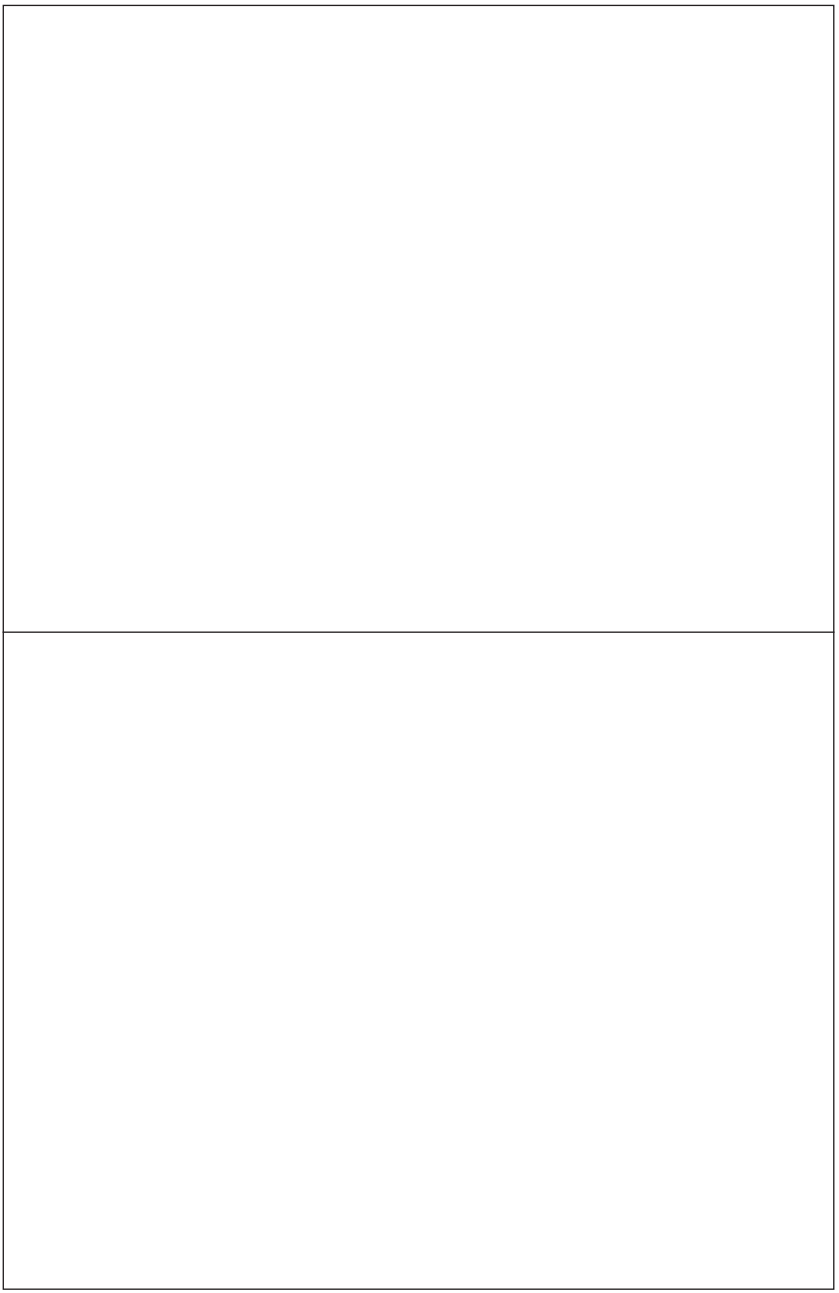
Stefan Lorenzmeier/Dorota Miler (eds.)

The New Law

Suggestions for Reforms and Improvements of Existing Legal Norms and Principles

Nomos



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Foreword

The Augsburg Graduate Conference in Law took place at the Law Faculty of the University of Augsburg on June 3 and 4, 2016. The theme of the Conference was "The New Law – Suggestions for Reforms and Improvements of Existing Legal Norms and Principles." The Conference was addressed to young academics and researchers wishing to pursue an academic career.

The editors express sincere gratitude to everyone who made this conference and the publication possible. We are very grateful to the participants of the conference for their contributions published in this volume. We would like to express our sincere gratitude to professors from the Law Faculty of the University of Augsburg, specifically: Prof. Dr. Thomas M.J. Möllers, Prof. Dr. Matthias Rossi, Prof. Dr. Christian Gomille and Prof. Dr. Luís Greco (now Humboldt University of Berlin), and Prof. Dr. Roman Petrov (National University of Kyiv-Mohyla Academy), who held chairs during the Conference and whose remarks stimulated participants to consider their theses in a broader perspective. We would also like to thank Michael Friedman for his language assistance with some of the contributions and the Augsburg Center for Global Economic Law and Regulation (ACELR) as well as the Gesellschaft der Freunde der Universität Augsburg e. V. (GdF) for the financial support that allowed publication of this book.

Augsburg, October 2018 Stefan Lorenzmeier & Dorota Miler

Contents

Abbreviations

Art. / Arts.	Article / Articles
e.g.	exempli gratia (for example)
EC	European Community
ed, eds	editor, editors
EU	European Union
ff.	and the following pages
i.e.	id est (that is)
ibid.	ibidem (in the same place)
No / no	number
p.	page
para. / paras.	paragraph / paragraphs
sec.	Section
UK	United Kingdom
UN	United Nations
v.	versus
Vol.	Volume

Introduction to The New Law – Suggestions for Reforms and Improvements of Existing Legal Norms and Principles

Stefan Lorenzmeier, Dorota Miler

A. Augsburg Graduate Conference in Law

The Augsburg Graduate Conference in Law provided young scholars wishing to pursue an academic career with a forum in which they could present their academic work, exchange innovative ideas and engage in a scholarly discussion. It encouraged the participants (doctoral and post-doctoral candidates) to develop an international academic network that would serve to advance their careers. It also provided a venue for taking first steps in the academic world, including a chance for a publication with a respected publisher.

As the organizers, we recognized that many young scholars and researchers are intimidated by their experienced colleges and role-models and that they are, consequently, reluctant to present new ideas that may diverge from the accepted state of affairs. Our goal was to encourage them to share these new concepts. The conference aimed at enhancing the self-confidence of ambitious young scholars by showing them: (1) that their innovative ideas can gain recognition; (2) that they can present and publish like experienced scholars and (3) that their comments and observations may advance the work of others or become a source of inspiration.

