Gift and Danger*

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ABSTRACT: The intensity of the law's interaction with gift giving suggests that examining their relationship might produce interesting insights about both gift giving and the law. Yet no social scientist has seriously examined the gift norms included in modern systems of private law. The complexity of gift law is due to the interaction of two competing social ideas: the law's concern that gift giving represents a danger to society; and the power of customary gift obligations to engender and maintain social relationships. The law gets involved in gift giving when it feels that the parties need some protection, and this involvement varies considerably among legal systems. Some systems are suspicious of *inter vivos* transfers, while others tend to view gifts as they view exchange. Since the law's formal requirements do not displace customary obligations this field provides an opportunity to examine how the law is shaped by the customary obligations Mauss elaborated.

KEYWORDS: Civil law; common law; custom; danger; exchange; gift giving; gift law; Mauss.

TÍTULO: Doação e perigo

RESUMO: A intensidade da interação da lei com a realização de doações sugere que o exame dessa relação pode produzir deduções interessantes tanto sobre as doações quanto sobre a lei. No entanto, nenhum cientista social já examinou seriamente as normas sobre doação incluídas nos modernos sistemas de direito privado. A complexidade do regime das doações se deve à interação de duas ideias sociais concorrentes: a preocupação legal de que doações representam um perigo à sociedade e o poder das obrigações consuetudinárias de doar para engendrar e manter relações sociais. A lei se envolve na realização de doações quando sente que as partes precisam de proteção, e esse envolvimento varia consideravelmente entre os sistemas jurídicos. Alguns sistemas suspeitam de transferências inter vivos, *ao passo que outros tendem a ver doações como permutas. Como os requisitos legais formais não afastam obrigações costumeiras, esse campo provê uma oportunidade de examinar como a lei é moldada pelas obrigações consuetudinárias que Mauss elaborou.*

PALAVRAS-CHAVE: Direito civil; common law; *costume; perigo; permuta; doação; regime jurídico das doações; Mauss.*

* Uma versão do presente artigo em língua portuguesa pode ser encontrada neste mesmo volume da civilistica.com, na sessão Traduções.

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Anthropologists like to flirt with the gift, but it is married to the law. Western gift law dates from the Roman *lex Cincia* (204 bc).[1] Over the past two thousand years, the law has had a more intense interaction with gift giving than has any other field of study. Moreover, as Marcel Mauss emphasized in *The Gift*, the law and the gift economy are fully intertwined in pre-modern societies. Thus there is good reason to think that an examination of the relationship between gift giving and the law might produce interesting insights both about the nature of the gift and about the nature of the law.

So it is odd, but understandable, that no social scientist has seriously examined the gift norms included in modern systems of private law. In all these systems gift law is complex. In fact, it is often the most conceptually complicated and confused area in the private law. It proves difficult to state clearly what the law is on almost any point of gift law in almost any modern Western legal system.[2] In a moment I want to explore why that might be the case. The basic idea is easily stated – the complexity is partially due to the interaction of two competing social ideas. The first is the law's concern that gift giving represents a danger to society; the second is the inherent power of customary gift obligations to engender and maintain social relationships.

Topics

It is useful to begin by examining the content of modern gift law. In contemporary Western legal systems, in both the common and the civil law, gift law assumes a number of tasks: it elaborates a legal definition for the gift, determines who has the capacity to give and to receive, decides whether gift promises are legally enforceable, establishes the formalities required to make a valid gift, provides for cases in which completed gifts may be revoked, and addresses the characterization question, namely whether the gift should be included in the category of contracts.

The law's *definition* of the gift differs dramatically from the definition employed in other disciplines. If the law were to follow the terms of anthropology, most notably as formulated by Mauss (1990 [1925]), it might understand the gift as the transfer of an object in the context of a relationship that implies obligations to give, to receive, and to reciprocate. If instead the law were to follow daily usage, it would include a number of transactions that it often excludes, including presents given to friends and close relatives

[1] This article is concerned principally with gift law in the civilian jurisdictions of Belgium, France, Germany, Italy, and Spain, as well as in the common-law systems in England, India, and the United States.
[2] For an extended discussion of this problem, see Hyland (2009).

on special occasions, incentives given to customers and productive members of the sales force, awards made to employees upon retirement, and anatomical gifts. Instead, the law chooses to become involved principally when it believes the parties need protection. It therefore focuses on those transactions that, from the point of view of the marketplace, seem particularly risky. The principal concern involves larger gifts made between family members or given to charitable institutions. As a result of the law's protective goals, some systems impose stringent requirements before they will consider a gift transfer to be valid. It is therefore useful to remember (though it is easy to forget) that a legal system usually favors a transaction when it excludes it from the domain of gift law.

