writing (Scotland) Act 1995, s 1(2)(a)(ii).

⁶²³ Requirements of Writing (Scotland) Act 1995, s 1(2)(a)(i).

⁶²⁴ Requirements of Writing (Scotland) Act 1995, s 1(2)(a)(ii).

⁶²⁵ The requirements of form are therefore variable depending on the aspect of life in society where the promise to donate was made: a) if the promise to donate was made within the family or friends – all of them individuals/parties acting for non-commercial purposes –, then oral promises are not legally binding and do not create an obligation to the promisor; b) if unilateral juridical act is made in the course of business, there are no limits to the form used to create an obligation to donate. This flexibility intends to promote confidence and therefore to promote commercial activity by incurring in liability if a trader changes his mind. Finally, in c) it is being protected the confidence of the promisee in the actions of the promisor – basically, if the promisor led the promisee to act in a certain way, he should be liable for his actions.

in court if they were made to the public⁶²⁶; and (iv) in the case when the subject matter of a donation is a real right in a moveable good, the transfer of possession of the good indicates transfer of property⁶²⁷.

It is therefore possible to argue that Scots law of donation promotes security by laying down clear rules on which donations are enforceable under the law and which are not. This is achieved by enforcing unilateral gratuitous juridical acts made in the course of business. The enforcement of these unilateral juridical acts is particularly relevant when assessing the validity of donations made by business organisations in the course of business (while requiring writing or possession for the gratuitous transfer of real rights). Finally, it is also worth noticing that Scots law of donation promotes the security and confidence of the market actors by enforcing gratuitous obligations that led the donee to act (or refrain from acting) in reliance on a promise with the promisor's knowledge or acquiescence⁶²⁸ and unilateral gratuitous juridical acts made to the public⁶²⁹.

3.5.3.2. Transactional clarity

In order to achieve transactional clarity, the law of donation must promote the exchange of information between the parties. In other words, the parties must know the terms on which the donation is made, as well as agree to them. Knowing the terms on which the donation is made is particularly relevant to the donee who, as the result of the donation, will gratuitously hold a right he did not hold before. The donee may accept to be vested in the relevant right/benefit in an explicitly or implicitly fashion. Acceptance is explicit if clearly expressed or demonstrated by the donee by his actions (for example, resorting to the clear statement 'I

⁶²⁶ And may be enforced by a party unaware of the promise at the time of performing the act in question, see *Regus (Maxim) Ltd v Bank of Scotland plc* 2013 SC 331, paras 33-34.

⁶²⁷ That is why W Gordon, "Donation" (reissue 2011) *SME*, 6, para 5 states that "after some hesitation, it was settled in the course of the nineteenth century that a donation in the sense of actual transfer of property by delivery could be proved parole", following a steady stream of court decisions comprising, among others, *Morris v Riddick* (1867) 5 M 1036; *Robertson v Taylor* (1868) 6 M 917; *Wright's Executors v City of Glasgow Bank* (1880) 7 R 527 and *Sharp v Paton* (1883) 10 R 1000; *Hutton's Trustees v Hutton's Trustees* (1916) S.C. 860.

⁶²⁸ The requirements of form are therefore variable depending on the aspect of life in society where the promise to donate was made: a) if the promise to donate was made within the family or friends – all of them individuals/parties acting for non-commercial purposes –, then oral promises are not legally binding and do not create an obligation to the promisor; b) if unilateral juridical act is made in the course of business, there are no limits to the form used to create an obligation to donate. This flexibility intends to promote confidence and therefore to promote commercial activity by incurring in liability if a trader changes his mind. Finally, in c) it is being protected the confidence of the promisee in the actions of the promisor – basically, if the promisor led the promisee to act in a certain way, he should be liable for his actions.

⁶²⁹ And may be enforced by a party unaware of the promise at the time of performing the act in question, see *Regus (Maxim) Ltd v Bank of Scotland plc* 2013 SC 331, paras 33-34.

accept’). It may be implicit where the donee’s actions do not expressly demonstrate his acceptance, but acceptance may be inferred by his actions (for example, if the donee promises to sell or assign the subject matter of the donation or enforce his right to delivery in court). It could also be implied by his silence, which can only be conceived by the attribution of a positive legal value to the donee’s silence.

Several legal writers espouse the position that a donation does not need to be accepted by the donor under Scots law to be binding on the donor. This idea is followed by the presumption that while a donation does not need to be accepted by the donee to produce legal effects, it may also be rejected by him at any time. One such writer is Stair, who states that: “if he in whose favour they are made, accept not, they become void, not by the negative non-acceptance, but by contrary rejection”⁶³⁰. This idea is followed by other legal writers such as Bankton, who has defended that the donee does not need to accept a gratuitous benefit because Scots law presumes acceptance where no express rejection of donation is made⁶³¹. This is followed by contemporary legal writers such as Gordon⁶³² and Wark⁶³³. But it is worth mentioning that the idea that donation does not need to be accepted has not been taken to its limits. While Bankton introduced the idea of presumed acceptance if there is no express rejection by the donee⁶³⁴, Erskine stated that: “acceptance, admitting that it is necessary towards constituting an obligation, may be reasonably presumed, without any formal act, in pure and simple donations, which imply no burden upon the donee”⁶³⁵.

The idea that donation does not require acceptance is maintained by contemporary legal writers, such as Gordon, who states that donations do not require acceptance, but that donees retain the power to reject the benefit gratuitously received⁶³⁶. It may be therefore argued that a law of donation which does not require acceptance for the production of legal effects to a donation promotes security in the market – the donor cannot revoke the donation and the

⁶³⁰ Stair, *Institutions*, I.10.4.

⁶³¹ Bankton, *Institute*, I.9.9.

⁶³² W Gordon, “Donation” (reissue 2011) *SME*, 6, para 1.

⁶³³ J Wark, “Donation”, *Encyclopaedia of the Laws of Scotland* (1928) 6, p 54: “acceptance by the donee is not, in a case of pure donation, requisite to complete the donation; nor is knowledge on his part in all cases necessary, for donation may be made by delivery to a third party on behalf of the donee”.

⁶³⁴ As stated by Stair, *Institutions*, I,8,1: “the dispositive will of the owner alone, without any further, is sufficient to alienate his right, without delivery or possession, is evident in personal rights, wherein the dispositive clause of assignations or translations is sufficient; intimation or possession or possession being introduced for expediency in some cases, by our custom”; and followed by, among others, Bankton, *Institute* I.9.9.

⁶³⁵ Erskine, *Institute*, III.3.88.

⁶³⁶ G Watson (e), *Bell’s Dictionary and Digest of the Law of Scotland* (7th ed, 1890) [2012], para 11.

donee's rights are protected. But it may also be argued that a donation where legal effects are produced to the donee without his agreement, or possibly his knowledge, gravely lacks on transactional clarity. However, if acceptance of the donee is presumed⁶³⁷, and a gratuitous benefit is received without any kind of acceptance from its beneficiary, the principles of freedom to contract and private autonomy⁶³⁸ are heavily restricted by Scots law donation. If donations based in unilateral juridical acts are able to fully produce legal effects without the donee's acceptance, the donor would be able to change the donee's patrimony without his knowledge; an action that would produce onerous tax and other public law consequences. This action of the donor collides with the most basic principle of transparency in the market. It also undermines the donee's freedom to conduct his life as he wishes, limiting his right to choose with whom to contract (in particular, the right not to contract) and the right to decide on which terms and conditions he wishes to enter into a juridical/contractual relationship⁶³⁹.

I would therefore argue that Scots law of donation would lack transparency if donations in the market do not need to be accepted by the donee to produce legal effects. In fact, this idea would conflict with the principles of private autonomy and contractual freedom. The need for the existence of more than one party (donor and donee) felt in Scots law of donation may explain why Erskine refers to donation by using the expression *pactum donationis*, as a pact between donor and donee⁶⁴⁰. Following Erskine, the donee may accept a donation in Scots law tacitly: by remaining in silence⁶⁴¹. This means that Scots law considers the silence of the donee as acceptance. The need for some form of acceptance by the donee may also be found in the writings of Gloag, where he states that "no one can be forced to accept a gift. But where a promise is made, its acceptance is sufficiently indicated by a demand for

⁶³⁷ Following Erskine, *Institute*, III.3.88.

⁶³⁸ Principles set out in a well-known line of authority. As examples, see *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Company* (1894) AC 535; and *Agri Energy v Ian Logan McCallion* (2014) CSOH 14.

⁶³⁹ The relevance of these principles in a European level has been extensively studied and explained in the DCFR, Intr. 13.

⁶⁴⁰ Erskine, *Institute*, III.3.90.

⁶⁴¹ If a unilateral juridical act performed by the donor was able to create a right to the donee, then a subsequent refusal of acceptance would be no more than another unilateral juridical act. This then ought to either re-transfer the right back to the donor or destroy the right which has been created. Two independent acts would mean that the benefit would have been provided to the non-accepting donor's for a certain amount of time, which may produce burdensome public or private legal consequences such as the payment of taxes. That is why a presumption has long been settled that acceptance of the beneficiary is to be presumed in gratuitous unilateral juridical acts (promises). The presumption of acceptance may be, however, subsequently rebutted by a refusal of the donee, or confirmed (either in an express or implicit way) by the donee or someone in his behalf. See G Bell, *Principles of the Law of Scotland* (4th ed 2010) 1, p 4, where the author states that in Scots law "a promise differs from an offer; as being a unilateral engagement, to which acceptance is presumed; while an offer is always and *in terminis* conditional, raised into an obligation only by acceptance"; and W Gloag, *The Law of Contract* (2nd ed 1929) p 25, where he declares that "where a promise is made its acceptance is sufficiently indicated by a demand for fulfilment".

fulfilment”⁶⁴². Therefore, both parties in the relationship established by a donation must be free to intervene and both wills must be aligned in order for the donation to exist and both parties must want the same thing: the provision of a gratuitous benefit by the donor to the donee.

3.6. Interim conclusion

Scots law of donation as a flavour of multiple juridical acts. It has been argued in this chapter that donation may be regarded in Scots law as a flavour of gratuitous juridical acts, a flavour which may be found in multiple juridical acts. In this sense, different juridical acts may therefore be defined as a donation under the Scots law, as long as all cardinal elements of donation are found. Scots law of donation is not, therefore, a law which is able to regulate only one juridical act, but multiple juridical acts. This means that the law of donation adds an extra layer of regulation, considering the particularities of donation (such as its gratuitous essence and liberal motivation), to the regulation of juridical acts which would, otherwise, be solely regulated by other laws.

Scots law’s fitness for the purpose of regulating market donations. It is possible to conclude that Scots law of donation is fit to regulate donations made in a market context. By regarding donation as a quality of multiple market-operating juridical acts, Scots law has been able to dissociate itself from family orientated considerations which often apply to donation in other EU jurisdictions. This fact allows donation to be flexible and adaptable, evolving at the same speed as the laws regulating multiple (often otherwise onerous) juridical acts, and where donation only intervened to protect the special character of donation. Furthermore, Scots law of donation is fit for the purpose of providing security for all parties affected by a donation in the market context, even if the parties do not share the same culture or background.

Need for clarity. Scots law of donation succeeds in promoting security for the parties, third parties and the market in general, but fails to fully promote transactional clarity. This perceived failure is due to the lack of clarity on the moment when the donation is created in Scots law. By presuming the acceptance of the donee, providing legal effects to a donation which was not explicitly accepted by the donee, Scots law of donation is able to create confusion in parties who are not familiar with the intricacies of this area of law.

⁶⁴² W Gloag, *The Law of Contract* (2nd ed 1929) p 25.

Chapter 4 – Portugal

4.1. Introduction

The present chapter aims to critically review Portuguese law of donation with the objective of assessing its suitability to regulate donations made in a market context. This critical analysis will focus primarily on the legal regulation of donation as found in the Portuguese Civil Code (from now on the “PCC”), complemented by a review of relevant legal writings on donation⁶⁴³, and by relevant court decisions⁶⁴⁴. As mentioned before, and bearing in mind the changes to the European reality brought forward by the EU⁶⁴⁵, with particular emphasis to the creation of the European Common Market⁶⁴⁶, it is noticeable that there is a lack of substantial legal literature on gratuitous relationships in market context⁶⁴⁷. In the case of Portuguese law, only three works stand out on the study of Portuguese law of donation in the past century⁶⁴⁸, reviewing and interpreting the comprehensive rules on donation, as found in the PCC⁶⁴⁹. This chapter is therefore relevant to the overall thesis because it investigates, in an innovative fashion, and for the first time, how Portuguese law of donation regulates donations made in a market context.

4.2. Placement of donation in Portuguese private law

4.2.1. Definition and Cardinal Elements of donation

4.2.1.1. The legal definition of donation

Portuguese law of donation is primarily found in the PCC⁶⁵⁰. Enacted in 1966 by the Decree-law 47344/66 of 25th November, the PCC has been subject to 69 amendments so far⁶⁵¹,

⁶⁴³ Portuguese legal writers have devoted scarce attention to the study of the law of donation, when comparing to studies on other areas of private law. As a demonstration, in the last decade, only Carlos Ferreira de Almeida wrote extensively on Portuguese law of reference, being therefore the main reference of the field in Portugal. See C Almeida, *Contratos III* (2012) and C Almeida, “Contratos de liberalidade: em especial os contratos para o uso de coisas corpóreas e incorpóreas” (2011) *Estudos em Homenagem ao Prof. Doutor J. L. Saldanha Sanches*, p 155. In the last century, it is important to reference the works of A Ferrão, *Das Doações Segundo o Código Civil Português* (1911); J Varela, *Ensaio sobre o Conceito de Modo* (1955); and M Palma Ramalho, “Sobre a Doação Modal” (1990) *O Direito*, p 720 as comprehensive studies on Portuguese law of donation.

⁶⁴⁴ As a Civil Law country, the sources of Portuguese law are legal statutes (issued by organs with legislative powers under the Portuguese Constitution), corporative statues and the legal praxis, under art 1 and 3 PCC.

⁶⁴⁵ Art 3 TEU.

however, none of the amendments affected the main principles regulating the law of donation in Portugal. On the contrary, only the articles dealing with the formalities and powers of revocation granted to the donor have been amended⁶⁵². Other statutory instruments, particularly tax instruments, may also be regarded as relevant for the study of Portuguese law of donation. However, these statutes mainly regulate the public law aspects of donation such as taxes emerging from donations and other payments to the Portuguese State⁶⁵³, and are outwit the scope of the present thesis. It is also worth mention that constitutional provisions must be taken into consideration, in particular those regulating the freedom of contract, and the freedom of disposition of rights (both, gratuitously and non-gratuitously)⁶⁵⁴. As will be demonstrated below, the connection between donation and family has led to the inclusion of several provisions in the Portuguese law of donation, specifically regulating what happens to the donation after the death of the donor⁶⁵⁵.

Different European Civil Law jurisdictions provide a definition of donation in their Civil Codes, but the Portuguese and Italian Civil Codes are often described as those which provide the most complex definitions of donation⁶⁵⁶. The similarity between the Portuguese and Italian Civil Codes is due to the fact that the PCC followed the definition of donation presented by article 769 of the Italian Civil Code⁶⁵⁷. Both, the Portuguese and the Italian Civil Codes, therefore list as cardinal elements of donation (i) a juridical act which takes the

⁶⁴⁶ Beginning with the reviewing the Treaty of Rome in 1957.

⁶⁴⁷ One of the few noticeable cases is the essay written by M Schmidt-Kessel, “At the frontiers of contract law: donation in European private law” (2008) *European private law beyond the common frame of reference: essays in honour of Reinhard Zimmermann* p 77-96.

⁶⁴⁸ J Varela, *Ensaio sobre o Conceito de Modo* (1955); A Ferrão, *Das Doações Segundo o Código Civil Português* (1911); and C F Almeida, *Contratos III* (2012).

⁶⁴⁹ Found in particular in art 940 to 979 PCC, among others, which may be found when family-related subjects are under regulation, such as coalition, testament, marital regimes, prenuptial agreements, among others.

⁶⁵⁰ Its generic regulation may be found in art 940 to 979 PCC and must be interpreted in accordance with the provisions of the Portuguese Constitution (in particular those on the freedom to contract and legal security).

⁶⁵¹ The last amendment to the PCC was made by Law 150/2015, of 10 of September 2015.

⁶⁵² Amended by Decree-Law 496/77 of 25 November 1977, which has removed the powers of revocation arising from the birth of subsequent children to the donor, after the donation is made.

⁶⁵³ Those who receive a gratuitous benefit by inheritance or donation is required to declare it to the tax authorities and is, in principle, subject to payment of Stamp Duty (with a few exceptions for spouses, descendants and ascendants, under art 6 Stamp Duty Code (enacted by Decree law 287/2003 of 12 November).

⁶⁵⁴ Art 60, 61 and 62 of the Portuguese Constitution.

⁶⁵⁵ In particular rules regarding the ingratitude of the heir, which by action of art 974 PCC are directly applicable to donation.

⁶⁵⁶ C F Almeida, *Contratos III* (2012) p 23.

⁶⁵⁷ Art 769 of the Italian Civil Code: “La donazione è il contratto col quale, per spirito di liberalità, una parte arricchisce l'altra, disponendo a favore di questa di un suo diritto o assumendo verso la stessa un'obbligazione”. Following P Lima, A Varela, *Código Civil Anotado* (4th ed 2010) II, p 236.

form of a contract⁶⁵⁸; (ii) entered into with a “spirit of liberality”⁶⁵⁹; (iii) where the donor benefits the donee at his own expenses⁶⁶⁰; (iv) by granting a right to the donee he did not hold before or by undertaking an obligation⁶⁶¹.

In particular, in respect of the PCC, donation is defined under article 940(1) PCC as a “contract by which a person, acting with a spirit of liberality, and with prejudice to his own patrimony, gives gratuitously an asset or a right, or undertakes an obligation, for the benefit of the counterparty”⁶⁶². Therefore, donation is expressly defined as a contract⁶⁶³ under Portuguese law, where donor and donee agree on the legal effects to be produced by the contract (the provision of a gratuitous benefit to the donee at the expense of the donor’s patrimony). This definition thus describes donation under Portuguese law as a bilateral juridical act, where both parties need to agree upon the legal effects to be produced by the donation. These effects, which must consist of a gratuitous benefit to the donee, often correspond to an equivalent disadvantage of the donor⁶⁶⁴. In addition, article 940(2) PCC further develops the definition of donation by stating that juridical acts aiming at (i) the waiver of rights, (ii) the repudiation of inheritance or legacies, or (iii) any gifts given in accordance to social usages (*donativos*), are not regulated under the Portuguese law of donation⁶⁶⁵, therefore excluding these acts from the definition of donation. These exclusions will be critically reviewed below, in the subsection dealing with the object of donation in Portugal⁶⁶⁶.

4.2.1.2. Cardinal elements

As introduced above, under the definition of donation presented by article 940(1) PCC, several cardinal elements must be found in order for a juridical act to be classified as a

⁶⁵⁸ Art 940 n 1 PCC and art 769 of the Italian Civil Code.

⁶⁵⁹ Art 940 n 1 PCC and art 769 of the Italian Civil Code.

⁶⁶⁰ Art 940 n 1 PCC and art 769 of the Italian Civil Code.

⁶⁶¹ Art 940 n 1 PCC and art 769 of the Italian Civil Code.

⁶⁶² Art 940 n 1: “Doação é o contrato pelo qual uma pessoa, por espírito de liberalidade e à custa do seu património, dispõe gratuitamente de uma coisa ou de um direito, ou assume uma obrigação, em benefício do outro contraente.”

⁶⁶³ The definition of a donation as a non-contractual juridical act in civil law jurisdictions is supported by a minority of legal writers, which write against the legal definition of donation on their relevant civil codes, one such case being Brazilian legal writer N Diogenes, *A doação não é contrato* (1947) or the notes on Portuguese law of donation, when compared to Roman law, by A Santos Justo, “A Doação no Direito Romano, Breve referência ao Direito Português” (2001) *Estudos em Homenagem a Cunha Rodrigues*, II, p 238.

⁶⁶⁴ P Lima, A Varela, *Código Civil Anotado* (4th ed 2010) II, p 237.

⁶⁶⁵ Art 940 n 2 PCC.

⁶⁶⁶ See 4.2.2. *Object of donation*, p 154.

“contract of donation” under Portuguese law. These cardinal elements are: (i) a bilateral juridical act: donation is always defined as a contract under Portuguese law⁶⁶⁷; (ii) a spirit of liberality, which is interchangeably referred to as *animus donandi* by Portuguese legal writers⁶⁶⁸; (iii) the sacrifice of the donor, who must have his patrimony reduced⁶⁶⁹ as a consequence of the donation; (iv) the creation of a benefit to one of the contracting parties (the donee); (v) gratuity, defined by the lack of correspondent benefit being provided to the donor by the donee⁶⁷⁰; and (vi) the provision of a benefit *inter vivos*, meaning that all effects of the donation must be produced while both contracting parties are alive⁶⁷¹. The different cardinal elements of donations under Portuguese law will be individually reviewed in order to better understand Portuguese law of donation, in general, and its suitability to regulate market donations, in particular.

4.2.1.2.1. Donation as contract (a bilateral juridical act)

Following the definition of donation set by the PCC, donation is expressly defined as a contract under Portuguese law⁶⁷². By defining donation as a contract, the PCC made clear that the juridical act which creates a donation must be a legally binding agreement reached by the parties⁶⁷³. This means that a unilateral act of donee, where his intention to benefit the donee gratuitously is clearly shown, is not enough to create a donation under Portuguese law⁶⁷⁴: on the contrary, the reception of the benefit must be accepted by the donee for a donation to exist. Both, the declarations of the donor and donee, must also comply with the

⁶⁶⁷ Art 940 n 1 PCC.

⁶⁶⁸ A Ferrão, *Das Doações Segundo o Código Civil Português* (1911) p 24.

⁶⁶⁹ Patrimony will be used in this thesis as meaning any rights, with pecuniary value or not, which integrate a person's patrimony and which may be disposed by its holder. This definition follows the broad definition of patrimony in what donations are concerned, as proposed by Professor Carlos Ferreira de Almeida in C Almeida, *Contratos III* (2012) p 17. Contrary positions, which define patrimony in what the law of donation is concerned, as rights with patrimonial value, are defended by P Lima, A Varela, *Código Civil Anotado* (4th ed 2010) II, p 258; and M Leitão, *Direito das Obrigações, Contratos em Especial* (10th ed 2015) III, p 177.

⁶⁷⁰ As clarified by the Portuguese Supreme Court, in its decision n 98A1071 of 28 November 1998: “*É da essência do conceito de doação, e como emana do artigo 940 do Código Civil, o espírito de liberalidade, se integrada por natureza gratuita.*”

⁶⁷¹ Connected with the personal character of donation, under art 949 PCC. A Santos Justo, “A Doação no Direito Romano (Breve referência ao Direito Português)” (2001) *Estudos em Homenagem a Cunha Rodrigues*, II, p 339.

⁶⁷² Art 940 PCC.

⁶⁷³ The qualification of donation as a contract is unanimous in Portugal. See, as examples, A Ferrão, *Das Doações Segundo o Código Civil Português* (1911); Varela, *Ensaio sobre o Conceito de Modo* (1955); C Almeida, *Contratos III* (2012); C Gonçalves, *Dos Contratos em Especial* (1953) 3; or I Galvão Telles, *Manual dos Contratos em Geral* (4th ed 2002), among others.

⁶⁷⁴ Exceptions exists – for example, donations to non-born donees and the particular case of public promises, which are never to be classified as donations, but which are able to grant the beneficiary of the donation with a right to force the donor to enter to a contract of donation with him.

formal legal requirements set by the law of donation⁶⁷⁵. It is also relevant to notice that Portuguese legal writers agree that at least two parties, and two declarations of will (even if issued together in the same document⁶⁷⁶), are necessary to create a donation. These declarations of will come together to produce typical juridical effects⁶⁷⁷. If the intervention of all parties is required, it is possible to conclude that, under Portuguese law, a donation only exists after the acceptance of the donee⁶⁷⁸.

As with many other rules, several exceptions apply to the rule that donations must be accepted under Portuguese law⁶⁷⁹. These exceptions have been created to care for donees who are regarded as needing extra protection under the law. Therefore, in the case of unborn children⁶⁸⁰ or persons who are not deemed mentally or physically able to conduct their own business⁶⁸¹, the PCC makes provision for their protection. The law does so by waiving the need for acceptance, and therefore allowing such individuals to benefit automatically from a donation made to them. The existence of these exceptions leads to criticism of the contractual character of donation by a minority of legal writers⁶⁸². It may be argued that none of the legal writers who criticises the contractual essence of donation has managed to deliver a full rejection of donation as a bilateral juridical act in Portugal. Furthermore, these writers

⁶⁷⁵ The formalities to be observed by a contract of donation under Portuguese law may be found under art 947 CPP, according to which the donation of immoveable property is only valid if made by deed or written document where the signatures of the parties have been notarized, while the donation of moveable property or any other rights must take the form of written document or needs to be placed in the possession of the donee (*traditio*). If the donation fails to comply with these formalities, it does not produce legal effects, as clarified by the decision of the Portuguese Supreme Court n. 084986 of 9 June 1994, regarding a donation *sub modo*.

⁶⁷⁶ C Almeida, *Contratos I* (2015) Chap. II.

⁶⁷⁷ Among others see, C Gonçalves, *Dos Contratos em Especial* (1953) III, p 204; C Almeida, *Contratos III* (2012) p 23; and A Ferrão, *Das Doações Segundo o Código Civil Português* (1911) p 4; M Andrade, *Teoria Geral da Relação Jurídica* (reissue 2003) II, p 37; I Galvão Telles, *Manual dos Contratos em Geral* (4th ed 2002) p 71; J Castro Mendes, *Teoria Geral do Direito Civil* (1995) II, p 41.

⁶⁷⁸ As stated by the decision of the Portuguese Supreme Court n. 084986 of 9 June 1994, regarding a donation *sub modo*.

⁶⁷⁹ The exceptions to the need for the acceptance of the donee are found on art 951 PCC, where it is stated that people who have been declared unfit to conduct their own business by a court, under Portuguese law, benefits from a pure donation even if not accepted; and art 952 PCC, regulating donations to unborn children, to whom donations produce their effects despite of acceptance if the parent is named and is alive at the time when the declaration was made by the donor (art 951 n 1).

⁶⁸⁰ Art 952 PCC.

⁶⁸¹ Art 951 PCC.

⁶⁸² The critique to the definition of donation as a contracted is supported by a minority of legal writers in what Portuguese law is concerned. As examples it is possible to find Brazilian legal writer N Diogenes, *A doação não é contato* (1947); and the notes on the Portuguese law of donation, when compared to Roman law, by A Santos Justo, “A Doação no Direito Romano (Breve referência ao Direito Português)” (2001) *Estudos em Homenagem a Cunha Rodrigues*, II, p 238.

have also failed to disprove that the large majority of donations in Portugal are produced by a bilateral juridical act (contract).

In defence of the contractual character of the juridical act which creates a donation in Portugal, it may be further argued that the legal definition of donation, as presented by the PCC⁶⁸³ cannot be disregarded: the PCC systematically addresses donation as the outcome of a bilateral juridical act (a contract)⁶⁸⁴ and, in addition, it is stated under article 945 PCC that a donation must be accepted in order to produce legal effects⁶⁸⁵. For these reasons, article 951(2) PCC presumes acceptance of pure donations if the donee is not deemed mentally or physically able to conduct their own business. This legal presumption of acceptance may, however, be rebuked by the donee's legal representative. If this presumption is rebutted, the lack of acceptance will void a donation which would have been valid otherwise⁶⁸⁶.

Following the criterion that donation in Portugal is always a bilateral juridical act (a contract), Portuguese law actively excludes from the concept of donation the following juridical acts: (i) a juridical act granting a benefit to someone who is not one of the parties in the agreement⁶⁸⁷; (ii) the unilateral juridical act where someone refuses to receive a legacy, therefore benefiting a subsequent heir⁶⁸⁸; and (iii) the unilateral waiver of a right, which by mere effect of the law, and without *spirit of liberality*, causes a benefit to someone⁶⁸⁹. In all three cases, a benefit is received by a beneficiary due to the acts of someone who may be regarded as a benefactor. However, no benefit is received due to a conveyance created by agreement between the benefactor and beneficiary. On the contrary, a benefit emerges directly from the law. Following this line of argument, acceptance, either actual or legally presumed⁶⁹⁰, is regarded as necessary to the validity of a (contract of) donation in Portugal. It is therefore possible to conclude that donation in Portugal is created by a contract (a bilateral juridical act), where the parties (the donor and the donee) both intervene for the

⁶⁸³ Donation is expressly defined as a contract (*contrato*) under art 940 n 1 PCC.

⁶⁸⁴ The PCC systematically addresses donation as the outcome of a bilateral juridical act (a contract). See art 954 (legal effects), 963 (*modo*), 966 (resolution) PCC, among others.

⁶⁸⁵ In particular, see art 945 n 1 PCC: "the offer to donate expires if it is not accepted while the donor is alive".

⁶⁸⁶ Under art 350 PCC all legal presumptions may always be rebuked, unless the Law states otherwise. This is not the case in what the law of donation is concerned, which means that all legal presumptions of acceptance may be rebuked by the donee or relevant legal representative.

⁶⁸⁷ The contract for the benefit of third parties is defined under art 443 PCC.

⁶⁸⁸ Art 940 n 2 PCC.

⁶⁸⁹ Art 940 n 2 PCC.

⁶⁹⁰ C Gonçalves, *Dos Contratos em Especial* (1953) 3, p 224; M Baptista Lopes, *Das Doações* (1970) p 10.

production of the legal effects⁶⁹¹. It is therefore not surprising to find that Portuguese legal writers state that the payment of someone's debt without their consent cannot be defined as a donation⁶⁹².

4.2.1.2.2. Spirit of liberality

Article 940(1) PCC defines donation as a contract where the donor gives a thing or a right (or undertakes an obligation) with “spirit of liberality” (*espírito de liberalidade*). In this sense, the assessment of the donor's will is necessary in order to determine if a donation actually exists: if the donor acted with a spirit of liberality (and all other cardinal elements are present), then the relevant contract may be qualified as a donation. If not, this act cannot be considered a donation under Portuguese law. But it is also necessary to recognise that the PCC has not defined what “spirit of liberality” means, having instead left the clarification of this concept to be made by legal writers and courts.

The expression “spirit of liberality” is used interchangeably with the expression *animus donandi* by legal Portuguese writers⁶⁹³, who define spirit of liberality by looking at two main elements: (i) an objective element - the lack of payment⁶⁹⁴ being demanded to the donee; and (ii) a subjective element - the spontaneity of the donor⁶⁹⁵, who must be willing to benefit the donee gratuitously. Additionally, the donor cannot be acting for the discharge of a previously existing obligation to give/pay based on a legal or natural obligation⁶⁹⁶. But a debate exists on the best way to assess the existence of the spirit of liberality. This debate is promoted by conflicting court decisions and opinions of legal writers, who are divided between those who defend that a negative assessment of liberality suffices, i.e. that the omission of an onerous intention by the donor, or lack of demand of payment is sufficient for the creation of a spirit of liberality⁶⁹⁷; and those who defend a positive assessment of

⁶⁹¹ L M Diogo, R J Januário, *Direito dos Contratos e Institutos de Direito Privado* (2007) p 79; A Ferrão, *Das Doações Segundo o Código Civil Português* (1911); J Varela, *Ensaio sobre o Conceito de Modo* (1955); C Almeida, *Contratos III* (2012) p 24; A Santos Justo, “A Doação no Direito Romano (Breve referência ao Direito Português)”, *Estudos em Homenagem a Cunha Rodrigues* (2001) II, p 239.

⁶⁹² C Gonçalves, *Dos Contratos em Especial* (1953) 3, p 204.

⁶⁹³ As examples, see C Almeida, *Contratos III* (2012) p 32; P Lima, A Varela, *Código Civil Anotado* (4th ed, 2010) II, p 258; C Gonçalves, *Dos Contratos em Especial* (1953) 3, p 206; among others.

⁶⁹⁴ C Almeida, *Contratos III* (2012) p 30.

⁶⁹⁵ M Palma Ramalho, “Sobre a Doação Modal” (1990) *O Direito*, p 720.

⁶⁹⁶ A natural obligation is defined under art 402 PCC as a “moral or social duty, which discharge is not enforceable by court, but which corresponds to a duty of justice”.