The reaction following the call for papers for the Augsburg Graduate Conference in Law exceeded our expectations. We received over 100 abstracts from scholars from Europe, Asia, North America and Australia. The chosen participants come from fourteen countries (Czech Republic, Finland, Germany, Greece, Hungary, India, Iran, Norway, Poland, Scotland, Slovenia, Thailand, Ukraine and Vietnam) from top academic institutions such as the Max Planck Institute for Comparative Public Law and International Law, Free University of Berlin and the Universities of Budapest, Edinburgh, Kiew, Krakau, Ljubljana, Oslo and Thessaloniki. The presenters and contributors are a blend of experienced and early-stage researchers with diverse legal and cultural backgrounds and with different interests and ideas

about and for law. Their commonality was having forceful and original proposals for a new law.

The theme of the Augsburg Graduate Conference in Law was "The New Law – Suggestions for Reforms and Improvements of Existing Legal Norms and Principles." All laws are, by definition, imperfect, thus needing further interpretation and contextual understanding. Throughout the evolutionary development of law, many have struggled with unjust, impractical and obsolete laws, requiring practitioners and academics to seek alternative solutions when the legal rules did not keep pace with societal or technical developments, and to look for equitable principles or the spirit of the law when the letter of the law was unclear or unfair. These are only a few of the many problems legal scholars have faced and have overcome while influencing the process of reforming and improving the law. Adopting this theme aimed at stimulating a deep exploration of the mentioned issues and finding common patterns for their resolution which could be applied in different legal contexts.

A broad wording opened the Conference to all young, talented legal scholars regardless of their particular legal field. The scholars were provided with an opportunity to combine the knowledge and experience of legal academics and practitioners with their legal know-how and creativity so as to think beyond the traditional legal models and to introduce significant innovations advancing the existing body of law. Especially welcome were original approaches situated 'outside the box' of traditional legal thinking.

The young scholars participating in the Augsburg Graduate Conference were not limited to a particular question or area of law or to a specific research approach. Solutions to legal problems can be found by applying different approaches, reasoning or methodologies. However, and not surprisingly, most of the questions discussed during the conference and in the contributions have an international character extending beyond countries to regions and continents.

As innovation also entails failure, it is not necessary that the reader is always convinced by the proposed solutions. Nevertheless, we do hope that they will be helpful in advancing the legal discussion and the law.

B. 'The New Law' as Innovative and Constructive Proposals, Predictions, Evaluations and Theoretical Conceptions

In this publication the contributions are organized according to the geographic scope of applicability of the discussed issues. There are therefore three parts in which new ideas focus on national (Part A), European (Part B) and international (Part C) laws. An additional part is dedicated to solutions influencing our understanding of general legal concepts.

The common feature shared by all the contributions is a discussion of a new law. What is 'new law'? This simple question requires a complex answer. There are four ways in which this term was understood by the contributors.

I. 'The New Law' as an original proposal for a solution to an existing legal problem

There are many recognized problems that remain unsolved in legal literature. The hitherto presented recommendations have proven unfit for a successful and definitive clarification of these matters. A new hope for solving such well-known issues looks to turn the existing discussion in a different direction by considering brand new ideas that, although building on already examined suggestions, are primarily based on an application of alternative approaches and fresh sources of inspiration.

The known controversy regarding the appropriate starting point for the period of prescription in relation to delictual claims is addressed in a revolutionary way by *Kruszyńska-Kola*. She examines the question of period of time that needs to expire before a debtor should be entitled to refuse performance in situations where Polish private law might classify rising the defence of prescription as an abuse of rights. To solve this significant problem, she proposes a novel and flexible regulation for determining the period of prescription, one that provides maximum transparency and predictability. Her recommendations are inspired by French law.[1]

The innovation that *Prostybozhenko* puts forward is to include goodwill (understood as "a favour or advantage that a person or a business controlled

1 In detail see *Kruszyńska-Kola*, Time, Emotions, Legal Certainty and Justice. New Period of Prescription of Delictual Claims for Damages in the Polish Civil Code, p. 47.

by a person has acquired especially owing to a number of factors, including education, knowledge, skills, contact network, intellectual property, branding, and good reputation") as a component in the process of dividing matrimonial assets acquired over the duration of validity of the matrimonial property regime. He suggests a method of determining goodwill and, depending on the type of a matrimonial regime applicable in a given country, different ways of incorporating it in a legal system. [2]

Fenkner introduces an original and radical proposal to optimize the interpretation and application of EU law. The mandatory requirement that has been imposed by the Court of Justice of the European Union to compare all twenty-four official language versions of a provision of European law to ensure uniform interpretation and application is, according to her, impractical, time-consuming, something demanding advanced language knowledge and, for most practitioners and individuals, simply, impossible to comply with. She presents an original alternative solution and analyses it.[3]

An improvement to EU law is proposed also by *Urban-Kozłowska*. She critically examines the new guidelines issued by the European Commission in 2014 on State aid to airports and airlines,[4] which provides a framework for determining whether State aid in the form of public funds granted to airports and/or airlines is compatible with the internal market. Her novel proposal significantly optimizes the Commission's decision-making process.[5]

As pointed out by *Nguyen*, the problem of jurisdictional conflicts occurring when a single dispute is submitted in parallel or consecutively to a number of fora has been studied before. However, he is the first to propose and comprehensively analyse a new approach: application of the principles

2 In detail see *Prostybozhenko*, Equal v. Fair: Considering Goodwill in the Division of Matrimonial Property, p. 115.

3 In detail see *Fenkner*, Multilingualism and the Uniform Interpretation of European Union Law, p. 143.

4 See: Communication from the Commission – Guidelines on State aid to airports and airlines, OJ C 99, 4.04.2014, p. 3–34.

5 In detail see *Urban-Kozłowska*, In Search of a More Effective Assessment of State Aid Measures in the Aviation Sector, p. 179.

of treaty interpretation, particularly Article 31 (3) (c) of the Vienna Convention on the Law of Treaties, as a practical and useful alternative serving to minimize the negative consequences of multiple proceedings.[6]

An original idea advocating the adoption of a multi-faceted approach to climate change refugees – defined as "refugees who are forced to leave their normal places of residence because of environmental changes adversely affecting their lives and livelihood" – by using various international instruments is proposed by *Sanyal*. As he describes, this issue is potentially of enormous concern since by 2050 as many as 200 million people could be displaced by the consequences of climate change. His proposal aims at solving the problem of there not being any effective and uniform protection of the basic human rights of these refugees.[7]

Mendelsohn has an innovative idea for how to determine whether adopted legislative and policing measures minimize systemic risks. In her contribution, she inquires whether the actions undertaken by legislators and policy makers are sufficient to prevent the next systemic crisis. In so doing, she looks at the reasons behind systemic risk – understood as "the risk that the failure of one or more financial institutions or a shock in the financial system can lead to widespread losses and consecutive failures that threaten the stability of the entire financial system and the real economy at large" – considering both the economic description and legal definition of systemic risk and also analysing the consequences of bailouts associated with such risks.[8]

II. 'The New Law' as a prediction of future developments in law

The term 'new law' can also be understood as a prediction of advancements in legal regulations, customary law or legal doctrines. These tendencies can be identified, for instance, on the basis of the evolution of the relevant area of law and the opinions on its future prospects as represented in legal liter-

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6 In detail see *Nguyen*, Resolving Jurisdictional Conflicts Between WTO and RTA Dispute Settlement – Possible Roles for Article 31(3)(c) of the VCLT, p. 211.