The *capacity* to give gifts is much more restricted in some systems than is the capacity to enter into a quid pro quo contract. Amazingly, the capacity to *receive* a gift is even more restricted. For example, until the last few years, private associations in France and Italy were not permitted to receive gifts without elaborate administrative authorization. Moreover, until recently, gifts between spouses were void in Italy and revocable in France. Yet, despite the fact that spouses could not give binding gifts to one another, gifts between unmarried cohabitants were often valid.

The question whether *promises to make a gift* should be enforceable is one of the most vexed questions in the private law. In France, gift promises are generally void, though there are ways to make them enforceable. When the promise is made before a notary, German law enforces the promise. German jurists argue that enforcement gives donors greater freedom by permitting them to bind themselves for the future. In principle, the common law does not enforce gift promises. Common lawyers argue that not enforcing the promises gives donors greater freedom because it allows them to decide for themselves which of their gratuitous promises to perform. Nonetheless, many gift promises are enforced in common law courts, either because they have been characterized as contracts (particularly in England) or because the donee relied on the promise (in the United States).

The *formalities* required for an enforceable gift also vary greatly among systems. It is helpful to think of an aunt who wishes to write a check for $1,000 to her nephew as a present. In some systems, all she need to do is hand him the check. In Italian law, as discussed in more detail below, she must first engage in an elaborate legal ritual.

Completed gifts may also be subject to *revocation*. In many systems, gifts may be revoked for ingratitude. In some legal systems, including in France, gifts may also be revoked

upon the birth of a child. In fact, until very recently, whenever French law applied, all gifts a donor had ever given were automatically revoked by operation of law upon the birth of the donor's first child. Finally, civilians almost universally insist that the gift is a contract, even though in most civil law countries gift norms generally vary from the norms that govern quid pro quo contracts. Common lawyers, by contrast, do not consider the gift to be a contract, even though the common law enforces many gifts as contracts.

It is becoming increasingly clear that many gift norms, even those that might once have seemed justifiable, are not helpful and should be abrogated. As a result, the law is slowly abandoning many of these restrictions. In the future, there is likely to be, as there should be, less gift law.

Prohibition

Gift law is especially complex in those legal systems that consider gift giving to be dangerous – and it is most complex when a system considers the gift to be dangerous not only to donors, their spouses, their families, and their prospective heirs, but to donees as well. At certain moments, the danger has appeared so grave that legislatures have decided to prohibit gift giving. These are moments in which the law's hostility to gift giving has surfaced in pure form. There are two dramatic examples.

One occurred during the French Revolution. In March 1793, the National Convention prohibited parents from giving gifts of any kind to their children. As the Revolution became more radical, the prohibition was extended to cover almost all gifts. At the time, the revolutionaries felt besieged by enemies of all sorts. They were particularly piqued at counter-revolutionary aristocrats who prevented their children from participating in the Revolution by threatening to disinherit them. The best way to enforce equality among heirs, it seemed, was to prohibit gratuitous transfers of all types.

A second example concerns the potlatch, a tribal leader's large-scale distribution of gifts to members of an invited tribe according to rank and debt obligation. Potlatch was particularly cultivated by the First Nations on and around Vancouver Island. The Canadian government several times prohibited the potlatch. It jailed numerous participants over the years and confiscated many items of potlatch paraphernalia, some of which are now on display in Canadian museums.[3] The Indian Agents believed that the

[3] The confiscated items seem particularly crude. It is now thought that they may have been manufactured specifically for the purpose of surrender to the authorities (see Carpenter, 1981: 68).

Northwest tribes would never prosper as long as they continued to give away their wealth. Anthropologists rarely discussed the prohibition. Nonetheless, in 1895, as Franz Boas sat recording the details of the winter potlatch, he was witnessing criminal activity.[4]

Formalities

Of course, prohibition does not produce complexity. Matters become complex when the law does not directly prohibit gift giving but instead surrounds it with extraordinary protections. Some of these protections take the form of formalities required before a gift transfer can be considered to be valid.

