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# Gift-Giving in Society, Marriage and Its Nature in Law Enforcement in China

## La donación en sociedad, el matrimonio y su naturaleza en la aplicación de la ley en China

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### Abstract:

Gift-giving is a prevalent human activity existing in different temporal and different spatial dimensions. Main issues discussed in this article are about gift exchange in socio-legal context, particularly in pertinent to marriage and divorce, as well as law enforcement against offence of bribery in China. The research identifies different modes of gift giving, including gift exchange and unilateral gift-giving. The research further explores into gift-giving by parents before marriage and during family life of their children, with special regard to real estate as a gift. The research also discusses gift as distinguished from and as identified as offence of bribery under Chinese law.

**Keywords:** Gift exchange; Gift giving; Social Networking; Marriage; Contract; Divorce; Bribery; Civil litigation; Criminal prosecution.

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### Resumen:

La donación es una actividad humana predominante que existe en diferentes dimensiones espaciales temporales y diferentes. Los principales temas discutidos en este artículo son los siguientes: el intercambio de obsequios en el contexto socio-legal, particularmente en lo referente al matrimonio y el divorcio, así como la aplicación de la ley contra el delito de soborno en China. La investigación identifica diferentes modos de donación, incluyendo el intercambio de regalos y donaciones unilaterales. La investigación explora más a fondo la donación de los padres antes del matrimonio y durante la vida familiar de sus hijos, con especial atención a los bienes raíces como un regalo. La investigación también discute el regalo como distinto de y como identificado con el delito de soborno bajo la ley china.

**Palabras clave:** Intercambio de regalos, Dar regalos, Redes sociales, Matrimonio, Contrato, Divorcio, Soborno, Juicio civil, Enjuiciamiento criminal.

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**1. Introduction**

Gift exchange is a human activity existing in different temporal and different spatial facets. Gift can be studied from several different disciplines. In his book "The Gift" published in 1923, Marcel Mauss, "Emile Durkheim's nephew and most distinguished pupil" (Evans-Pritchard 1966: v), claimed that there are three obligations in gift exchange: the obligation to give, the obligation to receive, and the obligation to return or repay (Mauss 1966).

To some extent, in Chinese society, all these obligations existed and continue to exist. "Li ji", a Chinese classic suggests that "Propriety suggests reciprocity. It is not propriety not to give but to receive, or vice versa" (li ji, qu li shang). Traditionally, reciprocity (li shang wang lai) meant more than gift exchange, but in gift exchange, it meant at least the same as the obligation to give, the obligation to receive, and the obligation to return. However, under such a cultural circumstance, bidirectional "exchange" is not always the case, while unidirectional "giving" occurs more frequently.

It is more than complicated to reveal the reality of gift giving in Chinese society. Following this introduction, the discussion can be developed into three issues. The first issue is concerning gift exchange or gift giving in Chinese social context, which, from outsiders' point of view, is not only heavily influenced by traditional culture, but also deeply sculptured by persisting bureaucratic system. The second issue revolves around different circumstances of gift giving involved in marriage and thus in family life. Particularly, the research explores into real estate given by parents to their children as a gift before their marriage or during the contract of their marriage. Disputes usually take place in disposition of such property when the marriage goes to an end. Separation of property in divorce has been a focus of discussion in recent Chinese law and society. And finally, the third issue deals with the circumstances regarding identification of the offence of bribery involving gift-giving and gift-receiving, which can be considered deeply affected by both Chinese tradition and modernized practice in law enforcement. The latter is a focal point in anti-corruption in both political and commercial lives. Final part of the article will briefly conclude the whole text.