7 In detail see *Sanyal*, Solutions to the Problem of Climate Change Refugees, p. 289.

8 In detail see *Mendelsohn*, The Theory and Principles of Banking Regulation after the Financial Crisis: No (Systemic) Risk, No Fun, p. 307.

ature. Given that the harmonization of different laws happens also in a bottom-up process, the uncertainty of the future – along with the uncertainty of what it may bring – can be further minimized by considering progressive laws that have already been adopted in other countries and by determining, where possible, how those laws came to evolve.

The direction of the development of liability principles in Polish and German tort law (in particular, the principles of fault, risk and community life) and the assessment of their potential evolution is what *Krygier* sheds light on. After comparing and analysing relevant regulations and legal literature from these two jurisdictions, she presents original suggestions for improving effectiveness in applying the principles of liability in Polish and German tort law.[9]

The task of identifying current and foreseeable trends in the reform of rules on forced succession and of estimating their future shape was undertaken by *Miler*. In her study, she poses a question: How is the freedom of testation likely to be balanced in the future in respect of a close family member's interest in receiving a portion of the testator's estate (rules of forced succession)? To answer this question, she analyses rules on forced succession in chosen civil law jurisdictions, examining both their character as well as recent reforms.[10]

III. 'The New Law' as a critical evaluation of new laws, practices, theories and proposals

In many cases, the efficiency of new legislation can be assessed only after the law is adopted, enforced and complied with. At that point, the controlling law can be scrutinized not only theoretically but also from a practical perspective. Suggestions for the improvement of such law can then be based on known outcomes that could not always be predicted in advance. Additionally, new legal practices, theories and proposals can be examined regarding their correctness, applicability or usefulness. Thanks to constructive critique, they can gain recognition, acceptance and further evolve.

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9 In detail see *Krygier*, Principles of Liability in Tort and Their Future in the German and Polish Legal Systems – *De Lege Lata* and *De Lege Ferenda* Remarks, p. 61.

10 In detail see *Miler*, The Present and Future of Forced Succession in Chosen Civil Law Jurisdictions, p. 89.

Kotowski critically evaluates the new law regulating supplementary performance – the law includes both a right of repair as well as the right to have a defective product replaced – and identifies a number of problems in this law. For instance, there are no detailed rules explaining the enforcement of supplementary performance, there is no statutory period system for its accomplishment and customers are persistently misinformed about their rights. However, based on his analysis, commercial guarantees do not provide a sound alternative to supplementary performance. Thus, the author looks for alternate new solutions.[11]

The newest Iranian Act on debt convictions from 2015 is constructively critiqued by *Barzegar*. The Act regulates the problem of imprisoning convicted debtors. This problem, rather unknown to European scholars, has not only been considered in Iran for decades but also has significant practical importance: "78 per cent of the inmates in Iran prisons are imprisoned because of financial matters." *Barzegar* explains the legal and social-historical background of this issue, critically assesses the newest Act and recommends a number of progressive changes.[12]

An improvement of the unwritten principle prohibiting an abusive use of rights – thereby constituting a limitation on the exercise of the fundamental freedoms ensured by the European Treaties – is the goal of *Beck*. Such abuse takes place when "a factual circumstance is created that allows rights to be exercised contrary to the purposes the fundamental freedoms intend to protect." After an analysis of the principle's legal foundations and the relevant case law, he discusses the most recent developments regarding the abuse of rights doctrine.[13]

Pouikli scrutinizes the transposition, application and enforcement of Directive 2004/35/EC on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage and identifies a number of issues. She finds that the Directive is ineffective as it is difficult to reach the threshold set in it and that it is not uniformly and efficiently implemented due to its inherent ambiguity. In particular, the Member States can each de-

11 In detail see *Kotowski*, Effective Supplementary Performance?, p. 77.

12 In detail see *Barzegar*, A Critical Review of Iranian's New Imprisonment Policy Regarding Convicted Debtors, p. 131.

13 In detail see *Beck*, Abuse of Rights in EU Law: A General Law Principle Limiting the Exercise of Rights at the EU Level?, p. 157.

cide for themselves on the strength of the implemented measures. She considers a number of significant revisions that would allow for the creation of a powerful liability system.[14]

Puškár, on the other hand, is concerned with the almost unlimited immunity enjoyed by international organizations in a host state that allows these organizations to be excluded from the jurisdiction of the host state's courts as well as other state organs. He questions whether this immunity should not be restricted, especially in context of an individual's right of access to a court. After considering the reasons for the immunity and the current prevailing practice, he makes a strong recommendation on how jurisdictional immunity could be restricted.[15]

Current practice is also challenged by *Korošec* and *Veber*. They examine whether and under what conditions the use of force against non-state actors could be classified as an exercise of the right of self-defence under Article 51 of the United Nations Charter. Particular attention is given to the interpretation of the term 'armed attack' as used in the article as well as the role of the 'unwilling or unable doctrine', providing that the unwillingness or inability of a state to prevent the use of its territory as a shelter for terrorist activities may justify use of force against this state. The theoretical discussion is set in context of the most recent international developments, starting from the 9/11 attacks and the reaction of states and international bodies thereto, and continuing on to the US-led coalition's military intervention against ISIL (Islamic State of Iraq and the Levant) in Iraq and Syria.[16]

The ineffectiveness of international law in preventing mass atrocity crimes is criticized by *Žagar*. She argues that the primary responsibility for the maintenance and restoration of international peace and security is borne by the United Nation's Security Council. She critically examines the latest international developments and the initiatives to change 'veto as a right' to 'veto as a responsibility'.[17]

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14 In detail see *Pouikli*, Propositions towards a Potential Revision of Directive 2004/35/EC on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage (ELD), p. 199.

15 In detail see *Puškár*, Jurisdictional Immunity of International Organizations – Should It Be Restricted?, p. 233.

16 In detail see *Korošec* and *Veber*, The Right of Self-Defence in International Law: Contemporary Developments in the Context of the Fight against Terrorism, p. 243.

