

BOOK REVIEW

GIFTS: A STUDY IN COMPARATIVE LAW

BY RICHARD HYLAND

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Gifts: A Study in Comparative Law provides an erudite analysis of the law of gifts which is impressive in its international scope. A gift is generally thought of as a thing given gratuitously; however, Professor Richard Hyland discusses much wider notions of gifts and gift-giving from historical, anthropological, economic, sociological, philosophical and artistic perspectives. Focusing on gratuitous *inter vivos*, as well as testamentary, transfers, he examines these transactions in the context of contract, restitution, property, family and succession laws. Hyland's detailed comparative study encompasses not only the common law and several civilian European jurisdictions,¹ but also the Roman law and non-European law. His knowledge of languages allows the author not only to translate the relevant law, but also to note semantic, historical and cultural nuances associated with the relevant legal terminology and expression.

The book begins with the grand historical drama of the French Revolution, and the story of Marie-Jean Hérault de Séchelles (1759–1794), a young lawyer born into an eminent noble family of the *ancien régime*. In 1785, at the

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¹ Jurisdictions which have civil codes derived, often rather indirectly, from the Roman law. They include Germany, France, Italy, Spain, Switzerland, and Belgium.

age of 26, he was made Attorney-General to the *Parlement* of Paris, which at the time had both judicial and legislative powers. However, in 1789 de Séchelles was disinherited because of his early and passionate involvement with the revolution. (In pre-revolutionary France, under the system of primogeniture, which governed the law of succession for the nobility, the eldest son inherited the entire estate, to the exclusion of younger siblings. Amongst the peasants and the middle class, on the other hand, a father had an absolute right to choose his heir (not necessarily the eldest son), and leave very little to the other children. During the period of the French Revolution, in 1792, de Séchelles was elected to the legislative assembly and then the National Convention. He was deeply involved in drafting the decree of 7 March 1793, by which the National Convention abolished ‘the power to make gratuitous transfers to direct descendants, whether mortis causa, inter vivos, or by contractual gift’, thus giving all descendants ‘an equal right in the division of the property of their ascendants’.² Moreover, by Decree of 17 Nivôse, all gifts which had the effect of prejudicing the presumptive heirs were made invalid with retroactive operation to July 1789. And then, two months later, all inter vivos gifts were retroactively voided to 1789. These laws, though made in the name of equality, had a collateral effect of restoring Hérault de Séchelles’ inheritance. Hérault did not live to enjoy his fortune, however, for, on 5 April 1794, accused of treason, he was tried before the Revolutionary Tribunal, condemned, and guillotined.

In 1800, after the French Revolution, laws prohibiting parents from giving or willing gifts to their children, and their effects, were retracted or substantially amended under the Directory. However, Hyland notes that the revolutionary provisions serve as an excellent illustration of the Western law’s distrust of gift-giving, a distrust that has its sources in the Roman Law (*lex Cincia* of 204 BCE).³ The distrust of gift-giving became:

the policy foundation for ... [an] eighteenth century formulation of the law of gifts, the substance of which passed into the French Civil Code and ultimately into the laws of Europe and most of the civilian world.⁴

Hyland argues that the distrust is unfounded and supplies his own vision of what the law of gifts, particularly, inter vivos gifts, should be. Chapter 1 involves the reader in a wide-ranging and insightful discussion on the nature, custom, and communal and political status of gift-offering and gift-receiving.

² Richard Hyland, *Gifts: A Study in Comparative Law* (Oxford University Press, 2009) 4 n 21.

³ *Ibid* 7.

⁴ *Ibid*.

In Chapter 2 he sets out the methodology of comparative law, and explains how it guides his analysis.

Chapter 3, 'The Legal Concept of the Gift', forms the centerpiece of the book insofar as the following four Chapters ('Gift Capacity'; 'The Gift Promise'; 'Making the Gift' and 'Revocation') are devoted to detailed comparative descriptions of the ways in which different jurisdictions approach and define the requirements for valid gift disposition. In the final chapter, 'The Place of the Gift' Hyland discusses the question of whether the institution of gift-giving should be characterised as contract (as in, for example, Germany, France, Belgium, Spain, Italy and other civilian countries), an aspect of property law (as in the common law countries), or an autonomous legal institution with its own, uniquely matched, norms.