Because gift giving results in a transfer of property, the law must decide when to recognize it. The easiest solution is to accept as valid any gift transfer made by the same means recognized as valid in the context of a quid pro quo contract. German law generally adopts this position. In German sales law, for example, title to chattels (tangible personal property) generally passes upon agreement and delivery, while title to real property passes upon agreement and recording in the land-title register. Transfer of title pursuant to a gift is made in the same manner. No additional formalities are required. This is the zero degree of gift regulation.

In those legal systems that tend to consider gift giving to be a danger to society, transfer of title to a gift involves additional steps. Italian law represents a particularly vivid example of how the legal imagination envisages a protective mechanism. Transfer of title pursuant to a sales contract in Italian law requires even less than is required in German law – delivery is not required; title passes upon conclusion of the contract. However, when the transfer of title is made pursuant to a gift, whether of personal or of real property, Italian law requires that the contract be concluded ritualistically in the form known as the public act (*atto pubblico*). The aunt who wishes to make a gift of a check to her nephew will have to appear before a notary. The gift act will be read aloud, the aunt will be cautioned about the dangers of making the gift, she will be required to sign the gift act in the presence of witnesses who also must sign, and the nephew will have to expressly accept the gift either in the same writing or in another. The parties may not dispense with these formalities. If they vary the script, the gift is void and may not subsequently be confirmed. In some cases, the forms that are otherwise required for the transfer of title to the property, such as when shares of stock are involved, must also be

[4] For Boas's account of potlatches during the Winter Ceremonial in November 1895, see Boas (1966: 179–241). See also Hyland (2009: 140–145).

completed. Moreover, the gift of the check, like all gifts of personal property, will be valid only if, in addition to the public act, it is specifically described in a written inventory, included either in the gift document or in a separate signed writing.

The French system manages to combine the spirit of the Italian system with that of the German system, though without attempting to resolve the contradiction. French law does not integrate the two ideas; rather it applies the two irreconcilable approaches at the same time to the same gifts. On the one hand, French law rigorously insists on the principle that all gifts must be made in the form of a notarial act (*acte authentique*), similar in form to the Italian atto pubblico. The French Civil Code provides no exceptions to this rule. A written inventory must also accompany gifts of personal property. On the other hand, the French courts have approved three alternative mechanisms for gift giving, some of which were in use well before the promulgation of the Civil Code. These mechanisms permit virtually any gift to be made without regard to the mandated forms.

First, manual gifts are exempted from the French law form requirements. Most personal property, including bank accounts and other intangibles, may be gifted by simple delivery. A notarial act is not required. Second, French law does not require formalities for disguised gifts. A disguised gift is a gift disguised in the form of a quid pro quo transaction. For example, an aunt might disguise her gift of the check to her nephew in the form of a sales transaction. In reality, of course, both parties agree that the nephew will never transfer any property in exchange. The disguise only operates as an exception if the pretense is not apparent, if the disguise is so effective that there is nothing in the documentation to tip off third parties. Finally, indirect gifts are also exempted from the form requirements. This category includes gratuitous transfers made in forms other than a direct transfer of title, such as the beneficiary designation in a life insurance policy. The code's rigorous formality has not been altered to accommodate the exemptions. Both sets of principles continue to govern French gift law. For this reason, French law cannot be placed at the midpoint of a spectrum that runs from German law at one end to Italian law at the other. It is more accurate to say that French law occupies both positions at the same time.

American gift law is structured as a rule with exceptions, and here too both govern exactly the same gifts. The foundational principle is similar to that prevailing in German law. In general, the inter vivos transfer of title employs the same forms for both quid pro quo and gratuitous transactions. However, the exceptions move well beyond German law in their accommodation to informality. Though the case opinions universally affirm that a

gift of chattels is valid only upon delivery, the fact is that the courts do not enforce the rule. One author has suggested that no gift of personal property has been denied effect in the past fifty years in the United States for the sole reason that delivery was not completed.[5] In other words, despite what the cases proclaim, as long as donative intent is clear, the gift is valid, even in the absence of delivery. The same flexibility may sometimes be applied to gratuitous transfers of real property. Though a transfer of a signed writing is required under the Statute of Frauds, some cases enforce an oral gift of real property when the court believes that equitable considerations require it.