⁶⁹⁷ M Andrade, *Teoria Geral da Relação Jurídica* (reissue 1964) II, p 192; J Oliveira Ascensão, *Teoria Geral da Relação Jurídica* (2nd ed 2003) II, p 226; C Ferreira de Almeida, *Contratos III* (2012) p 32; among others.

liberality, demanding evidence of a positive will of the donor to benefit the donee gratuitously⁶⁹⁸. Those who defend a negative assessment of the spirit of liberality are guided by the idea that *animus donandi* does not need to be express in the contract of donation. This negative perspective means that as long as all remaining cardinal elements are found, and legal formalities required for the validity of the donation are met, a donation is created⁶⁹⁹. This also means that a donation may be hidden under a contract which is wrongly or deceptively named⁷⁰⁰. However, such cases may still be classified as a donation if all donation's cardinal elements are present, including the spirit of liberality, which is conveyed by a benefit which is given gratuitously and without demand for payment.

In disagreement with the above negative assessment of the spirit of liberality in Portugal, it is possible to find several legal writers who claim that *animus donandi* must be clearly expressed by the donor, in order for the relevant contract to be classified as a donation⁷⁰¹. On one side, it may be argued that by assessing the existence of the *animus donandi* in a contract in a negative fashion, any bilateral juridical act (even if not named a donation by the parties) which is gratuitous in its effects may potentially be classified as donation. This means that the cardinal elements and effects of a juridical act are assessed in order to classify the relevant juridical act as a donation or not. On the other side, by requesting an express declaration of intention in all contracts of donation (the positive way to assess the existence of an *animus donandi*), the scope of *animus donandi* would be restricted, therefore creating the need to prove its existence by requesting an extra declaration of the donor. Bearing in mind the above, and following Ferreira de Almeida⁷⁰², it is possible to argue that the will to donate walks side-by-side with the intention to create certain legal effects. Therefore, if the

⁶⁹⁸ M Leitão, *Direito das Obrigações, Contratos em Especial* (10th ed 2015) III, p 178; M Pinto, *Teoria Geral do Direito Civil* (4th ed 2012) p 401; P Lima, A Varela, *Código Civil Anotado* (4th ed 2010) II, p 260; J Beza dos Santos, *A Simulação em Direito Civil* (1921) I, p 362; I Galvão Telles, *Manual dos Contratos em Geral* (4th ed 2010) p 180; L Carvalho Fernandes, “Valor do Negócio Jurídico dissimulado, Anotação”, *Revista da Ordem dos Advogados* (1997) p 139; H Horster, “Simulação. Simulação Relativa. Formalismo Legal.” (2007) *Cadernos de Direito Privado*, p 21; among others

⁶⁹⁹ M Andrade, *Teoria Geral da Relação Jurídica* (reissue 1964) II, p 192; J Oliveira Ascensão, *Teoria Geral da Relação Jurídica* (2nd ed 2003) II, p 226.

⁷⁰⁰ The simulated donation, or *doação dissimulada*, which is often described as “a simple mechanism” where “one of the spouses buys a good in his/her own name, while the other spouse pays the price”, R Lobo Xavier, *Limites à Autonomia Privada na Disciplina das Relações Patrimoniais entre os Cônjuges* (2000) p 220.

⁷⁰¹ M Leitão, *Direito das Obrigações, Contratos em Especial* (10th ed 2015) III, p 178; M Pinto, *Teoria Geral do Direito Civil* (4th ed 2012) p 401; P Lima, A Varela, *Código Civil Anotado* (4th ed 2010) II, p 260; J Beza dos Santos, *A Simulação em Direito Civil* (1921) I, p 362; I Galvão Telles, *Manual dos Contratos em Geral* (4th ed 2010) p 180; L Carvalho Fernandes, “Valor do Negócio Jurídico dissimulado, Anotação” (1997) *Revista da Ordem dos Advogados*, p 139; H Horster, “Simulação. Simulação Relativa. Formalismo Legal.” (2007) *Cadernos de Direito Privado*, p 21; among others.

⁷⁰² C Ferreira de Almeida, *Texto e enunciado na teoria do negócio jurídico* (1992) p 80.

intention to gratuitously benefit the donee is found in a contract, there should be no need for an extra declaration of will by the donor to confirm that a donation has been entered into. By demanding this extra proof, extra obstacles would be created to the existence of donations in Portugal, potentially leading to the reduction of the number of contracts of donation entered into in Portugal. This could also give rise to a potential misuse of this extra formality by a regretful donor, wishing to destroy an otherwise valid donation.

In addition, it may also be argued that a negative way to assess the existence of a spirit of liberality, by looking at the gratuitous terms of the contract of donation, is in line with the generic provisions of the PCC, where it states the necessary elements for the validity of a juridical act. Looking in particular to article 246 PCC⁷⁰³, it is clear that only if the donor is aware that he is gratuitously benefiting the donee, and that no payment is being provided for the benefit, may the contract of donation be formed. Therefore, and bearing in mind that no donation is valid if the donor is not aware of its effects/consequences, the need for an extra declaration of will from the donor (even if in a market context) is small, or even irrelevant. The donor is protected against entering into surprise gratuitous contracts, while security is promoted by the law, by protecting the donee against a change of heart by the donor⁷⁰⁴. Finally, it may also be argued that forcing courts to distrust the form given by the parties to the juridical act may create a delay in the execution of justice, as well as insecurity in the market. This is because the parties and third parties may see what they used to regard as a purchase and sell agreement turned into a contract of donation by action of the courts, with all the repercussions this may have⁷⁰⁵.

4.2.1.2.3. Sacrifice of the donor

⁷⁰³ Art 246 PCC.

⁷⁰⁴ The donor is going against *facto proprio* – his agreement to the terms of the contract –, and that by arguing against the gratuitous character of donation by lack of a formality may be used against him in court by the donor. However, this would create instability, instead of promoting confidence and (legal) security to both parties.

⁷⁰⁵ Such as tax repercussions, consequences connected with insolvency law and/or the rules on succession, gratuitous transfer of property between spouses or collation rules.

The impoverishment (*o empobrecimento*) of the donor is the expression commonly used by Portuguese legal writers⁷⁰⁶ and courts⁷⁰⁷ when referring to the cardinal element of donation described under the PCC as the “cost” to the donor’s patrimony as a consequence of donation⁷⁰⁸. There is no unanimous agreement in Portugal regarding the boundaries of the concept of impoverishment in what the law of donation is concerned, but following the wording of the PCC, this impoverishment of the donor is created by the will of the donor and must have a negative impact on the donor’s patrimony⁷⁰⁹. Considering this uncertainty, it is possible to identify two perspectives for the definition of this concept: first, and following a Savignian perspective⁷¹⁰, often found in the writings of Portuguese legal writers⁷¹¹, the “cost” of the donor is to be defined as the pecuniary impoverishment suffered by his patrimony⁷¹²; and secondly, building on a comprehensive concept of patrimony, where non-patrimonial rights are included in one’s patrimony, some legal writers regard the cost of the donation as the release of any right previously held by the donor or the undertaking of an obligation. Both cases, either by releasing a right or undertaking an

⁷⁰⁶ As examples, see S Justo, “A Doação no Direito Romano (Breve referência ao Direito Português)” (2001) *Estudos em Homenagem a Cunha Rodrigues*, II, p 339; A Ferrão, *Das Doações Segundo o Código Civil Português* (1911); J Varela, *Ensaio sobre o Conceito de Modo* (1955); among others.

⁷⁰⁷ As examples, see Portuguese Supreme Court decisions n 246/12.9T2 and C1S1, of 29/04/2014; Tribunal da Relação de Évora n 156/05-3, of 28/04/2005; Tribunal da Relação do Porto n 82/1999.P1, of 19/09/2011; among others.

⁷⁰⁸ Art 940 n. 1 PCC.

⁷⁰⁹ Art 940 n. 1 PCC: “por espírito de liberalidade e à custa do seu património”.

⁷¹⁰ The main influence on the conceptualisation of donation in Portugal, as found in the writings of Portuguese legal writers is F Savigny, *Traité de Droit Romain* (2nd 1856), who defines a donation as any transaction with the following qualities: (i) a donation must be performed during the life of both parties, and cannot be have its effects after the death of the donor; (ii) the donation must cause an enrichment of the donee equal to the impoverishment of the donor; and (iii) the transaction must be entered with an *animus donandi* of the donor, i.e. he must perform a donation with the purpose of creating a benefit to the donee.

For Savigny (F C Savigny, *Traité de Droit Romain* (2nd 1856) p 3: “*je place la donation dans la partie générale du traite, a cote du contrat, avec lequel elle a tant d’analogie par la généralité de sa nature et la multiplicité de ses applications*”), the point of departure for an analysis of the concept of donation is that donation is a transfer (usually of a real right) from the donor to the donee, creating a loss for the donor; which means that, in the end, the enrichment of the donee should correspond to the donor’s impoverishment. The traditional way to categorise gratuitous juridical acts is to look at the object of the right created, transferred or discharged by the relevant juridical act. This approach is subject to review and critique. Following this perspective, it is not easy to regard a donation as a reduction of the donee’s liabilities because the donee, in that case, does not hold additional rights, rather he has fewer liabilities/obligations.

⁷¹¹ Savigny’s words have influenced the way how Portuguese legal writers think about donation (in particular Pires de Lima, Antunes Varela and Menezes Leitão). Under this perspective, the point of departure for an analysis of the concept of donation is that donation is a transfer (usually of a property right) from the donor to the donee, creating a loss for the donor; which means that, in the end, the enrichment of the donee should correspond, in the exact same amount, to the donor’s impoverishment. The Romanic perspective, as influenced by Savigny, may be criticized on two grounds. First, personal rights as well as real rights may be the object of a donation. And second, the enrichment of a donee may or may not be linked to a correspondent impoverishment of the donor. Among others, the best example is found at M Leitão, *Direito das Obrigações, Contratos em Especial* (10th ed 2015) III, p 177.

⁷¹² L Gonçalves, *Dos Contratos em Especial* (1953) p 205.

obligation, are then regarded as negative for the calculation of global patrimony of the donor⁷¹³.

It may be further argued that the second perspective is the one which most accurately follows the systematic approach of the PCC to the sacrifice of the donor. If only patrimonial rights could be given by donation, then, there would be no law in Portugal governing the gratuitous (definitive) transfer of non-patrimonial rights⁷¹⁴. This perspective is further developed by prominent legal writers such as Pires de Lima and Antunes Verela, who state that donation is often defined by a transfer of a right⁷¹⁵. However, these writers also recognise that the object of donation may consist of smaller real rights, which are created by the fragmentation of the donor's pre-existent real right⁷¹⁶. Bearing this in mind, it may be argued that only a definition of "cost" comprising both patrimonial and non-patrimonial rights suits the present Portuguese law of donation.

4.2.1.2.4. The creation of a benefit to the donee

The cardinal element which is defined as the creation of a benefit to the donee walks side by side with the sacrifice of the donor and with the need for acceptance, considering the bilateral essence of the contract of donation in Portugal. Building on the assumption that any rights which are capable of being disposed by the donee may be donated under Portuguese law⁷¹⁷, it may be argued that the benefit received by the donor may also be defined in a broad sense, therefore allowing the donee to either hold a right he did not hold before, or to be free from an obligation or liability.

With regard to the need for acceptance by the donee, and bearing in mind that donation is defined as a contract in Portugal⁷¹⁸, as a rule, no benefit may be transferred without the donee's consent⁷¹⁹. Looking at the reception of the benefit from a constitutional

⁷¹³ C Almeida, "Contratos de liberalidade: em especial os contratos para o uso de coisas corpóreas e incorpóreas" (2011) *Estudos em Homenagem ao Prof. Doutor J. L. Saldanha Sanches*, II, p 155, when writing on the social-economic function of liberalities under Portuguese law, a macro-category of gratuitous juridical acts, as defined by this legal writers, where donation is included.

⁷¹⁴ Following C Almeida, *Contratos III* (2012) p 27.

⁷¹⁵ P Lima, A Varela, *Código Civil Anotado* (reissue of 4th ed 2010) II, p 258.

⁷¹⁶ P Lima, A Varela, *Código Civil Anotado* (reissue of 4th ed 2010) II, p 258.

⁷¹⁷ As discussed above and following the teachings of C Almeida, *Contratos III* (2012) p 27; C Almeida, "Contratos de liberalidade: em especial os contratos para o uso de coisas corpóreas e incorpóreas" (2011) *Estudos em Homenagem ao Prof. Doutor J. L. Saldanha Sanches*, II, p 155.

⁷¹⁸ Art 940 n 1 PCC.

⁷¹⁹ Silence has no declaratory value under art 218 PCC.

perspective⁷²⁰, it may be further argued that, under Portuguese law, the reception of the benefit without previous consent of the donee deprives the donor from his right to liberty of contract⁷²¹. The principle of liberty of contract is defined under article 405 PCC⁷²², and (along with their sub-principles), is today considered vital under the Portuguese Constitution⁷²³.

The freedom to contract allows individuals to trade and to freely and securely dispose of the rights they hold (this being referred to, under Portuguese law, as disposing of one's patrimony)⁷²⁴. On one side, respecting the donor's contractual freedom means that none of the parties will be subject to obligations they did not agree with, a security of particular relevance to the donor. On the other side, respecting the donee's freedom of contract means that donees cannot be forced to receive a benefit without their previous consent. If a unilateral juridical act performed by the donor was able to create or transfer a right to the donee's patrimony, then a subsequent refusal of acceptance would only (re-)transfer the right back to the donor's patrimony. This would mean that the right would have entered into the non-accepting donor's patrimony for a certain amount of time, with potentially burdensome public legal consequences such as the payment of taxes or others. Therefore, it may be argued that the refusal to recognise the freedom of contract (to enter into a contract of donation or not, as well as to define the terms of the relevant contract) would increase doubt in the legal sphere, and would create instability in the market. In extreme cases, the disrespect of the freedom of contract would allow the donor to unilaterally create obligations to the donee (such as the payment of taxes for holding rights they never wished to hold). The insecurity created by such a system is not allowed under the PCC, a code which is structured on the basis of principles of private autonomy⁷²⁵ and contractual freedom⁷²⁶.

It is also worth mention that the existence of a presumption of acceptance, in Portuguese law, represents a judgment made by the law, where the silence of the donee equates to acceptance. As a rule, silence does not equal acceptance, although there are specific

⁷²⁰ The present Portuguese Constitution was adopted in 1976 and includes s Preamble and 296 articles.

⁷²¹ Art 60, 61 and 62 of the Portuguese Constitution.

⁷²² Art 405 PCC: "1. Under the law, the parties may agree on the content of contracts, celebrate contracts which are different from those listed in this code, or to amend them in the way they want to. 2. The parties may also reunite under the same contract the rules of two or more juridical acts, which are fully or partially regulated under the law."

⁷²³ Art 60, 61 and 62 of the Portuguese Constitution.

⁷²⁴ Art 60, 61 and 62 of the Portuguese Constitution.

⁷²⁵ Art 218 PCC.

⁷²⁶ Art 405 PCC.

exceptions⁷²⁷. By defining donation as a contract, the PCC actively encourages the principle of liberty of contract by denying to the donor the power to bind himself to an obligation, where rights and obligations would be created immediately to the donee. It may therefore be concluded that, under the PCC⁷²⁸, a donation may only occur if express acceptance is given by the donee. In short, either the donee accepts the donation, or the law presumes acceptance, leading to the formation of a contract between donor and donee.

4.2.1.2.5. Gratuity

Donations are created under Portuguese law by gratuitous contracts⁷²⁹. Gratuity is described as a cardinal element of donation under Portuguese law⁷³⁰, but the concept of gratuity is able to comprise three different meanings: (i) the lack of an obligation (to pay) emerging to the donee⁷³¹; (ii) the lack of a counter performance being imposed on the donee⁷³²; or (iii) an intention to benefit the donee⁷³³. It may be argued that the last of the three meanings presented should not be part of the definition of gratuity under Portuguese law of donation because it is absorbed by the concept of spirit of liberality or *animus donandi*. Two definitions therefore remain to be used, which seem able to define the concept of gratuity under the Portuguese law of donation: (i) gratuity as the lack of obligations arising to the donee from the contract of donation, and (ii) gratuity as the lack of counter performance being imposed on the donee under the contract of donation.

The first definition (no obligations arising to the donee) is more restrictive than the second presented (no counter performance being required of the donee). If gratuity is regarded as no obligations being undertaken by the donee under the contract of donation, this would mean that the donee's acceptance would never create to the donee the obligation to receive

⁷²⁷ Art 218 PCC. Furthermore, and as stated by F C Savigny, *Traité de Droit Romain* (reissue 1943) p 260: "Le simple silence oppose à des actes ou à une interrogation, ne peut, en principe, être regardé comme un consentement ou comme un aveu. Si donc quelqu'un m'apporte un contrat et déclaré qu'il prendra mon silence pour un acquittement, je ne suis pas engagé, car nul n'a le droit, quand je ne consens pas, de me former à une contradiction positive".

⁷²⁸ Art 940 n 1 PCC, art 945 n 2 and 3 PCC, and art 948 n 2 PCC.

⁷²⁹ Art 940 n 1 PCC.

⁷³⁰ As clarified by the Portuguese Supreme Court, in its decision n 98A1071 of 28 November 1998: "*É da essência do conceito de doação, e como emana do artigo 940 do Código Civil, o espírito de liberalidade, se integrada por natureza gratuita.*"

⁷³¹ P, A Varela, *Código Civil Anotado* (4th ed 1997) II, p 236.

⁷³² A Ferrão, *Das Doações Segundo o Código Civil Português* (1911) p 8.

⁷³³ C Gonçalves, *Dos Contratos em Especial* (1953) 3, p 205.

delivery of the object of donation⁷³⁴. It is therefore possible to argue that defining gratuity as the lack of obligations arising to the donee is not correct, considering that, once the contract of donation is concluded, the donor no longer holds the right donated, which is immediately transferred/held by the donee under article 954 (a)⁷³⁵. This line of argument is based on the placement of donation as one, among other contracts to be regulated under Book II of the PCC, which means that the generic part of Book II of the PCC is directly applicable to the contract of donation⁷³⁶. Bearing in mind the above arguments, articles 813 to 816 PCC, regulating what happens to default of creditors, apply to contracts of donation. The rules found on these articles therefore regulate the refusal to accept delivery of the subject-matter of the donation by the donee (unless otherwise stated in the contract). By themselves, these articles create an obligation to the donee: to accept delivery of the subject-matter of donation.

After excluding two of the three definitions of gratuity presented, it is necessary to enquire if the third definition of gratuity presented is adequate to explain what gratuity means for the Portuguese law of donation. The definition of gratuity, as the lack of counter-performance by the donee, is in line with the latest writings on donation in Portugal, where gratuity is defined as a unilateral sacrifice⁷³⁷. In other words, donation is regarded as gratuitous because sacrifice must only be undertaken by the donor, and never by the donee, who is the beneficiary of the contract (of donation)⁷³⁸. In addition, it is important to note that under the PCC, obligations may be undertaken by the donee: a consideration or *modo* may be requested to the donee under article 963(1) PCC. However, the sacrifice must remain with the donor, and if the donee undertakes an obligation, he is only liable for payment of the *modo* up to the value of the benefit received⁷³⁹. Also, if the *modo* requested from the donee is a pecuniary one, such as the payment of all or some debts of the donor, the donee is only liable for the payment of debts existing at the time of the donation. If a consideration is imposed on the donee, demanding the payment of future debts, the donee is only liable if the debts' pecuniary value is determined at the time of the donation, and it is specified in the contract

⁷³⁴ In all cases when delivery is not a constitutive formality of the juridical act which creates a donation in Portugal, i.e. when the donation takes the form of a private written document or a deed.

⁷³⁵ Art 954(a) PCC: "Donation has as essential effects: a) the transfer of the property of the thing or the right".

⁷³⁶ Art 9 PCC.

⁷³⁷ This idea follows the writings and conceptualisation of the sacrifice as presented by C Almeida, *Contratos III* (2012) p 30.

⁷³⁸ C F Almeida, *Contratos III* (2012) 17: "A unilateralidade da relação entre custo e benefício (isto é, sacrifício para uma das partes, vantagem para a outra)".

⁷³⁹ Art 963 n 2 PCC.

of donation. Finally, and most important of all, the donee is only liable for the payment of the debts of the donor up to the pecuniary value of the benefit received under the contract of donation⁷⁴⁰. It is also worth mentioning that if a *modo* is requested to the donee, both the donor, his heirs, or any interested parties may demand the discharge of the obligations undertaken by the donee⁷⁴¹. Alternatively, they may request the resolution of the donation in court if the donee fails to comply with the *modo* undertaken in the donation contract⁷⁴².

4.2.1.2.6. *Inter vivos* transactions

Under Portuguese law, the legal effects of a contract of donation must be produced while all parties are alive. For this reason, donations where the benefit is to be received by the donee upon the death of the donor are forbidden, as a rule, under the PCC⁷⁴³. Following this idea, if a donation is to produce its effects upon the death of the donor and all formalities required by the law of testament have been followed, then the gratuitous juridical act is regarded as a legacy and regulated under the law of succession⁷⁴⁴. Unlike acts *mortis causa*, a contract of donation cannot be subject to a suspensive condition which delays the production of its effect to the moment of death of one or more parties⁷⁴⁵. Furthermore, the identity of the parties, as well as the production of the effects of donation while the parties are alive is so relevant that the offer to donate expires if not accepted while the donor is alive⁷⁴⁶.

The cardinal element of the production of effects *inter vivos* builds on the idea that donations are a personal affair, and that the identity of the parties matters⁷⁴⁷. Because the identity of the parties in a contract of donation is essential to the validity of donation, the parties cannot allow a third party to designate who the donee will be, or what the object of the donation is⁷⁴⁸. The idea that the identity of the parties in a donation matters, follows a chain of thought observed in other (European) jurisdictions, as described by Richard Hyland: “the most

⁷⁴⁰ Art 964 PCC. Otherwise, the sacrifice would have been suffered by the donee, who would give more than received under the donation. This would go against the principle of gratuity and sacrifice of the donor.

⁷⁴¹ Art 965 PCC.

⁷⁴² Art 966 PCC. It is worth mention that only the donor or his heirs may request the resolution of the donation based on the failure of the donee to discharge his obligations, contrary to the discharge of obligations undertaken by the donee in a contract of donation, which may be requested to court by interested third parties as well.

⁷⁴³ Art 946 n 1 PCC.

⁷⁴⁴ Art 946 n 2 PCC.

⁷⁴⁵ Art 946 n 1 PCC.

⁷⁴⁶ Art 945 n 1 PCC.

⁷⁴⁷ A Santos Justo, *Direito Privado Romano, Direito das Sucessões e Doações* (2009) V, p 339.

⁷⁴⁸ Art 949 n 1 PCC.

adequate notion of the gift for comparative law purposes involves the transfer of an interest that occurs in conjunction with four additional elements. First, the transfer is gratuitous [...]. Second, certain subjective factors are present [...]. Third, the transaction takes place *inter vivos*, which distinguishes gifts from transfers made under a will. Finally, the object of the transfer involves rights⁷⁴⁹.

Bearing this in mind, it is therefore possible to conclude that, under Portuguese law of donation, the identity of the parties matters for the validity of the contract of donation. As such, both parties must be alive when the legal effects of the contract are produced. If one of them is not alive, then the personal character of donation would be compromised, and one of the parties' heirs would be forced to undertake the obligation to donate (donor) or would receive the benefit (donee). This would go directly against the rules created by the PCC prohibiting donations to take effect upon or after the death of the parties⁷⁵⁰. It would also undermine the personal character of donation, where the identity of the parties matters for the validity of the contract of donation⁷⁵¹.

4.2.2. *Object of donation*

The object of donation under Portuguese law will be critically reviewed in order to achieve further clarification of the boundaries of the donation under Portuguese law. This subsection will define which benefits may be granted by donation in Portugal, and which may not. This distinction is relevant to distinguish donations from other gratuitous juridical acts in Portugal. It will also assist us to understand the versatility and efficiency of Portuguese law of donation, as a tool which can be used by players in the market to transfer or grant gratuitous benefits to their counterparties.

The object of the contract of donation is extensively regulated under the PCC⁷⁵². The first relevant aspect of the regulation of the object of donation under Portuguese law is stated under article 940 PCC, where the object of donation is positively defined as: (i) the disposition of a thing/asset by the donor with benefit to the donee; (ii) the disposition of a right by the donor with benefit to the donee; or (iii) the undertaking of an obligation by the

⁷⁴⁹ R Hyland, *Gifts, A Study in Comparative Law* (2009) p 11.

⁷⁵⁰ Art 946 n 1 PCC.

⁷⁵¹ Art 949 and 945 n 1 PCC.

⁷⁵² The regulation of the object spans between the art 940, 863, 940, 942, 943, 956, 957 and 958 to 968 PCC.

donor to the benefit of the donee⁷⁵³. But the PCC goes beyond the positive definition of the object of donation, by negatively stating which objects cannot be donated. The first exclusion is set under article 940(2) PCC, where it is stated that the renunciation of rights, renunciation of legacies or the renunciation of inheritance are not regulated under Portuguese law of donation⁷⁵⁴. Bearing in mind the cardinal elements of donation presented above, it is understandable why the PCC excludes these juridical acts from the concept of donation: first of all, they are created by an unilateral juridical act (an act of renunciation), where its effects are produced without agreement, or even acceptance, of the beneficiary; secondly, there is no sacrifice of the person who renounces a right/legacy, and only a loss of chance occurs, which means that their patrimony remains the same as it was before the act of renunciation; and thirdly, this unilateral act does not need to be made with an *animus donandi* / a spirit of liberality, i.e. the person who renounces a right is never presumed to be doing so with the intention to benefit someone⁷⁵⁵.

The second exclusion found under article 942(1) PCC are donations of future rights, i.e. rights which are not held by the donor at the time when the donation is made, cannot be given by donation⁷⁵⁶. Once again, it is understandable why future rights cannot be donated: because the donor does not hold the relevant rights, they cannot be disposed by the donor, and therefore, the cardinal element of sacrifice to the donor is not present. In addition, because future rights are not held by the donor at the moment of the donation, the donor is not able to gratuitously dispose of them, and he will need to acquire them in a future moment, only then being able to enter into a contract of donation, where the right will be transferred/granted to the donee⁷⁵⁷. Because some of the cardinal elements of donation are absent in a juridical act where future benefits are promised, the law of donation does not regulate these acts, which are left to be regulated under the law of promise⁷⁵⁸. For the same reason, if a donation of someone else's property is made, the contract will be null and void⁷⁵⁹.

⁷⁵³ Art 940 n 1: a donation is “a gratuitous disposition of a thing or a right, or the undertaking of an obligation, for the benefit of the counterparty”.

⁷⁵⁴ Art 940 n 2 PCC. The renunciation of rights which by effect of the law benefit someone is therefore excluded from the concept of donation under Portuguese law of donation.

⁷⁵⁵ For the same reasons, art 1411 n 3 PCC excludes from the concept of donation the renunciation to the right of property by joint owners (which benefits the remaining joint owners by effect of the law), with the intention of not being liable for necessary maintenance and repairs of property.

⁷⁵⁶ Art 942 n 1 PCC.

⁷⁵⁷ As a rule, under art 954 (a) PCC, the rights are transferred to the donee by the contract, and not by a future act of disposition of the donee.

⁷⁵⁸ The contract of promise is mainly regulated under art 410 to 463 PCC.

⁷⁵⁹ Art 956 n 1 PCC: the contract of donation is null, however, the nullity of the contract cannot be argued in court by the donor against a donee who has entered the contract in good faith.

The donor is also responsible for any damage caused to the donee if the donee has entered the contract in good faith and (i) the donor expressly undertook the obligation to pay him damages; or (ii) if the donor acted with *dolus*; or (iii) if the donation is a remuneratory donation; or (iv) if the donee undertook a correspondent obligation upon acceptance of the donation. In this case the donor's liability is limited to the pecuniary value of the obligation undertaken by the donee⁷⁶⁰.

The PCC further regulates the object⁷⁶¹ and subject-matter⁷⁶² of the donation, by providing that the donation of a *universalidade* or group of things⁷⁶³ includes all future assets and fruits, that will comprise the *universalidade* in the future⁷⁶⁴. The quality of the subject-matter of the donation is also regulated under the PCC, according to which the donor is not responsible for the obligations and limitations of the subject-matter of the donation (which pass to the donee with the object of the donation), nor is the donor responsible for a malfunction of the subject-matter of the donation, unless he expressly undertook responsibility for the quality of the gift or proceeded with *dolus*⁷⁶⁵. Other examples of the regulation of the object and subject-matter of the donation may be found in the PCC, such as article 958 PCC, which allows the donor to reserve the right of use of the subject-matter of the donation for himself or others; article 959 PCC, where the donor is allowed to reserve the right to dispose of the subject-matter of the donation⁷⁶⁶; article 960 PCC, where the parties may agree that if the donee (or his descendants) die before the donor, the object of the donation returns to the donor⁷⁶⁷; article 967 PCC, where the donation creates an obligation to the donor which is physically impossible, illegal or an offence of morality, the obligation is regulated under

⁷⁶⁰ Art 956 n 2 PCC. Furthermore, under art 956 n 3 PCC, only the pecuniary value of the subject-matter of the donation will be taken into consideration when calculating the amount of damages to be paid to the donee. If damages are not paid to the donee, he will be assigned to all future rights to be received by the donor, and which are connected to the subject-matter of the donation (art 956 n 4 PCC).

⁷⁶¹ Object of the donation, in the present thesis and as mentioned above, describes the benefit granted by the donor and received by the donee.

⁷⁶² Subject-matter of the donation, in the present thesis, and as mentioned above, describes the physical or non-physical reality which underlies the object of the donation. For example, if the object of the donation is a real right over a ring, the subject-matter of the donation is the physical ring.

⁷⁶³ An *universalidade* or group of things that belong together is defined under art 206 n 1 PCC as: "a composed thing, or *universalidade de facto*, the plurality of movables that belong to the same person and that are used for the same purpose." Among other examples, it is possible to think of a heard of sheep or a set of dinner plates.

⁷⁶⁴ Art 942 n 2 PCC.

⁷⁶⁵ Art 957 n 2 PCC, under which the bona fide donee may request to the court the annulment of the contract of donation based on the lack of quality of the subject-matter of the donation.

⁷⁶⁶ This clause must be registered to be used against third parties' interests or rights, and the right to dispose of the subject-matter of the donation cannot be transferred upon the death of the donor to his descendants and/or heirs.

⁷⁶⁷ This clause must be registered to be opposed to third parties' rights or interests. If the object of the donation returns to the donor, the subject-matter of the donation will return to the patrimony of the donor without any obligations that may have been attached to it by the donee (or his descendants/heirs) under art 961 PCC.

testament law; or article 942 PCC, which states that if the benefit is to be delivered to the donee in periodic instalments, such obligation ends upon the death of the donor⁷⁶⁸.

Finally, it is also important to notice that, both the payment of a previously existent debt by the donor, as well as the undertaking of an obligation which causes a sacrifice to the donor, are defined by the Portuguese courts as valid objects of donation⁷⁶⁹. That is the reason why the object of donation is often described in Portugal as comprising three different possibilities: “*in dando, in obligando, in liberando*”⁷⁷⁰. *In dando* traditionally refers to a transfer of rights from donor to donee. A better example to describe this form of enrichment is the gratuitous transfer of real rights, where the benefit granted upon the donee corresponds directly to the sacrifice of the donor. *In obligando* refers to the undertaking of an obligation by the donor, aiming to benefit the donee. *In liberando* is associated with the provision of a benefit to the donee by releasing him from a payment. Under Portuguese law, the *remissão* (or release of an obligation) is regulated under article 863 PCC, where it is expressly stated that the release of a debt takes the form of a contract, and when made with a spirit of liberality, is regulated under the law of donation⁷⁷¹.

4.2.3. Confrontation with similar juridical acts

Following a similar approach to the discovery of hard boundaries for the law of donation in Chapter 3⁷⁷², the concept of donation will be confronted with similar juridical acts, which could be confused with donation in Portugal. This comparison aims to better understand the concept of donation in Portuguese law of donation, as well as to affirm hard boundaries on

⁷⁶⁸ As an example, if the donor has donated a certain amount to the donee, to be paid in instalments of 500€ a month, the obligation of payment will stop with the death of the donor, and his heirs will no longer be responsible for the payment of the instalments.

⁷⁶⁹ As stated by the Tribunal da Relação do Porto n 0230205 of 27 June 2002: “No texto e no espírito do artigo 940 n.1 do Código Civil cabe tanto a hipótese de alguém assumir a título gratuito a dívida já existente do devedor em face de terceiro, beneficiando o devedor, como a de alguém assumir a título gratuito uma obrigação inteiramente nova para com o outro contraente, como no caso de alguém se obrigar a doar (transmitir gratuitamente) alguma coisa ou direito ao outro contraente.”

⁷⁷⁰ C F Almeida, *Contratos III* (2012) p 25 and R Hyland, *Gifts, A Study in Comparative Law* (2009) p 193, among others.