**2. Gift exchange or gift giving?**

Among relatives of same generation and similar age, friends of similar age, and colleagues of similar rank and age, gift exchange means precisely the "exchange", a

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bilateral, bidirectional process. Let alone gift giving during some festivals, giving valuable gifts is normal practice at occasions when friends, colleagues or relatives have their or their children's wedding and birthday. There also exists widespread practice of congratulatory gift for being admitted to university, high school, etc. In some areas of China, any happenings of lucky or unlucky nature can be occasions for inviting those who are intimate to get together and collecting gifts from them. Mostly, this kind of gift-exchange is an issue of moral. Gift in case of wedding is not only a moral issue, but can also be a legal one. Ordinarily, those who give will also receive; vice versa. Breaching such potential rules is a very precarious practice. Those who receive but not give will be regarded as stingy and will endanger good relationship, good reputation and thus good opportunities (sometimes with regard to job or promotion) among people of the same benefit group.

In social dimension, the direction of gift giving seriously depends on seniority in the family. Usually, unilateral gift giving occurs from elder generation to younger generation, who is in the condition before employment or marriage; or unilaterally from younger generation, who is in the condition after employment or marriage, to elder generation, etc. So is the case of "red envelope", which is presented by a senior relative (not necessarily older in the sense of age, but senior in hierarchy of generations) to underage relatives particularly during Spring Festival, celebrated as China's New Year. Generally, receiving a red envelope when paying a New Year's call to the elder relative by the younger generation during the first Spring Festival directly following the marriage, marks the end of such unidirectional gift-giving from elder generation to the younger generation. And the next Spring Festival will witness the unilateral gift giving from the married younger generation to the elder generation. We can safely say that gift giving in this string of social network is tightly connected and strongly maintained by, relatives among, say, five live generations (grandparents, parents, self and spouse, children, and grandchildren).

Unilateral gift giving more frequently takes place depending on social status of presenter and presentee, for example, from student (or student's parents) to teacher, employee to employer, and ordinary official to leading official. It means that inferiors have to give gift to their direct superiors at many and different occasions, including Spring Festival and other festivals, and other occasions where Chinese people habitually receive gifts from others, including weddings and superiors' relatives' burials. It is critical for an inferior to follow such rules in each and every occasion to give gifts to the superior. It is "awful" for an inferior not to give gifts to a superior, which will lead to "chuan xiao xie", making things very difficult for the inferior to deal with in the future. Such a person can also be labeled as "si nao jin", stubborn and bullheaded, and will not be "zhong yong", i.e. put in an important position, ignored in salary increase or promotion. Such potential rules does not necessarily impose the obligation of gift giving, yet majority of the classmates and colleagues will voluntarily give and laugh at those who do not (like Stockholm Syndrome, which was studied in Bejerot 1974).

Special gift giving also take place when the presenter has special demand from the presentee. When looking for a good job, lobbying for a post promotion, or bidding for a project, expensive gift of property, money, gold, services, etc. to those who hold official power. In case of power-money dealt, legal issue emerges.

### 3. Gift in marriage

Due to universality of gift giving in marriage, it is an important dimension to deal with separation of property received as a gift before and during the marriage when divorce: what will be common property and divided between two parties and what will be one party's property without division upon divorce? Consensus on several situations has now reached. Gift received by one party before or during marriage will still be property of that party, no division is necessary upon divorce. Gift received clearly stated as given to both parties before or during marriage will be property of both parties, division is necessary upon divorce. Housing bought by a party's parents before marriage still belongs to this party. Only if it was explicitly expressed as giving to both parties, the housing should be divided between two parties.

In fact, historically, there was rarely the case where gift given by close relatives of one party of the marriage to the new family was not clearly stated as given to one party. Due to very low divorce rate, it would be very strange for a presenter to clearly assign the gift to only one party of the marriage. Particularly, when there were only gifts of small value and lifespan of a marriage was lengthy, it did not make sense to specify one and the only presentee from between the couple of the new marriage.