When analysing the legal concept of the gift, Hyland notes that 'a systematic [legal] definition of *gift* is hard to find'⁵ because, rather than defining the legal constituents of the gift, the law tends to focus on the process of gift-giving — the requirements for its valid execution or disposition. He adopts four definitional elements of the gift:

1. '**gratuitousness**' (no expectation of consideration);
2. '**the subjective element**' (whether the donor had a subjective intent to donate, either by donative intent or by an agreement between the parties that the transaction will be gratuitous);
3. '**an *inter vivos* transfer**' (a transfer that takes place during the donor's lifetime, by contrast with a testamentary disposition); and
4. '**the gift object**' (at common law, any alienable real or personal, corporeal or incorporeal property, as well as assignable choses in action can be subjects of gift; in civilian jurisdictions the gift object tends to include such patrimonial rights as 'ownership rights (*droits réels*) of both movable and immovable property').⁶

Any lawyer from a common law system would raise an eyebrow at the absence of a serious discussion relating to the requirements of (1) the donor having to be of sound mind; and (2) the donor's intention to donate being

⁵ Ibid 127.

⁶ Ibid 135ff.

voluntary, and free of coercion.⁷ However, these requirements were not among the elements of the gift as initially articulated by the German jurist, Friedrich Carl von Savigny (1779–1861). Likewise, they are conspicuously missing from the legal definition articulated by Wolfgang Siebert, who elaborated Savigny's ideas. Hyland adopts Siebert's description of three principal requirements that make inter vivos gifts valid, namely: (1) 'disposition (*Zuwendung*) that both enriches the donee's patrimony and impoverishes that of the donor'; (2) the gratuitous (*unentgeltlich*) nature of the disposition, and (3) the acceptance by the donee of 'the disposition and its gratuitous character'.

Siebert's approach still governs German law, and has been very influential in other civil law systems. Of the civilian countries discussed by Hyland, only Argentina actually specifies in addition that a gift transfer must be voluntary.⁸

Richard Hyland briefly refers to freedom of compulsion in the context of the Roman understanding of generosity, and cites Italian jurists who argue that 'any sort of compulsion, whether physical or moral', and any 'transaction designed to satisfy a preexisting moral or social duty is compelled'⁹ and cannot coexist with gratuitousness. However, he considers that this 'approach operates with a conception of freedom that cannot be reconciled with the conventional experience of gift'.¹⁰ Well, this depends on one's view about whether the law of gifts should include protection of vulnerable donors from donees who are in the position of power in the relationship.

It is a great pity that Hyland does not place the formulation by Siebert of the legal elements of a gift in its historical context. For Wolfgang Siebert (1905–1959)¹¹ was a Nazi Party¹² member from at least 1933, and one of the legal

⁷ For example, undue influence is mentioned in relation to guardian and ward; physician-patient; priest-penitent, and lawyer-client relationships (Chapter 6 ('Making the Gift')) but not in relation to donees and donors. Hyland argues that there is no need to have general laws safeguarding donors against undue influence because the law already does so for donors who are in guardian-ward, physician-patient, priest-penitent, and lawyer-client relationships (Chapter 6 ('Making the Gift')).

⁸ Ibid 130.

⁹ Ibid 145.

¹⁰ Ibid 145.

¹¹ *Wolfgang Siebert* (1 November 2010) Wikipedia <http://de.wikipedia.org/wiki/Wolfgang_Siebert>.