⁷⁷¹ Art 863 PCC.

⁷⁷² See Chapter 3 – Scotland, 3.2.6. *Confrontation with similar institutions*, p 105.

the use of Portuguese law of donation, the aim of which is of particular relevance when regulating market donations.

4.2.3.1. Socially relevant gratuitous transfers of rights (*donativos*)

Portuguese law of donation distinguishes between donations and gifts given according to social usage (*donativos* or social gifts) under article 940(2) PCC. While donations are regulated under the law of donation⁷⁷³, social gifts are not specifically regulated under Portuguese law. This separation between donations, which are regulated under the law, and other gratuitous acts, which are not regulated under the law, follows the idea that “acts of kindness” should not be regulated under the law⁷⁷⁴. Potentially, this is because they are already (and/or should only be) regulated under other normative orders such as moral or religion.

The traditional examples of *donativos* are those related with ordinary social interaction, such as presents exchanged during the Christmas period, the payment of beverages to friends in social context, or any other gratuitous act that provides a small pecuniary benefit to a family member⁷⁷⁵. The exclusion of these gratuitous acts from being regulated under Portuguese law of donation is not, however, connected with the pecuniary value of object. The exclusion of social gifts from being regulated under the law of donation is set by article 940(2) PCC, where it is stated that “there is no donation (...) in gifts made according to social usage”. It is therefore necessary to analyse this concept in order to determine which gratuitous acts are regulated under the law of donation, and which are left to be regulated by other normative systems.

The leading Portuguese writer on the subject, Ferreira de Almeida, lays down two tests in order to distinguish between donations and social gifts⁷⁷⁶. The first test is a positive one: it is necessary to understand if the benefit provided to the beneficiary may be considered typical, by looking at the moment when it was made, the identity of the parties, the pecuniary

⁷⁷³ Art 940 PCC and following.

⁷⁷⁴ F P Jorge, “Doações para casamento - Doações entre casados” (1963) *Boletim do Ministério da Justiça*, p 124 and 287; C F Almeida, “Contratos de liberalidade: em especial os contratos para o uso de coisas corpóreas e incorpóreas” (2011) *Estudos em Homenagem ao Prof. Doutor J. L. Saldanha Sanches*, II, p 155.

⁷⁷⁵ C F Almeida, “Contratos de liberalidade: em especial os contratos para o uso de coisas corpóreas e incorpóreas” (2011) *Estudos em Homenagem ao Prof. Doutor J. L. Saldanha Sanches*, II, p 155.

⁷⁷⁶ C F Almeida, *Contratos III* (2012) p 23 and following.

value of its object, and the systematic correlation between all these criteria. After this preliminary test, it is necessary to run a negative test: it is necessary to determine if any legal provision demands the qualification of the act as a donation. In order to explain how these tests work, Ferreira de Almeida provides the reader with an example of social gifts which passes both tests: a gratuitous promise with small economic value which is made between family members⁷⁷⁷. In this case, both tests are satisfied and the relationship may no longer be defined as a donation but instead as a social gift. Thus the law of donation no longer applies.

The Portuguese courts are yet to create a *nexus* between social usages and the small economic value of the subject-matter of the gift, as part of the definition of a social gift. Instead, they define social usages by linking them to “social normality”, a concept which often comprises small gifts for the promotion of sales, rewards to employees and gifts to charities⁷⁷⁸. *Pari passu* with the courts, legal writers have defined social usages as the rules of coexistence in Portuguese society, courtesy, propriety and worldly relations. Examples of when social gifts occur as a consequence of such rules include birthdays, weddings and other family celebrations⁷⁷⁹.

Considering the above, it may be argued that in order to better understand what fits into the definition of “social usage”, it is necessary to look at the social relationship established between the beneficiary and the provider of the benefit, as well as the social context where the benefit is being provided. For example, if we are looking at two friends exchanging presents during Christmas time, this gift is not regulated under Portuguese law of donation. Rather it is considered a social gift, which was gifted according to social usages. This is because the gifting was based on the relationship maintained between the parties involved, the time of the year when it was performed, and the rules of courtesy and life in the Portuguese society.

Bearing in mind that these exchanges are not regulated under Portuguese law of donation, it is unclear what the legal implications of social gifts are. In my opinion, these gifts are to be

⁷⁷⁷ C F Almeida, *Contratos III* (2012) p 17.

⁷⁷⁸ Decision of the Portuguese Supreme Court n 2380/05.2TBOER.S1, 6th Camber, of 27/01/2010. This view will be challenged in the next chapter, when analysing the evolution of European Law of Donation, as well as its impact the Member States’ concept of donation.

⁷⁷⁹ F P Lima, J A Varela, *Código Civil Anotado* (reissue 4th ed 2010) II, p 261.

classified as natural obligations, considering that they fulfil the legal definition of natural obligation, as stated by article 402 PCC: “the obligation is said to be natural, when it is based on a mere moral or social duty, whose fulfilment of which is not judicially enforceable, but which corresponds to a duty of justice”. Following this approach, the social gifts are to be “subject to the regime followed by civil obligations in everything that is not connected with the enforcement of the benefit”⁷⁸⁰. In other words, by declaring social gifts to be natural obligations, they will produce legal effects. As a demonstration, if the property of a pen is given away by social gift, the relevant real right will be legally transferred from the benefactor to the beneficiary, and the beneficiary will hold a right he did not hold before which cannot be disturbed by the benefactor or by third parties.

4.2.3.2. Promise

Promises are defined under Portuguese law as contract by which “someone undertakes the obligation to celebrate a contract”⁷⁸¹. A promise may be either gratuitous⁷⁸², where only the promisor undertakes the obligation to enter into a new contract, or onerous⁷⁸³, where the obligation to celebrate a future contract emerges to both/all parties. Under Portuguese law, and similarly to what happens with donation, promises are typified bilateral juridical acts (contracts), particularly regulated under the PCC⁷⁸⁴. Because promises are defined as bilateral juridical acts (contracts) under Portuguese law⁷⁸⁵, one of the parties cannot unilaterally revoke the promise. But this is not the only common thread between promises and donations under Portuguese law⁷⁸⁶.

First, it is clearly stated under the PCC that promises and donations are two independent contracts, due to the fact that they are regulated autonomously as independent contracts, with their regulation appearing in different parts of Book 2 of the PCC⁷⁸⁷. Secondly, only

⁷⁸⁰ Art 404 PCC.

⁷⁸¹ The legal definition of promise is found under art 410 n 1 PCC.

⁷⁸² Art 411 PCC.

⁷⁸³ Art 410 n 3 PCC.

⁷⁸⁴ With the exception to promises made to the public, which are unilateral juridical acts and bind the promisee, in view of the protection of the expectations created by a widely advertised declaration of the promisor, under art 459 PCC.

⁷⁸⁵ Art 410 PCC.

⁷⁸⁶ Note: I have not entered into the debate regarding the contradiction of a promise to donate: if a promise to donate exists, that means that the donor will enter the contract of donation because a previous-existing obligation to give exists. Because the donor is merely discharging the obligation to donate, he is not acting with a true spirit of liberality (*animus donandi*).

⁷⁸⁷ Promises are regulated under 401 PCC, while donations are regulated under art 940 PCC and following.

donations must be entered with a spirit of liberality (or *animus donandi*)⁷⁸⁸, while promises, on the contrary, may be entered with a spirit of liberality (when gratuitous – the sacrifice is only made by one of the parties)⁷⁸⁹ or not (when both parties undertake the obligation to celebrate a future contract and sacrifice is undertaken by both parties)⁷⁹⁰. Thirdly, the production of the legal effects happens in a different moment in promises and donations. While the constitutive effect of donations⁷⁹¹ means that the relevant right (real or personal) is transferred/held immediately by the donee, by mere effect of the contract, a promise only grants the promisee the right to demand a future action of the promisor (corresponding to the promisor’s obligation to enter into a new contract). In other words, donations immediately grant access to the subject-matter of the contract, while promises provide the donee with the necessary tools to access the subject-matter of the promise in the future, but are not able, by themselves, to vest in the promisee the subject-matter of the promise. Subsequent action by the promisor is needed to achieve this objective⁷⁹².

This clear distinction between donations and promises is disputed by legal writers who state that the “promise to donate, as accepted by the beneficiary, constitutes therefore a real donation, where it creates, from the beginning, a right of credit for the benefit of the promisee, at the expenses of the promisor’s patrimony”⁷⁹³. Against this perspective, it may be argued that the object (and goal) of both contracts is distinct. On one hand we may find the gratuitous promise, where the object of the contract is the celebration of a future contract, according to which the promisee will be granted with a gratuitous benefit; on the other hand, we may find donation, where the object of the contract is the actual benefit of the donee, without need for a subsequent act of either party. Even if the contract of promise provides the promisee with a right of credit he did not hold before⁷⁹⁴ (the right to demand the celebration of a subsequent contract to the promisor), a promise never grants its beneficiary

⁷⁸⁸ Art 940 n 1 PCC.

⁷⁸⁹ Art 411 PCC.

⁷⁹⁰ One such case being the contract of promise to buy and sell, art 441 PCC and following.

⁷⁹¹ Art 954 (a) PCC.

⁷⁹² As a demonstration, if the subject-matter of a donation is the ownership (real right) of a car, ownership of the relevant car is vested in the donee immediately, by effect of the contract, on the contrary, if the subject-matter of the promise is the same car, the promisee will only be vested on the ownership of the car once a new contract is entered into by the promisor, therefore vesting the promisee in the ownership (real right) of the car.

⁷⁹³ P Lima, A Varela, *Código Civil Anotado* (reissue 4th ed 2010) II, p 238, following Vaz Serra, “Anotação ao Acórdão do Supremo Tribunal de Justiça de 18 de Maio de 1976” (110th year) *Revista Leg. Jur.*, p 213; and Eckstein, *Das Schenkungsversprechen* (1904) p 384.

⁷⁹⁴ P Lima, A Varela, *Código Civil Anotado* (reissue 4th ed 2010) II, p 238.

with direct access to the subject-matter of the contract. Donation, on the other hand, grants the donee, in principle, direct and irrevocable access to the subject-matter of the contract⁷⁹⁵.

In conclusion, despite the fact that both promises and donations are bilateral juridical acts (contracts) under Portuguese law, and are both able to create benefits (and create a correspondent sacrifice) to only one of their parties, or be entered into with a spirit of liberality (*animus donandi*), they are different juridical acts, which are regulated under different laws – one is regulated under the law of promise, the other is regulated under the law of donation⁷⁹⁶. The distinction between both contracts is explained by the fact that promises may be onerous (creating sacrifices and benefits to both parties), may be entered into without a spirit of liberality and, while donation's legal effects are produced immediately upon completion of the contract, promises need a subsequent juridical act of the promisor to vest in the promisee the benefit/subject-matter of the contract⁷⁹⁷.

4.2.3.3. Testament and legacies

Testament is defined under the PCC as the “unilateral and revocable act by which people dispose, for after their death, of all or part of their goods”⁷⁹⁸. Because testament is a unilateral act, it does not require acceptance from its beneficiary(ies) to produce legal effects. Testament may therefore be defined as a unilateral gratuitous disposition of part or all the *de cuius*' patrimony⁷⁹⁹. If the *de cuius* identifies which goods are to be received by one (or each) beneficiary of the testament, he is creating legacies, which may be defined as identified goods to be received by nominated parties upon the death of the *de cuius*⁸⁰⁰.

Bearing in mind the above, both donation and testament (or legacies) are gratuitous juridical acts which, in principle, do not oblige their beneficiaries to counter-performance. In other words, no sacrifice is demanded, as a rule, from donees or legatees. The similarities between donation and testament/legacy end here, considering that donation is a contract (a bilateral

⁷⁹⁵ Under art 954 PCC are “essential effects” of donations the immediate transfer of the (property) right or the undertaking of the obligations if that is the object of the contract of donation.

⁷⁹⁶ Both are regulated under the PCC as separated typical contractual forms. Promise is regulated under art 410 PCC and following and donation is regulated under art 940 and following.

⁷⁹⁷ As a demonstration, if the promisor promises to buy a house, he only undertook the obligation to enter into a future contract of sale with the promisee.

⁷⁹⁸ Art 2179 n 1 PCC. It is worth mentioning that under art 2179 n. 1 PCC testaments may be comprised solely of non-patrimonial rights, as long as they are adopted under the formalities set by the PCC.

⁷⁹⁹ Patrimony defined as all rights and obligations held by the *de cuius* at the time of his death.

⁸⁰⁰ Art 2183 PCC.

juridical act)⁸⁰¹, while testament is a unilateral juridical act⁸⁰². Because donations are contracts they cannot be revoked unilaterally by one of the parties⁸⁰³. On the contrary, one of testaments (or legacies)' cardinal elements under Portuguese succession law is their free revocability⁸⁰⁴ – the testator-benefactor is free to revoke the testament (legacy) at all times and cannot renounce his right to revoke a testament (or legacy) in the future⁸⁰⁵. Furthermore, testaments (or legacies) do not need to be made with a spirit of liberality (*animus donandi*), contrary to what happens with donation⁸⁰⁶, and they produce their effects upon (and because of) the death of the benefactor (the *de cuius*)⁸⁰⁷. Because testaments produce their effects upon the death of the *de cuius*, they are classified as juridical acts which produce their effects *mortis causa*⁸⁰⁸.

In addition, while the production of effects *mortis causa* is one of testament's cardinal elements⁸⁰⁹, a contract of donation may only benefit the donee while both parties are alive. Portuguese law of donation is clear on this point, expressly forbidding, as a rule, donations the effects of which are to be produced *mortis causa*⁸¹⁰. The legal effects of a donation are to be produced while all parties are alive. One example of this is when a donor decides to donate all or part of his patrimony to his presumed heirs (but reserving the real right of use the goods for himself while alive). In this case, the contract entered into by the parties is not regarded as testament, but as a donation if the legal effects are produced immediately (*inter*

⁸⁰¹ Art 940 n 1 PCC.

⁸⁰² Art 2179 n 1 PCC.

⁸⁰³ Art 406 n 1 PCC.

⁸⁰⁴ A Ferrão, *Das doações segundo o Código Civil Português* (1911) p 4.

⁸⁰⁵ Art 2311 PCC. In addition, under art 2311 n 2 PCC, any clause where the testator (legator) renounces his right to revoke the testament (legacy) is regarded as non-written/inexistent.

⁸⁰⁶ Art 940 n 1 PCC.

⁸⁰⁷ Art 2179 n 1 PCC.

⁸⁰⁸ Art 2179 n 1 PCC.

⁸⁰⁹ If a new legal heir is found, he may request a payment from the remaining heirs, in the same amount of the goods he would have been legally entitled to receive otherwise (art 2029 n 2 PCC). Art 2179 PCC.

⁸¹⁰ Art 946 PCC.

vivos)⁸¹¹. Therefore, it is possible to conclude that testament (or legacies) and donations are different juridical acts, therefore being regulated under different laws⁸¹².

4.2.3.4. Pact of succession

Pacts of succession are defined under article 1701 PCC⁸¹³ as “the contractual nomination of an heir or legatee”⁸¹⁴, which are made in the prenuptial agreement, for the benefit of one or both spouses. Pacts of succession share cardinal elements with donations such as gratuity – an agreement on the effects to be produced is essential, while only one of the parties bears the sacrifice. Both emerge from contracts and, for this reason, pacts of succession cannot be revoked unilaterally by the benefactor⁸¹⁵. The benefactor cannot also prejudice the expectations created by the beneficiary by gratuitously disposing of the benefits to be granted under the pact (unless this right has been reserved by the benefactor or so is determined by court)⁸¹⁶. But while the parties in a pact of succession are referred to as “donor” and “donee” under the PCC⁸¹⁷, it may be argued that the use of this terminology is incorrect. Indeed, it ought to be changed, considering that not all cardinal elements of donations are present in a pact of succession. As a demonstration, a pact of succession never produces its effects while the parties are alive. On the contrary, they always produce their effects *mortis causa*.

4.2.3.5. Comodatus and Mutuum (free loan of unfungible / fungible goods)

Comodato (comodatus or free loan of unfungible goods) is defined under the PCC as “the gratuitous contract by which one of the parties delivers to another a good, movable or immovable, so that can be used, with the obligation to return”⁸¹⁸. *Mútuo (mutuum or loan of fungible goods)* is defined under article 1142 PCC as “the contract by which one party loans

⁸¹¹ Art 2029 n 1 PCC.

⁸¹² As stated by the PCC, where donations are regulated in Book II PCC – Law of Obligations, as a typical contract (art 940 and following), while testament (and legacy) is regulated under Book V –Law of Succession (art 2179 PCC and following).

⁸¹³ Pacts of succession are regulated under art 1701, 1702, 1703, 1704, 1705, 958, 959, 960 and 961 PCC.

⁸¹⁴ Art 1701 n 1 PCC.

⁸¹⁵ And under art 1701 n 1 PCC, they cannot be revoked by agreement of the parties if both parties are spouses, only being possible to revoke them if the benefactor is a third party and agreement on the revocation is reached by all the parties in the contract.

⁸¹⁶ Art 1702 PCC.

⁸¹⁷ Art 1701 and 1702 PCC.

⁸¹⁸ Art 1129 PCC: “Comodato é o contrato gratuito pelo qual uma das partes entrega à outra certa coisa, móvel ou imóvel, para que se sirva dela, com a obrigação de a restituir.”

money or another fungible good to another party, where the second party is obliged to return the same amount of the same kind and quality”, and this contract may be gratuitous or onerous (although it is presumed onerous under the PCC⁸¹⁹). Both contracts mentioned above share similarities with the contract of donation, considering that all of them are bilateral in nature: they are formed by agreement reached by the parties; they are gratuitous: they are able to produce a benefit without correspondent sacrifice to the beneficiary⁸²⁰; and they produce their effects *inter vivos*. However, contracts of *comodatus* and *mutuum* are different from contracts of donation because they lack some of donation’s cardinal elements, and are not, therefore, regulated by the PCC under the law of donation⁸²¹.

When gratuitous, both the contracts of free loan and donation lead to the sacrifice of only one of the parties of the contract (the benefactor/donor). But only in a contract of donation may the benefactor’s sacrifice be defined as permanent and irrevocable⁸²², considering that in the case of free loan, the benefactor is deprived of the enjoyment of a right for a certain period of time, however, he always regains full access to and/or use of the subject-matter of the contract in the future⁸²³. Furthermore, it should also be noticed that one of donation’s cardinal elements is the spirit of liberality (or *animus donandi*)⁸²⁴. This element is not

⁸¹⁹ Art 1145 n 1 PCC.

⁸²⁰ Under art 1135 PCC (*comodatus*) and art 1142 PCC (*mutuum*), both the *comodatus* and the gratuitous *mutuum* impose obligations to the beneficiary, however, and as a rule, none of these contracts demands a sacrifice to be sustained by the beneficiary (he will not be deprived of a right or any benefits which he held before the celebration of the contracts or as consequence of the contract(s). On the contrary, he will benefit from both contracts by holding a new right he did not hold before (as consequence of the relevant contract).

⁸²¹ While the contract of donation is regulated under art 940 PCC, the contract of *comodatus* is regulated under art 1135 PCC and following, and the contract of *mutuum* is regulated under art 1142 PCC and following. Another argument in favour of the distinction between contracts of *comodatus* and *mutuum* and donation is that the PCC distinguishes between the three contracts, providing each one of them with particular rules, which only apply to the relevant contract.

⁸²² Because the benefit is granted or transferred in a permanent basis to the donee under art 940 PCC.

⁸²³ Being the beneficiary obliged to the care for the subject-matter of the contract, as well as to return it (or the same kind and number) by the end of the agreed period under art 1135 PCC in what the contract of *comodatus* is concerned and art 1142 PCC in what *mutuum* is concerned.

⁸²⁴ Art 940 n 1 PCC.

necessarily present in a contract of loan, where both parties may act following a previously existent obligation to enter into the contract of loan⁸²⁵.

4.2.3.6. Public subsidies and the creation of foundations

Public subsidies may be defined as economic benefits granted by a legal person, who has been created and/or acts under public law provisions⁸²⁶, such as the government, the municipalities, public foundations, and public companies, among others⁸²⁷. Both in the case of subsidies and donations, the juridical acts creating the benefit may be classified as bilateral in nature, *inter vivos*, and gratuitous because both create a benefice (and corresponding sacrifice) only to one of the parties in the relationship: the benefactor. However, only donations are made with a spirit of liberality (*animus donandi*). This happens because public organisations' actions (such as the state or municipalities) are guided by the duty to benefit the society. By providing their habitants with subsidies, these public organisations are doing nothing more than discharging the duties imposed on them by law⁸²⁸.

Foundations are legal persons which are created to pursue a socially relevant purpose by a unilateral juridical act of the founder (either *inter vivos* or *mortis causa*⁸²⁹). The foundation only gains legal personality (and consequently holds the rights granted by the founder) by an act of recognition⁸³⁰ which has been issued by the relevant ministry⁸³¹. Following the same line of argument found above, it is necessary to recognise that both the setting up of foundations and contracts of donation are juridical acts which are gratuitous in their effects. However, only donations are bilateral juridical (or contracts). The creation of a foundation is made by a unilateral juridical act, which separates rights and obligations from the

⁸²⁵ A previous obligation to enter into the contract may exist, under art 1142 and art 1129 PCC.

⁸²⁶ L Cabral de Moncada, *Direito Económico* (5th ed 2007) p 41.

⁸²⁷ L Cabral de Moncada, *Direito Económico* (5th ed 2007) p 41.

⁸²⁸ Art 63 to 79 of the Portuguese Constitution.

⁸²⁹ Art 185 n 1 PCC.

⁸³⁰ Art 188 PCC.

⁸³¹ The foundations of social solidarity are recognized by the Ministry of Work and Social Affairs or by the Ministry of Education, depending on the area of operation, while the foundations aiming the creation of a Higher Education Establishment fall within the competence of the Ministry of Science, Technology and High Education. Under art 188 n 1 PCC the recognition of the social character of the foundation must be requested by the founder or his heirs (or be unofficially promoted by the competent authority) in the 180 days after the creation of the foundation.

founder's patrimony, and transfers them to an autonomous patrimony. This autonomous patrimony is then granted with legal personality by a ministerial act of recognition⁸³².

4.2.3.7. Volunteering (giving "time")

Volunteering is defined under Law 71/98 of 3 November as "the set of actions of social and communal interest, performed selflessly"⁸³³, with the exclusion of any actions which are "isolated and sporadic in nature or which are determined by family reasons, friendship or good neighbourhood interests"⁸³⁴. In addition, a volunteer is defined as the "individual who in a free, uninterested and responsible fashion, undertakes the obligation to, according to his own skills and his free time, volunteer for a promoting organisation"⁸³⁵. Both volunteering and donations are bilateral juridical acts, and yet they benefit the beneficiary in a different way. The benefit created by a donation is based on the sacrifice of the donor, which will benefit the donee by resulting in him holding a right he did not hold before (or by being released from a debt/obligation). Conversely, the benefit created by volunteering is granted without a sacrifice of the volunteer: the volunteer is never deprived from a right he held, and no actual obligation to volunteer (work for free) is undertaken by the volunteer under Portuguese law⁸³⁶. The volunteer remains responsible only for the observance of deontological duties of care and safety, among others⁸³⁷. It may therefore be argued that no sacrifice exists for the volunteer, considering that his patrimony remains the same as before (no right was lost and no obligation was undertaken by him). The sacrifice must be present, as it is one of donation's cardinal elements.

4.3. Placement of the law of donation

4.3.1. *Taxonomy*

Donation is a typified contract under the PCC⁸³⁸. Because it is defined as a contract, donation may only be created by a bilateral juridical act under Portuguese law. The placement of the

⁸³² Regulated under Law 150/2015, of 10 September.

⁸³³ Art 2 n 1 of the Law 71/98, of 3 November.

⁸³⁴ Art 2 n 2 of the Law 71/98, of 3 November.

⁸³⁵ Art 3 n 1 of the Law 71/98, of 3 November.

⁸³⁶ Art 3 of the Law 71/98, of 3 November.

⁸³⁷ Art 3 n 1 of the Law 71/98, of 3 November.

⁸³⁸ Placed under Book II (*Obligations*), Title II (*Of the contracts in particular*) of the PCC.

regulation of the Portuguese law of donation in the PCC⁸³⁹ is in line with the treatment given to donation by most European civil law jurisdictions, which also place their laws of donation within the relevant national civil codes⁸⁴⁰. In the Portuguese case, the generic regulation of donations is found within Book 2 of the PCC, the book dealing with the Law of Obligations (*Direito das Obrigações*), and under Title 2 – Of the Contracts in Particular (*Dos Contratos em Especial*). The placement of the law of donation within the PCC as a typical contract leads to the conclusion that the principles and rules governing contract law apply to donation if the event is not particularly regulated under the law of donation⁸⁴¹.

Donation is also defined as a liberality⁸⁴² under the PCC and by contemporary Portuguese legal writers⁸⁴³. The word liberality (*liberalidade*) is expressly used in 25 articles of PCC, however, none of those articles defines the concept of liberality. Following a systematic interpretation of the PCC⁸⁴⁴, it is possible to argue that liberalities are a macro category, used by the PCC when referring to gratuitous juridical acts. As examples of juridical acts defined as a “liberality” under the PCC, it is possible to find, among others: donation⁸⁴⁵; gratuitous promises for the benefit of a third party⁸⁴⁶; testament provisions⁸⁴⁷; the gratuitous forgiveness/waiver of a debt⁸⁴⁸; remuneratory donations⁸⁴⁹; succession pacts for the benefit of one of the parties⁸⁵⁰; and succession pacts for the benefit of a third party⁸⁵¹. Furthermore, it is relevant to notice that the classification of donation as a liberality is a trend in southern

⁸³⁹ The generic regulation of the law of donation is found in art 940 to 979 PCC.

⁸⁴⁰ As an example, see Art 618 of the Spanish Civil Code, art 931 of the French Civil Code, art 769 of the Italian Civil Code, art 475 of the Swiss Civil Code, art 628 of the Czech Civil Code, among others, while other countries decided to regulate donation in comprehensive statutes which perform the same function as a Civil Code, as a demonstration, see art 225 of the Bulgarian Obligations and Contracts Act, and art 479 of the Croatian Civil Obligations Act.

⁸⁴¹ Art 9 n 1 PCC.

⁸⁴² For more on the study of liberality in Portugal, see C F Almeida, *Contratos III* (2012) p 17; and C F Almeida, “Contratos de liberalidade: em especial os contratos para o uso de coisas corpóreas e incorpóreas” (2011) *Estudos em Homenagem ao Prof. Doutor J. L. Saldanha Sanches*, II, p 155.

⁸⁴³ C Almeida, *Contratos III* (2012).

⁸⁴⁴ In line with art 9 PCC.

⁸⁴⁵ Art 603 PCC and art 722 PCC.

⁸⁴⁶ Art 450 PCC.

⁸⁴⁷ Art 603 PCC.

⁸⁴⁸ Art 863 PCC.

⁸⁴⁹ Art 941 PCC.

⁸⁵⁰ Art 1701 PCC.

⁸⁵¹ Art 1705 PCC.

European jurisdictions, where legal writers, with particular emphasis on those based in the French⁸⁵² and Italian⁸⁵³ jurisdictions, place donation within this macro category as well.

Liberalities may therefore be described as any juridical acts able to produce a gratuitous benefit (such as a gift or a legacy), which is legally protected and enforced under the law⁸⁵⁴, producing its effects either between living persons (*inter vivos*) or on the death of the granter of the benefit (*mortis causa*). Under the definition of donation presented above, as well as the express wording of the PCC, it may be argued that donation is one liberality among others in Portuguese law. The classification of donation as a liberality is important for interpretation purposes, considering that under Portuguese law, legal gaps in private law are filled by systematic interpretation of the law and by analogy⁸⁵⁵. Therefore, if a legal gap is found in the Portuguese law of donation, the rules which regulate other liberalities may be used by the courts to fill the relevant gap in the law of donation.

4.3.2. Types of donation

Different types of donation may be identified under Portuguese law of donation. This subsection is able to demonstrate that some of the types of donations, as identified through critical analysis of the PCC, exist with the primary scope of regulating family relationships. With regard to their primary concern with the regulation of donations made in a family context, the use of such rules in a market context must be subject to review, in order to assess if these family-orientated rules are fit to the purpose of also regulating donations in a market context. Different legal writers have grouped donations in different categories and times⁸⁵⁶. However, after a critical systematic review of the PCC, it is possible to argue that five types of donations exist under the PCC, and therefore will be subject to critical review below. These types are: (i) pure donations; (ii) conditional donations; (iii) remuneratory donations; (iv) donations in view of the wedding; and (v) donations between married parties/spouses.

4.3.2.1.1. Pure donations

⁸⁵² M Planiol, G Ripert, *Traité Théorique et pratique de droit civil français* (2nd ed 1957) V, p 21.

⁸⁵³ F Angeloni, *Liberalità e solidarietà, contributo allo studio del volontariato* (1994) p 16.

⁸⁵⁴ M Planiol, G Ripert, *Traité Théorique et pratique de droit civil français* (2nd ed 1957) V, p 21-22.

⁸⁵⁵ Art 10 PCC.

⁸⁵⁶ C Gonçalves, *Dos Contratos em Especial* (1953) p 203, among others.

Pure donations are those which are made with no conditions (or *modo*) being imposed on the donee. The purity of donation is a topic which has been regularly addressed by European legal writers⁸⁵⁷. The definition of a pure donation is closely followed by the definition of gratuity, and two main chains of thought are followed by Portuguese legal writers: (i) on one side are those who defend a “purity of principles”, and do not accept the classification of a juridical act as a donation if the donee is obliged to perform a counter performance to the benefit received⁸⁵⁸; (ii) on the other side are those who postulate that a donation does not lose its gratuitous essence if obligations are undertaken by the donee. One such case is Cunha Gonçalves⁸⁵⁹, according to whom a donation is pure when no recompense is requested from the donee, but other types of donation are also allowed under Portuguese law of donation⁸⁶⁰. These non-pure donations being those where the obligation emerging to the donee is not able to transform the contract of donation into an onerous contract, where (equal or similar) sacrifice is demanded to both parties.

The debate on the level of purity required for a juridical act to be classified as a donation in Portugal is expressly resolved under article 963(1) PCC, where it is declared that obligations may arise to the donee from the contract of donation⁸⁶¹. Due to the gratuitous essence of the contract of donation under Portuguese law, however, the donee will only be liable for the discharge of obligations up to the value of the benefit received⁸⁶². Therefore, this “obligation imposed on the beneficiary”⁸⁶³, as it is defined under Portuguese law, must still be able to create a measurable benefit for the donee, i.e. it must still increase the donee’s patrimony by holding a right he did not hold before, or by being released from an obligation. If the obligation imposed on the donee has the same or higher value than the benefit received, then

⁸⁵⁷ A Ferrão, *Das doações segundo o Código Civil Português* (1911) p 219; A Ascoli, *Il Concetto della Donazione nel Diritto Romano con Richiami al Diritto Civile Italiano* (1893) p 22; F C Savigny, *Traité de Droit Romain* (1943) p 290; M B Lopes, *Das Doações* (1970) p 18; M R P Ramalho, *Sobre a Doação Modal* (1990) *O Direito*, p 673-744; and J Varela, *Ensaio sobre o Conceito de Modo* (1955).

⁸⁵⁸ G Moreira, *Instituições do direito civil português* (1925) II, p 579.

⁸⁵⁹ C Gonçalves, *Dos Contratos em Especial* (1953) p 203, who classifies donations under Portuguese law as: (i) pure, (ii) restricted, (iii) onerous, or (iv) remuneratory.

⁸⁶⁰ C Gonçalves, *Dos Contratos em Especial* (1953) p 203.

⁸⁶¹ As may be observed in the following court decisions: *Tribunal da Relação do Porto* n 0633771 of 14/09/2006; and *Tribunal da Relação do Porto* n 0230783 of 14/06/2002.

⁸⁶² Art 963 n 2 PCC.

⁸⁶³ J Varela, *Ensaio Sobre o Conceito de Modo* (1955) p 4.

no real benefit is provided to the donee – on the contrary, the value of his patrimony remains unchanged or could even be decreased as result of the donation⁸⁶⁴.

In addition, the principle of the freedom to contract⁸⁶⁵ allows the parties to agree on the creation of an obligation to the donee with no (economic/pecuniary) value, as long as this recompense corresponds to a legitimate and serious interest of the donor⁸⁶⁶. The serious interest of the donor is also protected under the law if it also corresponds to an interest of the donee. For example, if an uncle donates £1,000 to his 18-year-old nephew, where the contract of donation imposes an obligation to the nephew-donee to use the money to pay his tuition fees, this obligation pursues the interests of both: the uncle-donor (who wishes to pay a moral debt to his brother) and the nephew-donee (who wishes to graduate).