However, with rising of divorce rate and shortening of marriage duration, valuable gifts are more and more assigned to one party in order to prevent property from being obtained by the other party of the marriage. Such specification and assignation will be certified through notary offices. Yet, more and more disputes emerge when the divorcing parties cannot reach agreement on deparation of property received as gifts before and during marriage. In such cases, they have to seek court judgment. One party of the couple with closest connection with the presenter may claim sole ownership of the valuable gifts, supported by legal evidences against any share of the other party. The following paragraphs will consider the complexity of different situations revolving around gift before a marriage and gift to a married couple.

#### 3.1. *Property in joint possession*

Before going into the gift giving in marriage, a dividing line must be drawn between property in joint possession and that in separate possession.

As a general rule absent of a specific agreement, Article 17(4) of the Marriage Law of the People's Republic of China (hereafter "the Marriage Law") stipulates that pro-

property acquired by the husband and the wife from presentation during the period they are under contract of marriage shall be in their joint possession. In such a case, husband and wife shall enjoy equal rights in the disposition of their jointly possessed property. Nevertheless, the property shall belong to one party of the couple where the property is in the possession of one party by an agreement on gift (Article 18(3)).

When there is a specific agreement, the provisions of the agreement shall apply. Article 19 of the Marriage Law stipulates that the husband and the wife may conclude an agreement that the property acquired by them during the period in which they are under contract of marriage and the property acquired before marriage shall be in their respective possession separately or jointly or part of the property. If such an agreement is concluded, the property shall be in their possession separately and the other part jointly. Such an agreement shall be in written form. Where such an agreement is lacking, or the provisions in the agreement are not clear, the general provisions of Articles 17 and 18 of the Marriage Law shall apply (Article 19(1)).

The agreement concluded by the husband and the wife with regard to the property acquired during the period in which they are under contract of marriage and the property acquired before marriage shall be binding on both parties (Article 19(2)).

Of course, debts can also be paid off with relevant property. Where the husband and the wife agree that the property acquired by them during the period in which they are under contract of marriage shall be in their possession separately, debts contracted by the husband or the wife shall be paid off with the property in the possession of the party of the husband or the wife, if the third person knows that there is such an agreement (Article 19(3)).

### *3.2. Disposition of betrothal gift*

Betrothal gift has been a popular practice in Chinese society for hundreds of years. Traditionally, the male party of the marriage will pay a certain sum of money or provide a certain amount of property to the female party. Usually, these are given to the female party's parents, and more and more, to the female party for use in consumption. Upon divorce, disputes can also take place on whether or not such money or property should be returned to the male party.

According to Article 10 of "Interpretation II of the Supreme People's Court Regarding Several Issues in Application of Marriage Law of the People's Republic of China (Fa Shi (2003) 19 Hao)" (hereafter "the SPC Interpretation II"), "If it is found that the pleading of a party concerned for the return of the betrothal gifts given to the other party according to the tradition is under any of the following circumstances, the people's court shall support him or her: (1) Both parties fail to complete the marriage register formalities; (2) Both parties have completed the marriage register formalities."

ties, but as a matter of fact, they fail to cohabit; (3) The betrothal gifts given prior to the marriage make the giver live in difficulty. The application of Items (2) and (3) in the preceding paragraph shall be based on the precondition of divorce between both parties.”

When the betrothal gift is a housing unit, which is of a large value, it shall be directly determined as in possession of the party whose parents give the gift. According to Paragraph 1, Article 22 of SPC Interpretation II, before the parties concerned get married, if the parents spend money on purchasing a house for them, the money shall be determined as a personal donation to their own son or daughter except that the parents clearly express that the money is donated to them both. The reason for such a provision lies in the presumption that presents before marriage are in nature betrothal gifts, different from gifts after marriage.

### *3.3. Disposition of the disputes on house purchased after marriage by parents for their children*

General rule can be different in deal with gifts after marriage. Parents of one party of the marriage can also spend money on purchasing a housing unit for a married couple. In such a situation, the property is supposed to be given to both parties and thus in joint possession. The legal basis if such a proposition can be found in Paragraph 2, Article 22 of SPC Interpretation II, “After marriage, if the parents spend money on purchasing a house for them, the money shall be determined as a donation to both the husband and wife except that the parents clearly expressed that the money is donated to one party.”