17 In detail see *Žagar*, Responsibility Not to Veto, p. 275.

Kompatsiari explores a legal gap falling between the rejection of a legal obligation of people to live and the rejection of a positive right to die, a gap that forces people incapable of committing suicide to remain alive. In her contribution, she discusses the social legitimation of law and the element of 'fellowship' among members of a society. She disapproves of the current state of affairs and looks to stimulate a legal debate on the existence of and preconditions for a right to die as held by people incapable of committing suicide.[18]

IV. 'The New Law' as innovative theoretical conceptions of legal issues

The theoretical understanding of a concept leads to its better enforcement and application. To influence the entire legal system, a concept's nature, characteristics and manner of function must be explored. Only a clear understanding of the world of legal norms and rules allows improvements of a general nature and the creation of laws that not only perfectly fulfil their purpose but also are easy to enforce and comply with.

MacFarlane investigates the unique nature of the right to enforce a benefit provided by contracting parties to a party that is external to the contract (a third party right) in Scots and German law. The theoretical classification of the legally unsystematized right has practical consequences. What laws are to be complied with? What terminology is to be used? How do we make third party rights doctrinally and theoretically sound? How are they classified in German law and could this support their classification in Scots law? How do we make them theoretically apt for any future harmonization measures? To answer these questions *MacFarlane* briefly considers eight potential approaches to the nature of third party rights and discusses in detail the advantages and disadvantages of two of them (the promissory and *sui generis* analyses) in Scots and German law.[19]

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18 In detail see *Kompatsiari*, Contribution of the Element of 'Fellowship' to the Recognition of a Positive Right to Die for People Incapable of Committing Suicide, p. 327.

19 In detail see *MacFarlane*, The Nature of Third Party Rights: Lessons from German Law, p. 27.

The contribution of *Salmi* disapproves of legal rules that have forms against which real life activities cannot be measured. In his opinion, it is particularly problematic when public authorities supervise and enforce rules requiring continuous compliance of the relevant activities. He correlates the difficulty of complying with norms to such norms' vagueness and indeterminacy and urges the introduction of specific, precise norms in dynamic compliance situations, especially when they are enforced by a public body.[20]

The phenomenon of 'retroactivity' in law is studied by *Tøssebro,* who discusses the principle of retroactivity specifically in context of Norwegian constitutional law. She formulates a ground-breaking hypothesis arguing that the content of the principle and the scope of its application are different than commonly accepted. Particularly, she distinguishes two different rules under the principle: The prohibition to make 'true' retroactive laws and the permission to make 'false' retroactive laws. She examines these rules' characteristics and justifications, their possible links with each other and with other relevant legal principles. Finally, she discusses the applicability of these rules to individually drafted administrative decisions.[21]

A novel approach to explaining the relationship between the world of legal norms and systems and the natural world is proposed by *Saensawatt*, who attempts to prove that legal systems, as with all the other systems existing in the nature world, have the nature and characteristics of complex adaptive systems. In his contribution, *Saensawatt* focuses on explaining the first feature, namely the complexity of a system, by discussing hierarchical organization, the concept of nonlinearity, initial conditions and their relation to the chaotic behavior of dynamical legal systems, and the emergent behaviour of dynamical legal systems. The author lists potential benefits that can be gained through the recognition of legal systems as complex adaptive systems.[22]

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20 In detail see *Salmi*, Principles Based Regulation and Compliance with Financial Legislation, p. 343.

21 In detail see *Tøssebro*, The Principle of Non-Retroactivity and Its Application to Administrative Decisions, p. 361.

22 In detail see *Saensawatt*, On the Nature and Characteristic of Legal Systems as Complex Adaptive Systems, p. 379.

C. Concluding Remarks

Each of the contributions included in this volume embodies the idea that moved us to organize the Augsburg Graduate Conference in Law, namely that young scholars and researchers should receive a chance to present their work; propose solutions attempting to solve legal problems; critically analyse governing laws, current legal practices or academic policies and their newest developments; formulate bold theories; and, most importantly, with their novel ideas contribute to legal progress and an enhancement of the quality of law.

We hope that the new ideas envisioned and examined by the young scholars during the Augsburg Graduate Conference in Law and presented here will help solve problems that international organizations, states, populations and common people struggle with every day. The proposals for new laws that the young scholars have shared with us inspire belief in a bright future for the law. We are delighted to have contributed to advancing law by disseminating their ideas for potential reforms and for the improvement of existing legal norms and principles.

A. Lessons from National Legal Systems

The Nature of Third Party Rights: Lessons from German Law

Lorna MacFarlane

A. Introduction

Generally, only the parties to a contract will derive rights under that contract, due to the privity doctrine.[1] However, the contracting parties may wish to confer a benefit upon another party who is external to the contract. When the parties provide that person with a right to enforce the benefit, that person is the recipient of a third party right. This basic definition applies in both Scots[2] and German[3] law.

This article discusses the theoretical nature of third party rights in Scots and German law, and assesses whether these positions are desirable. The nature of the third party right is important in practical terms, as this determines (at least in part) various aspects of the right. For example, if third party rights are promissory in nature, the formation of the rights must comply with the laws governing the formation of promises. The terminology used to refer to the contracting parties and third party may be impacted by the right's theoretical classification.[4] Clarity on the issue is also essential in ensuring that third party rights are doctrinally and theoretically sound.

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1 In Germany, this is enshrined in § 311 I BGB. See *Medicus*, Allgemeiner Teil des BGB, 2010, p. 14; *Flume*, Allgemeiner Teil des Bürgerlichen Rechts, 1992, p. 42. For discussion on the doctrine in Scotland, see *Sutherland/Johnston*, Contracts for the Benefit of Third Parties, in: Zimmermann/Visser/Reid (eds), Mixed Legal Systems in Comparative Perspectives: Property and Obligations in Scotland and South Africa, 2004, p. 208 (209); *D&J Nicol v. Dundee Harbour Trustees* 1915 SC (HL) 7 at 13 per Lord Dunedin.

2 Contract (Third Party Rights) (Scotland) Act 2017, s 1 (1). See also *Gloag*, The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland, 1929, p. 68; *McBryde*, The Law of Contract in Scotland, 2007, § 10-01.

3 The German contractual third party right is provided for in §§ 328–335 BGB.

4 The English Contracts (Rights of Third Parties) Act 1999 refers to the contracting parties as the promisor and promisee, for example. See also *Scottish Law Commission*, Discussion Paper on Third Party Rights, Scot Law Com No 157, March 2014, § 4.1.

B. An Overview of the Potential Theoretical Analyses

This section outlines the potential analyses of third party rights and identifies which of these may provide an accurate description of the theoretical nature of third party rights.

Reference is made primarily to third party rights generally, rather than providing an in-depth assessment of the suitability of the classifications to the particular characteristics of Scots and German third party rights. Commentary from both jurisdictions is however cited as necessary to illustrate the unsuitability of certain analyses. This section serves to eliminate the majority of the potential 'natures'.