The American construction is particularly intriguing because it sometimes treats gifts more favorably than transfers based on a quid pro quo. In some circumstances title passes in American law at the moment the contract is concluded, but that is not the general rule. Whenever the goods are to be shipped under a sales contract, for example, title generally passes when the goods are delivered to the first carrier. In other words, the American system can be considered less than the zero degree of gift regulation, something akin to a negative number.

The binding effect of the gift promise also varies from system to system. The variations seem to correspond to the rigidity of the form requirements for making the gift and therefore to a system's estimation of the riskiness of gift giving. The question is whether the promisee may sue the promisor to enforce a gratuitous promise. In those jurisdictions (Italy, France) that consider gift giving to be dangerous enough to require rigorous form requirements, gift promises are not binding. In neutral jurisdictions (such as Germany) that impose the same form requirements on both gratuitous and quid pro quo transactions, gift promises become binding when documented by a notary. In systems in which clear donative intent can overcome the absence of form (United States), there is a willingness to enforce gift promises either by construing them as contracts or by honoring the promisee's detrimental reliance.

In lieu of an explanation

Why do these different approaches arise, and why do different jurisdictions adopt different rules? These are not questions lawyers generally ask, even comparative law scholars. Since the task of the law is to determine how cases should be decided, it would seem logical to ask why we use the system we have rather than another one. But that question arises as rarely as corresponding questions arise in other disciplines. Why do

[5] McGowan (1996).

some societies favor analytical over Continental philosophy? Why do some literatures have an extensive avant-garde while others do not? Why do some countries have presidential systems while others have a parliamentary system?

There are also methodological difficulties. For example, it is not clear in modern social science whether functionalist explanations count as explanations at all or are useful merely as heuristic speculation. Even more seriously, there seems to be little agreement on what it may mean to offer an explanation for a social phenomenon. What follows therefore can offer nothing more than preliminary considerations.

Surely one relevant factor is the degree of suspicion provoked in some legal systems by the inter vivos gift. The suspicion probably has several sources. Romance legal systems (Italy, France, Spain) seem to be more circumspect than other systems, an antipathy that may be related to the long history of dispute between secular and clerical power. Another factor is the symbiosis between the private law and the market in the form of the principles of contract law. In the market, individuals act rationally when they attempt to maximize utility. From this point of view, it makes no sense for a party to give something away without receiving a benefit. Gift giving makes so little sense in the market perspective that economists have tried to find a way to accommodate it within the framework of classical economics. These attempts have not been successful.[6] To the extent that gift giving seems inexplicable from the point of view of transactional law, the law believes that special protection may be useful. Different systems may vary in the extent to which the law adopts the perspective of exchange.

Of course, the market perspective does not encompass all social activity.[7] Like everyone else, jurists are involved in personal relationships outside of the market. Those relationships are initiated, explored, and expanded by means of gift exchange. Though a gift is generally a thing, in its essence a marker in the economy of human relationships. In modern as well as tribal societies, human relationships continue to involve the three gift obligations – the obligations to give, to receive, and to reciprocate.

However, it is worth emphasizing that these are not typical obligations – certainly not obligations in a legal or even a moral sense. In other words, this means that these obligations cannot be legally enforced, and there is little moral sanction for their breach.

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[6] See generally Hyland (2009: 50–75).
[7] '[S]ocial activity of course involves calculation and individual interest, material or immaterial, but there is more to it than that: there is also obligation, spontaneity, friendship, and solidarity – in short, gift' (Caillé, 2007: 16; my translation).

More importantly, these obligations arise chiefly within the framework of a particular relationship. As the relationship varies in intensity and intimacy over the years, the nature of the giving follows and signals shifts in the bond. For this reason, failed reciprocity is not sanctioned. Instead, it may mean only that the relationship is at an end.

From personal experience, judges are aware of the economy of gift exchange, of gift giving required by non-legal obligations. The intent to be legally bound is considered to be absent in most agreements in the social or family context, and they are therefore held to be not justiciable. To accommodate this fact, those legal systems that impose elaborate formalities on gift giving generally exclude gifts made in the social and family context from the definition of the gift.