The exception of such a proposition is to conclude a clause in a written agreement, determining that the property shall be in separate possession by the party whose parents give the gift. This is often not the case because traditional Chinese parents believe that a marriage will last forever and divorce is rare. However, with the development of the society, social value, and family value, divorce rate has been increasing steadily in recent decades. Parents of contemporary generation have already undergone a tide of unstable family due to rapid change of social life and challenge of new culture. It becomes more acceptable for parents to impose such clauses as to pre-define their children’s property, when such property is valuable, sometimes, as expensive as the deposit of parents’ earnings in their whole life. Such a valuable gift will not be given without the marriage lasting for a period long enough. Civil law ideas in China fully understand such a tradition and such a transition, both of which lead to current law and its interpretation.

It proves that the tendency of divorce has been developing continuously and challenging the understanding and implementation of the long-lasting customary rule. Development has been thus continuously incorporated into law and practice. Unlike

cash or consumer goods, which can be given to a person without extra procedure, real estate is both expensive and bound by strict procedures in transfer. Even though there is not gift duty (taxation on gift) in China, modification registration of real estate is a necessary procedure in transfer of ownership of a housing unit. As a gift, whether the modification registration is performed or not, can be an important element in determining whether the housing unit is actually "given and accepted". Among private persons, simply a promise to give and hope to accept cannot constitute a gift agreement. Only when the gift is actually given and accepted, does the relationship of gift giving take place.

According to Article 7 of "Interpretation III of the Supreme People's Court Regarding Several Issues in Application of Marriage Law of the People's Republic of China" (2011, hereafter "the SPC Interpretation III") provides further instructions on the disposition of real estate gift after marriage from parents to children. "Where the title to a real estate purchased by the parents of one party for the party after the party's marriage is registered under the party's name, such real estate shall be deemed a gift given by the parents to the party and be determined as the party's personal property according to item (3) of Article 18 of the Marriage Law. Where the title to a real estate purchased by the parents of both parties is registered under the name of one party, such real estate may be determined as jointly owned by both parties according to the proportion of capital contributions made by their respective parents, unless it is otherwise agreed on by the parties concerned."

As it is mentioned above, in real social life, traditional customs determine that Chinese parents, particularly male party of the married couple, usually spend all of their deposit on purchasing housing for their children. In addition, such customs also neglect the practice of signing written agreement, due to the above-mentioned fact that there was traditionally a strong sense of family life, low divorce rate and long-lasting marriage in China. Therefore, there was a low probability for a couple to divorce in their whole life or in an early moment of their marriage. The current tendency of a higher rate of divorce is a new phenomenon. People of young generation born in 1980s and 1990s in China are less and less serious for sex, love, marriage and family, leading to a high divorce rate and short marriage life-cycle (Wu 2014). At the same time, another consideration is regarding the fact that the price of real estate in China now reaches its historical height, married children cannot afford for the housing without parents help with all the deposit they have accumulated in their life (Wu 2014). During such a process of transformation, explicit and clear protection of interest of the old generation is considered feasible, so as to avoid the unlucky event for those parents who still hold the traditional idea to suffer a big sum of loss in a very short period. Therefore, it is reasonable to register the title of the real estate under the party's name whose parents actually spend the money on the property. Similarly, if both parties' parents spend money on the purchase of the property, the housing can be regarded as joint possession based on a ratio of investment by each party's parents. Here, the real intention of the parents in purchasing a real estate for their



children will be considered according to both traditional customs and contemporary development (The Supreme People's Court 2011).