I. The Promissory Analysis

According to this analysis, the third party is the recipient of a unilateral promise from the debtor.[5] Hogg defines a promise as a "statement by which one person commits to some future beneficial performance, or the beneficial withholding of a performance, in favour of another person."[6]

This seems an apt description for third party rights, save for the fact that the definition appears to apply to only bilateral relationships, whereas third party rights deal, of course, with tripartite relationships. One can however easily see that Hogg's definition could be expanded to cover cases in which two parties wish to confer a benefit on another. Further, Fried asserts than two parties may in numerous situations wish to confer a promise on a third party.[7] Third party rights need not be construed in promissory terms in order to be viewed as promises, as promises can be both verbalized and written in various ways.[8]

If promises are enforceable in some circumstances in a particular jurisdiction, it appears logical that promises should also be valid in the context of third party rights – there is no compelling reason not to enforce such

5 *Hogg*, Promises and contract law: comparative perspectives, 2011, chapter 5.
6 Ibid., p. 288.
7 *Fried*, Contract as Promise, 1982, p. 45.
8 *Hogg*, 2011, p. 287–288.

promises. Unilateral promises are enforceable in Scots law,[9] however, German law recognises such obligations only in particular circumstances, such as the promise of reward in accordance with § 657 *Bürgerliches Gesetzbuch* (German Civil Code, hereinafter BGB).[10] This obviously impedes recognition of third party rights as promissory under German law. Nonetheless, the failure of German law to recognise promises generally has been criticised,[11] and so the possibility of viewing the German third party right as promissory should not be dismissed, as the possibility of reform is always present, if remote, and German law recognises promises in some circumstances.

One potential obstacle to the promissory analysis is that promises in both Scotland[12] and Germany[13] are binding upon formation, whereas the contracting parties are permitted (or ought to be permitted) in both jurisdictions to create a revocable third party right under certain circumstances.[14] Hogg does not view this as an impediment to a promissory analysis in either jurisdiction.[15] The possibility of viewing each jurisdiction's third party right as promissory in spite of the fact that promises are generally irrevocable is assessed with reference to the particularities of Scots and German law in the following sections.

A final point is that the promissory analysis:

> "makes the doctrine of third party rights redundant: since Scots law recognises the enforceability of unilateral promises, the mere fact that such a promise occurs within a contract to which the promisee is not a party is of no particular significance in itself."[16]

Essentially, the consequence of accepting the promissory analysis is that it is not necessary to have any specific laws governing the third party right.

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9 *McBryde*, 2007, § 2-02; *Stair*, The institutions of the law of Scotland, 1681, § 1.10.4.

10 *Hogg*, 2011, p. 152 and 159.

11 Ibid., p. 463–464.

12 *Stair*, 1681, § 1.10.4.

13 *Schuster*, The principles of German civil law, 1907, § 283.

14 The relevant German law is § 328 II BGB. In Scotland the matter of whether third party rights must be irrevocable has been subject to rigorous academic and judicial debate. An overview of the issues can be found in *Hogg*, 2011, p. 205. The Contract (Third Party Rights) (Scotland) Act 2017 clarifies that it is possible to confer a revocable third party right (s 2 (4) (a)).

15 *Hogg*, 2011, p. 308.

16 *MacQueen*, The laws of Scotland: Stair Memorial Encyclopaedia, 1995, § 827.

The same reasoning applies if the third party right fits any of the other possible natures below, with the exception of the *sui generis* analysis. It can consequently be said that the promissory approach and all of the other analyses which treat the third party right as falling within an existing doctrine are an efficient approach to categorising the right, as the consequences of such approaches is that separate laws are not needed to govern third parties.

II. The 'Full Contracting Party' Analysis

According to this view, the third party is treated as a party to the contract in the same terms as the contracting parties, and as such has the status of a full contracting party.[17] The approach is unusual, although it has been adopted in Dutch law.[18]

The analysis is perhaps suitable in jurisdictions such as the Netherlands, in which acceptance on the part of the third party is required for formation of their right. However, neither Scots nor German law contains such a requirement. Von Kübel, the editor of the BGB responsible for the law of obligations, rejected a contractual view on the grounds that the third party cannot realistically be viewed as the recipient of an offer, as acceptance on the part of the third party is not required for the constitution of the right.[19] It is clear from both case law[20] and academic commentary[21] that a contractual analysis is not accepted in German law. In Scots law, a third party right

17 *Hogg*, 2011, p. 290.
18 Dutch Civil Code, § 6:254 (1).
19 *Hogg*, 2011, p. 309.
20 See, for example, BGH 08.02.2006 – IV ZR 205/04, RGZ 71, 324 (§ 8).
21 *Gernhuber*, Das Schuldverhältnis, 1989, p. 469, 480.

is conferred on a "person who is not a party to the contract".[22] Scots academic commentary likewise disapproves of a contractual analysis,[23] and von Kübel's views apply equally in Scots law. It is simply impossible to pursue a contractual analysis in jurisdictions which do not require acceptance on the part of the third party before the right is enforceable.

Further, one cannot view the third party as a party to the contract without treating the tripartite relationship as a multi-partite contract,[24] and this is not an accurate assessment of the factual situation. Such an analysis may be unappealing in legal practice, as categorising the third party right as contractual would indicate that the third party enjoys the same weight in contractual negotiations as the contracting parties. The analysis is thus contrary to the aim of ensuring that the third party right is practically usable. Further, as third parties have no means by which to vary or rescind the entire contract, their right is inferior to those of the contracting parties. For these reasons, the analysis ought not to be followed in either jurisdiction.

III. The Assignment Analysis

A party assigns a right when they transfer it to another party: A and B may conclude a contract, and then assignor B may assign his rights to assignee C, in which case C 'steps into B's shoes' and becomes a party to the contract with A.[25] According to the assignment analysis, the third party is in the position of an assignee, and the third party right consists of the benefit originally granted to the assignor.

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22 Contract (Third Party Rights) (Scotland) Act 2017, s 1 (1). This view was also accepted in historical Scottish case law. It was said in *Wood v. Moncur* (1591) Mor 7719 at 7719 that "albeit [the tertius] was no contractor, yet there was a provision made in the same in his favours." See also *Morton's Trustees v. Aged Christian Friend Society of Scotland* (1899) 2 F 82 at 84 per Lord Kinnear.

23 *MacQueen* (ed), Gloag and Henderson – The Law of Scotland, 2012, p. 97; *McBryde*, 2007, § 10-23; *Smith*, Jus Quaesitum Tertio – Remedies of the Tertius in Scottish Law (1956) Juridical Review, p. 3 (14); *Loewensohn*, *Jus quaesitum tertio*: a comparative and critical survey, (1940) 56 Scottish Law Review, p. 77 and 104 (111).