4.3.2.2. Conditional donations

As mentioned above, obligations may be created for the donee under article 963(1) PCC, but the donee is only liable for their discharge up to the value of the benefit received⁸⁶⁷. Following this principle, if the obligation created to the donee consists in the payment of all or some of the donor's debts, then the donee is only liable for the payment of debts existing at the moment when the donation was made. In the case of future debts, the donee is only liable for their payment if their pecuniary value is determined under the contract of donation⁸⁶⁸. The donor, his heirs, or any interested parties may demand the discharge of obligations undertaken by the donee in the contract of donation⁸⁶⁹. As an option, the donor or his heirs may request the resolution of the donation in court due to the failure of the donee to comply with the obligation undertaken in the contract of donation⁸⁷⁰. But it is also necessary to investigate what happens if a donation is given for a particular reason or motive, even if this donation does not impose a *modo* to the donee. The question then arises of whether the motive for donating should be taken into consideration, to assess the validity, or if the motivation is of little value after the contract has been concluded. In order to answer this question, it is necessary to separate (i) the motives why the contract was celebrated – or,

⁸⁶⁴ Following A Ferrão, *Das Doações segundo o Código Civil Português* (1911) I, p 255.

⁸⁶⁵ Art 396 PCC.

⁸⁶⁶ M Palma Ramalho, "Sobre a Doação Modal" (1990) *O Direito*, p 689.

⁸⁶⁷ Art 963 n 2 PCC.

⁸⁶⁸ Art 964 PCC.

⁸⁶⁹ Art 965 PCC.

⁸⁷⁰ Art 966 PCC.

in other words, what motivated the parties to enter into the contract and what the expected outcome was; from (ii) *modo*, or any duties imposed on the donee under the contract⁸⁷¹.

4.3.2.2.1. Relevance of the motive

If the donee refuses to discharge the obligations undertaken in the contract of donation, it is clear under Portuguese law of donation that either the donor or his heirs may submit a claim to court, compelling the donee to discharge the obligation⁸⁷². On the contrary, the frustration of the motives why the donation was entered into is not particularly regulated under Portuguese law of donation. It is therefore necessary to find the generic principle, applicable to all contracts including those of donation, to answer this question. Under the general principle set by article 251 PCC, mistake regarding the parties or the object of contracts allows the parties to request the court to declare the contract as void (*anulável*). However, under article 252 PCC, if the error refers to the motives which have contributed to the will of the parties to enter into the contract, then the contract may only be declared void if these motives have been expressly recognised as essential in the letter of the contract.

In addition, because donation was classified as a liberality above, it may be argued that the rules applicable to other liberalities may be called, by analogy, to regulate the non-fulfilment of the motives/reason why the donation was made. This rule is found in article 1131 PCC, where it is stated that if a contract of *comodatum* does not specify how the benefit should be used, then the beneficiary may use it to any “lawful purposes within the normal function of things of the same nature”. It is easy to understand why the PCC has decided that motives are not, as a rule, relevant for the validity of contracts under Portuguese law: it aims to provide confidence to the contracting parties, in the sense that only essential motives, expressly recognised as such by all parties, are relevant for the unilateral revocability of the contract. Finally, it may be argued that this solution is useful, and one which is able to provide security to donations made in a market context. This is because of the security

⁸⁷¹ Regulated under art 966 PCC, and which discharge may be requested in court by the donee or his heirs.

⁸⁷² Art 963 to 968 PCC.

provided to the parties, in that no hidden motives will compromise the validity of the contract of donation.

In conclusion, only non-compliance with the obligations undertaken by the donee (*modo*) is expressly defined as a cause for unilateral revocability of the donation in the PCC⁸⁷³, a set of rules which will be reviewed in detail below. On the contrary, if the objective of the contract of donation is frustrated based on the motives why it was entered into by the donor, then it may only be declared void by the courts if the essentiality of the motive was expressly recognised by all parties⁸⁷⁴. The answer to this case would have been different if the error of the donor had related to the person of the donee or on the object of the donation, in which case, the contract of donation could be declared void by the courts⁸⁷⁵.

4.3.2.2.2. Non-compliance of the donee with the *modo*

As mentioned above, the PCC states that obligations may be imposed on the donee under the contract of donation⁸⁷⁶, allowing the donor to request from the donee a counter performance. The only limits to the counter performance (*modo*), are that it cannot be physically impossible, against the law or morally offensive⁸⁷⁷. But due to the fact that a donation aims to generate a gratuitous benefit to the donee, and that the *modo* only has an accessory position in the contract of donation⁸⁷⁸, the donee may only be compelled to discharge his obligations up to the value of the thing or right received⁸⁷⁹. For this reason, *modo* is often defined by legal writers in simple terms: as “an obligation imposed upon the beneficiary” of the donation⁸⁸⁰; or as a subtype of contract of donation which “is defined by imposing an accessory burden to the liberality received by the donee which, without being regarded as a counter performance, limits its value”⁸⁸¹.

Because article 963(2) PCC defines that the donee is only liable for a *modo* up to the value of the benefit received, it would be possible to argue for the need for a pecuniary value

⁸⁷³ Art 963 to 968 PCC.

⁸⁷⁴ Art 252 n 1 PCC.

⁸⁷⁵ Art 251 PCC.

⁸⁷⁶ Art 963 n 1 PCC, which follows the principle of freedom to contract and autonomy of the parties, set under art 405 PCC.

⁸⁷⁷ Art 976 PCC.

⁸⁷⁸ A Vaz Serra, “Responsabilidade patrimonial” (1958) *Boletim do Ministério da Justiça*, p 271.

⁸⁷⁹ Art 963 n 2 PCC.

⁸⁸⁰ J Varela, *Ensaio sobre o Conceito de Modo* (1955) p 4.

⁸⁸¹ M Palma Ramalho, “Sobre a Doação Modal” (1990) *O Direito*, p 731.

attached to both, the benefits granted by a donation, and the *modo* given in return by the donee. This line of argument fails, however, considering that it collides with the principle of freedom of the parties to agree on the content of obligations (i.e. freedom of contract)⁸⁸². For this reason, any “serious intent” of the donor may be imposed as a *modo* to the donee under Portuguese law of donation⁸⁸³, only limited by physical impossibility, illegality of the object or immorality⁸⁸⁴.

It is important to mention at this stage that if the donee does not comply with the *modo*, the donor (his heirs or interested third parties⁸⁸⁵) may only enforce the obligation of the donee, and not revoke the donation based on this fact, unless otherwise expressly stated in the contract⁸⁸⁶. It is possible to argue that, by not granting the donee the right to revoke the donation based on the lack of compliance of the donee with the *modo*, the PCC respects the spirit of liberality of the donor. This is one of the cardinal elements of the contract of donation. Because the donor gave *animus donandi*, entering into a contract of donation for the benefit of the donee, he should not be allowed to go against his own actions by revoking the donation based on the future behaviour of the donee, unless this right is reserved by the donor.

4.3.2.3. Remuneratory donations

A remuneratory donation is defined under the PCC as a donation which is motivated by “services received by the donor” for which payment cannot be enforced under the law⁸⁸⁷. This type of donation is further defined by legal writers as a donation entered into by a donor with no previous legal obligation to do so, but which is motivated by the moral duty of repayment of something granted to him in the past⁸⁸⁸. The motivation for these donations is therefore typical – they are motivated by a benefit received in the past by the donor, provided to him by the donee, which payment is not enforced under the law. But because no legal obligation exists, compelling the donor to give, the donor’s spirit of liberality (*animus*

⁸⁸² Art 398 PCC.

⁸⁸³ M Palma Ramalho, “Sobre a Doação Modal” (1990) *O Direito*, p 689.

⁸⁸⁴ Art 976 PCC.

⁸⁸⁵ Art 965 PCC.

⁸⁸⁶ Art 966 PCC.

⁸⁸⁷ Art 941 PCC: “É considerada doação a liberalidade remuneratória de serviços recebidos pelo doador, que não tenham a natureza de dívida exigível”.

⁸⁸⁸ L C Goncalves, *Dos Contratos em Especial* (1953) p 203.

donandi) is not deemed as tainted under Portuguese law of donation⁸⁸⁹. The classification of a donation as remuneratory has relevant legal consequences. As preliminary examples of these consequences, it is possible to find exceptions to the rules preventing doctors, nurses or priests from accepting donations from sick patients. These rules are disregarded if the donations are classified as “remuneratory donations for the payment of medical care or spiritual aid services”⁸⁹⁰. Another example is the rules on the revocation of donations, which are deemed as non-applicable if the relevant donation is defined as a remuneratory donation⁸⁹¹.

It is important to clarify that remuneratory donations are full donations under Portuguese law, and should not be confused with social gifts. The boundaries between the two concepts are elusive, but it is possible to argue that social gifts are never regulated under the law of donation, while remuneratory donations are true donations, motivated by a benefit received by the donor in the past, such as a donation. While social gifts are not motivated by a past enrichment of the donor, caused by the donee, remuneratory donations are always motivated by a past enrichment of the donor. Furthermore, and because the benefit received by the donor in the past did not generate any legal obligation to give, the donor now acts with an untainted *animus donandi*⁸⁹². For this reason, a remuneratory donation may be described as a donation motivated by a past enrichment of the donor, caused by the donee, a motivation which is acknowledged as relevant by the law.

4.3.2.4. Donations in view of the wedding

Donations “made to one of the partners, or both, in view of their wedding”⁸⁹³ are defined by the PCC as a separate type of donation. These donations are regulated, in particular, under articles 1753 and 1760 PCC and may be made by one of the spouses to the other, or by a third party, where one or both spouses receives a benefit under the contract of donation⁸⁹⁴. Donations in view of the wedding are therefore defined by a future event: the wedding of the donee. Unlike what happens to donations where other motives are essential for the formation of the will of the donor to donate, the effects of these donations are only produced

⁸⁸⁹ M Palma Ramalho, “Sobre a Doação Modal” (1990) *O Direito*, p 689.

⁸⁹⁰ Art 953 PCC.

⁸⁹¹ Art 970 and art 975 b) PCC.

⁸⁹² M Palma Ramalho, “Sobre a Doação Modal” (1990) *O Direito*, p 689.

⁸⁹³ Art 1753 n 1 PCC.

⁸⁹⁴ Art 1754 PCC.

when wedding has occurred, unless expressly stated otherwise⁸⁹⁵. Donations in view of the wedding are therefore regulated by special rules, which have been introduced for historical reasons. These rules operate to protect the donor against a future frustration of the objectives of the donation: a benefit which is granted to the donee(s) in view of a new family being created.

Furthermore, and due to the family-orientated considerations followed by the rules on donations in view of the wedding, an extra protection is given to the donor against the cancellation of the wedding (frustration of expectations), where the legal effects of these donations may also be suspended until the death of the donor⁸⁹⁶. The special regime followed by donations in view of the wedding also includes particular rules on the formalities to be followed for the validity of the donation: donations for the wedding must be included in the prenuptial agreement⁸⁹⁷. If this formality is not followed, the contract is deemed null and void if the effects are to be produced after the death of the donor, or fall under the generic category of donation⁸⁹⁸, if the effects are to be produced *inter vivos*⁸⁹⁹.

Unless stated otherwise, the subject-matter of the donation between married parties always belongs to the donee alone, with disregard to the matrimonial regime of the couple⁹⁰⁰. They cannot be revoked by agreement of the parties – a reduction of the right to contract, created for the protection of a perceived weaker donee-spouse, who would otherwise agree to return what had been received by donation in view of the wedding⁹⁰¹. Following a different objective of protecting a donee who donated in view of a marriage that never happened, and still in the pursuit of family-orientated policies, article 1760 PCC states that donations in view of the wedding expire within a year from the day when they were made if the marriage never occurs or has been declared void. The same occurs if the couple decides to separate or

⁸⁹⁵ Art 1755 n 1 PCC.

⁸⁹⁶ However, if this is the case, under art 1755 n 2 PCC, these donations are no longer regulated under the law of donation, but under the specific rules guiding succession contracts.

⁸⁹⁷ Art 1756 n 1 PCC.

⁸⁹⁸ Regulated under art 940 to 979 PCC.

⁸⁹⁹ Under art 1756 n 2 PCC the generic regulation of the law of donation will apply to donations in view of the wedding, where their effects are to be produced *inter vivos*, if they fail to comply with the formalities set under art 1756 n 1 PCC.

⁹⁰⁰ Art 1757 PCC.

⁹⁰¹ Art 1758 PCC.

divorce and the donee is found as having the sole or main responsibility for the dissolution of the marriage⁹⁰².

4.3.2.5. Donations between married parties/spouses⁹⁰³

Donations between married parties (or spouses) are regulated under articles 1761 to 1766 PCC. It may be argued that this type of donation is to be regarded as separate from donations in view of the marriage because (i) these donations occur after the wedding; (ii) they do not need to follow the formalities set under article 1756 PCC; and (iii) they are regulated separately in the PCC. The existence of this type of donation is also particularly relevant to the argument that Portuguese law of donation is still heavily influenced by family-related considerations.

Particular rules apply to donations between spouses, with particular relevance to article 1762 PCC, which declares void all donations between spouses married under a marital regime where their property is imperatively separated. All other donations between spouses are allowed if contracted by written document⁹⁰⁴ and reciprocal donations are forbidden when made in the same contract⁹⁰⁵. Again, aiming at protection of the weakest party, only rights solely held by the donor may be donated between spouses⁹⁰⁶, and the donor is permanently deprived of the benefit donated, with disregard to the matrimonial regime applicable⁹⁰⁷.

As another example of how family-orientated policies have influenced Portuguese law of donation, special powers of revocation exist in the context of donations between spouses: the donor may revoke donations between married parties at any time and he may not abdicate this right⁹⁰⁸. Furthermore, only the donor is able to revoke the donation and no revocation rights are transferred to his heirs upon his death⁹⁰⁹. In addition to special powers of

⁹⁰² Art 1760 PCC.

⁹⁰³ Note: *Doações entre casados* are traditionally referred to in English as “donations between husband and wife”. Considering that the concept of marriage has been re-defined to comprise marriage between two people of the same sex, I have decided to translate *doações entre casados* as “donations between married parties” or “donations between spouses” instead. This name is also in line with the terminology adopted by the Marriage and Civil Partnership (Scotland) Act 2014.

⁹⁰⁴ The donation of moveable goods between married parties must adopt the written form even if possession of the good is immediately transferred to the donee (art 1763 n 1 PCC).

⁹⁰⁵ Art 1763 n 2 PCC, with the exceptions listed in art 1763 n 3 PCC.

⁹⁰⁶ Art 1764 n 1 PCC.

⁹⁰⁷ Art 1764 n 2 PCC.

⁹⁰⁸ Art 1765 n 1 PCC.

⁹⁰⁹ Art 1766 n 2 PCC.

revocation, donations between spouses expire in the following circumstances: (i) if the donee dies before the donor, except if the donation is confirmed by the donor in the three months following the death of the donee following the same formalities adopted by the donation⁹¹⁰; (ii) if the marriage is declared null and void⁹¹¹; and (iii) if the donee is declared solely or mainly responsible for the divorce⁹¹².

4.3.2.6. Other accessory clauses

Bearing in mind that the principle of freedom to contract allows the parties to change the contract of donation to better reflect their interests, they are granted the power to include accessory clauses to a contract of donation⁹¹³. Some of these clauses are even listed under the PCC, due to their expected high use, but none of them exempts the contract of donation from being regulated under the law of donation. One such case is the reservation, by the donor, of the real right to use the subject-matter of the donation for himself or others⁹¹⁴. Other examples include reservation of the right to dispose of the subject-matter of the donation. This clause must be registered at the public registrar, in order to produce effects to third parties, and cannot be transferred upon the death of the donor to his heirs⁹¹⁵. This may also include the return of the object of donation to the donor where he survives the donee⁹¹⁶.

4.4. Effects

The critical review of the cardinal elements of donation above⁹¹⁷ provided us with knowledge on the definition and boundaries of the juridical act qualified as a “donation” under Portuguese law. Based on this knowledge it is now necessary to consider what the consequences are of defining a juridical act as a “donation”, in order to understand the repercussions of qualifying a juridical act in the market as a “donation” in Portugal. Bearing

⁹¹⁰ Art 1766 n 1 (a) PCC and art 1766 n 2 PCC.

⁹¹¹ Art 1766 n 1 (b) PCC.

⁹¹² Art 1766 n 1 (c) PCC.

⁹¹³ Following the principle of the freedom to contract, under art 405 PCC.

⁹¹⁴ Under art 958 PCC, the donor is allowed to fragment the right of property, and to only transfer some of its components.

⁹¹⁵ Art 959 PCC.

⁹¹⁶ Art 960 PCC: the parties may agree that if the donee (or the donee and all his descendants) dies before the donor, what was donated returns to the donor. This clause must be registered to be used against third parties. If this happens, the subject-matter of the donation will return to the patrimony of the donor without any obligations that may have been attached to it by the donee (or his descendants) under art 961 PCC.

⁹¹⁷ See above 4.2.1. *Definition and cardinal elements of donation*, p 139.

in mind the above, an investigation will be conducted in the present subsection of this chapter, in order to determine: (i) the legal effects produced by an act of donation in Portugal; (ii) the specific legal consequences for the parties brought by the law of donation; and (iii) the specific regulation brought by the law of donation for regulating a gratuitous relationship between the parties, which differs from the generic regulation of onerous contracts.

4.4.1. Legal effects

The essential legal effects of a contract of donation in Portugal are defined under article 954 PCC as: (i) the transfer of the property, or otherwise transfer of the right/creation of the benefit to the donee; (ii) the creation of the obligation to deliver the subject-matter of the donation; and/or (iii) the undertaking of an obligation by the donor, if this is the object of the contract of donation. Furthermore, the legal effects of a donation are produced immediately and upon completion of the contract⁹¹⁸, creating a personal relationship between the parties, where the identity of the parties matters⁹¹⁹. Bearing in mind that donation is a unilateral contract under Portuguese law of donation⁹²⁰, the relationship created between donor and donee may be conceptualised as two parties playing different roles. The donor is considered to be the active party, by granting a benefit or by undertaking an obligation, and the donee acts as the passive party, receiving the benefit without being obliged to correspondent payment. The consequences of these legal effects will be discussed below from each party's perspective, considering that despite all the parties agreeing to the

⁹¹⁸ Art 949 n 2 PCC.

⁹¹⁹ A Santos Justo, "A Doação no Direito Romano (Breve referência ao Direito Português)" (2001) *Estudos em Homenagem a Cunha Rodrigues II*, p 239.

⁹²⁰ C F Almeida, *Contratos III* (2012) p 23.

result and legal consequences of the contract of donation, each party assumes different positions and risks under the contract⁹²¹.

4.4.2. Legal consequences

4.4.2.1. Consequences to the donor

The essential consequence to the donor under the contract of donation is the sacrifice of a portion or all of his patrimony⁹²². Under article 948 PCC, which regulates the capacity of the donor, this sacrifice may be produced in all persons' (legal or physical) patrimonies, because all persons are free to donate as long as they have the capacity to enter into contracts and to dispose of their rights⁹²³. Furthermore, the capacity of the donor to donate is determined at the time of the donation⁹²⁴ and legal representatives of persons deemed incapable of conducting their own business cannot donate on their behalf⁹²⁵. It is also worth mention that parents cannot donate on behalf of their children without consent of the court⁹²⁶. Beyond the capacity to donate, Portuguese law of donation aims to protect the personal connection established between donor and donee, as created by the contract of donation⁹²⁷. Following this objective, only the donor has the power to choose the donee, and he cannot allow other people to choose on his behalf or to determine the object of the donation⁹²⁸. Only one exception exists to this rule, where the donor may allow a third party to select, among a

⁹²¹ C F Almeida, *Contratos III* (2012); C F Almeida, "Contratos de liberalidade: em especial os contratos para o uso de coisas corpóreas e incorpóreas" (2011) in *Estudos em Homenagem ao Prof. Doutor J. L. Saldanha Sanches*, II.

⁹²² As mentioned before, under art 940 PCC, one of donation's cardinal elements in Portugal is the decrease of the donor's patrimony, by disposing of one of his rights or by undertaking an obligation.

⁹²³ In what legal persons is concerned, they may only act, either gratuitously or in view of profit, within the boundaries set by their articles of incorporation (their "*objecto social*" or social object of the company) under art 6 of the Business Organisations Code, enacted by Decree Law n. 262/86 of 2 Septembe.

⁹²⁴ Art 949 n 1 PCC.

⁹²⁵ Art 949 n 2 PCC.

⁹²⁶ Art 1889 n 1 (a) PCC. However, parents represent their children when accepting donations on their behalf (art 1890 n 1 PCC). If they do not do so 30 days after receiving the offer, the children, their relatives, the public prosecutor or the donor may request to the court issue a deadline for the parents to accept the donation (art 1890 n 2 PCC). If this deadline is not met by the parents, the donation is presumed accepted unless the court rules otherwise (art 1890 n 3 PCC).

⁹²⁷ For this reason, if the donee is the receiver of child/adult support (or any other maintenance obligations) and donates, the persons obliged to maintain the donee may refrain from doing so (art 2011 n 1 PCC). If this is the case, the obligation to provide support will, in some cases, be transferred to the donee and his heirs up to the value of the rights received by donation (art 2011 n 2 PCC).

⁹²⁸ Art 949 n 1 PCC.

previously determined group of people, who will be the donee, or how the object of donation will be distributed⁹²⁹.

Under article 954 PCC, an obligation to deliver the subject-matter of the donation is imposed on the donor by the contract of donation. The discharge of this obligation is further regulated under the PCC, where it is defined that the subject-matter of the donation must be delivered in the state it was at the moment of the celebration of the contract of donation, and that all relevant parts, fruits and documents of the subject-matter of the donation (thing or a right) are comprised within the obligation to deliver⁹³⁰. Furthermore, and bearing in mind that a contract of donation immediately transfers/creates the rights to the donee or creates an obligation to the donor, delivery is perceived as of crucial relevance by the PCC. That is why the donor's heirs cannot refuse to deliver the subject-matter of an otherwise void donation if the donation was confirmed by the donor or by them⁹³¹.

4.4.2.2. Consequences to the donee

The donation may benefit one or multiple donees. When a donation is made to more than one donee, the PCC presumes that the donation is made in the same proportion to all donees, and that they cannot benefit from the refusal of one or more of them to receive the benefit (unless stated otherwise)⁹³². All (legal and physical) persons may receive benefits under a contract of donation, except when the law expressly forbids them to do so⁹³³. Acceptance is presumed of persons who are declared unfit to conduct their own business by the courts⁹³⁴. It is also worth mentioning that, in the case of unborn donees, acceptance is presumed under article 952 PCC if they are descendants of an identified person, who is alive at the moment of the offer, and the legal effects are produced immediately⁹³⁵.

Aiming to protect vulnerable donors, the PCC provides that certain persons (such as doctors, nurses, priests or legal representatives) are forbidden from receiving donations based on their

⁹²⁹ Art 949 n 1 PCC and art 2182 n 2 PCC.

⁹³⁰ Art 955 PCC.

⁹³¹ Art 968 PCC.

⁹³² Art 944 PCC and with the exception for the donation of the real right to use (*usofruto*).

⁹³³ Art 950 PCC.

⁹³⁴ Art 951 PCC. It is worth mention that non-pure donations (i.e. where a *modo* is demanded to the donee) are not presumed accepted, and must, therefore, be accepted by their legal representatives in order to produce legal effects.

⁹³⁵ Art 952 PCC is odd in its effects, considering that the effects of the donation are produced at the moment of the offer, i.e. the right is immediately transferred/given to the donee. However, the donee only received

personal relationship with the donor⁹³⁶. Other considerations connected with the family may also be found in the PCC, where if a donee marries a new person without respecting the waiting period, he or she loses all donations received from the previous partner⁹³⁷; or if the donation is made to a married person, only that person benefits from the donation⁹³⁸. In addition, and bearing in mind the protection of the donee, if a donation is made to an underage person, their parents cannot administer any benefits received by donation against the donor's will or the donation may be made excluding the parents from administering the benefit received by donation⁹³⁹.

4.4.3. *Effects of a donating relationship*

The declaration of a bilateral juridical act as a donation in Portugal attracts different laws, such as the law of collation⁹⁴⁰, particular insolvency provisions⁹⁴¹, and tax law⁹⁴². However, because the present study aims to review the impact on the private relationship reached between parties by the declaration of a juridical act as a donation, only the contractual consequences of donation will be subject to critical review. The qualification of a bilateral juridical act as a donation bears three specific consequences: (i) the quality of the object is not as protected by the law as it is in respect of other juridical acts; (ii) specific rules regulate the non-compliance of the donee with the *modo* or any obligations undertaken by the donee; and (iii) revocation rights are provided to the donor, allowing, in some cases, one of the

juridical personality at the time of his birth (art 66 n 1 PCC). This means that the rights which are the object of the donation remain in limbo until the birth of the donee – they no longer belong to the donor, but have not yet been received by the donee either because he is still to acquire juridical personality.

⁹³⁶ Art 953 PCC. With the exception of remuneratory donations, able to be regarded as non-mandatory payment for services gratuitously received by the donor, under art 970 and art 975 b) PCC.

⁹³⁷ Art 1650 n 1 PCC.

⁹³⁸ Art 1729 n 1, art 1730 and art 1733 PCC.

⁹³⁹ Art 1888 n 1 (b) and (c) PCC.

⁹⁴⁰ Regulated under art 2104 to 2120 PCC.

⁹⁴¹ Regulated under the Portuguese Code of Insolvency and Recuperation of Companies (*Código da Insolvência e Recuperação de Empresas*), enacted by Decree Law 53/2004 of 18 March.

⁹⁴² As mentioned above, those who receive a gratuitous benefit under a contract of donation is required to declare it to the tax authorities and is, in principle, subject to payment of Stamp Duty (with the exceptions listed under art 6 Stamp Duty Code (enacted by Decree law 287/2003 of 12 November).

parties unilaterally to revoke the contract. These three consequences will be critically reviewed below.

4.4.3.1. Quality of the object

As mentioned above, the donor is not responsible for the obligations and limitations of the object of the donation, nor is the donor responsible for the malfunction of the subject-matter of the donation, unless he expressly undertook responsibility for the quality of the thing given to the donee or has proceeded with the intention to cause harm (*dolus*)⁹⁴³. On the contrary, after the contract of donation is concluded, the donor is only responsible for delivering the subject-matter of the donation in the same state as it was when the donation was accepted⁹⁴⁴. The burden of being liable for the malfunctioning or lack of quality of the subject-matter of the donation is therefore lifted from the donor and placed on the donee. To the donee a choice is given: he may either keep the object (and corresponding subject-matter) of the donation as it is, answering for any debts or liabilities it may bring attached to it, or he may request the annulment of the donation, motivated by the lack of quality of the object⁹⁴⁵.

The low protection of the donee's expectations on the quality of the object of donation may be explained by the gratuitous essence of donation: because donation is a gratuitous contract, where the donor is the only party withstanding a sacrifice, it would be unfair for the law to further extend such sacrifice. This can be compared with onerous contracts, regulated under the same section of the PCC⁹⁴⁶, with one such case being the contract of sale⁹⁴⁷. It is easy to argue that the protection conferred upon the quality of the object in a contract of sale is more comprehensive than the protection conferred upon a contract of donation⁹⁴⁸. On one side, while under a contract of donation the donee must receive the object of the contract as it was

⁹⁴³ Art 957 n 2 PCC, under which the bona fide donee may request to the court the annulment of the contract of donation based on the lack of quality of the subject-matter of the donation.

⁹⁴⁴ Art 955 n 1 PCC.

⁹⁴⁵ Art 957 n 2 PCC.

⁹⁴⁶ Under Book II – The Law of Obligations, PCC.

⁹⁴⁷ Regulated in the same section of the PCC as donation, under art 874 to 930 PCC.

⁹⁴⁸ This comparison is conducted taking into consideration the regulation of private contracts under the PCC, and excludes contracts which may be classified as consumer contracts (regulated, among others, under Decree Law 84/2008 of 21 May, amending Decree Law 67/2003 of 8 April, which gives effect to Directive 1999/44/CE of 25 May regarding the sale of consumer goods) or commercial contracts (regulated under art 270, 367, 368, 370, 469, 470, and 471 of the Portuguese Commercial Code (*Código Comercial Português*), enacted by the Letter of Law of 28 June 1888 and last amended by the Decree Law n. 62/2013 of 10 May.

at the time when the contract was entered into⁹⁴⁹, in a contract of sale, if no other guarantee is agreed in the contract, the buyer may request the repair or replacement of the purchased good within six months from purchase⁹⁵⁰. Furthermore, if the defect of the good is known after purchase but before delivery, the responsibility for the defect falls on the seller⁹⁵¹. On the other side, in a contract of donation, the donor does not answer for the defects or limitations of the thing or right given by the donation, except if he has undertaken such responsibility or acted with *dolus*⁹⁵². If any of these cases happen, the donee is only granted the right to require the annulment of the contract of donation to the courts⁹⁵³. It is therefore possible to argue that while the expectations of the buyer are protected by rights to replacement or reparation of the defaulted item, among others, the donee only holds the right to request the court to annul the donation. These differences, allow the conclusion that donation curbs the rights of the beneficiary in respect of the quality of the object concerned, when compared to onerous contracts under the PCC.

4.4.3.2. Limitation to the obligations undertaken by the donee

A consideration or *modo* may be requested from the donee under article 963(1) PCC, however, and as stated above, in order for the contract of donation to remain “gratuitous”, the sacrifice must remain with the donor. The qualification of a juridical act as a donation in Portugal further demands the existence of a spirit of liberality, where the donor gives with the intention to benefit the donee, and not to benefit himself. Due to the accessory position of the *modo* in the contract of donation⁹⁵⁴, Portuguese law of donation has imposed a limitation on the discharge of obligations undertaken by the donee. The limitation is placed upon the discharge of the obligation, and not upon the undertaking of the obligation itself. In this sense, the donee may oblige himself to pay more than he is receiving, but the donee is never liable for the discharge of an obligation of a pecuniary value greater than the pecuniary value of the benefit received⁹⁵⁵. For the same reason, if the *modo* requested from the donee is the payment of all or some debts of the donor, the donee is only liable for the payment of debts existing at the time when the donation was made or up to a pre-determined

⁹⁴⁹ Art 955 n 1 PCC.

⁹⁵⁰ Art 921 n 2 PCC. For sales under the PCC, and with disregard, for comparative purposes, of particular rules applicable to consumer contracts of sale or mercantile contract of sale, which are regulated outside of the PCC.

⁹⁵¹ Art 918 PCC.

⁹⁵² Art 957 n 1 PCC.

⁹⁵³ Art 957 n 2 PCC.

⁹⁵⁴ A Vaz Serra, “Responsabilidade patrimonial” (1958) *Boletim do Ministério da Justiça*, p 271.

⁹⁵⁵ Art 963 n 2 PCC.

pecuniary value for future debts⁹⁵⁶. It is therefore possible to conclude that the qualification of a juridical act as a donation limits the sacrifice asked from the donee. Because the donee is the only party regarded as the “beneficiary” of a contract of donation, his sacrifice can never be equal or superior to the sacrifice undertaken by the donor. On the contrary, he must always receive a benefit (by holding a right he did not hold before or by the removal of an obligation from his patrimony), which is more valuable or otherwise greater than any obligation undertaken by him.

4.4.3.3. Revocation

The definition of a juridical act as a contract of donation under Portuguese law also provides revocation rights⁹⁵⁷ to the donee in case of ingratitude of the donee⁹⁵⁸. Article 974 PCC, and following, define the cases when a contract of donation may be revoked by the donor⁹⁵⁹ due to ingratitude of the donee⁹⁶⁰. With regard to the legal effects of revocation, the PCC defines

⁹⁵⁶ Art 964 PCC.

⁹⁵⁷ The unilateral revocation by the donor used to be found, in the past, in other reasons, such as birth of new children of the donor, however, these rights were revoked in 1977 by Decree-law 496/77, of 25th November, which revoked art 971 PCC.

⁹⁵⁸ Art 970 PCC. Under art 975 PCC donation cannot be revoked by the donor (or his heirs) if it was made to in a wedding context (art 975 a PCC), if the donation is a remuneratory donation (art 975 (b) PCC) or of the donor has expressly forgiven the donee (art 975 (c) PCC). Under art 976 PCC revocation by the donor must be requested to court while the donee is alive. The donor’s heirs cannot start revocation proceedings, unless the donee has murdered the donor, in which case the donor’s heirs may start revocation proceedings up to one year after the death of the donor (art 976 n 3 PCC). The revocation proceedings must be brought to court within a year from the fact that legitimizes the revocation, or within a year from the moment when the donor has gained knowledge of this fact (art 976 n 1 PCC). In case of a court procedure started while the relevant party was alive, it continues and it is transferred to his heirs (art 976 n 2 PCC).