However, there can also be special cases where parents only make down payment for children, and the couple jointly repays the loan. In such circumstances, the real estate should be identified as in joint possession. The divorce judgment will support the claim that the increase in value of the part of down payment of such property should be considered in possession of the party whose parents have made the down payment. If the divorced female party faces financial difficulties in her life, she can ask for financial assistance. In addition, maintaining female party and children's rights and interests will also be taken into account. If the title to the real estate is registered under the name of both parties, whose real share of investment cannot be proved, the property shall be identified as in joint possession (Wu 2014).

#### *3.4. Disposition of real estate given as a gift between two parties of a marriage*

Regarding the disposition of real estate given by one party as a gift to another party, according to the Article 6 of the SPC Interpretation III, "Where, before marriage or during the existence of a marital relationship, the parties concerned agree that a housing unit owned by one party is given to the other party as a gift, but the giver revokes the gift before the modification registration of the housing unit, if the other party requests the continual performance of the gift, the people's court may handle it according to Article 186 of the Contract Law of the People's Republic of China (hereafter "the Contract Law")." It means that such withdrawal of such present can be confirmed by the court according to Article 186 of the Contract Law. If it falls into the legal circumstances under Article 192 of the Contract Law, the right for legal withdraw can be exercised by the party, and the withdraw shall be recognized by the court (Wu 2014).

Even though there is a declamatory provision in Article 19 of current Marriage Law, which stipulates that the agreement that is concluded by married couple about the property acquired during the period in which they are under contract of marriage and the property acquired before marriage shall be binding on both parties, it is to some extent flexible due to special provisions in other laws. Literally, the agreement concluded by the married couple about the real estate should be effective and binding, so long as it is based on expression of authentic intention, without fraudulence or intimidation. The modification registration of the housing unit is not prerequisite, and thus the people's court shall not support the proposition of one party to revoking the agreement of giving the real estate as a gift. There have been both theorists and judges holding the same standpoint. Some court made decisions requiring that the giver to fulfill the agreement.

However, according to the Property Law of the People's Republic of China (hereafter "the Property Law"), if the registration of the housing unit has not been modi-

fied, the ownership of the real estate is considered not being transferred. Thus, according to provisions on gift giving in Article 186 of the Contract Law, the giver can revoke the gift giving, and this does not contradict the provisions in the Marriage Law (Wu 2014).

However, it must be understood that the Article 6 of the SPC Interpretation III is not only based on current legal framework literally but also more on Chinese tradition. It emphasizes the application of Article 186 of the Contract Law to deal with cases involving giving real estate as a gift by one party of the marriage to the other party. Even if the registration of the housing unit has been modified as under the name of the presentee, who fails to perform the obligation of supporting that s/he bears, seriously breaches the benefit of presenter or presenter's close kinship, or fails to perform the obligation agreed in the contract, the agreement can be revoked according to the provision of the Contract Law, which stipulates that "The donor may rescind the donation if the donee behaves in any of the following manners: (1) severely infringing upon the donor or upon any close relatives of the donor; (2) having obligation to support the donor but failing to fulfill that obligation; or (3) failing to fulfill the obligations as stipulated in the donation contract. The right of rescission of the donor shall be exercised within one year from the date on which it is aware or ought to be aware of the reasons therefor" (Article 192 of the Contract Law).

In sum, in such circumstances, there can be two different types of revoking the agreement: discretionary revoking based on Article 186 of the Contract Law, the prerequisite of which is that the modification registration of the housing unit has not been done; and decretory revoking based on Article 192 of the Contract Law, the prerequisite of which is occurrence of particular events stipulated by law (The Supreme People's Court 2011).

### *3.5. Revoking of Clauses on Giving of Real Estate as a Gift in Divorce Agreement*

In divorce agreement, two parties of the marriage can conclude a clause on giving the real estate to their children. Before modification registration of the housing unit has been formally done, one party might turn back and requires revoking the presentation clause, and dispute thus take place.

In dealing with disputes revolving such a presentation promise, there are two different situations: one is where the agreement is concluded in divorce based on agreement registered in civil administration department; the other is where the agreement is concluded in divorce based on agreement in court.