24 *Hogg*, 2011, p. 288.

25 *McBryde*, 2007, § 12-01 – 12-08 (Scots law); § 398 BGB and *Hoffmann*, Zession und Rechtszuweisung, 2012, p. 7–20 (German law).

The analysis is unsuitable in both jurisdictions, as benefits granted to external parties by assignment are originally intended for one of the contracting parties, whereas third parties possess rights initially intended for them. In other words, third party rights are original and rights obtained by assignment are derivative.

The formation requirements of the two mechanisms are also incomepatible. In Scotland, assignation is completed by intimation (i.e. A must be informed that B has assigned his rights to C);[26] this is not required for Scots third party rights.[27] Further, the BGB demands that assignors provide assignees with documents serving as proof of the right assigned,[28] and assignors are obliged, if requested by assignees, to provide a document certified by a notary evidencing the assignment.[29] Neither of these requirements apply to the German third party right.

The analysis has thus been rejected in both Scots[30] and German[31] commentary. The two mechanisms are distinct, and third parties are clearly not assignees.

IV. The Agency Analysis[32]

Agency is the "relationship, usually created by contract, in terms of which the principal instructs the agent to act on his behalf in order to produce legally binding effects for the principal."[33]

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26 *McBryde*, 2007, § 12-07.
27 Contract (Third Party Rights) (Scotland) Act 2017, s 2 (4) (b).
28 § 402 BGB.
29 § 403 BGB.
30 *Hogg*, 2011, p. 313; *McBryde*, 2007, § 12-13.
31 *Gernhuber*, 1989, p. 470; *von Gierke*, Der Lebensversicherungsvertrag zugunsten Dritter nach deutschem und ausländischem Recht, 1936, p. 20, 28; *Gottschalk*, Zum Wesen des Rechtserwerbs beim Vertrag zugunsten Dritter, Versicherungsrecht, 1976, p. 797 (798); *Raab*, Austauschverträge mit Drittbeteiligung, 1999, p. 37.
32 The German concept of 'agency without specific authorisation' is discussed below.
33 *Macgregor*, The law of agency in Scotland, 2013, § 2-01 (Scots law). For the German law see §§ 164–181 BGB; *Markesinis*/*Unberath*/*Johnston*, The German Law of Contract: A Comparative Treatise, 2006, p. 109–118.

This analysis provides that the third party is a principal, for whom the stipulator has acted as an agent.[34] However, this has been discounted in Scots commentary because it is highly doubtful that a stipulator would view himself as an agent.[35] German commentators have also dismissed the analysis, because it ignores the role of the debtor in the tripartite relationship, and, further, due to the fact that principals become full contracting parties, whereas third parties do not.[36] The agency analysis therefore fits neither the Scots nor the German third party right.

V. The Negotiorum Gestio Analysis

In Scots law, *negotiorum gestio* applies where one party, through absence, ignorance, or incapacity, cannot manage their own affairs, and a second party undertakes to manage the affairs.[37] The resulting relationship is not contractual, but the first party is nonetheless liable for expenses incurred in the unauthorised management.[38] The German equivalent is "agency without specific authorisation."[39]

The analysis provides that the debtor manages the affairs of the third party without authorisation, and the third party's acceptance of this beneficial intervention constitutes ratification of the unauthorised management.[40]

However, *negotiorum gestio* deals with bipartite relationships, and third party rights necessarily involve tripartite relationships.[41] Further, the party who improves the other's situation according to the doctrine acts on their own initiative – their performance is not contractually compelled in the manner of a stipulator obliged to fulfil a third party right. Lastly, *negotiorum gestio* involves the management of a party's existing affairs, and in the case of third party rights the 'affairs' surrounding the right do not exist

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34 *Hogg*, 2011, p. 313.
35 Ibid., p. 313.
36 *Gernhuber*, 1989, p. 470; *von Gierke*, 1936, p. 29; *Raab*, 1999, p. 37–38.
37 A recent overview of the law is found in *MacQueen*, The sophistication of unjustified enrichment, (2016) 20 (3) Edinburgh Law Review, p. 312.
38 *Hogg*, Obligations, 2006, § 1.04, 1.26, and 1.33.
39 §§ 677–687 BGB.
40 *Hogg*, 2011, p. 292.
41 *Zweigert/Drobnig* (eds), International Encyclopaedia of Comparative Law, 2002, p. 9.

until the contracting parties deem them to do so.[42] The analysis is thus discounted.

VI. The Trust Analysis

The Scots law of trusts impacted upon the development of the Scots third party right,[43] as the tripartite relationships are similar: the trustor and trustee(s), and the contracting parties confer benefit on the beneficiary and *tertius* respectively. In Germany, cases where one party agrees to manage another's property under a trust, making transfers to a third party, may amount to contracts in favour of third parties under § 328 BGB.[44]

However, whilst the two concepts are certainly intertwined in some situations, the analysis is on the whole unsuitable. Trustors and trustees are under fiduciary duties to the beneficiary (this is not necessarily the case in relationships involving third party rights),[45] and the formation of the trust requires the transfer of property between the trustor and trustee (this is not required in the formation of third party rights).[46]

VII. The Donation Analysis

This analysis is appropriate where the contracting parties wish to confer a third party right as a gift. However, the stipulator may use the right to settle a debt owed to the third party, in which case the third party is in the position of a creditor.[47]

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42 *Hogg*, 2011, p. 291.

43 *MacQueen*/*Sellar*, Scots Law: Ius quaesitum tertio, Promise and Irrevocability, in: Schrage (ed), Ius Quaesitum Tertio, 2008, p. 357 (383).

44 *Schermaier*, Contracts for the Benefit of a Third Party in German Law, in: Schrage (ed), Ius Quaesitum Tertio, 2008, p. 289 (295–296).

45 *Scottish Law Commission*, March 2014, § 2.20.

46 *Allan's Trs v. Lord Advocate* 1971 SC (HL) 45; *Scottish Law Commission*, March 2014, § 2.20 (Scots law); *de Waal*, Trust law, in: Smits (ed), Elgar encyclopaedia of comparative law, 2012, p. 926 (931) (German law).

47 *Smith*, (1956) Juridical Review, p. 3 (14–15).

According to German law, donations must be evidenced in writing and authenticated by a court or notary public.[48] It would be commercially inconvenient if this was required for the formation of all third party rights, and so the analysis has been dismissed in commentary.[49] Scots commentators have also spoken unfavourably of a donation analysis.[50]

Thus, whilst the analysis may be appropriate under certain circumstanceses, it is too restrictive to apply to third party rights generally.