⁹⁵⁹ For comparison, please see the discussion on revocation above, at 3.2.5.1.

⁹⁶⁰ Under art 974 PCC, a right of revocation is granted to the donor when the donee becomes unable to inherit from the donor due to acts committed against him or when the donee has committed any acts justifying the disinheritance of the donee. Ingratitude of the donee is further defined under the Portuguese law of succession (art 2034 PCC, art 2036 PCC, art 2037 PCC, art 2038 PCC, and art 2166 PCC). Furthermore, under art 977 PCC the donor cannot renounce the right of revocation emerging from ingratitude of the donee. Furthermore, under art 2034 PCC: “a) The condemned as author or accomplice to murder, even if not against the person whose estate or against your spouse, descendant, parent, adopter or adopted; b) convicted of slanderous denunciation or false testimony against the same people, for the crime that corresponds imprisonment of more than two years, whatever their nature; c) that through fraud or coercion induced the person whose estate to make, revoke or amend the will, or that stopped him; d) What fraudulently subtracted, hidden, crippled, he falsified or suppressed the will, before or after the death of the person whose estate or took advantage of some of these facts”; Art 2036 PCC: “The action for the indignity statement can be brought within two years from the opening of the succession, or within one year after either of condemnation for crimes that determine whether knowledge of the indignity of causes provided in c) and d) of Article 2034”; Art 2037 PCC: “After the declaration of indignity, the donation is regarded as non-existent, and the donee is regarded as a bad faith possessor of the subject-matter of the donation”; Art 2038 PCC: “1. The donor may expressly rehabilitate the donee by testament or deed. 2. Non-express rehabilitation is possible if at the time when the donation is made, the donation knows the fact leading to the declaration of indignity and still proceeds with the donation”; and art 2166 PCC: “Disinheritance happens when a) the donee has been convicted of a felony committed against the person, property or honour of the donor, or his spouse, or a descendant, parent, adopter or adopted, if the crime is punishable with six months or more of imprisonment; b) the donee is convicted of false testimony

that all effects produced by a donation will revert to the moment when the donor started court proceedings, aiming to revoke the donation⁹⁶¹ and all goods must be returned to the donor (or his heirs) as they are in the present⁹⁶². In this case, if the subject-matter of the donation is alienated by the donee or his heirs, the donor must be compensated in the same amount as the pecuniary value of the subject-matter at the moment when it was alienated (plus legal interests counting from the moment when court proceeding started)⁹⁶³. The rights acquired/held by third parties before the starting of the court proceedings are protected and will not be affected by the declaration of revocation of the donation⁹⁶⁴.

4.5. Regulation of market donations

Donation is legally defined in Portugal as “contract by which a person, acting with a spirit of liberality, and with prejudice to his own patrimony, gives gratuitously an asset or a right, or undertakes an obligation, for the benefit of the counterparty”⁹⁶⁵. Therefore, donation may only emerge from one specific juridical act – contract of donation⁹⁶⁶ - where one of the parties benefits at the expense of the other. When this contract is entered into between family members, often motivated by strong feelings such as love or devotion, donation has the potential to impoverish the donor to a degree often unacceptable by the community. On the contrary, because the donee receives a benefit gratuitously, there is a chance of abuse by the donor, who may take advantage of a thankful donee. For this reason, Portuguese law of donation regulates the donating relationship with particular emphasis on donations motivated by strong feelings: those entered into between family members. As a demonstration, several provisions have been included in the law of donation in order to protect the family (as a whole, or family members in particular), such as those forbidding donations *mortis causa*⁹⁶⁷, which protect the heirs’ expectations against acts of the *de cuius*;

against the donor; and c) the donee has, without a good cause, refused to provide assistance to the donor or his spouse”.

⁹⁶¹ Art 978 n 1 PCC.

⁹⁶² Art 978 n 2 PCC.

⁹⁶³ Art 978 n 3 PCC.

⁹⁶⁴ Art 978 PCC.

⁹⁶⁵ Art 940 n 1.

⁹⁶⁶ The definition of a donation as a non-contractual juridical act in civil law jurisdictions is supported by a minority of legal writers, which write against the legal definition of donation on their relevant civil codes, one such case being Brazilian legal writer N Diogenes, *A doação não é contrato* (1947) or the notes on Portuguese law of donation, when compared to Roman law, by A Santos Justo, “A Doação no Direito Romano, Breve referência ao Direito Português” (2001) *Estudos em Homenagem a Cunha Rodrigues*, II, p 238.

⁹⁶⁷ In particular rules regarding the ingratitude of the heir, which by action of art 974 of the PCC are directly applicable to donation.

the protection of vulnerable donors against those who may abuse a personal relationship with the donor⁹⁶⁸; the existence of a waiting period, which if not respected causes the loss of all donations received from their previous partner⁹⁶⁹; or the protection of the more vulnerable partner, by stating that if a donation is made to a married person, only that person benefits from the donation⁹⁷⁰. The existence of a special regime applicable to donations in view of the wedding⁹⁷¹, or donations between married parties⁹⁷², as well as the exclusion of socially relevant donations from being regulated under the law of donation⁹⁷³, demonstrates the interference of family-related considerations in the law of donation.

These family-related considerations softened somewhat in 1977, when the provisions regulating the revocation of donation based on the birth of a new child to the donor were repealed⁹⁷⁴. In other words, Portuguese law of donation has taken a step towards the promotion of security in 1977 by making clear that no donations will be unilaterally revoked by the donor based on the birth of a new child⁹⁷⁵. But other rules, which may conflict with principles of security and confidence, still exist in Portuguese law of donation. These rules will be critically reviewed below in order to assess their suitability to regulate donations made in multiple contexts and in particular in a market context. This critical review will be conducted with the aim of assessing the security and confidence provided by Portuguese law of donation. It will begin by looking at the formalities demanded by Portuguese law of donation for the creation of a donation in Portugal, to be followed by assessment of the

⁹⁶⁸ Art 953 PCC.

⁹⁶⁹ Art 1650 n 1 PCC.

⁹⁷⁰ Art 1729 n 1, art 1730 and art 1733 PCC.

⁹⁷¹ Art 1753 PCC.

⁹⁷² Art 1761 to 1766 PCC.

⁹⁷³ As mentioned before, Portuguese law of donation distinguishes between donations and gifts given following a social usage (*donativos*) under art 940 n 2 PCC. The firsts are regulated under the law of donation, while the second are not regulated under the law. This separation between what donations, which are regulated under the Law, and other gratuitous acts, which are not follows the idea that “acts of kindness” should not be regulated under the law because they are already (and/or should only be) regulated under other normative orders such as moral or religion.

⁹⁷⁴ Under Decree-Law n. 469/77 of 25th November, art 971, 972 and 973 PCC were revoked, and art 970 PCC was amended, in order to only allow the revocation of donation by unilateral act of the donor founded in the ingratitude of the donee.

⁹⁷⁵ A topic which is also covered in Chapter 3 Scotland, at 3.2.5. *Pure donations and donations sub modo*; and Chapter 5 France, at 5.5.1.2. *Revocation*.

protection of security and the expectations of the three parties affected by a donation: the donor, the donee and third parties.

4.5.1. Formalities

Article 947 PCC distinguishes between formalities to be followed by donations which transfer immoveable property rights and other donations. If the donation aims to transfer the property of an immoveable to the donee, this donation must take the form of a deed or be made in writing and the parties' signatures must be authenticated⁹⁷⁶. If, however, the contract of donation aims to transfer the ownership of moveable goods, create or transfer any other rights or create an obligation on the donor, these donations may be adopted by physical/manual delivery and acceptance alone – as long as possession of the subject-matter of the donation passes to the donee - or, as an option⁹⁷⁷, may be adopted by private written document⁹⁷⁸. With regard to legal persons, they may donate and receive donations under Portuguese law, within the boundaries set by their articles of association⁹⁷⁹. However, if a donation is made to an association without legal personality, the donation is made to all the members of the association. The only exception is where the donor has decided that the donation will only produce effects if the association gains legal personality⁹⁸⁰.

These formalities for the creation of a contract of donation are essential to the promotion of security, not only for the parties, who relied on the formalities followed by their counterparty to convey their will to donate/accept the donation, but also for the community at large, where third parties are able to trust that relevant rights were lawfully and definitively transferred or granted to the donee. Because formalities are able to create security and to demonstrate that

⁹⁷⁶ Art 947 n 1 PCC.

⁹⁷⁷ Art 947 n 2 PCC.

⁹⁷⁸ Or when taking the form of a certified private document (under Decree-law 116/2008, of 4th July).

⁹⁷⁹ As mentioned above, companies may only act, either gratuitously or in view of profit, within the boundaries set by their articles of incorporation (their "*objecto social*" or social object of the company), as defined by art 6 of the Business Organisations Code (*Código das Sociedades Comerciais*).

⁹⁸⁰ Art 197 PCC.

the donee now holds a relevant right, third parties are able to enter securely into transactions connected to the right received by the donee without fear of future acts of the donor.

4.5.2. *Protection of the parties*

4.5.2.1. Need for acceptance

As mentioned before, donation is defined as a bilateral juridical act (a contract) under Portuguese law⁹⁸¹, which means that the wills of both parties need to come together in order for a donation to be created. This also means that the celebration of a contract of donation is often regarded as the outcome of an offer made by the donor, followed by an acceptance of the donee, which combine to create a contract of donation⁹⁸². The definition under Portuguese law of the formation of a contract, as an offer followed by an acceptance, has long been disputed by Portuguese legal writers⁹⁸³. These writers regard contracts as *any* agreement where the wills of the parties converge for the production of a relevant juridical effect⁹⁸⁴. Nevertheless, the PCC regards the formation of contracts as *offer plus acceptance*, and in the case of contracts of donation, the donor is free to revoke the offer to donate at any time⁹⁸⁵, as long as this revocation occurs before acceptance⁹⁸⁶. Bearing in mind that the offer made by the donor does not expire if no deadline for acceptance is set, acceptance is still needed for the creation of a contract of donation. It may be argued that the rule of need for acceptance is only tempered by a few exceptions, where acceptance is presumed by the law⁹⁸⁷, therefore creating a valid donation at the moment when the offer is known (or

⁹⁸¹ Art 940 n 1 PCC.

⁹⁸² Following the wording of art 969 PCC and others in the PCC.

⁹⁸³ C Almeida, *Contratos I* (2015) Chap II.

⁹⁸⁴ For example, when a contract is entered into by a single act, where both parties participate, issuing only one joint declaration, as happens in deeds and other written documents.

⁹⁸⁵ Art 969 PCC.

⁹⁸⁶ This particular rule is only applicable to contracts of donation, and goes against the generic rule on offers, comprised under art 230 n 1 PCC, where it is stated that “except if stated otherwise, the offer to contract is irrevocable after being received by the counterparty or after he gains knowledge of it”.

⁹⁸⁷ C Gonçalves, *Dos Contratos em Especial* (1953) 3, p 224; M Baptista Lopes, *Das Doações* (1970) p 10.

received) by the donee or his representatives. For example, it is possible to find donations made to adults lacking the capacity to contract⁹⁸⁸ or to unborn donees⁹⁸⁹.

With regard to donations in a market context, and despite exceptions, the need for acceptance of the donee protects the donee from receiving benefits (or holding rights) without his consent. This protection is essential for the protection of donees against any responsibility created by the transfer of real rights to them (which include liability for damages caused by property, taxes or fees to be paid, among others). The need for acceptance is also relevant in respect of donations *sub modo*. Under Portuguese law of donation, a *modo* may be requested to the donee⁹⁹⁰, but the donee is only liable for the fulfilment of the consideration or *modo* up to the pecuniary value of the benefit received⁹⁹¹. Furthermore, if the requested *modo* is the payment of all or some debts of the donor, the donee is only liable for the payment of debts existing at the time when the donation was made and the donee is only liable for the payment of future debts if its pecuniary value is determined at the time of the donation and it is specified in the contract of donation⁹⁹².

It is therefore possible to conclude that, in respect of donations in a market context, it is important for the donee to have the right to accept or refuse a donation, in particular those with a *modo*, and that this right is granted to the donee by Portuguese law of donation. This right is particularly relevant in donations which create obligations on the donee, considering that the donor, his heirs, or any interested parties may demand payment or discharge of any obligations undertaken by the donee in a contract of donation⁹⁹³. As an option, and only

⁹⁸⁸ Art 951 PCC, where pure donations are presumed accepted and donations *sub modo* may only be accepted by their legal representatives.

⁹⁸⁹ Under art 952 PCC, donations made to unborn donee are valid and presumed accepted if their parents are alive and determined at the time of the offer made by the donor.

⁹⁹⁰ Art 963 n 1 PCC.

⁹⁹¹ Art 963 n 2 PCC.

⁹⁹² Art 964 PCC.

⁹⁹³ Art 965 PCC.

when this right emerges from the contract of donation, the donor or his heirs may refer the resolution of the donation to court if the donee fails to comply with the *modo*⁹⁹⁴.

4.5.2.2. Revocation

The rules on the revocation of donations are based on a personal relationship created between donor and donee⁹⁹⁵. It is therefore necessary to enquire if these rules, which apply to all contexts where donation is made, are fit for the regulation of a donation which is made in a market context. As mentioned above, article 974 PCC, and following, define the cases when a contract of donation may be revoked by the donor, due to the ingratitude of the donee⁹⁹⁶. When used by the donor, the donation will revert to the moment when the donor started court proceedings, aimed at revoking the donation⁹⁹⁷ and all goods must be returned to the donor (or his heirs) as they are in the present⁹⁹⁸. The uncertainty caused by granting unilateral rights of revocation to the donor is, however, tempered by the rules on remuneratory donations. The definition of a donation as remuneratory has consequences for the parties, one such case being donations made to doctors, nurses or priests by their patients, which may be validly accepted when classified as remuneratory for the payment of medical care or spiritual aid services⁹⁹⁹.

As an example, when a donation is defined as remuneratory, and the object of the donation is the transfer of real rights that did not belong to the donor, the donation is not valid as a rule¹⁰⁰⁰. It does, however, remain valid for a *bona fides* donee who received a remuneratory donation, meaning that the donor has the obligation to compensate the donee¹⁰⁰¹. The pecuniary value of the subject-matter of the donation will be taken into consideration when calculating the amount of damages to be paid to the donee when the donation is remuneratory¹⁰⁰². Remuneratory donations also have consequences for the parties in the case

⁹⁹⁴ Art 966 PCC.

⁹⁹⁵ Art 949 PCC.

⁹⁹⁶ Under art 974 PCC, a right of revocation is granted to the donor when the donee becomes unable to inherit from the donor due to acts committed against him or when the donee has committed any acts justifying the disinheritance of the donee. Ingratitude of the donee is further defined under the Portuguese law of succession (art 2034 PCC, art 2036 PCC, art 2037 PCC, art 2038 PCC, and art 2166 PCC). Under art 977 PCC the donor cannot renounce the right of revocation emerging from ingratitude of the donee.

⁹⁹⁷ Art 978 n 1 PCC.

⁹⁹⁸ Art 978 n 2 PCC.

⁹⁹⁹ Art 953 PCC.

¹⁰⁰⁰ Art 956 n 1 PCC.

¹⁰⁰¹ Art 956 n 2 (c) PCC.

¹⁰⁰² Art 956 n 3 PCC.

of revocation based on the ingratitude of the donee¹⁰⁰³, where donations cannot be revoked by the donor (or his heirs) if classified as remuneratory¹⁰⁰⁴. It may be argued that, in a market context, donations may often be considered to be remuneratory donations, in particular when donors thank the provision of gratuitous services with a donation. These donations are not based on a pre-existent obligation emerging from the gratuitous service received by the donor. On the contrary, it is freely made and, because it is classified as remuneratory¹⁰⁰⁵, the donee has greater protection against unilateral revocation acts of the donor than he would have under another type of donation.

4.5.2.3. The value of the object

Gino Gorla's method provides a useful means of remaining within the boundaries of legal debate: "we must seek to ascertain whether the intent to obligate oneself (civil law) or that of giving a consideration (common law) in exchange for an impossible thing may be considered a serious intent, and if the interest of the creditor is worthy of legal protection"¹⁰⁰⁶. The link between the economic value of the object and the legal protection given to the transaction (where transactions with a small economic value are often disregarded by the law, and labelled as legal bargains¹⁰⁰⁷) does not have a direct impact on Portuguese law of donation. Donations are, in principle, protected under Portuguese law as long as they represent a legitimate interest of the parties¹⁰⁰⁸. It may be argued that the protection conferred upon the parties in a market context must not be linked to the pecuniary or economic value of the benefit received by the donee and if a *modo* is required from the

¹⁰⁰³ Art 970 PCC. Ingratitude is defined under art 974 PCC as all cases when "the donee becomes unable to inherit from the donor due to acts committed against him or he has committed other acts justifying the disinheritance of the donee". Under art 975 PCC, donation cannot be revoked by the donor (or his heirs) if it was made to in a wedding context (art 975 (a) PCC), if the donation is a remuneratory donation (art 975 (b) PCC) or of the donor has expressly forgiven the donee (art 975 (c) PCC). Under art 976 PCC, revocation by the donor must be requested to court while the donee is alive. The donor's heirs cannot start revocation proceedings, unless the donee has murdered the donor, in which case the donor's heirs may start revocation proceedings up to one year after the death of the donor (art 976 n 3 PCC). The revocation proceedings must be brought to court within a year from the fact that legitimizes the revocation, or within a year from the moment when the donor has gained knowledge of this fact (art 976 n 1 PCC). In case of a court procedure started while the relevant party was alive, it continues and it is transferred to his heirs (art 976 n 2 PCC). Finally, under art 977 PCC, the donor cannot renounce on the right of revocation emerging from ingratitude of the donee.

¹⁰⁰⁴ Art 975 (b) PCC.

¹⁰⁰⁵ Art 941 PCC.

¹⁰⁰⁶ G Gorla, "The Theory of Object of Contract in Civil Law: A critical analysis by means of the comparative method" (1953-1954) *Tulane Law Review*, p 457.

¹⁰⁰⁷ Following the legal concept of legal bargain, and in particular the rationale of bargain consideration in Common law jurisdictions, H E Willis, "Rationale of Bargain Consideration" (1938) *Georgetown Law Review*, p 414-423.

¹⁰⁰⁸ M Palma Ramalho, "Sobre a Doação Modal" (1990) *O Direito*, p 730.

donee, this *modo* is enforceable if representing a legitimate interest of the donor. But it is also necessary to notice that the *modo* may only be demanded from the donee, up to the pecuniary value of the benefit received¹⁰⁰⁹. This limit represents an important protection for the donee, considering the importance of the pecuniary value of transactions in a market context.

4.5.2.4. Samples and small gifts

As mentioned above, a doubt exists under Portuguese law of donation as to how to classify a gratuitous juridical act entered into in accordance with social usage: should it be regulated under the law of donation, or should it qualify as a gift (*dádiva*), where no legal regulation would apply to this gratuitous act? These gifts, which elude the law, are defined by their social expectation (*usos sociais*)¹⁰¹⁰. Different acts have been classified by the Portuguese courts as gifts (*dádivas*), such as small gifts for the promotion of sales, rewards to employees and small gifts to charities or beggars¹⁰¹¹. But leaving aside the qualification of an agreement, even if gratuitous, to the casuistic assessment of the courts¹⁰¹², creates a high degree of uncertainty, in particular in a market context. Bearing in mind that Portugal is a civil law country, and court decisions do not create a precedent¹⁰¹³, it is possible to argue that this would create uncertainty and insecurity, in particular with regard to non-Portuguese market players, who are not used to the Portuguese cultural and social norms of the Portuguese community. This security is therefore particularly relevant in an EU single market context. Although it is possible to argue that the rules on objective product liability of the producer¹⁰¹⁴ balance the lack of regulation provided to gifts made according to social usage¹⁰¹⁵, it is also important to notice that these rules fail to regulate the full extent of the relationship created between the parties¹⁰¹⁶. Therefore, it is possible to conclude that the existence of a subjective criterion for the disqualification of a gratuitous act as a donation under Portuguese law, based on social usage, creates an uncertainty which is contrary to the principles of security in the market. It would be more appropriate to classify any transaction

¹⁰⁰⁹ Art 963 n 2 PCC.

¹⁰¹⁰ Art 940 n 2 PCC.

¹⁰¹¹ Decision of the Portuguese Supreme Court n 2380/05.2TBOER.S1, of 27/01/2010.

¹⁰¹² Portugal is a civil law country, and therefore, court decisions do not create precedent. Art 1 PCC.

¹⁰¹³ Art 1 and 4 PCC.

¹⁰¹⁴ Decree Law 131/2001 of 24 April, which transposes Directive 1999/34/CE of 10 May and Decree Law 383/89 of 6 November, which transposes Directive 85/374/CEE of 25 July.

¹⁰¹⁵ Art 940 n 2 PCC.

¹⁰¹⁶ Art 1 of the Decree Law 131/2001 of 24 April, according to which “the producer is responsible, regardless of guilt, of any damages caused by products he has placed in the market.”

occurring in the market as a donation. This would provide security to all parties involved in the gratuitous transaction, as well as granting to the beneficiary the, albeit limited, protection granted by the law of donation to the quality of the object, among others.

4.5.3. Protection of third parties

On one side, third parties may be defined as those parties which are potentially affected by the donation (such as the creditors of the donor/donee or the potential heirs of the donor). As mentioned above, donations are revocable under article 970 PCC. These revocation rights may potentially affect rights and expectations of third parties, who interact with the donee in a market context¹⁰¹⁷. If a donation is revoked, all effects produced by the relevant donation will revert to the moment when the donor started court proceedings¹⁰¹⁸ and all benefits must be returned to the donor or his heirs in its present state¹⁰¹⁹. Revocation rights granted to the donor do not, as a rule, affect third parties' rights, if any donated rights are then further alienated by the donee or his heirs. In this case, the donee (or his heirs) must compensate the donor to the same pecuniary value as the rights had at the time when they were alienated (or at the time when returning the rights became impossible) plus legal interest counting from the moment when court proceedings began¹⁰²⁰. The rights acquired/held by third parties before the beginning of the court proceedings are not affected by the declaration of revocation of the donation, therefore remaining in the patrimony of the relevant third parties¹⁰²¹.

4.5.4. Protection of the community

4.5.4.1. Remuneratory donations

The community may be conceptualised, for the present purposes, as the group of people subject to a relevant law of donation, and which is, therefore, directly affected by it. It may be argued that the existence of specific regulations guiding remuneratory donations are good for the increase of security in donations made in a market context as they protect donations

¹⁰¹⁷ Either by receiving the relevant right by subsequent donation or by onerous juridical act, or by expecting the payment of debts owed by the donee with the benefits received by donation.

¹⁰¹⁸ Art 978 PCC.

¹⁰¹⁹ Art 978 n 2 PCC.

¹⁰²⁰ Art 978 n 3 PCC.

¹⁰²¹ Art 978 PCC.

made as non-mandatory payment of services received by the donor. This protection is conferred against acts of unilateral revocation by the donee. It should be noted that it is also possible to assign any rights received by donation in Portugal, a faculty which promotes efficiency in the market context, and facilitates the circulation of property in both, the internal and in the European Common Market¹⁰²². However, donations made in a market context raise issues such as the security of those who enter into market transactions and confidence that the quality of what was received complies with the quality stated in the contract.

4.5.4.2. Safety and quality of the subject-matter

The quality of the object and subject-matter of donation is regulated under article 957 PCC. Under the PCC, the donor is not responsible for the obligations or limitations of the rights donated, nor is he responsible for the defects of the subject-matter of the donation. From a safety perspective, this means that, as a rule, the donor is not responsible for the defects or harm caused by the subject-matter of the gift to the donee. Nor, from the perspective of the quality of the object of the donation, is the donor responsible for obligations which are attached to the object of the donation – these pass, along with the relevant right, to the donee. Furthermore, the donor is not responsible for the malfunction of the subject-matter of the donation. If the donor is the producer of the good, then he may be found liable under Decree-law 383/89, as amended, which has transposed the Council Directive 85/374/EEC into the Portuguese jurisdiction. This objective liability for any harm caused by a faulty good is only undertaken by the donor, under Article 2 if the donor is also the manufacturer of the finished product, the producer of any raw material or the manufacturer of a component part. If any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer or if he has imported the product into the EU in view of

¹⁰²² Art 962 PCC.

profit; or if he is the supplier of the product cannot be named, then the donor is also liable under Decree-law 383/89.

This lack of responsibility of the donor, under the PCC, for any harm caused by the subject-matter of the donation, or its malfunctioning, contrasts with the above-mentioned objective responsibility of producers for faulty items¹⁰²³, or the responsibility of producers and sellers in consumer contracts¹⁰²⁴. In fact, under the PCC, a donor is only responsible for the quality and safety of the subject-matter of the donation if he undertook responsibility for the goods donated in the contract of donation, or if he donated with *dolus*, therefore aiming to use the donation do harm to the donee or others¹⁰²⁵. It may therefore be argued that the absence of rules on product liability applicable to donations compromises the fitness of Portuguese law of donation, in its current form, for the purpose of regulating donations made in a market context.

4.6. Interim conclusion

Donation as a contract. It is possible to conclude that a donation is defined as a contract under Portuguese law of donation, which always comprises the following cardinal elements: (i) it is a bilateral juridical act: donation is always defined as a contract under Portuguese law; (ii) made with a spirit of liberality, often defined as *animus donandi*; (iii) causing sacrifice to the donor, who must see his patrimony reduced after the donation; (iv) and benefiting the donee; (v) in a gratuitous manner, which is defined by the lack of correspondent benefit being provided to the donor by the donee; and finally, (vi) being a contract where the provision of the benefit is made *inter vivos*, meaning that all effects of the donation must be produced while both contracting parties are alive.

Legal effects of donation. Under Portuguese law of donation, several typical effects are produced by a contract of donation, those being; (i) the transfer of the property, or otherwise transfer of the right/creation of the benefit to the donee; (ii) the creation of the obligation to deliver the subject-matter of the donation; and/or (iii) the undertaking of an obligation by

¹⁰²³ As mentioned above the rules on Objective Product Liability are found in Portugal under Decree Law 131/2001 of 24 April.

¹⁰²⁴ As mentioned above, the quality of the object in consumer contracts is regulated under Decree Law 84/2008 of 21 May, as amended by Decree Law 67/2003 of 8 April.

¹⁰²⁵ Art 957 n 2 PCC. In this particular case, the *bona fide* donees may request to court the annulment of the contract of donation.

the donor, if this is the object of the contract of donation. Furthermore, different types of donation exist under Portuguese law of donation, a distinction between types of donation with consequences, in particular in respect of the protection of the donee against revocation rights.¹⁰²⁶

Fitness for purpose. Among others, the need for acceptance and the protection against revocation rights for remuneratory donations have been identified as able to protect donations in the market. In particular, the need for acceptance protects against insecurity caused by otherwise legally binding unilateral acts of the donor. However, the existence of legal powers of revocation may cause distrust and disturb confidence in the market – because donations which are valid may be unilaterally revoked by the donor. The biggest problems, however, faced by donations made in a market context in Portugal are those connected with the safety and quality of the subject-matter of the contract. In that context, a donor is only responsible for the quality and safety of the subject-matter of the donation if he undertook responsibility for the goods in the contract of donation, or if he donated with *dolus*, intentionally causing harm to the donee or others¹⁰²⁷. The absence of rules on product quality and liability applicable to donations made particularly in a market context compromises the fitness of Portuguese law to regulate donations made in a market context. Finally, it is also important to mention that the exclusion of social gifts from being regulated under the law of donation opens the door for the definition of samples or other small gifts given in view of the profit as *donativos*. The exclusion of these gifts from being regulated by the law, and leaving it to be regulated by religious or moral norms, is not suitable for a market logic, in particular when considering the European Common Market, where parties from different religions, cultures or backgrounds interact with each other. The relationship of these parties should not be regulated by Portuguese social norms because these norms are unknown to foreign parties. On the contrary, these gratuitous transactions should be regulated under the law, a set of rules which promotes equality and bring security to the market.

¹⁰²⁶ These types are: (i) pure donations; (ii) conditional donations; (iii) remuneratory donations; (iv) donations in view of the wedding; and (v) donations between married parties/spouses.

¹⁰²⁷ Art 957 n 2 PCC. In this particular cases, the *bona fide* donees may request to court the annulment of the contract of donation.

Chapter 5 France

5.1. Introduction

The present chapter will shed light on the French law of donation with the objective of assessing its suitability to regulate donations made in a market context. This critical review of the French law of donation will have as its main focus the regulation of donation found in the French Civil Code (“FCC”), which will be studied together with the review of relevant legal writings on donation and relevant decisions of the French courts, aiming the assessment of the fitness of French law of donation to regulate donations in the market. The assessment of the fitness for purpose of French law of donation will analyse if the need for security and the promotion of confidence are overshadowed by family-related policies in France or if, on the contrary, any family considerations undertaken by the French law of donation are also suitable to regulate gratuitous juridical acts (in particular donations) in the market context.

This chapter is the last of three chapters which aim to review different European laws of donation, with the objective of using them as case studies of how donations made in a market context are being regulated in Europe. The critical review of French law will primarily rely on the critical analysis of literature and philosophical ideas of French writers, considering that these sources are the most suitable to provide a better understanding of French law of donation as it is today. This study builds on the increase of commercial exchanges between European countries, an area which is regarded as key to a prosperous EU¹⁰²⁸. The present chapter is therefore relevant to the overall thesis because it investigates the suitability of French literature and philosophical ideas to influence the legal regulation of donations in the market context.

5.2. Placement of donation in French private law

5.2.1. *The French writers’ perspective*

French literature and philosophical ideas have an important impact on the development of law in Europe. It is therefore important to understand which philosophical ideas have

¹⁰²⁸ Beginning with the reviewing the Treaty of Rome in 1957.

contributed to the concept of donation as it is today in France. French legal writers who are devoted to the study of donation may be divided into two groups: those who distrust gratuitous juridical acts, and those who regard gratuitous juridical acts as normal acts, i.e. acts of everyday life. The first group of legal writers is composed of those who distrust donation¹⁰²⁹, while the second group of legal writers regard gratuitous juridical acts in general, and donation in particular, as one of the most common instruments provided by the law to circulate property¹⁰³⁰. The debate between these two factions can be used to demonstrate the existence of a prejudice against donation in France, which has often led to the creation of rules which are intended to protect the donor, his family and his creditors.

The existence of a prejudice against donation has the effect of creating policies wishing to undermine what is perceived as an unbalanced relationship. By looking at the parties as not equals, the French law of donation provides the donor (his family and his creditors) with rights aimed at protecting the donor from his own acts or these other parties from the donee, who is here regarded as in a privileged position¹⁰³¹ because he has received a benefit gratuitously. One such case is the right to revocation¹⁰³², which as will be critically reviewed below, provides the donor with the right to unilaterally revoke donation under certain circumstances¹⁰³³.

Legal writers who regard gratuitous acts as suspicious tend to describe donation as the manifestation of an act of love¹⁰³⁴. Guided by strong feelings, the actions of the donor are regarded as out of his control, therefore producing abnormal results: a gratuitous (juridical) act is produced, often economically impoverishing the donor. This willing impoverishment of the donor is classified as abnormal, because such legal writers do not understand why someone, in his right mind, would want to benefit another when such an act has no

¹⁰²⁹ P Malaurie, *Les successions, Les Libéralités* (5th ed 2012); A Foubert, *Le don en droit* (2007); D Guével, *Droit des successions et des libéralités* (2nd ed 2010); G Pacilly, *Le Don Manuel* (1936); P Delnoy, *Les libéralités et les successions, Précis de droit civil* (3rd ed 2010); or C M Mazzoni, “Le don, c’est le drame. Le don anonyme et le don despotique” (2004) *RTD civ.*

¹⁰³⁰ A Seriaux, *Manuel de droit des successions et des libéralités* (2003).

¹⁰³¹ As it will be demonstrated below, the privileged position of the donor is defined as such considering that he is provided with a gratuitous benefit, as well as benefiting from acts of the donor who may not be in his right mind, or who may have acted against his best interest.

¹⁰³² Art 953 FCC: “*La donation entre vifs ne pourra être révoquée que pour cause d’inexécution des conditions sous lesquelles elle aura été faite, pour cause d’ingratitude, et pour cause de survenance d’enfants*”.