In the first situation, the clause on giving real estate to their children is an inseparable part of the divorce agreement, and shall not be discretionarily revoked by any one party. In decision-making for the divorce, some party may take into account

various conditions comprehensively, including supplementary condition giving real estate to their children as a gift. In Chinese cultural context, due to rareness of divorce in the past, the meaning of divorce more than a betrayal of the relationship, and to some extent a sacrifice of benefit of one party and their children, usually one party will give up much of the share of property even in joint possession, leaving it to their children, who are going to live with the other party. Under such circumstances, the two parties may attribute their common property to their children due to the fact that divorce agreement is to be concluded, because it was not easy to get divorced and two parties' consent was necessary. If one party does not like to conclude an agreement on divorce, it meant in China that the divorce could not be granted. That was the context story of why one party would give in so as to acquire the consent of the other party. In this case, giving property to their children might be taken as an exchange for the consent of the other party's consent. This can be seen as a conditional act of presentation with the prerequisite of the divorce agreement. Once the agreement of divorce takes effect, a particular clause in the agreement, that is to say, discretionarily revoking the clause on giving real estate to their children shall not be allowed. The abuse of such a clause might happen in case one party maliciously exploits the revocability of ordinary presentation agreement as a means of possess the real estate.

In the second situation, the parties conclude the presentation agreement, which is confirmed by the court in mediation agreement, which is irrevocable. One the agreement is in effect, it has the same effectiveness as a judgment, and the two parties must comply with the agreement.

However, according to Article 236 of the Civil Procedural Law of the People's Republic of China, a written order to suspend or terminate execution shall become effective immediately after being served on the parties concerned. However, the presentee is not among the parties mentioned here. Therefore, in fact, the presentees have no right for applying for enforcement by the court, because they are not the parties of the agreement (The Supreme People's Court 2011).

### *3.6. Disposition of common property given by one party without authorization to a third party*

In recent years, it is uncommon that one party of the marriage in Chinese families giving their common property to a third party without authorization of the other party, such as in the case where one party cohabits with a third party, which is prohibited by Article 3 of the Marriage Law.

In China, without particular agreement, common property is in joint possession. Such property is an inseparable integrity, which is not disposable by any one party without the consent of the other party. Only when the joint possession is terminated,

the property can be separated and the share can be determined. Therefore, it is completely (not only partially) ineffective for any one party to dispose common property in joint possession to a third party without the consent of the other party (The Supreme People's Court 2011).

Article 17 of Interpretation I interprets the provisions of the Marriage Law as the follows: Article 17 of the Marriage Law, which provides that "both husband and wife shall have equal rights in the disposal of jointly owned property", shall be understood as follows:

(1) The husband and wife have equal right to dispose of their jointly owned property. If it is necessary to dispose of their jointly owned property for daily necessities, both the husband and wife shall have the right to make decisions; and

(2) When the husband or wife needs to make an important decision to dispose of their jointly owned property due to daily necessities, both husband and wife shall discuss the matter on an equal basis so as to reach an agreement. Where others have reasons to believe any common genuine expressions of both husband and wife, the other party shall not challenge any bona fide third party on the ground that he (she) does not agree or does not know.

Necessary disposition of common property in joint possession beyond daily life, must be approved by consent of two parties upon negotiation. Unilaterally giving common property of high value to a third party is ineffective, according to Article 51 of the Contract Law, where a person without the right of disposal disposes of another's property, upon ratification by the obligee or if the person without the right of disposal obtains the right of disposal after making the contract, the contract shall be effective. In addition, Article 106 of the Property Law also stipulates that, where a person transfers to a transferee immovables or movables which he has no right to dispose of, the owner shall have the right to recover them (Wu 2014).