VIII. The Sui Generis Analysis

The term *'sui generis'* means 'of its own kind.'[51] The analysis provides that third party rights are unique in nature, though they may share various properties with other rights. This is equally possible in Scots and German law, as neither restrict the classification of third party rights as necessarily falling within a particular category. Advocates of the analysis include Sutherland and Johnson,[52] and Hallebeek and Dondorp.[53]

Hogg states that such analyses should be avoided unless none of the existing characterisations are capable of describing the right, although he acknowledges that a *sui generis* classification of third party rights is 'perfectly possible.'[54] If third party rights do fit neatly into an existing category of right, this should be adopted in the interests of avoiding the development of a separate obligation at the expense of academic and judicial time and energy. However, a *sui generis* analysis can be avoided only if there is another suitable alternative.

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48 § 518 BGB.

49 *Wesenberg*, Verträge zugunsten Dritter, 1949, p. 29–35; *Schlechtriem*, Schuldrecht: Besonderer Teil, 1998, § 168.

50 *McBryde*, Jus Quaesitum Tertio, (1983) Juridical Review, p. 137 (138).

51 *Garner*, Garner's dictionary of legal usage, 2011, p. 862.

52 *Sutherland*/*Johnston*, in: Zimmermann/Visser/Reid, p. 208 (217); *Sutherland*, Third-Party Contracts, in: MacQueen/Zimmermann (eds), European Contract Law: Scots and South African Perspectives, 2006, p. 203 (209).

53 *Hallebeek*/*Dondorp*, Contracts for a Third-Party Beneficiary: A Historical and Comparative Perspective, 2008, p. 256.

54 *Hogg*, 2011, p. 291.

IX. Summary

This section has considered eight potential approaches to the nature of third party rights. Six of these are evidently incorrect. The third party is not a full contracting party in Scots or German law, and whilst assignment, agency, *negotiorum gestio*, trust, and donation all share similarities with third party rights, none fully account for the characteristics of the Scots or German third party rights. These analyses are not discussed further.

The remaining options are the promissory and *sui generis* analyses. Whilst Hogg is correct in his view that *sui generis* classifications should be avoided where possible, the promissory analysis must be analysed to ascertain whether this is indeed a robust theory of Scots and German third party rights. The following sections assess the merits and disadvantages of these approaches in each jurisdiction.

C. The Nature of the Scots Third Party Right

This section discusses whether the Scots third party right is promissory, and, if not, whether a *sui generis* analysis is appropriate.

I. The Promissory Analysis in Scots Law

The promissory analysis enjoys significant academic support in Scotland. Notable proponents include Smith,[55] MacQueen,[56] and more recently, Hogg,[57] amongst others.[58] It is thought that the canon law's emphasis on enforcing promises influenced the development of the right,[59] and Stair certainly viewed third party rights as promissory.[60] Whilst the theoretical nature of third party rights has not been the subject of a great deal of judicial

55 *Smith*, Studies Critical and Comparative, 1962, p. 172–197.
56 *MacQueen*, 1995, § 827.
57 *Hogg*, 2011, chapter 5.
58 *Baron Keith of Avonholm*, The Spirit of the Law of Scotland, 1957, p. 25–27.
59 *MacQueen*/*Sellar*, in: Schrage, p. 357 (361–369).
60 *MacQueen*, 1995, § 827; *Hogg*, 2011, p. 305.

discussion in Scots law,[61] the promissory analysis also has at least a degree of acceptance in the courts. Early cases on third party rights indicate a preference for promissory language,[62] and a promissory approach is also reflected in several more recent decisions.[63] Further, Scots law has long accepted the admissibility of unilateral obligations.[64]

Third party rights and promises share numerous characteristics. Neither need be communicated to their recipients in order to bind,[65] and recipients of promises and third party rights are not required to accept.[66] Both promises and third party rights require intention on the part of their makers to be legally bound,[67] and both may be made conditionally.[68]

However, there is also a significant body of academic opposition to the analysis. McBryde claims that whilst Stair adopted a promissory analysis to explain third party rights, such reliance is no longer necessary, and the 'specialties' of the law on promise may not be suited to an analysis of third party rights.[69] Rodger views the promissory approach as 'purely fanciful,'[70] and it is Sutherland's opinion that the analysis is 'unconvincing.'[71] Further, whilst the promissory analysis certainly has a foothold in Scots case law, it

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61 *MacQueen*, Third Party Rights in Contract – Jus Quaesitum Tertio, in: *Reid/Zimmermann* (eds), A History of Private Law in Scotland, 2000, p. 220 (243).

62 See, for example *Auchmoutie v. Hay* (1609) Mor 12126 at 12126: "the pursuer had promised to [the third party]."

63 *Morton's Trustees v. Aged Christian Friend Society of Scotland* (1899) 7 SLT 220 at 85–89 per Lord Kinnear. See also *Lamont v. Burnett* (1901) 3 F 797 per Lords Young and Trayner.

64 The oldest recorded case in which the Court of Session upheld a claim on the basis of unilateral promise is *Drummond v. Bisset* (1551) Mor 12381. See also *Kintore v. Sinclair* 1623 Mor 9425; *Stonehewer v. Inglis* (1697) Mor 7724.

65 *Regus (Maxim) Ltd v. Bank of Scotland plc* 2013 SC 331 at para. 34 per Lord President (Gill); Contract (Third Party Rights) (Scotland) Act 2017, s 2 (4) (b).

66 *McBryde*, 2007, § 2-28; Contract (Third Party Rights) (Scotland) Act 2017, s 1 (4).

67 *Hogg*, 2006, § 2.13; Contract (Third Party Rights) (Scotland) Act 2017, s 1 (1) (b).

68 *Gloag*, 1929, p. 20; *Walker*, The law of contracts and related obligations in Scotland, 1995, § 29.15; Contract (Third Party Rights) (Scotland) Act 2017, s 2 (2).

69 *McBryde*, 2007, § 10-07; *McBryde*, (1983) Juridical Review, p. 137 (138).

70 *Rodger*, Molina, Stair and the Jus Quaesitum Tertio, (1969) Juridical Review, p. 128 (143–144).

71 *Sutherland*, in: MacQueen/Zimmermann, p. 203 (209).

would be an exaggeration to say that such an approach is widely and unanimously accepted amongst the judiciary. It is unfortunate that the views of those who disagree with the promissory analysis are not fully explained. Rather, there is a tendency amongst these commentators to state their opinion without much explanation as to why third party rights ought to be so classified. This has perhaps contributed to the lack of clarity in Scots law regarding the nature of third party rights.