¹⁰³³ Art 955 FCC: “*La donation entre vifs ne pourra être révoquée pour cause d’ingratitude que dans les cas suivants : 1° Si le donataire a attenté à la vie du donateur ; 2° S’il s’est rendu coupable envers lui de sévices, délits ou injures graves ; 3° S’il lui refuse des aliments.*”

¹⁰³⁴ A Caubet, *L’institution contractuelle ou donation de biens à venir* (1911) p 15.

correspondent (legal or economic) benefit for the donor. Benefiting other(s) with no correspondent gain for the benefactor happens, according to this faction of legal writers, for one main reason: the will of the donor is not free, but formed under the influence of “benevolence”, “illusions produced by one’s self-esteem”, the “seductions of the passion”, or “obsession”¹⁰³⁵. The presumption that donations are always connected to powerful feelings explains why many legal writers¹⁰³⁶ define donation as abnormal¹⁰³⁷, “dangerous, suspicious and fragile”¹⁰³⁸. For these writers, the main danger of a donation is, therefore, the lack of self-control of the donor. Because he is acting upon very strong feelings, his actions are not entirely free, measured and rational.

Arguments for the qualification of donation as “abnormal”, “dangerous”, and “suspicious” must therefore be reviewed in order for us to better understand the underlying prejudice of French legal writers towards donation. This analysis will cover several French legal writers, as well as Henri de Page, a Belgian jurist, judge and university professor, widely known by his 13-volume *Traité élémentaire de droit civil belge* (1950), the leading textbook on Belgian civil law¹⁰³⁹, due to his notorious influence on the subjects of liberalities, donation and contract law in continental Europe in general, and in France in particular¹⁰⁴⁰. Among the several French legal writers reviewed below, the teachings of Didier Guével, a contemporary French jurist and university professor¹⁰⁴¹, will be critically reviewed in particular, because of his influence in the most recent doctoral thesis and writings on succession and donations in France¹⁰⁴².

¹⁰³⁵ M Colin, “Etude de jurisprudence et de législation sur les dons manuels”, *Revue pratique de droit français* (1833) p 194: “Lorsqu’il donne, en effet, l’homme ne cède pas toujours seulement aux « entraînements d’un bon cœur », [mais aussi aux] « illusions de l’amour propre », aux « séductions des passions », et aux « obsessions » des gens intéressés”.

¹⁰³⁶ P Malaurie, *Les successions, Les Libéralités* (5th ed 2012) p 146: “Les libéralités exercent un rôle social très particulier, car étant à titre gratuit, elles ne sont pas, à la différence des actes à titre onéreux, muées par la recherche du profit.”; J Levy, A Castaldo, *Précis d’Histoire du droit civil* (2002); A Foubert, *Le don en droit* (2007); D Guével, *Droit des successions et des libéralités* (2nd ed 2010); G Pacilly, *Le Don Manuel* (1936); P Delnoy, *Les libéralités et les successions, Précis de droit civil* (3rd ed 2010); D Guével, “La gratuite intéressée: oxymore d’avenir?”, *Mélanges en l’honneur du professeur F. Goubeaux* (2009) p 229; and C M Mazzoni, “Le don, c’est le drame. Le don anonyme et le don despotique”, *RTD civ.* (2004) p 701.

¹⁰³⁷ A Foubert, *Le don en droit* (2007) p 4.

¹⁰³⁸ J Levy, A Castaldo, *Précis d’Histoire du droit civil* (2002) p 1245.

¹⁰³⁹ E Holthöfer, “De Page, Henri” (2nd ed 2001) *Juristen: ein biographisches Lexikon*, p 163.

¹⁰⁴⁰ Henri de Page is widely quoted by European lawyers writing about liberalities, donation and contract law, one such case is A Foubert, *Le don en droit* (2007).

¹⁰⁴¹ In particular, D Guével, *Droit des successions et des libéralités* (2nd ed 2010); D Guével, “La gratuite intéressée: oxymore d’avenir?” (2009) *Mélanges en l’honneur du professeur F. Goubeaux*.

¹⁰⁴² See as examples: A Foubert, *Le don en droit* (2007); N Peterka, *Les Dons Manuels* (1999); C Larroumet, *Droit Civil, Les Obligations, le Contrat* (5th ed 2003) III; P Malaurie, L Aynes, P Gautier, *Les contrats spéciaux* (5th ed 2011); or M Grimaldi (e), *Droit Patrimonial de la Famille* (2011).

5.2.1.1. Abnormal

Gratuitous juridical acts in general, and donations in particular, are classified as “abnormal” by French legal writers who presume that all interventions in the market / society are made for the purpose of economic profit. To clarify their views on the abnormality of donation, it is common for those legal writers to define donations as acts which are (only) performed and/or expected within the family – i.e. only people with a common genetic heritage or linked by emotional bonds would enter into gratuitous agreements. One such case is Henri de Page¹⁰⁴³, who states that donations are dangerous and abnormal, after considering that a “pure” donation contradicts what he sees as “normal” in a typical social relationship. De Page further explains that a “liberality is inspired by other reasons [which are not benevolent], and is based on a will which is not the will to donate. It is nothing but a way” to achieve something else¹⁰⁴⁴.

Because donations are not deemed as “normal” in the social context, they are even less expected in a market context and, for this reason, De Page claims donations to be an “extremely rare act”¹⁰⁴⁵. Bearing in mind the potential abnormality of donations, Henri de Page further states that “on the other side, even if a liberality is found in its pure form, i.e., it is only inspired by the will of the donor to gratify the donee, the liberality represents great danger”, and therefore protection needs to be conferred upon (a) the donor himself; (b) his family; and (c) his creditors¹⁰⁴⁶. A donation is therefore defined by De Page as abnormal because, in his view, donation is mainly a way to achieve something else – a vehicle for non-obvious intentions leading to unpredictable consequences. If the donor does not expect to achieve an objective, solely wishing to reward a donee for something he did, this is also regarded as distant from legal and social normality, in particular in the market context: the donor is impoverishing himself without previous legal obligation to do so. For this reason,

¹⁰⁴³ H De Page, *Traité élémentaire de droit civil belge* (3rd ed 1962) I, p 55.

¹⁰⁴⁴ H De Page, *Traité élémentaire de droit civil belge* (3rd ed 1962) I, p 56: “[...] la libéralité s’inspire d’autres mobiles et, partant d’une autre cause que la volonté de donner. Elle n’est qu’un moyen total ou partiel d’arriver à un autre but, en telle sorte que l’acte subit parfois par rapport à sa justification apparente, une véritable déformation”.

¹⁰⁴⁵ H De Page, *Traité élémentaire de droit civil belge* (3rd ed 1962) I, p 55.

¹⁰⁴⁶ H De Page, *Traité élémentaire de droit civil belge* (3rd ed 1962) I, p 56: “D’autre part, même lorsqu’elle se rencontre à l’état pur, c’est-à-dire lorsqu’elle s’inspire uniquement de la volonté de donner, de gratifier, la libéralité présente de graves dangers; et ce à un triple point de vue : au point de vue de l’individu lui-même, tout d’abord ; au point de vue de sa famille, ensuite ; au point de vue de ses créanciers, enfin.”

it is possible to argue that “legal normality” is disturbed by non-legal normative orders, which compel the donor to donate as a moral reward for an action or inaction of the donee.

Consequently, it may be argued that De Page disregards the essential interaction between law and society, where law brings security and empowers individuals in their social interaction with others. Furthermore, donation should not be regarded as an abnormal act. On the contrary, donation is available to all, legal and individual people, considering that they all hold rights which may be disposed or used to create a gratuitous benefit for another(s). This act of everyday life happens on a regular basis, with everyone potentially being in the position of benefactor and beneficiary: tipping; tasting a sample; giving/receiving a birthday present, among many other examples emerging from everyday life. As a consequence of their constant presence in all persons’ lives, gratuitous acts in general, and donations in particular, cannot be classified as abnormal. On the contrary, donations are normal acts of life in society.

5.2.1.2. Dangerous

Donations are regarded as dangerous due to the belief that no individual acts freely when acting under the influence of strong emotions. This assumption explains why the enforcement of donations is not well regarded by some legal writers¹⁰⁴⁷, who consider donations as the outcome of morally/culturally enforced actions. The immediate response to this viewpoint, however, is that the law exists to serve moral and social-economic interests. It is also worth mentioning that, to some legal writers, the danger lies in the impoverishment of the donor. Such impoverishment may lead to harmful consequences, both present and future, to the donor himself, his creditors and his family (heirs)¹⁰⁴⁸. The impoverishment of the donor which is caused by a donation is even classified as “threats to the public order”¹⁰⁴⁹ and peace, being described by Pacilly as capable of disrupting a “desired” stability and confidence of all legal actors in the social status quo¹⁰⁵⁰. The above authors justify this assertion by regarding donation as disruptive for life in society, due to its potential to cause social change: a wealthy family may be left to starve, while another family, or some of its

¹⁰⁴⁷ M Colin, “Etude de jurisprudence et de législation sur les dons manuels“ (1833) *Revue pratique de droit français*, p 194.

¹⁰⁴⁸ G Pacilly, *Le Don Manuel* (1936).

¹⁰⁴⁹ G Pacilly, *Le Don Manuel* (1936) p 7.

¹⁰⁵⁰ G Pacilly, *Le Don Manuel* (1936) p 7.

family members, may enrich. This fluctuation of property is argued to cause social disruption, by changing the balance of power between individuals in a community, an idea which is disputed in the present thesis.

The main issue signposted by these French legal writers who regard donation as dangerous is the concern that it may be used by the donor to alienate a portion, or all, of his property. By no longer holding a substantial amount of property rights, the donor may undermine the expectations of his heirs and creditors. Departing from this view, it is possible to argue that classifying donations as dangerous, in order to protect non-legally enforceable expectations (of future gratuitous benefits or the expectations of ill-informed third parties), shows an excessively paternalistic view of life in society. The law is and should be used to defend public order and social stability, however, the law cannot be used to stop the transfer of patrimony between willing parties unless this transfer prejudices a right or an otherwise legally protected expectation.

5.2.1.3. Suspicious

Didier Guével further considers donations to be suspicious. This view is based on the nature of donation, which is defined by Guével as syncretic and contradictory¹⁰⁵¹. In this lawyer's perspective, donations may lead to a more harmonious and altruistic society, but may also allow the donor to assume an undesirable position of dominance towards the donee. This contradictory nature of donation is reflected by legal and non-legal literature, where two contradictory conceptualisations of donation are presented: (a) the idea of a "poisonous gift", being portrayed in some of the most relevant literary novels of our time such as the Trojan horse¹⁰⁵², or the Sleeping beauty¹⁰⁵³; and (b) the idea of an "altruistic gift", which is aimed at helping others¹⁰⁵⁴.

Guével starts by recognising the "undeniable" positive repercussions that donations have on (French) society. But he departs from an idea of necessary reciprocal gifts, as postulated by the doctrine of sociologist Marcel Mauss¹⁰⁵⁵. In Mauss' perspective, a collective exchange

¹⁰⁵¹ D Guével, *Droit des successions et des libéralités* (2nd ed 2010) p 26.

¹⁰⁵² Homer (8th century B.C.) *Odyssey* (2010), Deborah Steiner (ed.), XVII-XVIII, p xi-242.

¹⁰⁵³ C Perrault, "La Belle au bois dormant" (1697).

¹⁰⁵⁴ "No one is useless in this world who lightens the burdens of another", commonly attributed to Charles Dickens.

¹⁰⁵⁵ M Mauss, "Essai sur le don", *l'Année Sociologique* (1923-1924) p 2.

of gifts is produced due to a sense of pre-existent obligation, also described as a “community service”¹⁰⁵⁶. Mauss further emphasises the importance of the gift-giving phenomenon not only for the individual, but also for collectives and communities in particular¹⁰⁵⁷. Guével explains that while donations have positive effects, they also carry many risks. The first risk presented by this legal writer is the danger of an escalation in the pecuniary value of reciprocal donations – the “chain” of donations established might lead to the “ruin” of the donor, caused by an excessive impoverishment of his patrimony¹⁰⁵⁸. The second risk is caused by the potential use of donations by the donor in order to humiliate others, who, in certain circumstances, may be too poor to reciprocate the “favour”. This situation would be, according to Guével, (morally) wrong and therefore unacceptable¹⁰⁵⁹. Based on these arguments, Guével argues for the distrust in donations, which may be recognised, under his view, in Roman law, ancient European law, customary French law, and the French Civil Code alike¹⁰⁶⁰.

5.2.2. *The call for protection*

Regarded with suspicion¹⁰⁶¹, donation is addressed by a substantial body of French legal writers as a legal institution which, due to the fears demonstrated above, must be regulated by the law¹⁰⁶². The claim for a substantial regulation of donation is particularly aimed at the protection of the community against the alleged “hazard” of donation. As a rule, the French legal system uses the law of donation in order to protect those who are potential victims of the legal effects of donation. The potential victims are the donor himself, his family, and his creditors. Understanding what conceptions have contributed to the shaping of the law of donation in the past will help us to better understand the present French law of donation. The consequences of the suspicions towards donation raised by French legal writers in the past will therefore be further reviewed below. This will lead to greater understanding of whether the consequences of a heavy set of rules designed to respond to non-market related fears

¹⁰⁵⁶ C Hann, K Hart, *Economic Anthropology: History, Ethnography, Critique* (2011) p 50.

¹⁰⁵⁷ M Mauss, “Essai sur le don”, *l'Année Sociologique* (1923-1924) p 2.

¹⁰⁵⁸ D Guével, *Droit des successions et des libéralités* (2nd ed 2010) p 27.

¹⁰⁵⁹ D Guével, *Droit des successions et des libéralités* (2nd ed 2010) p 27.

¹⁰⁶⁰ D Guével, *Droit des successions et des libéralités* (2nd ed 2010) p 27: “Tout cela explique la méfiance du droit à l’égard de la donation : méfiance du droit romain, de l’Ancien droit, du Droit intermédiaire (...) et du Code civil”.

¹⁰⁶¹ As a demonstration, see A Seriaux, *Manuel de droit des successions et des libéralités* (2003) p 11.

¹⁰⁶² D Guével, “La gratuite intéressée : oxymore d’avenir ?” (2009) *Mélanges en l’honneur du professeur F. Goubeaux*, p 229; C M Mazzoni, “Le don, c’est le drame. Le don anonyme et le don despotique” (2004) *RTD civ.*, p 701.

(being often linked to the protection of family-related expectations) are also suitable to regulate donations made in a market context.

The first consequence of the French suspicion of donation is the call for protection of the donor from himself, i.e. the need to protect the donor from his own “ill-considered” actions¹⁰⁶³. Following this perspective, a reckless act from the donor may happen for different reasons: error; *dolus*; moral or religious gratitude; reverence, respect and wonder inspired by authority; among many others¹⁰⁶⁴. The call for protection of the donor is connected with the assumption that he may need the benefit given to the donee in the future. Secondly, under this perspective, the creditors of the donor are to be protected against several types of gratuitous transactions, which are able to compromise the fulfilment of the debtor’s obligations. But the oldest class of individuals protected against the “maleficent” effects of donations are the donor’s family. The protection of the family deals with the protection of the family as a unit, by presuming that all elements of the same nuclear family¹⁰⁶⁵ retrieve benefits from the aggregated patrimonies of all family members – which form, all together, what is often referred to in France as the “family patrimony”¹⁰⁶⁶.

The fear that one family member, acting alone, may disrupt the whole family’s patrimonial affairs, their social status and lifestyle, can be traced back to the Roman tradition¹⁰⁶⁷. Under Roman law, the *pater familias* was the manager of the family patrimony, with full administrative powers¹⁰⁶⁸. In this tradition, acts of the *pater familias* were able to effectively create a disadvantage to his family, affecting their lifestyle and what was regarded as their communal patrimony. It is clear that a systematic comparison between the Roman family patrimony (where the family’s patrimonial affairs were administered by one person only, the *pater familias*) and the artificially created concept of “family patrimony” of France today¹⁰⁶⁹ (where all family members’ patrimonies are theoretically combined), cannot be easily conducted. Such a comparison is prevented by the fact that today, under French law, each person has their own patrimony and, in principle, the right to administer their own patrimony

¹⁰⁶³ D Guével, *Droit des successions et des libéralités* (2nd ed 2010) p 27.

¹⁰⁶⁴ C M Mazzoni, “Le don, c’est le drame. Le don anonyme et le don despotique” (2004) *RTD civ.*, p 701.

¹⁰⁶⁵ The concept “nuclear family”, in this case, is used to describe the group formed by the *de cuius* and his legal heirs.

¹⁰⁶⁶ H Mazeaud, L Mazeaud, F Chabas, *Successions – Libéralités* (5th ed 1999) III - La protection du patrimoine familial contre sa transmission par les libéralités.

¹⁰⁶⁷ E Chenon, *Histoire Générale du Droit Français Public et Privé (des Origines à 1815)* (1929) II, p 129.

¹⁰⁶⁸ E Chenon, *Histoire Générale du Droit Français Public et Privé (des Origines à 1815)* (1929) II, p 129.

¹⁰⁶⁹ H Mazeaud, L Mazeaud, H Mazeaud, F Chabas, *Successions – Libéralités* (5th ed 1999) IV, p 543.

at will¹⁰⁷⁰. As a result, it is possible to argue that the family patrimony can no longer be regarded as a unit, but as an account of all the rights that may, in the future, circulate between family members (i.e. legal heirs) after their holder's death¹⁰⁷¹. However, it may also be argued that there is, at present, an interaction between individual and family patrimonies (these being regarded as the combined patrimonies of all members of a relevant family). Families are bound by legal, moral, religious and affective bonds, which bind their members in solidarity across their lives. In this sense, family members help each other economically and in other senses. Many factors must be taken into account, such as the proximity of the family members, sharing of the table/house, etc, but it seems possible for an argument to be constructed where a larger combined family patrimony potentially allows a better quality of life of all members of the relevant family.

5.3. Definition and taxonomical placement of French law of donation

5.3.1. Definition of donation in French law

Donation *inter vivos* is defined by the FCC as “an act by which the donor divests himself now and irrevocably¹⁰⁷² of the thing donated in favour of the donee, who accepts it.”¹⁰⁷³. Donation is further defined under the FCC as one of the listed institutions able to transfer property¹⁰⁷⁴ in France (the others being succession, testament and obligations). Donation is presented under the FCC as a bilateral juridical act, where one of two or more parties, the donor, gives something gratuitously to another party, the donee, who receives the benefit. Furthermore, this act of “disposition” is defined as producing its legal effects in the present, and cannot be freely revoked by the donor. As mentioned in previous Chapters 3 and 4, if certain cardinal elements are present in a juridical act, then this juridical act may be defined as a donation under the relevant national law of donation. In respect of French law, and taking into account the legal definition of donation, as stated under article 894 FCC, different legal writers regarded some cardinal elements as more relevant than others. This has created different definitions of donation in France. One such case is Van Gysel, who by interpreting systematically article 849 FCC, defined donation in France as “a contract by which a person

¹⁰⁷⁰ Art 2284 FCC (regarding the individual patrimony) and art 544 FCC (regarding the disposition of property).

¹⁰⁷¹ The rules on who may inherit may be found in art 731 to 732 FCC.

¹⁰⁷² Please see below the discussion on the irrevocability of donation in France, at 5.3.4.3.

¹⁰⁷³ Art 894 FCC.

¹⁰⁷⁴ Art 711 FCC.

disposes presently and irrevocably of a good or a patrimonial right, without consideration (or, anyway, without a consideration deemed equivalent), in behalf of another person who accepts, and the parties act with a reciprocal intention, the first of benefit and the second of receiving a benefit”¹⁰⁷⁵. It is therefore clear that the bilateralism of the legal definition of donation led Van Gysel to define donation in France as a contract, as well as interpreting the word “disposes” as an indication that the object of donation is always a patrimonial right.

Bearing in mind the objective of defining which cardinal elements are always found in a donation in France, in order to better identify a relevant juridical act as a donation, it may be argued that, under French law of donation, donation is defined by three cardinal elements. These cardinal elements are: a) the existence of a bilateral act of disposition; b) a liberal intention or *animus donandi*; and c) the production of immediate legal effects. First, the bilateralism necessary for a juridical act to be classified a donation means that at least two parties must intervene for the creation of the relevant juridical act, which presupposes an offer (from the donor) and an acceptance (by the donee). The bilateralism or contractual nature¹⁰⁷⁶ of the juridical act leading to a donation in France, further includes the idea of irrevocability. Bearing in mind that both parties must be in agreement to create a bilateral juridical act, then one of the parties cannot, except in special circumstances, change the terms of the agreement or refuse to discharge the obligations emerging the contract. On the contrary, based on the principle of freedom of contract¹⁰⁷⁷, neither party can change the terms of the agreement on his own. Because the bilateral essence of donation in France requires agreement from both parties, both the beginning and term of effects of donation require consent from both parties (an offer and an acceptance), and neither of the parties may revoke the agreement unilaterally.

Secondly, the benefit granted by the donor to the donee must be given with a liberal intention. The concept of liberal intention is often associated with gratuity, and with an agreement reached by the parties that the donee is to be the beneficiary of the transaction¹⁰⁷⁸. As will

¹⁰⁷⁵ A Van Gysel (e), *Précis du droit des successions et des libéralités* (2008) p 95 : « La donation est un contrat par lequel une personne dispose actuellement et irrévocablement d’un bien ou d’un droit patrimonial, sans contrepartie (ou, en tout cas, sans contrepartie jugée équivalente), en faveur d’une autre personne qui l’accepte, les parties agissant dans l’intention réciproque, la première de gratifier et la seconde d’être gratifiée. »

¹⁰⁷⁶ A Foubert, *Le don en droit* (2007) p 10 : « [La donation] forme avec les contrats de bienfaisance la catégorie des actes a titre gratuit. » ; G. Pacilly, *Le Don Manuel* (1936) p 18 ; A Van Gysel (e), *Précis du droit des successions et des libéralités* (2008) p 95.

¹⁰⁷⁷ Art 6, 1123 and 1134(1) FCC.

¹⁰⁷⁸ A Van Gysel (e), *Précis du droit des successions et des libéralités* (2008) p 95.

be discussed below, complete gratuity is not an essential element of donation under French law, and *animus donandi* is to be assessed under French law, by looking at the combined will of both parties. Finally, the legal effects of a donation must be produced while all parties are alive. This criterion answers to the demand for a disposition which happens *actuellement*¹⁰⁷⁹, which means that the legal effects are to be produced upon the completion of the donation as a rule, or, that such legal effects may only be delayed to a future moment where both parties are alive¹⁰⁸⁰. The need for the production of effects while all parties are alive is based on the distinction found in article FCC between liberalities *inter vivos* (donations) and those where effects are produced *mortis causa* (testament). Both juridical acts are classified by the FCC as liberalities¹⁰⁸¹ and both follow the same body of generic principles¹⁰⁸². However, they are each regulated by a different law¹⁰⁸³.

5.3.2. Sources of French law of donation

The main body of the French law of donation is found in the French Civil Code (FCC), in particular in its third book, “Of the Various Ways In Which Ownership is Acquired”, under the title “Donations *Inter Vivos and Testaments*”¹⁰⁸⁴. The FCC is the first of five Codes passed for France under Napoleon, becoming law in March 1804¹⁰⁸⁵, and regulates donations *inter vivos* and *mortis causa* under the same title. However, the FCC has devoted a sole chapter to the regulation of donations *inter vivos*, therefore distinguishing between donations in *stricto sensu* (where legal effects are produced while both parties are alive) and testaments (gratuitous juridical acts which produce their legal effects upon the death of the benefactor). Donations *inter vivos* are regulated under chapter four of the third book of the FCC: “Donations *Inter Vivos*”: i.e. articles 931 to 966.

¹⁰⁷⁹ Art 894 FCC.

¹⁰⁸⁰ Conditional donations are regulated under art 944 and 945 FCC, according to which a *modo* may be agreed between donor and donee, however, donations which execution depends on a discretionary act of the donor or depending on the future charges to be undertaken by the donee are deemed null and void.

¹⁰⁸¹ Art 893 FCC.

¹⁰⁸² Among others, see art 893 to 930-5 FCC and 1048 to 1099-1 FCC.

¹⁰⁸³ Testament is defined under art 895 FCC and regulated in particular under art 967 to 1047 FCC, while donation is defined under art 894 FCC and regulated in particular under art 931 to 966 FCC.

¹⁰⁸⁴ With the objective to achieve consistency, all translations of the FCC into English will be taken from the official website Legifrance, available at <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>, last accessed 28/10/2016.

¹⁰⁸⁵ C Ilbert, “The Centenary of the French Civil Code” (1905) *Journal of the Society of Comparative Legislation*, p 219.

More than 200 years have passed since the FCC was enacted, and several amendments have been made to the articles on donation¹⁰⁸⁶. These amendments have reflected the changes which have occurred in French society, such as the empowerment of women and the introduction of new values such as the equality of gender. One such case is, among others, the amendment made to article 934. In its original terms, article 934 declared that a married woman was not able to accept a donation without the consent of her husband. That provision was repealed by Law of 18 February 1938. But it is necessary to note that none of these amendments was able to produce a real change to the core essence of the regulation of the French law of donation. As a demonstration, the formal requirements requested by the FCC for the validity of a donation in France are still regulated under the unchanged article 931, wherein the necessary form for an act of donation remains a contract, specifically a public deed¹⁰⁸⁷. It is also necessary to notice that, in the last two centuries, several articles on donation found in the FCC were developed by the French courts; interpreting them in a new light to suit the needs of progress in society or further developing their scope. One such case is article 931, where delivery (and correspondent physical acceptance by the donee) is regarded as the only necessary formal requirement for the validity of a donation of moveable property (*don manuel*). In fact, French courts have created a presumption where a donee in possession of the subject matter of a donation, as long as the donation corresponds to the gratuitous transfer of a real right on movables, does not have the burden of proof that all the cardinal elements of donation are fulfilled¹⁰⁸⁸.

5.3.3. Liberality

Liberality is defined under the FCC as the act by which a person “disposes by gratuitous title of all or part of his assets or his rights to the advantage of another person. A liberality may be accomplished only by donation *inter vivos* or by testament”¹⁰⁸⁹. In respect of French law, the conceptualisation of a macro-categorisation of gratuitous juridical acts is of particular relevance, because it is able to shed light on the principles regulating all gratuitous juridical acts (commonly in opposition to those which regulate non-gratuitous juridical acts) in general, and to donation, in particular. Under French law, two parties are required for the

¹⁰⁸⁶ Law 2006-728 of June 23, 2006, Law 1964-1230 of December 14, or Law 1985-1372 of December 23.

¹⁰⁸⁷ Art 931 FCC.

¹⁰⁸⁸ Decision of the Court of Cassation, JPC G 2000, II, 10274, 1^{re} civ, of 30 March 1999; “*Le possesseur qui prétend avoir reçu une chose en don manuel bénéficie d’une présomption et il appartient à la partie adverse de rapporter la preuve de l’absence d’un tel don*”.

¹⁰⁸⁹ Art 893 FCC.

production of a liberality: the beneficiary (the party who gratuitously receives the benefit) and the benefactor (the party which allows the creation of the benefit).

Liberalities may therefore be described, under French law, as comprising two core elements: a formal element, which relates to the form these acts must adopt in order to produce legal effects; and a real element, which can be described as the creation of a gratuitous benefit (or the receipt of a benefit with no counterpart)¹⁰⁹⁰. A liberality can therefore be defined as any juridical act able to produce a gratuitous benefit (such as a gift or a legacy) to a counterparty, which is legally protected and enforced under the law. “Liberality” may therefore be regarded as a macro-concept which comprises all benefits provided by gratuitous juridical acts between private parties in France. For the same reason, a liberality may take place either between living persons (*inter vivos*) or on the death of the grantor (*mortis causa*).

In conclusion, it is possible to argue that donation is one liberality, among others, under the FCC. This conclusion is important because, by defining donations as liberalities, it may be argued that any gaps found in the legal regulation of donations *inter vivos* under French law, may be resolved by the analogical application of solutions found in the FCC to other liberalities. Bearing in mind that French legal writers regard donation with suspicion, and see it as deeply related to the family, it is particularly relevant to regard donations *inter vivos* in France as a sub-branch of liberalities. This will allow, by analogy, the integration of gaps found in French law of donation, by resorting to solutions found elsewhere, where other liberalities are regulated in a way that recognises their presence in the market.

5.3.4. Cardinal Elements

5.3.4.1. Bilateralism

French legal writers are unanimous in describing donation as a bilateral juridical act¹⁰⁹¹. Ferre-André and Berre are among the legal writers who best describe the ever-present

¹⁰⁹⁰ M Planiol, G Ripert, *Traité Théorique et pratique de droit civil français* (2nd ed 1957) V, p 21-22.

¹⁰⁹¹ The definition of donation as a bilateral juridical act refers to the need for agreement between the contracting parties. However, because donation is regarded as a gratuitous juridical act, this institution is also often described as a unilateral contract, i.e. the benefit is only received by one of the parties, while both need to agree on the legal effects. See N Peterka, *Les Dons Manuels* (1999) p 1; C Larroumet, *Droit Civil, Les Obligations, le Contrat* (5th ed 2003) III, p 91; R M Ricard, *Traite des Donations entre-vifs et testamentaires* (1783) I, p 1; J Hachin, *De la Cause en matière de Donation* ((1907) p 33; J Ray, *La notion de donation en droit civil français* (1912) p 33; J Montredon, *La désolennisation des libéralités* (1987) p 73; F Chabas (e),

bilateralism in donation in France, by declaring that “donation *inter vivos* needs two parallel wills: that of the donor and that of the beneficiary”¹⁰⁹². By defining donation as an agreement / contract¹⁰⁹³, the FCC denies to the donor the power to bind himself to a gratuitous obligation. This also means that French law of donation does not allow the creation of a benefit to the donee without his previous consent. On the contrary, under article 894 FCC, a donation can only occur after *express* acceptance is given by the donee.

The freedom to perform juridical acts is commonly designated as contractual freedom and, together with the principles of contractual security and contractual loyalty (along with their sub-principles), is considered of vital importance for French Private law¹⁰⁹⁴. If respecting the donor’s contractual freedom means that he will not be subject to a contractual obligation to which he did not agree, then respecting the donee’s freedom means that he should not be forced to receive, without his consent, a juridical benefit. Furthermore, it may also be argued that, if a unilateral juridical act performed by the donor was able to create a right to the donee, then a subsequent refusal of acceptance would be no more than another unilateral juridical act¹⁰⁹⁵. This would mean that the right would have entered into the non-accepting donor’s patrimony for a certain amount of time, which may produce burdensome public or private legal consequences such as the payment of taxes or suchlike. For this reason, the need for express acceptance by the donee is required under article 932 FCC, according to which, a donation “a donation *inter vivos* is binding upon the donor and produces its effects only from the day it is accepted in express terms”¹⁰⁹⁶.

Leçons de Droit Civil, Biens, Droit de propriété et ses démembrements (1994) II, p 351; M Grimaldi, *Droit civil, Successions* (6th ed 2001); P Malaurie, L Aynes, P Gautier, *Les contrats spéciaux* (5th ed 2011); F Terre, Y Lequette, *Précis de Droit Civil, Les successions, Les libéralités* (3rd ed 1997) p 202; A Gysel (e), *Précis du droit des successions et des libéralités* (2008) p 95; M Grimaldi (e), *Droit Patrimonial de la Famille* (2011) p 776; S Deville, *L’objet de la libéralité* (2012) p 2; J Levy, A Castaldo, *Précis d’histoire du droit civil* (2002) p 1352; E Tarbouriech, *De la Cause dans les libéralités* (1894) p 8; among others.

¹⁰⁹² S Ferre-André, S Berre, *Successions et libéralités* (2012) p 616: « la donation entre vifs suppose le concours de deux volontés : celle du donateur et celle du gratifié ».

¹⁰⁹³ A Gysel (e), *Précis du droit des successions et des libéralités* (2008) p 95; M Grimaldi (e), *Droit Patrimonial de la Famille* (2011) p 776; S Deville, *L’objet de la libéralité* (2012) p 2; J Levy, A Castaldo, *Précis d’histoire du droit civil* (2002) p 1352; E Tarbouriech, *De la Cause dans les libéralités* (1894) p 8; among others.

¹⁰⁹⁴ Art 1101 FCC.

¹⁰⁹⁵ The lack of acceptance may also increase doubt in the legal sphere, which would compromise the expectations and interests of those who did not want such benefits in their patrimonies (maybe even being forced to pay taxes for holding rights they never wished to hold). This is a reality that cannot be accepted by juridical systems which have their private law structured under the principles of private autonomy and contractual freedom.

¹⁰⁹⁶ Art 932 FCC: “a donation *inter vivos* is binding upon the donor and produces its effects only from the day it is accepted in express terms. Acceptance may be made during the lifetime of the donor, by a subsequent and authentic act, an original of which will be retained by the notary; but then the donation is effective, in regard to the donor, only from the day he has been notified of the act that evidences that acceptance.”