¹² *Nationalsozialistische Deutsche Arbeiterpartei* [National Socialist German Workers' Party].

theorists of National Socialism.¹³ He was active in re-casting private law in the light of the Nazi Party policies. For example, on 12 and 13 October 1935, at a conference of the University Teachers' Section of the Federation of National Socialist German Lawyers,¹⁴ Siebert voted in favour of a resolution against legal equality. It called for the replacement of the legal terms 'human' and 'natural person' within the meaning of article 1 of the German *Civil Code* (BGB) with racially defined concepts. According to the resolution, these two terms 'obscured and falsified the differences that existed between members of the German *Volk*, citizens of the German *Reich*, Jews and so forth'.¹⁵ The resolution followed the *Law for the Protection of German Blood and Honour* and the *Reich Citizenship Law* (*Nürnberger Gesetze*) of 15 September 1935, which deprived Jews of citizenship, the right to marry, or be married to, Aryans¹⁶ and to work in any professional capacity.¹⁷

Siebert served as a judge of the Nazi Supreme Labour Court between 1933 and 1945.¹⁸ This court was described by Taylor Cole in 1941 as having undergone 'a fundamental change in the character of the judicial personnel'¹⁹ in the wake of the 1933 election, and the enactment of the *Ermächtigungsgesetz* [Enabling Act], which formally ushered in Hitler's dictatorship. In particular Cole writes that:

¹³ See for example G Dahm, E R Huber and W Siebert et al, *Grundfragen der neuen Rechtswissenschaft* (Junker & Dünhaupt, 1935); Wilhelm Reuß and Wolfgang Siebert, *Die konkrete Ordnung des Betriebes* (Deutscher Rechtsverlag, 1941).

¹⁴ <http://de.wikipedia.org/wiki/Wolfgang_Siebert>. In 1936 it became the Federation of Defenders of the Law (*Rechtswahrerbund*), also known as the National Socialist Lawyers' Federation.

¹⁵ Otto Dov Kulka (ed), *Deutsches Judentum unter dem Nationalsozialismus*, vol 1: *Dokumente zur Geschichte der Reichsvertretung der deutschen Juden 1933-1939* (Mohr Siebeck, 1997) 591. On the conference see Christoph Müller, 'Das Freund-Feind-Theorem Carl Schmitts' in *Gegen Barbarei: Essays Robert W Kempner zu Ehren* (Athenäum, 1989) 168f.

¹⁶ For example, Wolfgang Siebert, *Das Recht der Familie und die Rechtsstellung des Volksgenossen: Systematische Gesetzessammlung (Die Rechtsstellung des Juden)* (Deutscher Rechtsverlag, 1939) (several 'updated' editions appeared throughout the 2nd World War).

¹⁷ For example, Wolfgang Siebert, *Das deutsche Arbeitsrecht: Sammlung der arbeitsrechtlichen Bestimmungen mit Einleitung, Vorbemerkungen und Hinweisen* (Hanseatische Verlagsanstalt, 1938); Wolfgang Siebert, *Das Recht der Arbeit: Systematische Zusammenstellung der wichtigsten arbeitsrechtlichen Vorschriften* (Deutscher Rechtsverlag, 1941); Carl Birkenholz and Wolfgang Siebert, *Der ausländische Arbeiter in Deutschland: Sammlung und Erläuterung der arbeits- und sozialrechtlichen Vorschriften über das Arbeitsverhältnis nichtvolksdeutscher Beschäftigter* (Verlag für Wirtschaftsschrifttum, 1942).

¹⁸ Michael Stolleis, 'Gemeinschaft und Volksgemeinschaft: Zur juristischen Terminologie im Nationalsozialismus' (1972) 20 *Vierteljahrshefte für Zeitgeschichte* 16.

¹⁹ Taylor Cole, 'National Socialism and the German Labor Courts' (1941) 3(2) *The Journal of Politics* 169, 174. The laws to guarantee the political reliability of judges were derived from: *Reichsgesetzbuch I* (RGB I) (1933), vol 1, 175 and RGB I (1937), vol 1, 39.

