Book review

***Gifts – a study in comparative law* by Richard Hyland**
Oxford University Press (2009), xxi + 708 pages
(ISBN–13: 978–0–19–534336–6), hardcover, £80,00

It would not be an exaggeration to say that this comprehensive work on gift law is unusual in its structure. I am saying this because of the unconventional approach that the author has chosen to deal with this topic. The author explains the reason for this approach in the preface to the book, stating that he had four different groups of readers in mind. First the lawyer or scholar (in the United States or abroad), who practices or writes in the various fields dealing with gift law, including the law of trusts and estates, and the laws of contract and restitution. Second, those who write and teach in the field of comparative law. Hyland's goal has been to provide information and knowledge of comparative law to those who want to understand the differences between the civil and the common laws, and the different theories underlying them. Third, the book was written 'for those who are engaged in comparative work in fields of study other than the law.' (Preface page xx). Finally, the author wrote the book 'for those who think about gift giving from the perspective of the humanities and the social sciences.' (Page xxi).

The book is divided into eight chapters. The first chapter is entitled 'The Context of the Gift' and takes a step back in history to sixteenth century France, where the revolutionaries 'abhorred gift giving' (page 1) and where the most detested gifts were those that parents gave to their children, resulting in the National Convention passing a law in March 1793 prohibiting those gifts, whether *mortis causa*, *inter vivos*, or by contract, without exception. As a result, all descendants had an equal right in the division of the property of their ascendants. The author then moves on to explain the notions of the gift. In terms of customary norms, the giving of gifts was already structured before it became a legal institution. Hyland uses the marriage ritual which is in almost all the cultures an occasion for gift giving as an example. But also in everyday notions, various transactions are spoken of as gifts, such as presents given to friends and close relatives on special occasions, transfers within the family to reduce taxes, or as an advancement of inheritance, surprises between spouses, incentives given to good customers and productive members in the sales business, awards made to employees upon retirement, and donations to charity. In this context, the

author points out that these transactions are not all subject to the law of gifts to the same extent, as gifts of modest value – sometimes known as customary gifts – for instance are often excluded from the scope of gift law. Due to their business context, incentives to customers and sales representatives are in some legal systems also not considered gifts, and gifts between spouses are commonly governed by an elaborate set of exceptions to the general rules. In some systems, special provision is made for remunerative gifts, which may include gifts given to employees upon retirement. With regard to the legal notion of gifts, gift law governs the enforceability and legal consequences of certain gratuitous transactions. The most adequate notion of the gift involves the transfer of an interest that occurs in conjunction with four additional elements. First, the transfer is gratuitous, a characteristic that is often inferred either from the absence of a *quid pro quo* or from the fact that the donor acted without being obliged to do so. Second, certain subjective factors are present, usually either the intent to make a donation, or an agreement between the parties about the gratuitous character of the transaction. Third, the transaction must take place *inter vivos*, which distinguishes gifts from transfers of assets made under a last will and testament. Fourth, the object of the transfer involves property rights and not services or other types of advantage.

In part B of Chapter 1, the author then deals with the approaches to gift giving under the subheadings anthropology, history, economics, philosophy and sociology, the approach of death, and art. He states that implicit in the anthropological approach is the idea that gift giving is practised in all societies, though not always generalised throughout society and with different functions according to the circumstances. It is important to note that gift giving entails to give, to receive, and to reciprocate, as its role is to create and maintain long-term relationships among social groups. Gift giving does not function as a series of discreet transactions, but each transfer creates a debt, which in turn must be reciprocated. The mere fact that reciprocation takes place over time, which requires the parties to cultivate a relationship, distinguishes the gift from the mere exchange, which is reciprocated immediately and thus does not require, nor encourage, a continuing bond between the giver and the recipient. The refusal to reciprocate a gift is equivalent to the denial of the relationship. Hyland notes that these anthropological findings on gift giving are paradoxical in the extreme. Gifts are one-sided actions, as they are a unilateral act, yet they must be reciprocated. The mandatory quality of the counter-gift is just as integral to the nature of the gift as its unilateral quality. Consequently, a person who has received a gift feels the urge to restore the balance. Where the time of gift

and counter-gift and the mandatory equivalence in their value coincide, the transaction can easily be mistaken for an exchange, or a market transaction. As a result, the gift loses at that moment its universal feature of social interaction.

Chapter 2 has the title 'Methodology' and is divided into three subsections: A. Comparative Law Functionalism; B. Critique; C. An Interpretive Approach. The author begins with a succinct description and discussion of the basic methodological principle underlying comparative law, which is the principle of functionality. He states (at page 64) that 'at the core of functionalist methodology is a particular approach to what has been presented as the fundamental dilemma of comparative law, namely the transition from description to comparison. Comparative law has always strived to provide accurate knowledge of foreign legal systems. Once the different systems are accurately described, it becomes immediately clear that, at least on their surface, they vary dramatically. Nonetheless, comparative law has always assumed that the different systems share important commonalities.' He then refers to the authoritative work by Zweigert & Kötz (*Introduction to Comparative Law*, 3ed 1998), where the authors did not base their comparison on one of the law's internal characteristics, but rather on the relationship between the law and society. Their argument was that different legal systems are comparable because all legal norms are designed to fulfil a social function. As Zweigert & Kötz put it (on page 34), 'the question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concepts of one's own legal system.' When dealing with what he calls the final element of comparative law functionalism (at page 67), Hyland refers again to Zweigert & Kötz who talk about the presumption of similarity which they consider to be a basic rule of comparative law: 'Different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure and style of operation.' (Zweigert & Kötz at 39).