These concerns are perhaps related to the matter of gratuitousness. Although Gloag opines that promises are not required in Scots law to be gratuitous,[72] and Atiyah writes that although promises may be made entirely benevolently, it is highly likely that most "are promises given as the price of something the promisor wants,"[73] Scots law currently lacks consensus on the issue of whether a promise must always be gratuitous, or whether it is possible for it to be gratuitous or onerous.[74] The acknowledgement in the Requirements of Writing (Scotland) Act 1995 (hereinafter RoWSA) that promises may be made in the course of business[75] would suggest that Scots law also encompasses the making of promises for reasons which may not be altruistic, and so it does appear that Gloag's approach is correct. However, the matter is clearly not settled, and this lack of clarity would affect the Scots third party right, should it be classed as promissory.

If the promissory analysis were adopted in Scotland, third party rights must comply with the promissory requirements of formation. This would entail adherence to the relevant rules contained in RoWSA, namely, that the third party right must be in writing unless it is made in the course of business.[76] Enforcing such a requirement for the formation of third party rights in domestic contexts would be undesirable. Recent legislation on Scots third party rights does not require formal writing. One of the Scots third party right's attributes is accordingly the flexibility of its requirements of formation, which allow for third party rights to be validly constituted orally in all contexts, or for the parties to create written proof of the right if they

72 *Gloag*, 1929, p. 25.
73 *Atiyah*, Promises, Morals and Law, 1983, p. 143.
74 For further discussion of the views of MacQueen, Black, and Sellar (who feel that promises must always be gratuitous), and Thomson and McBryde (who disagree), see *Hogg*, 2006, § 2.06.
75 RoWSA 1995, s 1 (2) (a) (ii) provides that a gratuitous unilateral obligation must be constituted in writing unless it was made in the course of business.
76 RoWSA 1995, s 1 (2) (a) (ii).

choose to do so. Unambiguous provision that third party rights are promissory would result in a loss of flexibility in the formation of the third party right, and this is unnecessarily restrictive.

It seems that, although the third party right shares a number of qualities with promises, adhering to a promissory analysis would be problematic in terms of the requirements of RoWSA pertaining to promises, and the lack of coherence on the matter of when the right is binding. The *sui generis* analysis should thus be considered as an alternative to the promissory analysis.

II. The Sui Generis Analysis in Scots law

This approach is well supported academically. McBryde describes the nature of third party rights as "uncertain,"[77]stating that it is best to treat it as "an independent right which shares some of the characteristics of other contractual rights but also has special features."[78] Similarly, Rodger opines that the right will "defy neat analysis," such that "little purpose will be served and much time will be wasted if we try to work out an elegant theory to cover the facts."[79] The approach is affirmed judicially by Lords Dunedin[80] and Penrose.[81]

III. Summary

There are certainly several convincing elements of the promissory analysis. However, it is not a feasible view of the nature of the Scots third party right. Consequently, the right ought to be described as *sui generis*.

The Scottish Law Commission, in their recent work on third party rights,[82] considers that

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77 *McBryde*, 2007, § 10-07.

78 *McBryde,* (1983) Juridical Review, p. 137 (138).

79 *Rodger*, (1969) Juridical Review, p. 128 (143–144).

80 *Maguire v. Burges* 1909 SC 1283 at 1290–1291 per Lord Dunedin.

81 *Beta Computers (Europe) Ltd v. Adobe Systems (Europe) Ltd* 1996 SLT 604 at 611 per Lord Penrose.

82 A team at the Scottish Law Commission, headed by Professor Hector MacQueen, produced the Report which ultimately lead to the enactment of the

> "there is considerable benefit in a reformed third party right being placed as far as possible within existing categories in the law of obligations, rather than being a 'standalone' right, the nature and implications of which have to be fully worked out in a complete legislative scheme."[83]

Following consultation, they concluded that specific juristic characteristics of the Scots third party right in any future legislation was unnecessary.[84] This was a sensible approach: the legislation[85] resulting from the project is intended to modernise Scots law and ensure it is practically fit for purpose, and legislative statement on the nature of the right is unnecessary in respect of this aim – adding a provision on the nature of third party rights would not be of direct use to practitioners. Nonetheless, in order to preclude application of RoWSA, and to ensure that the Scots third party right is soundly classified, academic and judicial authority ought to recognise that the right is *sui generis* where the matter arises.

D. The Nature of German Third Party Rights

This section ascertains the compatibility of the promissory and *sui generis* theories with German third party rights.

I. The Promissory Analysis in German Law

Although the BGB's provisions on third party rights are found under the heading "The promise of performance to a third party," the provisions therein use promissory language to refer to the relationship between the contracting parties, rather than between either of the contracting parties and the third party.[86] This reflects the fact that contracting parties generally are seen as making reciprocal promises to one another in German law,[87] but this has no implications for the nature of third party rights. The heading is the

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Contract (Third Party Rights) Scotland Act 2017. See further *Scottish Law Commission*, Report on Third Party Rights, Scot Law Com No 245, July 2016.

83 *Scottish Law Commission*, March 2014, § 4.18.

84 *Scottish Law Commission*, July 2016, § 3.17.

85 *Scottish Law Commission*, July 2016, Appendix A.

86 For example, §§ 331, 333–334 BGB.

87 *Markesinis*/*Unberath*/*Johnston*, 2006, p. 55.

only reference in the BGB which could be construed as describing the right as promissory: it clearly cannot be said that the BGB definitively provides that third party rights are promises.

A promissory analysis was initially advocated by von Kübel, but this approach was not eventually followed,[88] and the analysis has not been considered in recent commentary.

In light of the fact that gratuitous unilateral obligations are not generally enforceable in German law, and considering the lack of strong academic or judicial impetus to include third party rights within the small group of exceptions to the principle that such obligations are invalid, it cannot be said that German third party rights are promissory.

II. The Sui Generis Analysis in German Law

The *sui generis* approach is the dominant view in German commentary. The German Federal Court of Justice (*Bundesgerichtshof*, hereinafter BGH) describes third party rights as "vertragsähnlich" ('quasi-contractual').[89] Other commentators remark that attempts to explain the German third party right dogmatically have proved unsatisfactory and unnecessary,[90] and Gernhuber opines that attempts at categorisation should be regarded with scepticism in light of the diversity of uses of the right.[91] Wesenberg remarks that the right is a legal curiosity.[92]

III. Summary

The academic and judicial support for the *sui generis* analysis, and the unsuitability of the promissory analysis, indicate that German third party rights are unique in nature.

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88 *Hogg*, 2011, p. 151–152, 309.
89 BGH 29.04.1953 – VI ZR 63/52, BGHZ 9, 316 (§ 8).
90 *Hallebeek*/*Dondorp*, 2008, p. 256. The authors comment in relation to European third party rights generally, including the German right.
91 *Gernhuber*, 1989, p. 468.
92 *Wesenberg*, 1949, p. 133.