The principal focus of the law is on those gifts that, because they are not aspects of friendship relationships, provide grounds for concern – principally, as mentioned above, significant gifts among family members and donations to charity. Large gifts to family members may serve as advancements of inheritance. Gifts to charity may be designed for tax planning purposes or as an element of competition among the wealthy for prestige and membership on charitable boards. Since lawyers are usually involved, gift formalities are generally observed. The absence of formalities may indeed signal a problem, either overreaching on the part of the donee or improper influence exerted from another quarter. As a result, it may be unclear whether the normal favor donationis for friendshiprelated gifts deserves to be respected for these gifts. In some jurisdictions, the courts and the legislature, believing that all gifts should be treated alike, favor them all. In others, the rule makers subject all potentially problematic gifts to a form requirement, on the theory that, if legitimate, there will be no problem complying with the requirement.

An additional difficulty arises from the process of case adjudication, which, contrary to a common misconception, is not rigorously governed by precedent. When judges believe that a gift is actually intended and is proper in the circumstances, almost everywhere they tend to overlook form defects and validate the gift. As a result, cases on otherwise similar facts are decided differently. Thus, a principal source of the complexity of gift law arises from the attempts of the judges to reconcile the legal system's suspicion about gift giving with their own sense of the appropriateness of the institution.

The Maussian obligations

To the extent that customary obligations exist, the law's formal requirements do not displace them. If performance of the obligations is repressed in one arena, they will reassert themselves in another. In the end, it would be expected (except perhaps by jurists) that the law's pressure on gift exchange may alter its shape but not its overall extent. One of the amusing aspects of the law of gifts involves the law's repeated attempts to restrict gift giving, together with the repeated success of the parties in evading those restrictions. This dialectic is easily visible in connection with the rules that govern what in French law is known as *the interposition of third parties*.

French law severely restricts the capacity to receive gifts. For example, French law prohibits the receipt of gifts by the dominant party in certain relationships – a guardian may not receive a gift from the ward, a physician from the patient, or a priest from the penitent.[8] Until recently, French law also prohibited certain gifts between cohabitants and declared revocable all gifts between spouses.

Predictably, these restrictions are not effective. Third parties are often willing to help willing donors and donees circumvent the limitations. For example, the guardian who cannot receive a gift from the ward might instead ask for the gift to be given to the guardian's spouse, with the understanding that the gift is intended for the guardian's benefit. The employment of a third party in this context is called *interposition*. Interposition voids the gift – but only if someone with an interest proves the deceit. Interposition is unusually difficult to prove because no one involved in the fraud has any interest in disclosing it.

French law therefore decides that the problem requires yet a further level of prohibition – a kind of nuclear option. Whenever an individual is incompetent to receive a gift, French law presumes that any gift to a close relative of that individual is intended for the incompetent. That gift too is therefore void. The prohibition extends to gifts given to the incompetent's spouse, parents, children, and other descendants. Until recently, the presumption was not rebuttable. As a result, in order to protect the prospective donor from excessive altruism and undue influence, French law prohibits donors from giving gifts to the donee's entire family.

[8] Instead of concluding that the guardian does not have the capacity to receive the gift, it would seem more logical to hold that the ward does not have the capacity to make it. Nonetheless, these prohibitions are traditionally examined in the context of limitations on the capacity to receive.

A student of Mauss might suggest an interpretation of these rules. In these protected relationships, the party considered dominant often provides a service to the subordinate party. The service is sometimes rendered with compassion and even love. These services include those rendered by guardians, doctors, ministers, and female cohabitants, as well as, in the traditional marriage, those provided by the wife. The service provider is sometimes compensated, but not for the excess that involves emotional commitment. The excess above what is required by contract or custom results in a gratuitous benefit that Mauss teaches must be reciprocated.[9] Beneficiaries therefore experience an overwhelming need to make a return gift. The presumptions of interposition suggest that many of those even tangentially involved in the relationship not only understand the obligation to reciprocate but are also willing to assist in fulfilling the obligation. Indeed, the parties and their close relatives have often conspired to violate the law in order to meet their gift obligations. Little in the study of modern societies testifies as eloquently to the power of these obligations as do these presumptions of interposition.

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Recebido em: 01.11.2016
Publicado a convite

Como citar: HYLAND, Richard. Gift and Danger. **Civilistica.com**. Rio de Janeiro, a. 5, n. 2, 2016. Disponível em: <http://civilistica.com/gift-and-danger/>. Data de acesso.

[9] '[T]he services of all kinds rendered to the wife by her husband are considered as a remuneration-cum-gift for the service rendered by the wife when she lends what the Koran still calls "the field"' (Mauss, 1990 [1925]: 30).