The need for bilateralism in all donations regulated under French law may also be found in a steady stream of decisions, such as, for example, decision of the Court of Cassation of 29 June 2011¹⁰⁹⁷ and decision of the Court of Cassation of 2 March 1999¹⁰⁹⁸. In the first decision, it was held that an act which is regarded as unilateral (such as an act of disposition which aims to anticipate succession) cannot be perfected by acceptance, even if this acceptance takes the form of a subsequent deed¹⁰⁹⁹. In the second decision, it was declared that requesting an explicit acceptance does not collide with article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms¹¹⁰⁰. In this second ruling it was decided that gratuitous acts of disposition, even when made with a liberal intention, performed by a father to the benefit of his son, in the presence of his son, are deemed as lacking acceptance if the donee did not give express acceptance to the donation¹¹⁰¹. It is therefore possible to conclude that the lack of bilateralism, either created by the lack of express acceptance or by any other reason, invalidates the juridical act which leads to a donation under French law of donation.

5.3.4.2. The need for acceptance

The principle that acceptance is a core element of donation under French law, and that such acceptance shall only become binding for the donor after the notification of acceptance¹¹⁰²,

¹⁰⁹⁷ Decision of the Court of Cassation, 1^{re} civ, 10-17562, of 29 June 2011.

¹⁰⁹⁸ Decision of the Court of Cassation, 1^{re} civ, 97-11430, of 2 March 1999.

¹⁰⁹⁹ “La clarté des termes de la minute de l'acte authentique par lequel la donation initiale avait été reçue ne pouvait être remise en cause par la mention unilatérale imputable au seul notaire récipiendaire ; qu'elle ne pouvait pas l'être davantage par une mention tout aussi unilatérale”.

¹¹⁰⁰ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Paris, 20 March 1952. Art 1 (protection of property): “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

¹¹⁰¹ “M. X..., notaire, fait grief à l'arrêt [...], par lequel René Ferre faisait donation à son fils, M. Jean-Claude Ferre, de 100 parts de la société civile La Ferronnière, alors que, selon le moyen, il résulte de l'acte que le donataire était présent à l'acte authentique qu'il avait signé, de sorte qu'en se fondant sur l'absence d'acceptation du donataire, la cour d'appel a violé l'article 1er du protocole additionnel à la Convention européenne des droits de l'homme ainsi que les articles 932 et 938 du Code civil; Mais attendu qu'aux termes de l'article 932 du Code civil, la donation entre vifs ne produira effet que du jour qu'elle aura été acceptée en termes exprès ; que, contrairement à ce que soutient le moyen, l'acceptation expresse de la donation ne saurait résulter de la seule présence du donataire lors de la rédaction de l'acte de donation et de la simple signature de celui-ci ; que le moyen, en sa première branche, n'est donc pas fondé”.

¹¹⁰² Art 932 FCC: “a donation *inter vivos* is binding upon the donor and produces its effects only from the day it is accepted in express terms. Acceptance may be made during the lifetime of the donor, by a subsequent and

remains unchanged in the letter and spirit of article 932 FCC. This principle has not only been enforced by French courts in the past¹¹⁰³, but remains essential for the application of the law of donation in recent years¹¹⁰⁴. Recent court decisions, such as the decision of the Court of Cassation of 3 March 1998, follow a systematic line which clarifies that the absence of an express acceptance by the donee cannot be replaced by the behaviour of the donee from which it is possible to extract a tacit acceptance¹¹⁰⁵. As an example, in this case, M intended to make a donation for the benefit of his child and followed the formalities under the FCC¹¹⁰⁶. However, his child did not accept expressly as required under the FCC and, therefore, acceptance was not deemed as valid¹¹⁰⁷.

The need for an express acceptance under the French law of donation may also be found in recent court decisions, such as the decision of the Court of Cassation of 5 April 2005¹¹⁰⁸, where it was held that with regard to indirect donations— i.e. for the benefit of a third party - the benefit cannot be imposed upon the donee / beneficiary. In this particular case, the Court of Cassation held that the forgiveness of a debt is to be regulated in France under the law of donation and, therefore, cannot take the form of a unilateral juridical act¹¹⁰⁹. This decision was followed by other similar decisions, one such case being the decision of the Court of Cassation of 20 February 2007¹¹¹⁰.

authentic act, an original of which will be retained by the notary; but then the donation is effective, in regard to the donor, only from the day he has been notified of the act that evidences that acceptance”.

¹¹⁰³ As example, please see the decision of the Court of Cassation, DP 1902, 1, 214, of 4 March, 1902, which clarifies that “*le donateur n’est pas engagé tant qu’il n’a pas reçu notification de l’acceptation*”.

¹¹⁰⁴ Decision of the Court of Cassation, 1^{re} civ, 95-12053, of 3 March 1998; Decision of the Court of Cassation, 1^{re} civ, 97-11430, of 2 March 1999; Decision of the Court of Cassation, 1^{re} civ, 03-19614, of 5 April 2005; Decision of the Court of Cassation, 1^{re} civ, 04-16817, of 20 February 2007; and decision of the Court of Cassation, 1^{re} civ, 10-17562, of 29 June 2011.

¹¹⁰⁵ Decision of the Court of Cassation, 1^{re} civ, 95-12053, of 3 March 1998.

¹¹⁰⁶ Art 931 to 952 FCC.

¹¹⁰⁷ “Attendu que, pour rejeter cette demande, la cour d’appel a retenu que M. Gérard Y... avait manifesté sans équivoque sa volonté d’accepter la donation de cet immeuble que ses parents lui avaient consentie par acte authentique, en relevant, par motifs propres et adoptés, d’une part, que M. Gérard Y... avait expressément accepté les servitudes constituées par les donateurs dans l’acte de donation qu’il avait signé et qu’il était impossible d’accepter celles-ci sans accepter la donation elle-même, et, d’autre part, qu’en cédant le bien objet de la donation, il s’était comporté comme le véritable propriétaire de celui-ci”.

¹¹⁰⁸ Decision of the Court of Cassation, 1^{re} civ, 03-19614, of 5 April 2005.

¹¹⁰⁹ “La donation indirecte est soumise aux conditions de fond non seulement de toute donation, quelle que soit sa forme, mais aussi de l’acte dont elle emprunte le support ; qu’en vertu de l’article 932 du Code civil, la donation entre vifs n’engage le donateur, et ne produit effet que du jour de son acceptation en termes exprès ; que la remise de dette est une convention qui implique non seulement le consentement du créancier mais aussi l’acceptation du débiteur ; qu’ainsi la donation d’une créance par voie de remise de dette ne peut être valablement constituée par acte unilatéral du créancier sans l’acceptation du débiteur”.

¹¹¹⁰ Decision of the Court of Cassation, 1^{re} civ, 04-16817, of 20 February 2007.

Acceptance of an offer may be given either explicitly or implicitly¹¹¹¹. Acceptance is explicit if clearly expressed or demonstrated by the donee by his actions (for example, resorting to the clear statement “I accept”) and follows the formalities set under the relevant law¹¹¹². It is implicit where the counterparty’s actions do not expressly demonstrate acceptance, but acceptance may be inferred from their actions or their silence, when the law says so. It is, however, possible to conclude that donation cannot be accepted implicitly (or in a tacit manner), but, on the contrary, it must be accepted by the donee in express terms¹¹¹³.

5.3.4.3. Irrevocability

As mentioned above, under French law of donation, donations are bilateral juridical acts which are often associated with feelings of generosity and benevolence. According to several French legal writers, these feelings are then materialised by the parties as a donation, by using the tools provided by the law on principles such as the principle of private autonomy¹¹¹⁴. Donations are also considered dangerous due to the “stigma” imposed by the principle of irrevocability¹¹¹⁵, and the idea that donation in France is by principle irrevocable¹¹¹⁶. Renowned French scholars have argued that the donor, and in particular his creditors, are no longer able to access the benefit granted to the donee if a donation is complete. Irrevocability is also consistently used to distinguish between donations and legacies. It is common for French legal writers to use the “irrevocability” criterion to distinguish donation – a juridical act with effects in the present, which after performance, may no longer be revoked¹¹¹⁷ –, and legacy – based in a unilateral juridical act, the testament,

¹¹¹¹ W Gloag, *The Law of Contract* (2nd ed 1929) p 25.

¹¹¹² In the case of French law of donation, the formalities necessary for the validity of an acceptance are described under art 931 FCC: “All acts containing a donation *inter vivos* shall be executed before notaries, in the ordinary form of contracts; and the notaries shall retain an original of them, on pain of nullity”. Bearing in mind these formalities, it is also necessary to mention that when the object of donation is a moveable real right, acceptance may also take the form of *don manuel*, i.e. physical reception of the subject-matter of donation by the donee, following a steady stream of court decisions, such as Decision of the Court of Cassation, 1st civ. of 13 January 1969: *Bull.* 1 n. 17, p 12; Decision of the Court of Cassation, 1st civ. of 3 April 2001: *Bull.* I n. 105, p 82; or Decision of the Court of Cassation, 1st civ. of 11 July 1960: D 1960, p 702; among others.

¹¹¹³ Art 932 FCC.

¹¹¹⁴ H Meau-Lautour, *La donation déguisée en droit civil français, contribution à la théorie générale de la donation* (1985) p 24; J Hachin, *De la Cause en matière de Donation* (1907) p 33; S Deville, *L’objet de la libéralité* (2012) p 2 ; J Levy, A Castaldo, *Précis d’Histoire du droit civil* (2002) p 1245.

¹¹¹⁵ Present in the definition of donation, under art 894 FCC.

¹¹¹⁶ L Josserand, *Les mobiles dans les actes juridiques de droit privé* (1928) p 233; A Epée, *Le don d’argent – ressorts institutionnels et individuels de la générosité envers les associations caritatives et de recherche* (2004).

¹¹¹⁷ L Josserand, *Les mobiles dans les actes juridiques de droit privé* (1928) p 233; A Epée, *Le don d’argent – ressorts institutionnels et individuels de la générosité envers les associations caritatives et de recherche* (2004); H Meau-Lautour, *La donation déguisée en droit civil français, contribution à la théorie générale de la*

which may be changed at any time by the *de cuius* during his lifetime¹¹¹⁸. Take for example Guével's approach to donation¹¹¹⁹: under this writer's teachings, one of the cardinal elements of donation is its irrevocability. Article 894 clearly states that a donation must be present and irrevocable¹¹²⁰. In other words, after performance, the benefit conferred upon the beneficiary of the donation may no longer be removed by a discretionary act of the donor. Donation therefore acts as legal title for the benefit or as a justifying *causa* for the enrichment of the donee, entitling him to retain the benefit received. This principle seems, at first glance, to be a clear and straightforward principle, but further inquiry is necessary.

The freedom to revoke the unilateral juridical act of testament is clearly stated under the FCC¹¹²¹. Donation, on the contrary, is considered to be irrevocable¹¹²². According to this perspective, once the donation is final, the donor, his heirs and his creditors are no longer able to access the benefit granted to the donee. But, in reality, donations may be revoked in multiple circumstances under French law¹¹²³. It is therefore necessary to acknowledge that "in reality, the irrevocably [of the donation] is not always the rule"¹¹²⁴. In fact, several exceptions to the principle of irrevocability of the donating juridical acts have been accepted under French law: (i) the failure to fulfil the obligations undertaken by the donee; (ii) ingratitude of the donee; (iii) subsequent birth of descendants, and (iv) future and unforeseen poverty of the donor. Timbal is one of the few French legal writers who clearly identify a duality in the essence of donation: on the one hand, donations may become irrevocable, while on the other hand, a donation may also be characterised as "temporary and revocable" if the right circumstances are present¹¹²⁵. This means that a "regretful" donor is not able to unilaterally revoke a (bilateral juridical act of) donation. However, French law of donation provides the donor with revocation rights in particular circumstances¹¹²⁶.

donation (1985) p 24; J Hachin, *De la Cause en matière de Donation* (1907) p 33; S Deville, *L'objet de la libéralité* (2012) p 2 ; J Levy, A Castaldo, *Précis d'Histoire du droit civil* (2002) p 1245.

¹¹¹⁷ P Malaurie, *Les successions, Les Libéralités* (5th ed 2012) p 144.

¹¹¹⁸ A Van Gysel (e), *Précis du droit des successions et des libéralités* (2008) p 231; S Deville, *L'objet de la libéralité* (2012) p 218.

¹¹¹⁹ D Guével, "La gratuite intéressée : oxymore d'avenir ?" (2009) *Mélanges en l'honneur du professeur F. Goubeaux*, p 204; D Guével, *Droit des successions et des libéralités* (2nd ed 2010) p 205.

¹¹²⁰ Art 894 FCC.

¹¹²¹ Art 953 to 966 FCC.

¹¹²² L Josserand, *Les mobiles dans les actes juridiques de droit privé* (1928) p 233; A Epée, *Le don d'argent – ressorts institutionnels et individuels de la générosité envers les associations caritatives et de recherche* (2004).

¹¹²³ Art 953 to 966 FCC.

¹¹²⁴ J Levy, A Castaldo, *Précis d'Histoire du droit civil* (2002) p 1361.

¹¹²⁵ P C Timbal, *Droit Romain et Ancien Droit Français, Régimes matrimoniaux, Successions – Libéralités* (1960) p 213.

¹¹²⁶ Art 953 to 966 FCC.

It may therefore be argued that the myth of complete irrevocability of donation in French law, leading to its classification as “dangerous”, is unfounded. The comprehensive revocation rights¹¹²⁷ provided to the donor under the FCC aim to protect the donor against his own actions, against a poor future and against the frustrated objectives of the donation – for those donations which are not motivated by altruistic feelings. Finally, it is also necessary to bear in mind that the creditors and family members of the donor are protected under French law of donation, being granted tools for the reduction or cancellation of the effects of a donation. As examples, it is possible to find (a) the law of collation and reduction of excessive liberalities¹¹²⁸; (b) insolvency law¹¹²⁹, and (c) *actio pauliana*¹¹³⁰.

5.3.4.4. Liberal intention

Juridical acts are based on legal effects given by the law to the will of the parties¹¹³¹. French legal writers therefore argue that, under the French law of donation, the “cause for the donation is the liberal intention of the donor”¹¹³² and, for this reason, intention to donate and liberal intention are one and the same¹¹³³. This is a line of reasoning which is disputed by several legal writers, one such case being Baudry, who regards the will to donate as a will to undertake a relevant obligation, while the liberal intention represents the reason why the donor wishes to undertake the obligation¹¹³⁴. In any case, it is widely accepted by French lawyers that a liberal intention is a cardinal element of donation¹¹³⁵ and the “unbalance”, in the obligations emerging from a donation, is justified by the liberal intention of the donor¹¹³⁶.

The need for a liberal intention, described as a cardinal (or essential) element of donation¹¹³⁷, was further developed by the French courts. As a demonstration, the French courts have clarified that if a contract of sale and purchase creates unbalanced obligations for the parties,

¹¹²⁷ F Terre, Y Lequette, *Précis de Droit Civil, Les successions, Les libéralités* (3rd ed 1997) p 206.

¹¹²⁸ Art 912 to 930-5 FCC.

¹¹²⁹ In particular, regulated under Ordonnance n° 2014-326 of 12 March 2014.

¹¹³⁰ Art 1167 FCC.

¹¹³¹ Christian Larroumet, *Droit Civil, Les Obligations, le Contrat* (5th ed 2003) III, p 91.

¹¹³² J Hachin, *De la Cause en matière de Donation* (1907) p 33.

¹¹³³ J Hachin, *De la Cause en matière de Donation* (1907) p 36.

¹¹³⁴ M Baudry, *Des donations entre vifs et des testaments* (1905) I, p 17.

¹¹³⁵ S Lambert, *L'intention libérale dans les donations* (2006) p 15.

¹¹³⁶ S Lambert, *L'intention libérale dans les donations* (2006) p 16.

¹¹³⁷ Decision of the Court of Cassation, Req. 27 June 1887, 1 p 303; Decision of the Court of Cassation, Req. 9 December 1913, DP 1919, 1, p 29; Decision of the Court of Cassation, 1st civ. 4 November 1981, *Bull. I.*, 329, p 278.

the unbalance is not enough for a liberal intention of the seller to be presumed¹¹³⁸. The same happens in the case when a husband pays the price of land, where it is his spouse who gains ownership of the good. The same applies to the husband who has paid the price of goods which are owned by both spouses¹¹³⁹. Bearing in mind these examples, it is possible to argue that a liberal intention cannot be extracted from actions which create a benefit alone¹¹⁴⁰. Furthermore, the French courts have also clarified that the liberal intention is only relevant at the moment when the donation is concluded¹¹⁴¹.

The acceptance that the validity of donation is based on the liberal intention of the donor can be traced to the writers of the FCC, who deemed human nature as non-altruistic and assumed that one's "interests are the motors of human behaviour"¹¹⁴². Because human nature is described as non-altruistic, and donation is oppositely described as an act which is motivated by an *animus donandi*, it is hard for these legal writers to look at donation as an everyday act of life in society. Despite this prejudice against donation, it is commonly accepted that generosity, or to proceed with a liberal spirit, is a "signal of courage and an affirmation of liberty"¹¹⁴³. For this reason, and bearing in mind the letter of the law¹¹⁴⁴, it is possible to argue that even those legal writers who distrust donation and see a liberal intention as suspicious must recognise that the liberal intention, is a cardinal element of donation in France, acting as its motive (or *causa*).

5.3.4.5. Gratuity

The idea of gratuity is closely linked to the idea of liberal intention¹¹⁴⁵: the donor gives to the donee with the intention to benefit him, and not to gain a benefice for himself. But the discussion on gratuity is often linked to the idea of reduction of the "patrimony"¹¹⁴⁶ of the donor. Under French law, a personal patrimony may be defined as "all property owned by

¹¹³⁸ Decision of the Court of Cassation, 1st civ. 14 February 1989, *JPC* 89, IV, p 140.

¹¹³⁹ Decision of the Court of Cassation, 1st civ. 1 Mars 1988, *JCP* 89, II, p 21373.

¹¹⁴⁰ Decision of the Court of Cassation, 1st civ. 6 Mars 1996, *D.* 1998, p 163.

¹¹⁴¹ Decision of the Court of Cassation 1st civ. 24 September 2002, *Family* 2003, p 16.

¹¹⁴² X Martin, "Insensibilité des rédacteurs du Code Civil à l'altruisme", *Revue d'histoire du droit* (1982) 4, p 603.

¹¹⁴³ P Malaurie, *Les successions, Les Libéralités* (5th ed 2012) p 144.

¹¹⁴⁴ The legal definition of donation under art 984 FCC.

¹¹⁴⁵ P Malaurie, *Les successions, Les Libéralités* (5th ed 2012) p 146.

¹¹⁴⁶ See Carbonnier, *Terre, Simler, Cordey*, "La valeur explicative de la théorie du patrimoine en droit positif français" (1996) *RTD civ.*, p 819; F Magnan, "Propriété, patrimoine et lien social" (1997) *RTD civ.*, p 583; Hiez, *Etude critique de la notion de patrimoine en droit prive actuel* (2003); A Serieaux, "La notion juridique de patrimoine" (1994) *RTD civ.*, p 801.

an individual and all obligations, in the sense of liabilities, which are to be discharged by the same person, a legal universality. Patrimony consists in this universality; a notion which links all rights held by a person and his obligations”¹¹⁴⁷. A personal patrimony is therefore composed of active and passive elements, or, in other words, it comprises all rights and obligations held by a (legal or physical) person¹¹⁴⁸.

When an onerous contract is entered into by the contracting parties, both parties’ patrimonies are presumed to receive advantages (by undertaking obligations and receiving new rights). On the contrary, however, in gratuitous juridical acts, this exchange is not presumed to happen. In a *contrat a titre gratuit*, one such case being donation¹¹⁴⁹, only the donee is presumed to receive a benefit, which is granted by the donor without the expectation of receiving a counter-performance. In the particular case of donation, the donor will see his patrimony reduced, an impoverishment which corresponds to the benefit received by the donee¹¹⁵⁰.

It is important to notice that legal writers are not in agreement to what the concept of patrimony is in France, ranging between those who regard patrimony as a universality of rights and obligations¹¹⁵¹, and those who describe patrimony as only those rights and obligations held by a person with pecuniary value¹¹⁵². This debate has direct consequences towards which rights may be the object of donation: if an impoverishment of the donor’s patrimony is only brought about by the donation of rights with pecuniary value, then only these may be donated. On the contrary, if the concept of patrimony is wider, then any benefit granted to the donee may be classified as a donation under French law.

Two different approaches may be taken when addressing the concept of patrimony under French law: the first one, where all property is defined as having an intrinsic economic value, and the second one, where some items simply do not have an economic value¹¹⁵³. The first perspective is the one where all property (and most rights) are seen as containing a possible economic value. A perspective which may create major inequalities when applied by

¹¹⁴⁷ J Flour, J Aubert, E Savaux, *Droit Civil, Les obligations – I l’acte juridique* (24th ed 2010) p 18.

¹¹⁴⁸ J Flour, J Aubert, E Savaux, *Droit Civil, Les obligations – I l’acte juridique* (24th ed 2010) p 19.

¹¹⁴⁹ J Flour, J Aubert, E Savaux, *Droit Civil, Les obligations – I l’acte juridique* (24th ed 2010) p 72.

¹¹⁵⁰ J Flour, J Aubert, E Savaux, *Droit Civil, Les obligations – I l’acte juridique* (24th ed 2010) p 72.

¹¹⁵¹ C Larroumet, *Droit Civil* (2nd ed 1988) II, p 5.

¹¹⁵² C Larroumet, *Droit Civil* (2nd ed 1988) II, p 5.

¹¹⁵³ See Chapter 4 – Portugal, p 139.

different courts, which may value the same right differently. Such insecurity may potentially undermine the confidence of market players, leading to a reduction of the number of transactions made in a market context. However, if the second approach is followed, and patrimony is defined as comprising only rights with pecuniary value, then only donations of rights with a pecuniary value would be able to create an enrichment to the donee and a correspondent impoverishment to the donor. This second perspective is even more prejudicial to the market than the first one, considering that it restricts the principles of contractual autonomy and liberty. These principles are essential for a marketplace which is flexible enough to adapt itself to the ever-changing demands of supra-national trade.

The definition of the object of donation has changed over time in France, however, today, courts and legal writers define the object of donation in wide terms. The object of donation is therefore wide enough to comprise benefits granted to the donee found in the release of a debt¹¹⁵⁴; where the donor releases the donee from a debt by returning to the debtor the original document, which is the proof of the debt¹¹⁵⁵, or by agreement reached between the parties¹¹⁵⁶. Bearing in mind that the wider concept of patrimony (as comprising all rights and obligations held by a person) is the one which gathers most supporters, and that different types of benefits may be granted by donation in France, including those which do not produce an enrichment *per se*, it is possible to argue for an object of donation in France which is disconnected with the pecuniary value of the object.

5.3.4.6. Present disposition

The final cardinal element for the identification of a donation in French law is the production of legal effects in the present, and not in the future. This element may be traced to article 943 FCC, where it is stated that “donations can only have as their object the present assets of the donor; a donation concerning future assets will be void”¹¹⁵⁷. But this cardinal element of donation also has a second meaning: the juridical effects of donations must be produced while both parties are alive, or the law of testament will apply to the juridical act¹¹⁵⁸. It is for

¹¹⁵⁴ For example, Bretonnier, in M C Henrys, *Ouvres de M. Claude Henrys* (1738) 4.VI.I, considers that rights that pre-exist the donation may be gratuitously given by transfer or release of a duty, further stating that the gift of a debt, even when subject to litigation, has been permitted since the French *ancient regime*.

¹¹⁵⁵ Art 1282 FCC.

¹¹⁵⁶ Art 1285 FCC.

¹¹⁵⁷ Art 943 FCC.

¹¹⁵⁸ Art 895 FCC.

this reason that Seriaux has described donations as gathering “the elements shared by all liberalities: the impoverishment, the correspondent enrichment and the liberal intention”¹¹⁵⁹, but the “actuality of the act implies that the donor makes an element leave his patrimony, making a right or a debt against himself enter the patrimony of the donee”¹¹⁶⁰.

The actuality of the disposition is of prime relevance here, considering that, under article 944 FCC, “all donations made under the condition that its execution depends on the will of the donator” shall be void¹¹⁶¹. When interpreted systematically, it is easy to understand why the FCC took this stance: if the donor is able to decide in the future if he is still donating the benefit or not, then a donation would potentially never have existed. Similarly, if the donor is able to decide if and when the donee will gain access to the subject-matter of the donation, then, in practice, this would mean that the donee might never actually receive a benefit. This would also mean that the donating act would not produce its legal effects until the existence of a subsequent juridical act of the donor (left at his sole discretion). In conclusion, a present disposition has different meanings: a donation must only grant rights available to the donor at the time of the donation, and not in the future; and a donation must benefit the donee while donor and donee are still alive, under the consequence of the juridical act being defined as a testament, and being, therefore, regulated under the law of testament.

5.3.5. *Types of donations*

Donations under French law may be divided following two main criteria¹¹⁶²: the purity of the donation and the formalities involved for their creation¹¹⁶³. With regard to the purity of the donation, donations may be pure, i.e. no counter performance is expected from the donee, or conditional, where a *modo* is imposed upon the donee¹¹⁶⁴. Several legal writers have addressed the topic of the purity of donation in Europe in general¹¹⁶⁵, and in France in

¹¹⁵⁹ A Seriaux, *Manuel de droit des successions et des libéralités* (2003) p 231.

¹¹⁶⁰ A Seriaux, *Manuel de droit des successions et des libéralités* (2003) p 98.

¹¹⁶¹ “*Toute donation entre vifs, faite sous des conditions dont l'exécution dépend de la seule volonté du donateur, sera nulle*”.

¹¹⁶² It is important to notice that although sharing all cardinal elements of donations, other gratuitous juridical acts have been excluded by French legal writers from the concept of donation. For this reason, these will not be treated as types of donations under French law. As an example, please see J Ray, *La notion de donation en droit civil français* (1912) p 157, who review's remuneratory donations, mutual donations and family arrangements (such as donations in view of the wedding) as liberalities which are not donation.

¹¹⁶³ Bearing in mind the subcategory of *don manuel* available for donation of moveable goods.

¹¹⁶⁴ Art 896 to 900-8 FCC.

¹¹⁶⁵ See A Ferrão, *Das doações segundo o Código Civil Português* (1911) p 219; A Ascoli, *Il Concetto della Donazione nel Diritto Romano con Richiami al Diritto Civile Italiano* (1893) p 22; F C Savigny, *Traité de*

particular¹¹⁶⁶. Two different answers were given by lawyers and courts to this question: on one side are those who defend the purity of principles, and therefore, do not accept the classification of a relationship where all counterparties are legally obliged to return a benefit received as “gratuitous”¹¹⁶⁷. Writers such as Savigny see in the *modo* a restriction to the gratuity of the juridical act, therefore defining these acts as a *negotium mixtum*¹¹⁶⁸, which means that, for Savigny, only part of the donating act is a proper donation. On the other side, we can find those who admit the existence of different types of donations, some of which are not entirely gratuitous. The latter perspective is the dominant one in France¹¹⁶⁹. Finally, it is relevant to mention that the FCC expressly allows conditions to be imposed by the donor on the donee, as well as the creation of obligations to the donee, arising for the contract of donation¹¹⁷⁰. As a demonstration, under article 900 FCC all impossible conditions are deemed as unwritten; under article 900-1 FCC, the donee may be stopped from disposing of the benefit received, as long as this limitation is temporary and justified by a serious interest of the donor.

5.4. Effects¹¹⁷¹

The main legal effect of classifying a juridical act as a donation under the French law of donation is the vesting of a benefit in the donee¹¹⁷². This benefit is always a determined benefit, or the relevant juridical act cannot be qualified as a donation under French law of donation¹¹⁷³. Following the letter of the law, the FCC states that a donation “produces its effects only from the day it is accepted in express terms”¹¹⁷⁴. Article 893 FCC states that the legal effects of a donation are, in general a gratuitous disposition of all or part of the donee’s assets or rights for the advantage of the donee¹¹⁷⁵. Article 894 FCC specifies that, in

Droit Romain (1943) p 290; M B Lopes, *Das Doações* (1970) p 18; M R P Ramalho, *Sobre a Doação Modal, O Direito* (1990) 122, III-IV, p 673-744; and J Varela, *Ensaio sobre o Conceito de Modo* (1955).

¹¹⁶⁶ A Foubert, *Le don en droit* (2007) p 4; V Chauffour, *Le don* (1843) p 27, among others.

¹¹⁶⁷ See K Bartholdy, *Der Begriff der Schenkung* (1928) p 45; and G Moreira, *Instituições do direito civil português* (1907-1925) II, p 579.

¹¹⁶⁸ C F Savigny, *Traite de Droit Romain* (2nd ed 1845) 4, p 101.

¹¹⁶⁹ See R J Pothier, *Traité du contrat de vente* (1772) p 123; G Griolet, C Vergé, *Nouveau Code civil annoté et expliqué d'après la jurisprudence et la doctrine* (1900) art 894(12); J Chapeaux, *Étude sur la notion juridique de l'acte à titre gratuit en droit civil français* (1931) p 34; and L Mosco, *Onerosità e gratuità degli atti giuridici con particolare riguardo ai contratti* (1942) p 123-124.

¹¹⁷⁰ As defined under art 900 to 900-8 FCC.

¹¹⁷¹ Other than the general effects of obligations, as regulated under art 1134 FCC and following.

¹¹⁷² Art 894 FCC and see A Seriaux, *Manuel de droit des successions et des libéralités* (2003) p 11.

¹¹⁷³ A Seriaux, *Manuel de droit des successions et des libéralités* (2003) 11.

¹¹⁷⁴ Art 932 FCC.

¹¹⁷⁵ Art 893: “A liberality is an act by which a person disposes by gratuitous title of all or part of his assets or his rights to the advantage of another person”.

particular, a donation is a juridical act by which the donor (i) divests himself, (ii) now and irrevocably of the thing donated, (iii) in favour of the donee¹¹⁷⁶.

5.4.1.1. Sacrifice of the donor

The sacrifice of the donor is often regarded by legal writers as one of the legal effects of classifying a juridical act as a donation in France. Legal writers such as Savigny, and those who follow a similar approach to him in France¹¹⁷⁷, often use the element of impoverishment of the donor to distinguish between donations and testament. Therefore, for Savigny, “the transfer *mortis causa* does not diminish the patrimony of the *de cuius*; such patrimony remains the same, passes only into other hands. Therefore, the enrichment of the donee by the donor is of the essence of donation. However, a testator cannot know if he will benefit his heir, because misfortune[/debts] might absorb or reduce the benefit”¹¹⁷⁸. French courts have further defined the concept of divestment of the donor, bringing it closer to the idea of alienation of all or part of the donor’s patrimony. In this sense, it has been clarified that “a juridical operation does not present the character of a donation if its author, although acting with a charity intent and for the exclusive advantage of another, does not divest himself voluntarily of a portion of his patrimony”¹¹⁷⁹. In this sense, it is possible to conclude that the patrimony of the donor (as a compilation of his rights and duties) must be sacrificed, either by the alienation of a right he holds in the present, or by undertaking of a new obligation he did not hold before.

5.4.1.2. Effects that are produced now

The need for a present effect to be produced by the donation is not only found in the FCC¹¹⁸⁰, but has also been developed by the writings of legal writers¹¹⁸¹ and by court decisions¹¹⁸². One such case is Van Gysel, who declares that “the actuality of the act implies that the donor immediately releases an element of his patrimony, making it enter the patrimony of the

¹¹⁷⁶ Art 894 FCC: “A donation *inter vivos* is an act by which the donor divests himself now and irrevocably of the thing donated in favor of the donee, who accepts it”.

¹¹⁷⁷ As examples, see C Larroumet (ed), *Les Obligations, Le Contrat* (5th ed 2003) III, p 25; E Tarbouriech, *De la Cause dans les libéralités* (1894) p 8; or P Malaurie, *Les successions, Les Libéralités* (5th ed 2012) p 146.

¹¹⁷⁸ M F Savigny, *Traite de Droit Romain* (2nd ed. 1845) 4, p 21.

¹¹⁷⁹ Decision of the Court decision of the Civile of 5 April 1938: DH 1938.305.

¹¹⁸⁰ Art 894 FCC.

¹¹⁸¹ As an example, see A Van Gysel (e), *Précis du droit des successions et des libéralités* (2008) p 98.

¹¹⁸² As examples, see Court decision of the Civile of 5 April 1938: DH 1938.305 and 1st Civile of 22.3005: Bulletin Civile I, p 95.

donee, or undertake a debt”¹¹⁸³. The idea that a donation must produce immediate effects is further developed by the French courts, claiming that in the case of a property right, this right is transferred immediately by the donation¹¹⁸⁴. Without repeating the discussion on the irrevocability of donation in France undertaken above¹¹⁸⁵, articles 894 and 895 FCC distinguish between donations *inter vivos* and testament by the moment when the legal effects are produced. Therefore, in relation to donations, the benefit is provided by a bilateral juridical act and received by the donee immediately (while both parties are alive). Conversely, in the case of testament, the benefit is provided by a unilateral act of the testator, and the benefit is only received by the heir in a future moment (after the death of the testator).