## **4. Gift giving and identification of bribery**

### *4.1. General rules*

Another issue is more sophisticated: when does receiving money and assets as gifts constitutes bribery? Because it is so common in China to give gifts and receive gifts in every aspect of social lives, there is hardly a distinction between offence of bribery and gift when the presenter is in need of help from the presentee who is in power. Generally, many different factors can contribute to identification of bribery, for example, closeness of relationship between presenter and presentee, subjective motivation for gift giving, temporal distance between gift giving and power exercising, and value of gift. In appearance, it seems to be easy to distinguish bribery from

gift giving. However, bribery as an offence is always concealed with sophisticated deliberate camouflage of gift giving. That's why more and more legal rules on both substantive law and procedural matters have been implemented for incrimination of bribers.

Ordinarily, the goal of a regular gift is to demonstrate the presenter's respect for the presentee and his/her commitment to creating or maintaining a relationship. Failure of giving a gift makes the social behavior impolite, uncultured, and lacking of proper character. A bribe can take the form of a specific sum of hard currency, for example, cash, gold, silver; company stock; and expensive gifts, for example cars, and housing unit, in order for an individual may to ensure a specific desired outcome.

The Criminal Law of the People's Republic of China (hereafter "the Criminal Law") prohibits giving and receiving money or property for the purpose of obtaining undue benefits. Proprietary interests have been extended to cover material interests such as provision of housing renovation, the release of debt or other benefits such as membership services or travel. Bribery is distinguished by official bribery and non-official bribery. Corporations can also be held liable for the bribery of state personnel or their close relatives.

#### *4.2. Elements of the Offense of Bribery*

Criminal law prohibits any individual or entity from giving things of value to State personnel or entities or to non-State personnel to seek improper gains. In addition, no State personnel or entity or non-State personnel shall accept things of value to make use of his or her position to seek benefits for the person giving the bribe.

##### **3.2.1. Content of bribery**

The Criminal Law defines bribery as the unlawful transfer of "things of value," which is a key concept in Chinese anti-bribery law. In 2007, the Chinese Supreme Court and the Chinese Supreme Procuratorate jointly issued the Opinions on Several Issues in Application of Law in Dealing with Criminal Offence of Bribery-Receiving (hereafter "the 2007 Opinion"), and in 2008, they issued "the Opinions on Several Issues in Application of Law in Dealing with Criminal Offence of Commercial Bribery (hereafter "the 2008 Opinion"), directing lower courts and procuratorates to broadly construe the law to cover both tangible and intangible benefits. Therefore, "things of value" can cover included cash, in-kind objects as well as various "proprietary interests that can be measured by money," such as the provision of: home decoration; club membership; stored value cards; travel expenses; shares in, or dividends or profits from, a company without corresponding investments in the company; payment through gambling; and payment for services that have not been provided, etc. In

2016, the SPC and SPP jointly issued the 2016 Judicial Interpretation on Bribery, Corruption, and Misappropriation of Official Funds (hereafter "the 2016 SPC and SPP Judicial Interpretation") further clarifying such a coverage and forbidding exchanges of favors by defining "things of value" as to cover intangible but quantifiable benefits such as debt forgiveness, free services, club memberships, and sight-seeing tours.

In addition, the 2008 Opinion provided that the amount of such intangible benefits should be calculated on the amount actually paid, whereas the 2016 SPC and SPP Judicial Interpretation states that the amount concerned can also be calculated on the amount payable. This is to address situations in which services, travel or other intangible benefits may have been deliberately undervalued by bribe givers.

Nevertheless, under the current Chinese law, the action of proposing or promising to offer a bribe without actually "giving" the bribe to others does not constitute an offense (Griffith and Wang 2010, p. 11). As it was mentioned above, in legal theory in China, gift giving can only be realized by actual performance, where the gift is given and received.

#### 4.2.2. Purpose of bribery

In addition to giving or accepting "things of value," generally it must also be shown that the party giving a bribe has the intent to seek an "improper gain." Similarly, when establishing a "bribe-accepting" crime, the prosecutor needs to prove that the recipient of the bribe has used his or her power, authority or position to seek a benefit for the party giving the bribe.