A new type of partisan whose Party loyalty cannot be questioned now fills the judicial positions. This was made possible in part by the systematic purging of “non-Aryans” and of those who showed evidences of lack of conformity. The judiciary, in the language of National Socialists, was “gradually purified.”²⁰

The bailiwick of the Nazi Labour Courts included some 12 million slave labourers in the labour camps for ‘unreliable elements’ (*unzuverlässige Elemente*), and in the extermination camps.²¹

Siebert’s chapter on ‘*Schenkung*’ [Gift] was published in the *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes* [*Handbook of Comparative Civil & Commercial Law*], vol 6: 144–159. This *Handbook* series appeared in Berlin (published by Franz Vahlen) between 1927 and 1938, and was edited by Franz Schlegelberger.²² Schlegelberger was the highest-ranking defendant at the Nuremberg trial (known as the *Justice Trial*) of members of the Reich Ministry of Justice as well as members of People’s and Special Courts.²³ He was convicted of war

²⁰ Cole, above n 19, 174.

²¹ Cole, *ibid*, 197 n108, notes that ‘Wolfgang Siebert [*Das Arbeitsverhältnis in der Ordnung der nationalen Arbeit* (Hanseatische Verlagsanstalt, 1935)] has maintained that the basis of the labor relationship lies not in the contract of employment but in the joining of the “workshop community”. In other words, within the employer–employee relationship the element of consent was subsumed by the element of ‘community’. See also Marc Linder, *The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis* (V Klostermann, 1987); Wolf Gruner, *Jewish Forced Labor under the Nazis: Economic Needs and Racial Aims, 1938–1944* (Cambridge University Press, 2006).

²² In 1927 Schlegelberger was appointed Ministerial Director in the German *Reich* Ministry of Justice and became Secretary of State in the *Reich* Ministry of Justice in 1931. In 1941 he was put in charge of the *Reich* Ministry of Justice as Administrative Secretary of State, a position which he held until 1942: <<http://www.law.umkc.edu/faculty/projects/trials/nuremberg/alstoetter.htm#Schlegelberge>>. According to Matthew Lippman (‘The Prosecution of Josef Altstoetter et al: Law, Lawyers and Justice in the Third Reich’ (1997–1998) 16(2) *Dickinson Journal Of International Law* 343, 399), Schlegelberger ‘also harbored intellectual aspirations: publishing, teaching and lecturing at home and abroad on commercial, comparative and family law’.

²³ *Franz Schlegelberger* (17 November 2010) Wikipedia <http://en.wikipedia.org/wiki/Franz_Schlegelberger>; *The Nuremberg Trials: The Justice Trial* including complete trial transcripts at University of Missouri, Famous Trials <<http://www.law.umkc.edu/faculty/projects/trials/nuremberg/alstoetter.htm#Schlegelberge>>. See also Ingo Müller, *Hitler’s Justice: The Courts of the Third Reich* (Deborah Lucas Schneider trans, Harvard University Press, 1991) [trans of *Furchtbare Juristen* (first published 1989)]; Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany* (T Dunlap trans, University of Chicago Press, 1998); Christian Joerges and Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (with a prologue by Michael Stolleis and an epilogue by J H H Weiler (Hart Publishing, 2003).

crimes as well as crimes against humanity and sentenced to life imprisonment. One of his criminal acts was the drafting of the *Decree on Penal Law for Poles and Jews* of December 4, 1941, which essentially deprived Poles and Jews of all substantive rights under criminal law.²⁴

The Tribunal thus described ‘the national pattern or plan for racial extermination’ in which, both Siebert and Schlegelberger were implicated:

Fundamentally, the program was one for the actual extermination of Jews and Poles, either by means of killing or by confinement in concentration camps, which merely made death slower and more painful. But lesser forms of racial persecution were universally practiced by governmental authority and constituted an integral part in the general policy of the Reich. We have already noted the decree by which Jews were excluded from the legal profession. Intermarriage between Jews and persons of German blood was prohibited. Sexual intercourse between Jews and German nationals was punished with extreme severity by the courts. By other decrees Jews were almost completely expelled from public service, from educational institutions, and from many business enterprises. Upon the death of a Jew his property was confiscated. Under the provisions for confiscation under the 11th amendment to the German Citizenship Law ... the decision as to confiscation of the property of living Jews was left to the Chief of the Security Police and the SD. The law against Poles and Jews ... (4 December 1941), was rigorously enforced.²⁵