In his *Critique* (pages 69–98), Hyland states that despite the relative consensus, two fundamental difficulties remain, namely the frequent assumption that all developed societies are confronted with the same problems, and secondly the belief that the law is a mechanism to solve problems that exist outside the legal environment. As regards the first, the author himself discards it with the argument that this view has been rejected in social sciences, and even by functionalists. They argue that the social problems of practical life, which problems, in terms of functionalism, will

be addressed by the law, are already shaped by history, culture, religion, and language before they become legal problems. Secondly, the belief that law is primarily a problem-solving activity is in many cases not true. The author defines the function of the law as an imaginary attribution of an acceptable purpose, the attempt to justify our normative structure on rational grounds.

Hyland then links functionalism to the law of gifts and observes that a functional approach to gift law faces an additional hurdle, in that it must first determine the underlying purpose of giving a gift before one can evaluate how the law might best regulate it (at 85). Generally speaking, law is a social practice that attempts to govern other social practices. If one wants to compare the functionality of different gift norms, one has to first understand both the purposes gift law attempts to achieve and whether it succeeds in regulating that behaviour. Different legal systems have different gift laws, and gift promises are enforceable in some legal systems but not in others. Likewise, some legal systems require that specific formalities be complied with, whereas others do not prescribe any formalities. In this context it is, however, interesting to note that, according to Hyland, no scholar has studied the relative effectiveness of these different norms.

Subsection C of Chapter 2 has the heading 'An Interpretive Approach', which – so the author hopes – 'makes it possible both to avoid the difficulties of the traditional method and to discover something of the meaning of the law that governs the giving of gifts' (at 98). The author starts with a harsh critique of functionalism, which has 'abandoned its rigorous goals and now provides little more than a useful intuition'. He continues that functionalism has been criticised for failing to take account of history, change, and conflict, as well as for a conservative bias, and it has been argued that, once an institution's functionality is fully described, nothing is thereby explained. Furthermore, functionalism has proven to be incompatible with comparison, which led to the decline of comparative method in the discipline of anthropology. It is for this reason that in the context of comparative law, Zweigert & Kötz supplemented their functionalist method with the presumption that the practical effect of the norms is the same in every legal system. Hyland points out that comparativists worldwide are in agreement that the norms to be compared are not those printed in the statute books, but rather the norms that were dealt with in the judgments of the courts, the applied law. This means that the method of comparative law entails the understanding of the meaning of the legal norms in the social context.

The theory of dividing the vast number of legal systems into just a few large groups – legal families – seeks to provide the answer to several distinct questions in comparative law. The underlying assumption is that within these families, different legal systems share many characteristics with one another which can then be compared. However, as Hyland points out (at page 119), the law of gifts does not fit easily within a particular legal family, as in many cases, the major variations occur within the families and not between them. It is a common phenomenon in cultural history that legal systems that derived from the same historical source differ drastically from each other with regard to norm content and interpretative method. At the end of chapter 2, the author explains is choice of countries whose legal systems he is dealing with, which are Germany, Italy, Spain, France and Belgium as the civilian systems; and England, India, and the United States of America as the common law systems. With regard to Indian gift law, occasional reference is made to Islamic jurisprudence with a different legal perspective. As regards the law of the United States, Hyland emphasises that gift law is almost exclusively state law in the United States with very little uniformity. Therefore, when using the term *American law* he refers to the generally accepted elements of the American common-law tradition, as discussed in case law, restatements, uniform laws, model acts and rules, and the leading treatises. His study examines the private law governing the giving and revoking of gifts, but it does not examine all facets of gift law. Instead, it focuses on capacity, form, and revocation, as the author regards these as the most prominent aspects of gift law.

Chapters 3 to 8 then deal with the 'hard core' of gift law under the following headings: chapter 3: the legal concept of the gift; chapter 4: gift capacity; chapter 5: the gift promise; chapter 6: making the gift; chapter 7: revocation; chapter 8: the place of the gift. Each chapter has a number of sub-headings.

The book is a must-have for every comparativist, in that it is a critical analysis of the different theories of comparative law which makes it an indispensable tool when working in that field of the law. In addition to the theoretical first part, the book covers all the substantial law aspects of gift law in the remainder of the book. Last but not least, the book contains an impressive bibliography of seventy pages. I thoroughly enjoyed working through Hyland's work and hope that it will receive the acknowledgement and recognition that it deserves for being an authoritative contribution to the subject field.

Christian Schulze
University of South Africa