5.4.1.3. The donor is vested in a benefit

Bearing in mind the discussion above, where the different cardinal elements of donation in French law were critically analysed, it is possible to argue that the donee may have vested in him the right to several types of benefits, as long as the benefit is able to increase his patrimony. For example, donation is defined under the FCC as a juridical act able to transfer property¹¹⁸⁶, to release the donee of an obligation or vest in him a personal right he did not hold before¹¹⁸⁷. It is also relevant to notice that, due to its relevance in French society, the transference of property rights by donation has been regulated under articles 949 FCC, and following. Several rules therefore regulate the gratuitous transfer of both moveable and immovable property from donor to donee in France. Among others, the donor is allowed to reserve for his benefit the usufruct of the property donated¹¹⁸⁸. He may also stipulate a right of return of the property donated if he dies before the donee and/or his descendants¹¹⁸⁹.

5.5. Regulation of market donations

As mentioned before, the dominant views in early 19th century French political and legal philosophy regarded economic interest as the main motivation of human behaviour¹¹⁹⁰. It

¹¹⁸³ A Van Gysel (e), *Précis du droit des successions et des libéralités* (2008) p 98.

¹¹⁸⁴ Court decision of the 1st Civile of 22.3005: Bulletin Civile I, p 95.

¹¹⁸⁵ Where irrevocability is critically reviewed as one of donations’ cardinal elements under French law of donation.

¹¹⁸⁶ Art 711 FCC.

¹¹⁸⁷ Art 894 FCC.

¹¹⁸⁸ Art 949 FCC.

¹¹⁸⁹ Art 951 FCC.

¹¹⁹⁰ X Martin, ”Insensibilité des rédacteurs du Code Civil à l’altruisme” (1982) *Revue d’histoire du droit*, p 611.

was therefore commonly accepted that all voluntary acts were the mere reflection of an interest being pursued¹¹⁹¹. These conceptions have influenced the drafters of the FCC, who developed feelings of suspicion towards donation, and led to distrust towards gratuitous juridical acts such as donation. It is therefore commonly stated by French lawyers that a transaction's economic rationality is disturbed by a gratuitous *causa*¹¹⁹². This assumption may be explained by the fact that a donation is able to create an economic benefit to one of the parties – the donee - but no correspondent economic benefit may be conferred on the donor.

The imbalance in the “economic rationality” of the donation is regarded by French legal writers as unnatural, an unnatural transaction that is only justified by the “liberal intention” of the donor¹¹⁹³. But no stable definition exists to fully describe the essence of a “liberal intention” in France. In the case of the FCC, the existence of a liberal intention as the justification for an economically unbalanced transaction is traced by legal writers to the humanitarian ideas of the nineteenth century¹¹⁹⁴. For example, in Lambert's view, the humanitarian vision of society of the drafters of the FCC, where the individual will must always be respected, explains its use in the FCC¹¹⁹⁵. The respect for the individual will therefore led to a wide definition of “liberal intention” in the FCC and while *animus donandi* is not defined under the FCC, it is described by French lawyers as “an expression of altruism, an expression of uninterested desire”¹¹⁹⁶.

Given that donation is regarded with suspicion, several legal writers call for the protection of those potentially affected by the donation¹¹⁹⁷. The claim for substantial regulation of donation is particularly aimed at the protection of French society against a perceived “hazard” of donation¹¹⁹⁸. Therefore, it may be argued that, as a rule, the French legal system uses the law of donation in order to protect those who are potential victims of the legal effects of donation¹¹⁹⁹, protecting any potential victims of donation. These victims may be identified

¹¹⁹¹ X Martin, “Insensibilité des rédacteurs du Code Civil à l'altruisme” (1982) *Revue d'histoire du droit*, p 603.

¹¹⁹² L Poulet, *Transaction et protection des parties* (2005) p 452.

¹¹⁹³ S Lambert, *L'intention libérale dans les donations* (2006) p 16.

¹¹⁹⁴ S Lambert, *L'intention libérale dans les donations* (2006) p 16.

¹¹⁹⁵ S Lambert, *L'intention libérale dans les donations* (2006) p 16.

¹¹⁹⁶ S Lambert, *L'intention libérale dans les donations* (2006) p 17.

¹¹⁹⁷ As a demonstration, see A Seriaux, *Manuel de droit des successions et des libéralités* (2003) p 11.

¹¹⁹⁸ D Guével, “La gratuite intéressée : oxymore d'avenir ?” (2009) *Mélanges en l'honneur du professeur F. Goubeaux*, p 229; C M Mazzoni, “Le don, c'est le drame. Le don anonyme et le don despotique” (2004) *RTD civ.*, p 701.

¹¹⁹⁹ F Terre, Y Lequette, *Précis de Droit Civil, Les successions, Les libéralités* (3rd ed 1997) p 206.

as the donor himself, his family, and his creditors. Bearing in mind this distrust and call for protection against donation, a critical analysis of the fitness of French law of donation for the purpose of regulating donations made in a market context will be conducted on three different levels: (i) protection of the parties; (ii) protection of third parties; and (iii) protection of the community, in general.

5.5.1. *Protection of the parties*

The first consequence of the French suspicion towards donation is the need to protect the donor from himself, i.e. the need to protect the donor from his own “ill-considered” actions¹²⁰⁰. These ill-considered actions may occur due to a different number of reasons, such as: error; *dolus* of the donee; moral or religious gratitude; reverence, respect and wonder inspired by authority; among many others¹²⁰¹. Therefore, the FCC specifies that only those of “sound mind” may make a donation¹²⁰², and consent will be null if tainted by error, fraud or violence. In addition, French law of donation grants revocation powers to the donee¹²⁰³, as well as the necessary tools for the invalidation and reduction of donation to be used by the donor’s family and his creditors¹²⁰⁴.

It may be argued that the powers of revocation granted to the donor, where he alone is able to revoke an otherwise valid and binding bilateral juridical act, are able to create a high amount of instability and insecurity when in a market context. It may be argued that in the market context, the parties are not presumed to be motivated by strong emotions or others which led them to “ill-considered” actions¹²⁰⁵, on the contrary, the parties often deal with unknown counterparties, donating and/or receiving donations from strangers. This characteristic of donations in a market context separates them from other donations where strong emotions may impair the donor’s judgement (such as those made in a family context). Following this line of argument, it is possible to conclude that a protection towards acts of a donor motivated by strong feelings (such as love) is not needed, and may even oppose the principles of freedom and security in the market context. This level of insecurity cannot be deemed as compatible with creating the best conditions for donations to be used in a market

¹²⁰⁰ D Guével, *Droit des successions et des libéralités* (2nd ed 2010) p 27.

¹²⁰¹ C M Mazzoni, “Le don, c’est le drame. Le don anonyme et le don despotique” (2004) *RTD civ.*, p 701.

¹²⁰² Art 901 FCC.

¹²⁰³ Art 953 to 966 FCC.

¹²⁰⁴ Art 918 to 930-5 FCC.

¹²⁰⁵ D Guével, *Droit des successions et des libéralités* (2nd ed 2010) p 27.

context because they lead to distrust of donee – those who receive a benefit in a market context, because they fear that this benefit may be removed from them at any time by the donor. The negative impact of this distrust is, however, balanced by requesting firm formal requirements for the creation of a donation in France (whether in a market context or not)¹²⁰⁶. These requirements are formalistic in nature, and considerably stricter than those applied to other bilateral juridical acts such as contracts of sale and purchase¹²⁰⁷.

5.5.1.1. Formalities and need for acceptance

The French law of donation imposes heavy formal duties for the validity of a juridical act which is to be classified as a donation. Under article 931 FCC all donations must be executed “before notaries, in the ordinary form of contracts; and the notaries shall retain an original of them, on pain of nullity”, with the exception for moveable property, which may be donated by simple physical conveyance¹²⁰⁸. Another formality, which is of prime relevance for the protection of the security of the parties is the need for acceptance. As stated before, French law of donation demands acceptance to be given “in express terms”¹²⁰⁹. It may be argued that, because of the distrust in donation, heavy formalities are set under French law of donation, for the validity and productions of effects of a donation¹²¹⁰. These formalities are both suitable to increase security in the market, because the parties are able to trust in the contract if it follows the legally required formalities; but they can also decrease the exchange of products in the market, operated by gratuitous transfer (donation) when their subject-matter is not a movable. This decrease of market donations may be caused by high formalities being used as a deterrence against donations, due to the time and expense consumed, which may repel some parties from donating. In conclusion, a generic formalistic approach must be regarded as good for the promotion of security in the market, which means that French law of donation is suitable to regulate the relationship of parties in a market context, in what the promotion of security is concerned. This assessment is only possible due to the exclusion of movables from this heavily formalistic approach, where donations for sales promotions and others are facilitated.

¹²⁰⁶ Art 931 FCC.

¹²⁰⁷ Art 1582 FCC and following.

¹²⁰⁸ Decision of the Court of Cassation, JPC G 2000, II, 10274, 1^{re} civ, of 30 March 1999; “*Le possesseur qui prétend avoir reçu une chose en don manuel bénéficie d’une présomption et il appartient à la partie adverse de rapporter la preuve de l’absence d’un tel don*”.

¹²⁰⁹ Art 932 FCC.

¹²¹⁰ Art 938 FCC: “A donation duly accepted is complete by the sole consent of the parties; and ownership of the objects donated is transferred to the donee, without need of any other delivery”.

5.5.1.2. Revocation

With regard to revocation, as critically analysed above, donations are primarily treated as irrevocable under French law of donation¹²¹¹. It may be argued that the exceptions to the rule on irrevocability are family-orientated, or at least, have been created for parties who maintain or will maintain a personal relationship in the future. In this sense, article 953 FCC establishes that a donation may be revoked due to the following reasons: (i) “on account of the non-performance of the conditions” under which a donation was made¹²¹²; (ii) “on account of ingratitude”¹²¹³; and (iii) on account of the occurrence of the birth of new children for the donor¹²¹⁴.

Considering the scope of application of these rights of revocation, it is possible to conclude that, although they regard the donor’s acts with suspicion and are aimed at protecting the donor from an ungrateful donee or his children from disinheritance, they have a small impact on donations made in a market context. Because market transactions are often conducted by persons who do not have a relationship previous to the donation, or who may not pursue this relationship afterwards, they are not expected to remain in contact afterwards, reducing the possibility of the rules on revocation for ingratitude to ever be applicable to them. Similarly, the rules on revocability due to the birth of new children for the donor should be presumed inapplicable in a market context, as they have been designed to prevent the disinheritance of

¹²¹¹ Art 894 FCC.

¹²¹² Under art 954 FCC: “in the case of revocation on account of non-performance of the conditions, the assets shall revert to the hands of the donor free of all charges and hypothecs created by the donee; and the donor shall have the same rights against third party detainers of the immovables donated as he would have against the donee himself”.

¹²¹³ Under art 955 FCC: “a donation *inter vivos* may be revoked on account of ingratitude only in the following cases: 1° If the donee has made an attempt against the life of the donor; 2° If the donee has been guilty of cruelty, serious offenses, or grievous insults toward the donor; 3° If the donee refuses support to the donor”. To these, apply the exception of donations for the marriage, where according to art 959 FCC they cannot be revoked on account of ingratitude.

¹²¹⁴ According to art 960 FCC: “all donations *inter vivos* made by persons who had no children or descendants presently living at the time of the gift, of whatever value they may have been, and for whatever reason they may have been made, and although they were reciprocal or remunerative, even those made in favor of marriage by persons other than the spouses to each other, may be revoked, if the act of donation so provides, by the occurrence of the birth of a child to the donor, even after his death, or of the adoption of a child by him as provided in Chapter I of Title VIII of Book I”. The regulation of the right of revocation based on the birth of a new child for the donor is further regulated by the following articles of the FCC, such as art 961 FCC, where it is stated that the right of revocation exists even if the child of the donor had been conceived at the time of the donation.

the new child, as a rule. Consequently, this would only ever concern persons close to the donee.

5.5.2. Protection of third parties

5.5.2.1. Protection of creditors and heirs

In terms of French law of donation, the protection of third parties is mainly connected with the rules aimed at protecting the expectations of the creditors of the donor or his heirs (who expect to inherit in the future). In this sense, the creditors of the donor are protected against several types of gratuitous transactions which are able to compromise the fulfilment of the debtor's obligations in the future. This rationale also formed the basis for legal rules outside of the law of donation, such as those connected with *actio pauliana*¹²¹⁵, where a fraudulent conveyance or transfer is reduced in order to preserve the rights of the general creditors, or insolvency, and which will not be discussed in the present study.

But the oldest class of individuals protected against the “maleficent” effects of donations are the donor's family. The protection of the family deals with the protection of the family as a unit, by presuming that all elements of the same family¹²¹⁶ retrieve benefits from the aggregated patrimonies of all family members – which form, all together, what is often referred to in France as the “family patrimony”¹²¹⁷. In this sense, the expectations of the heirs are protected under French law of donation through different sets of rules, being the most relevant those dealing the revocability of donation on account of the occurrence of the birth of new children for the donor¹²¹⁸. The second set of rules may be found in articles 912 FCC and following, dealing with the reduction of donations due to infringement of the limits of the disposable portion of the donor's patrimony in what the law of succession is concerned. The disposable portion of the donor's patrimony is defined under the FCC as the “part of the assets and rights of the succession that is not reserved by legislation and of which the deceased can freely dispose by” donation or testament¹²¹⁹. Building on this concept, article

¹²¹⁵ C Ferreira de Almeida, *Contratos III* (2012) p 23.

¹²¹⁶ The concept “nuclear family”, in this case, is used to describe the group formed by the *de cujus* and his legal heirs.

¹²¹⁷ H Mazeaud, L Mazeaud, F Chabas, *Successions – Libéralités* (5th ed 1999) III (La protection du patrimoine familial contre sa transmission par les libéralités).

¹²¹⁸ Art 960 and 961 FCC.

¹²¹⁹ Art 912 FCC.

913 FCC further clarifies what limits are imposed to the donor on the disposition of his patrimony, which will be reduced when exceeded¹²²⁰. As it was argued in the paragraph critically analysing the protection of creditors, the protection of the heirs' expectations, as third parties in a donation, are widely regulated under French law of donation. Therefore, it is possible to argue that third parties, both creditors and heirs are protected against undesirable effects of donation in the market by both, rules present in the FCC, aimed at protecting the heirs of the donor, and those found in the French Commercial Code, which protect creditors against suspected gratuitous transactions occurring in a "suspected period", which are defined as null and void under French law¹²²¹.

5.5.3. *Protection of the community*

As mentioned before, different rules exist under French law of donation, aiming to promote security and confidence in the French community. These rules are mainly found in articles 913 FCC and following, establishing heavy formalistic rules to be followed by the juridical act which created a donation in France. But it is also worth reviewing the rules which protect the French community, as a whole, against impossible conditions or *modus* which are contrary to legislation or French "good morals"¹²²².

5.5.3.1. Protection against impossible conditions, contrary to legislation or good morals

The FCC confers protection against impossible conditions or those conditions which are contrary to legislation or "good morals". The most relevant of these rules may be found under article 900 FCC, according to which any obligation demanded from the donee, in exchange for the benefit received by the donation, are set aside if declared impossible, contrary to legislation or to "good morals". This generic rule is further clarified in articles 900-1 FCC and following, where it is specified that any clauses preventing to donee from alienating the subject-matter of the donation are deemed unwritten unless they are temporary

¹²²⁰ Art 913 FCC defines that a donation "may not exceed one-half of the property of a disposing party, if he leaves only one child at his death; one-third, if he leaves two children; one-fourth, if he leaves three or more. A child who renounces the succession is counted among the number of children left by the deceased only if he is represented or if he is bound to collate a liberality by application of the dispositions of Article 845". Other rules are also set by art 914 to 920 FCC.

¹²²¹ Art L632-1 to L632-4 of the French Commercial Code, comprising all donations apart from those which are considered as remuneratory in nature (without losing their gratuitous nature).

¹²²² Expression used by art 900 FCC.

or justified by a serious and legitimate interest of the donor¹²²³. These rules are relevant in the market context because if a donation is received by a donee where the above-mentioned charges are imposed, he may request a judicial review of the conditions and charges if they become “extremely difficult, or seriously detrimental” to him¹²²⁴.

5.6. Interim conclusion

A law of protection. Considering that French law of donation acts as a “law of protection”¹²²⁵ against the potentially maleficent consequences of donation, different levels of protection are therefore placed in order to protect the family, the donor (against his own actions) and his creditors under articles 913 FCC and following. For example, aiming to protect the family, the donor cannot alienate by donation more than a legal quota of his own patrimony, which is defined considering different criteria such as the number of descendants or the matrimonial status of the donor¹²²⁶. If this quota is exceeded, then the donation should be reduced for the benefit of the donor’s heirs¹²²⁷.

The abnormal donation. Prejudices against donation are particularly connected to their perception as abnormal while irrevocable in France. These considerations are particularly perceived as dangerous to the French society when affecting the donor, his families or his creditors. By not looking at both parties in a donation as equals, but instead choosing to distrust acts made with a liberal intention, French law of donation is creating uncertainty and potential distrust in market donations. One such case is the revocation right provided to the donor based on the birth of a child¹²²⁸. By providing the donor with rights of revocation based on family considerations, French law of donation is creating excessive uncertainty in non-family related contexts, such as the market, where the parties are expected to interact in view of profit. By imposing a regulation based on family-orientated considerations to other aspects of life in society, such as the market, an unbalance will be created between the parties, parties which do not make their decisions upon family considerations, but profit-orientated considerations. This leads to a further need of equality between the parties,

¹²²³ Art 900-1 FCC, according to which “a donee or legatee may be judicially authorized to dispose of the asset if the interest that justified the clause has disappeared or if it happens that a more important interest so requires.”

¹²²⁴ Art 900-2 FCC.

¹²²⁵ F Terre, Y Lequette, *Précis de Droit Civil, Les successions, Les libéralités* (3rd ed 1997) p 206.

¹²²⁶ In particular, see art 913, 914-1, 917 and 919-1 FCC.

¹²²⁷ Art 919-2, 921, 922 and 923 FCC.

¹²²⁸ Art 960 FCC.

because when acting in a market context, the parties are presumed not to be motivated by strong feelings, but by the pursuit of profit or other economic considerations. By over-protecting one of the parties, an imbalance is created, which will cause uncertainty, leading to a reduction of the transactions entered into by the parties. As a demonstration, if the law of sale was as protective as the law of donation, the seller of a five-bedroom flat would be able to revoke (unilaterally) a contract of sale and purchase based on the birth of new children. If he is not able to do so, then the donor should not be able to do so.

Distrust creates an unbalanced law of donation. Regarding donation as dangerous and as leading to an unbalanced relationship disrespects the principles of private autonomy and freedom of contract. These principles are of primordial relevance in a market context and their disrespect compromises the need for a promotion of security. By reconsidering the level of protection conferred upon the donor (and connected persons), the French law of donation would be promoting equality between donor and donee. This would promote confidence in the irrevocability of donation in France. Furthermore, property would circulate more freely and a greater autonomy of the donor would respect the principles of freedom of contract and private autonomy.

Chapter 6 Conclusion

Principles and objectives to be followed by the law of donation

It was stated in the present thesis that a law of donation which is fit to regulate donations made in a market context must provide the parties with the freedom to enter into gratuitous transactions with both connected persons and strangers alike¹²²⁹. In other words, the parties must be free to choose their counterparties and the terms of the donation. Providing security to the parties is also essential¹²³⁰, by reassuring the parties that no unilateral revocation rights are going to endanger the donation. This protection of the parties' expectations is particularly relevant when the donation is made between strangers in the market. This confidence will potentially lead strangers to enter into more donating agreements, considering that both parties are aware that they have the right to enforce performance and the right to rely on the situation created by the donation. Because different communities coexist and trade with each other, while potentially following diverse moral and religious norms, it is also imperative that they are regulated by the same law, providing them security and confidence in the legal outcome of an eventual dispute. In short, the rules guiding donation in the market must be secular and equal for all.

In addition to following these principles, it was argued that a law of donation which is fit for the purpose of regulating market donations should assume that donations in the market are explained by economic rationality, and that they are no longer compelled by powerful feelings such as love or affection¹²³¹. This means that donations made in a market context no longer need a protective law aimed at correcting a presumably irrational decision on the part of the donor. The parties may therefore be treated as equals and the law of donation should only intervene where the balance is threatened by illicit behaviour of the parties. In addition, the law of donation should promote confidence and security in the market¹²³². The

¹²²⁹ See Chapter 1 – Revisiting the law of donation, 1.2. *Changes occurred*, p 27.

¹²³⁰ See Chapter 2 – European contributions to the law of donation, 2.5. *Principles and objectives of donations in the market*, p 65.

¹²³¹ See Chapter 1 – Revisiting the law of donation, 1.3.4. *Different contexts where donation may be found*, p 36.

¹²³² See Chapter 2 - European contributions to the law of donation, 2.5. *Principles and objectives of donations in the market*, p 65.

focus on the market being relevant, considering that this is a context far away from the family, a context where the parties are expected to interact in view of profit. If donations are regulated by family-orientated considerations, an unbalance will be created between the parties, parties which acting, for example, in the market, do not make their decisions upon family considerations, but profit-orientated considerations. If the parties are not deemed to be equals, but instead, one of the parties is protected against the other, this will cause uncertainty, leading to a reduction of the transactions entered into by the parties. For example, if an Italian business decides to donate items to Danish consumers with the intention of entering the Danish market and promoting its sales, both Italian donors and Danish donees should be protected and certain about the rights and duties emerging from the donation. This means that both parties should trust that their rights are protected under the relevant national law of donation.

Are the national laws of donation under analysis fit for the purpose of regulating donations made in a market context?

Protection of the parties

*Scotland*¹²³³. In Scots law, the protection of the donor in case of mistake extends to all donations, including donations in a market context. As a rule, the donor may avoid the donation if this donation was concluded because of a mistake. For the same reason, when entering into a donation, each party must have full capacity to act by himself or in his own benefit. Because donation is conceptualised as a flavour of multiple juridical acts, the right to enforce performance is, under Scots law, regulated under the general rules for enforcing the performance of the relevant juridical act. In addition, it is possible to conclude that Scots law of donation is fit for the purpose of protecting the parties' expectations, in particular when a donation is made between strangers, considering that the law of donation only exists in addition to the law which regulates the relevant juridical act, which was, due to its characteristics, classified as a donation. This allows the parties to rely on the situation created by the donation. Finally, it is necessary to bear in mind that donations made in a market context may occur as a one-off juridical act between the parties. The Scots law of donation also caters for these situations, because the law regulating the juridical act which gives rise

¹²³³ See Chapter 3 – Scotland, 3.5.1. *Protection of the parties*, p 125.

to the donation is presumed to be able to regulate new market relationships or one-off market relationships.

*Portugal*¹²³⁴. Donation is defined as a contract under Portuguese law of donation, which means that donation is conceptualised as a specific juridical act in Portugal. The need for acceptance emerging from the classification of donation as a contract protects the donee from receiving benefits (or holding rights) without his consent. This protection shields the donee against responsibility created by an undisclosed transfer of real rights to him, including liability for damages caused by property, taxes or fees, among others. The rules on the revocation of donations are applicable to all contexts where donation is made, however, they are tempered by the rules on remuneratory donations. The definition of a donation as remuneratory has consequences for the parties, in particular when donations are made in a market context. One such case is the protection of donees such as doctors, nurses or priests, who may validly accept a donation as remuneratory payment for medical care or spiritual aid services, previously provided to the donor. It is also important to notice that the *modo* may only be demanded up to the pecuniary value of the benefit received by the donee. This gives important protection to the donor because of the importance of the pecuniary value of transactions in the market context. Finally, it is important to mention that it is not clear if Portuguese law of donation defines samples or small gifts for the promotion of sales as donations. If they are not qualified as a donation, a legal gap is created and these gifts are not regulated under the law. This creates a high degree of uncertainty, only tempered by the rules on objective product liability of the producer. It was therefore concluded that it would be more appropriate to classify any gratuitous transaction, as long as occurring in market context, as a donation, therefore providing further security to all parties involved.

*France*¹²³⁵. French law of donation highly regards consent and the free formation of the will of the donor, which must not be tainted. It also grants revocation powers to the donor, as well as revocation rights to be used by the donor's family and his creditor, aiming to protect what is perceived as the family patrimony from gratuitous acts of the donor. This creates a high amount of instability and insecurity as the same revocation rights are applicable to donations made in a market context. It was argued that, in the market context, the parties are not presumed to be motivated by strong emotions such as love, but instead, to be motivated

¹²³⁴ See Chapter 4 – Portugal, 4.5.2. *Protection of the parties*, p 188.

¹²³⁵ See Chapter 5 – France 5.5.1. *Protection of the parties*, p 224.

by economic rationality. A high level of insecurity is not, therefore, compatible with the objective of creating the best conditions for donations to be used in a market context. This distrust in donation has led to heavy formalities necessary for the validity of donations (with the exception of *dons manuels*). Heavy formalistic duties create security by trust in the formal validity of the donation, but they also increase the difficulty to interact with others. In what revocation is concerned, donations are primarily regarded as irrevocable under French law of donation, but it may be argued that many exceptions to this rule exist based on family-centred considerations (such as ingratitude or the birth of new children for the donor). These rights of revocation are not, however, appropriate for donations made in a market context, and irrevocability must be regarded suitable to the promotion of security in what market donations are concerned.

Protection of third parties

*Scotland*¹²³⁶. Donors and donees maintain relationships with third parties. Due to the gratuitous character of donation, third parties are potentially affected by the gratuitous dissipation of the donor's patrimony, and benefit from the non-reciprocal enrichment of the donee. Recognising the relevance of third parties' expectations, in Scots law of donation, the donee takes the subject-matter of the donation *cum onere*. By doing so, third parties' rights or claims secured by heritable securities remain valid. Furthermore, other third party rights based on succession law or insolvency rules will also apply. The expectations of third parties connected to the donee (expecting him to keep the subject-matter of the donation) are protected in Scots law of donation by the principle that the donee cannot be arbitrarily deprived of the benefit received.

*Portugal*¹²³⁷. Revocation rights exist in Portugal under article 970 PCC. These rights may potentially affect expectations of third parties because if a donation is revoked, all effects produced by the relevant donation will cease to exist. As an example, in respect of the protection of expectations of third parties connected with the donor, Portuguese law of donation defines that if any rights are alienated by the donee or his heirs and the donation is declared to be void, then the donee (or his heirs) must compensate the donor in the pecuniary value of the rights alienated. The protection given to the expectations of third parties

¹²³⁶ See Chapter 3 – Scotland, 3.5.2. *Protection of third parties*, p 128.

¹²³⁷ See Chapter 4 – Portugal, 4.5.3. *Protection of third parties*, p 193.

connected to the donor follows the principle that the donee cannot be arbitrarily deprived from the benefit received by the contract of donation. However, third parties' rights based on succession law (coalition) or insolvency law are protected under Portuguese law.

*France*¹²³⁸. The protection of third parties in France is mainly represented by rules aimed at protecting the expectations of the creditors of the donor or his heirs (who expect to inherit in the future). Creditors are protected against fraudulent donations by *action pauliana* and insolvency rules, making French law of donation suitable to regulate donations in a market context. In respect of the donor's heirs, they are protected by different sets of rules dealing with the revocability of donation on account of the occurrence of the birth of new children for the donor, coalition or other succession law considerations.

Protection of the community

*Scotland*¹²³⁹. Scots law of donation establishes a presumption against donation, adding efficiency to the market because it eliminates the instability and insecurity brought by the subjective element of the motivation/intention of the donor. The presumption against donation also provides courts and other legal actors with a tool which allows them to objectively evaluate the donor's will. Security is provided by the formalities required by each juridical act which forms the basis of the donation, and by clear rules, under which donations are enforceable under the law. It may be argued that Scots law of donation further promotes security by providing relevance to the formalities for each juridical act, one such case being promise, which in certain circumstances may be defined as a donation under Scots law. In the case of promise, the juridical act base for the donation does not need acceptance of the promisee-donee to generate juridical effects. But it may also be argued that donations which do not require acceptance of the donee for the production of legal effects exhibit a grave lack of transactional clarity.

*Portugal*¹²⁴⁰. Under the PCC, the donor is not responsible for the obligations or limitations of the rights donated, nor is he responsible for the defects of the subject-matter of the donation. From a security perspective, this means that, as a rule, the donor is not responsible

¹²³⁸ See Chapter 5 – France 5.5.2. *Protection of third parties*, p 227.

¹²³⁹ See Chapter 3 – Scotland, 3.5.3. *Protection of the community*, p 131.

¹²⁴⁰ See Chapter 4 – Portugal, 4.5.4. *Protection of the community*, p 193.

for the defects or harm caused by the subject-matter of the gift to the donee or others. This lack of responsibility of the donor for any harm caused by the subject-matter of the donation contrasts with the objective responsibility of producers for faulty items. It is therefore argued that the absence of rules on product liability applicable to donations compromises the fitness of Portuguese law of donation, in its current form, for the purpose of regulating donations made in a market context.

*France*¹²⁴¹. The FCC confers protection against impossible conditions or those conditions which are contrary to legislation or “good morals”. Following the enforcement by the law of donation of “moral rules”, any clauses preventing the donee from alienating the subject-matter of the donation are deemed unwritten unless they are temporary or justified by a serious and legitimate interest of the donor. These rules are relevant in the market context because if a donation is received by a donee where immoral charges are imposed, he may request a judicial review of the conditions and charges if they become “extremely difficult, or seriously detrimental” to him. It may be argued that these rules create uncertainty in a context where persons from different backgrounds, cultures or even nationalities interact with each other on a regular basis. By enforcing moral rules, French law of donation opens the gates for the application of non-uniform decisions by the French courts, potentially creating instability and uncertainty. It is therefore suggested that any moral considerations should be removed from French law of donation, in order to prevent instability in the market.

Considerations for the future

The widespread use and regulation of donation in the jurisdictions under analysis in the present thesis demonstrates that donation is a well-established institution in European law. Although defining donation in different terms, all jurisdictions under study present donation as a gratuitous way to convey rights and to create a benefit for the donee without the need for a correspondent enrichment of the donor. It is however clear that Scots law of donation is the best equipped, of the three laws of donations under analysis, to regulate donations made in a market context, considering that its application is limited, and different laws, already fit to regulate market transactions, regulate the relationship of the parties, depending on which juridical act was used to create a donation. It is also possible to conclude that, because it qualifies donation as a contract, without necessarily connecting it to the family,

¹²⁴¹ See Chapter 5 – France 5.5.3. *Protection of the community*, p 229.

the Portuguese law of donation provides security to the parties involved in the transaction, therefore upholding the principles of security and contractual freedom. The French law of donation is therefore the one which seems less fit to regulate donations made in a market context, due to the significant distrust of legal writers and the law of donation, is often presumed to be a threat to the donor or his family.

From an EU perspective, and without forgetting the uncertain position of Scotland within the EU¹²⁴², it is possible to argue that different ways to look at donation create a level of uncertainty in the market. This uncertainty could be prevented by a uniform approach. By creating a singular approach towards the regulation of the challenges faced by donations made in a market context, the different communities and market players would be fully aware of their rights and obligations when donating or receiving a donation in the market. Potentially, this could increase confidence and lead to an increase of gratuitous market exchanges and/or in a more integrated Common Market. Therefore, there are two possible solutions to a closer regulation of donations in Europe: (i) the adaptation of the different national laws, where the answers provided by the law of donation would follow a common approach aimed at gratuitous market transactions; or (ii) depending on the future membership of Scotland in the EU club, further action to be pursued by the European legislative organs, aimed at promoting further European integration in what gratuitous transactions made in the market are concerned.

On feelings

« L'amour, parce qu'il conduit à cette attitude si pleinement humaine qu'est le don, de soi ou de ses biens. »¹²⁴³

Finally, I would like to conclude by acknowledging that feelings such as love, compassion or charity motivate donations. But I also hope to have contributed to the understanding that not only these feelings motivate donation. Donations exist in all areas of life, even when motivated by “lesser honourable” feelings such as the desire of economic profit or a personal advantage. By acknowledging this it will be possible to further advance the study of donation

¹²⁴² See Chapter 3 – Scotland, 3.1. Introduction, p 78.

¹²⁴³ A Seriaux, *Manuel de droit des successions et des libéralités* (2003) p 9.

outside of the family and in relevant contexts of life such as the market, therefore contributing to the creation of more comprehensive laws of donation.

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