It is against this historical background that one would have expected the author to examine whether Siebert and his editor, Schlegelberger, had any reasons for excluding voluntariness and freedom from coercion from the requirements for legally valid gifts. Richard Hyland has adopted Siebert’s principles as the centrepiece of his book. The question arises of why, given the date of their publication, their author and editor, he did not repeat the pattern of historical, political and economic analysis so aptly used in the case of Marie-Jean Hérault de Séchelles. Whatever the answer is, the failure to consider these factors detracts from the persuasive force of the subsequent arguments.

Hyland concludes his massive study with an idealistic ‘new vision’ and a prediction that: (1) the ‘outmoded’ legal regimes, which at present regulate

²⁴ *The Nuremberg Trials: The Justice Trial* including complete trial transcripts at University of Missouri, Famous Trials <<http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/alstoetter.htm#Schlegelberge>>.

²⁵ *The Nuremberg Trials: The Justice Trial* including complete trial transcripts at University of Missouri, Famous Trials <<http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/alstoetter.htm>>.

gift-giving, will reduce their protections of donors, including the protection afforded by the requirement of gift-making capacity, not only in terms of sound mind, but also voluntariness;²⁶ (2) forms will be created to simplify the rules by which gift promises are made; and at common law ‘exceptions to the consideration doctrine will reach beyond detrimental reliance to permit the enforcement of all gift promises that are sincerely meant’; (3) the courts will enforce seriously intended promises, even where they lack the required formality.²⁷ Indeed, except in specific circumstances, for example safe harbour provisions and transfers of real estate, formalities will no longer remain a precondition to a valid execution of a gift.

According to Hyland:

The legal recognition of a valid gift will henceforth depend on a finding of clear donative intent. There are two aspects of this intent. The donor must have intended, first, that the transfer was to be gratuitous, and, second, that the transfer was to operate immediately. A gift completed in the prescribed forms will satisfy this proof. Satisfying the traditional delivery requirement will also offer relevant evidence. If the forms have not been employed, the courts will evaluate all of the facts and the circumstances. The role of the courts will be to determine whether a gift was actually intended and made.²⁸

Hyland also envisages that

The law will no longer intervene to revoke executed gifts. Some argue that the institution is already in decline ... Tort law provides remedies for most civil wrongs. Revocation due to the birth of a child has been so roundly criticized that the latest French code revision greatly restricted it. Revocation for impoverishment will be unnecessary as social services become more widely available. The goal will instead be to guarantee the legal security of executed gifts.²⁹

There are two fundamental problems with Hyland’s vision of the new law of gifts. The first again concerns the absence of the requirement of voluntariness and freedom from coercion. Intention is not the same as voluntariness.³⁰ In

²⁶ According to Hyland, above n 2, 594, ‘Capacity rules will be simplified to coincide with the capacity rules for other legal acts’.

²⁷ Hyland posits that, since ‘the courts in most systems now base their decisions on all of the facts and circumstances of the case ... [they] should be permitted to do so explicitly’: *ibid* 593.

²⁸ *Ibid* 594.

²⁹ *Ibid*.

³⁰ Hyland admits that ‘Donative intent has proved especially difficult to define’, and notes that ‘a finding of donative intent may often depend on whether it is possible to create a convincing

Germany during the 1930s, Jewish owners of businesses,³¹ shops, manufacturing plants, apartments, bicycles, or a packet of cigarettes were often faced with a choice between beating, arrest or extermination on the one hand, and ‘gifting’ their goods, property and choses in action to individual Aryans or to the Reich officials on the other.³² Irwin Cotler³³ has described the system of ‘the Aryanization or confiscation of Jewish property without compensation and its transfer to Aryan hands (ie, Nazi loyalists) on pain of imprisonment for refusal’,³⁴ which operated from 1938³⁵ in Austria (where the archival material is most extensive).³⁶

The Jewish ‘donors’ would have evidenced ‘a clear donative intent’ as well as Hyland’s other three requirements for a legally secure, executed ‘gift’. Arguments based on the experience of the Third Reich are sometimes dismissed as inapplicable to modern times; however, good law is not made for

narrative about the donor’s motivations’: *ibid* 149, 150. A sceptic would comment that such a criterion would be a gift to some donees — liars, bullies and those who, having preyed on the vulnerable donors, can employ the best lawyers (ie, those able to concoct the most convincing stories about the donor’s motivations): *ibid* 149.

³¹ The Deutsche Bank, for example, between 1936 and 1938, ‘aryanised’ through confiscation 363 Jewish businesses: Harold James, *The Nazi Dictatorship and the Deutsche Bank* (Cambridge University Press, 2004).

³² Frank Bajohr, ‘Aryanisation’ in *Hamburg: The Economic Exclusion of Jews and the Confiscation of Their Property in Nazi Germany* in *Monographs in German History*, vol 7 (George Wilke trans, Berghahn Books, 2002) [trans of ‘Arisierung’ in *Hamburg: Die Verdrängung der jüdischen Unternehmer 1933-45* (first published 1997)]; Frank Bajohr, ‘Book Review of *The Deutsche Bank and the Nazi Economic War Against the Jews: The Expropriation of Jewish-Owned Property* by Harold James (Cambridge University Press, 2001)’ (2003) 108(1) *The American Historical Review* 277–8; Beate Meyer, Hermann Simon, and Chana Schütz, *Jews in Nazi Berlin: From Kristallnacht to Liberation* (University of Chicago Press, 2009), particularly Part 3 ‘Aryanization’, which describes the process based on the case study of the Garbáty family.

³³ Irwin Cotler, ‘The Holocaust, Thefticide, and Restitution: A Legal Perspective’ (1998) 20 *Cardozo Law Review* 601.

³⁴ *Ibid* 606 citing Itamar Levine, *The Fate of Stolen Jewish Properties: The Cases of Austria and the Netherlands* (Institute of the World Jewish Congress, Policy Study No 8, 1997, 5).

³⁵ According to Cotler, above n 33, 604, ‘The Aryanization of Jewish property was buttressed by forced property declarations in which Austrian Jews, on pain of fine or imprisonment, were ordered to report “their agricultural property, forest holdings, immovables, business and industrial property, professional practices, securities, uncollected debts, savings, bank deposits, life insurance policies, pensions, annuities, jewelry, artworks, precious metals and stones, copyrights, etc.”’ In 1938, there were documented approximately ‘25,000 cases of Aryanization, including eighty percent of the businesses owned by Jews ... In 1940 the Germans evaluated the value of Austrian Jewish private property at \$1.5 billion in nominal value; in current terms, the figure surpasses \$15 billion. These figures do not include communal property and real estate’: at 604.

³⁶ The documents are housed in the National Archives in Vienna.

fair weather. And unfortunately, although conditions for Jews and other non-Aryans under the Third Reich were extreme, there have always been, are, and will be corrupt regimes and private circumstances under or in which vulnerable donors with ostensibly donative intentions in fact execute their ‘gifts’ under pressure. This is why, at least since the Roman *lex Cincia*, the law has inserted procedural safeguards aimed at protecting the vulnerable.

The second problem with Hyland’s vision or proposal involves the principle of the coherence of the law. If executed gifts carried a guarantee of legal security, then, by definition, the law of Torts (or any other law) would be powerless to intervene. Such guarantee would have the effect of subverting ‘many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms’.³⁷

To sum up, the book is a very impressive work of great scholarship — albeit one espousing debatable views — which, to borrow from its author’s concluding comments,³⁸ provides the reader with ‘an intricate and instructive tapestry of comparative law’ relating to gifts.

³⁷ *Sullivan v Moody* (2001) 207 CLR 562 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) 576 [42].

³⁸ Hyland, above n 2, 595.