In "bribe-giving" cases, a violation occurs when a party makes a bribe with the intent to seek "improper benefits," which include: (a) seeking benefits from a state functionary, non-state functionary or entity which would be a breach of law, regulations, administrative rules, or policies for that state functionary, non-state functionary or entity to provide; or (b) requesting a state functionary, non-state functionary or entity to breach the law, regulations, administrative rules or policies to provide assistance or facilitating conditions. For commercial activities related to bidding and government procurement, giving money or property to a relevant state functionary in violation of the principle of fairness to secure a competitive advantage is considered as giving money or property for the purpose of obtaining an "improper benefit" (Article 9 of the Opinion). Further, where "things of value" has been offered with intent to seek "improper benefits," but the offence of giving a bribe is not consummated because of factors independent of the said intent, such action may nevertheless constitute a criminal attempt offence (Article 23 of the Criminal Law).

The offender's "intent" is not an absolute pre-condition for a finding of bribery in practice. It is more a presumption than an objective identification. In general,

“improper benefits” must be shown that the party accepting the bribe has used its power or position to seek a benefit for the party giving the bribe. Exceptional circumstances also exist: (i) any person (whether a state functionary or non-state functionary) who takes advantage of his/her position to accept and keep for themselves a “kickback” or “handling fee” under any circumstances shall also be regarded as having committed the crime of accepting a bribe (Article 385 of the Criminal Law); (ii) any state functionary who received bribes with an amount exceeding 30,000 yuan (the currency unit of Chinese Renminbi) from his/her subordinate and may affect the performance of his/her duty (Article 13 of the 2016 SPC and SPP Judicial Interpretation); or (iii) a promise to seek benefits for others should be regarded as “seeking benefits” for others. If an official clearly knows that a person offering a bribe has in mind a specific request seeking the official’s help, the official will be considered to be “seeking benefits” for others (Article 13 of the 2016 SPC and SPP Judicial Interpretation). Therefore defendants charged with bribery crimes normally cannot have a defense based on the excuse that they did not have illegal or malicious intent or purpose to “give” or “accept” bribes (Griffith and Wang 2010, p. 11). This is intended to address situations in which officials accept money or property from bribers who do not request help explicitly but have some unspoken understanding with the officials regarding benefits sought.

In addition, provision of things of value does not have to occur sequentially prior to “seeking benefits” for others (Article 13 of the 2016 SPC and SPP Judicial Interpretation). The 2016 SPC and SPP Judicial Interpretation clarifies that bribes include payments given after benefits are received, i.e. a thank-you gift received after benefits are sought or received still constitutes bribery. Hence, if nothing has been requested from an official in the performance of his duties but that official afterwards accepts money or property from others based on such performance, that official will be considered to be “seeking benefits for others” (Xu, Palmer and Wang 2017).

Distinction between gift and bribery, as interpreted by the SPP and SPC, must refer to the following factors (Article 10 of the 2008 Opinion): (i) the circumstances giving rise to the transaction, such as the relationship between the parties, the history of their relationship, and the degree of their interaction; (ii) the value of the property involved in the transaction; (iii) the reasons, timing and method of the transaction and whether the party giving money or property has made any specific request for favour; and (iv) whether the party receiving money or property has taken advantage of his/her/its position to obtain any benefit for the party giving money or property.

In other words, a person who gives money or property to a state functionary, non-state functionary or entity without requesting any specific favour may not be regarded as offering a bribe.

#### 4.2.3. Offeror and recipient of bribery

Generally, the criminal sanctions for bribery crimes involving state functionary or state entities are more severe than those involving non-state functionary or entities.

The term “state functionary” is broadly defined, and includes civil servants who hold office in state organs, persons who perform public duties in state-owned entities or semi-government bodies, persons who are assigned to non-state-owned entities by state organs or state-owned entities to perform public duties, and persons who otherwise perform public duties according to the law (Article 93 of the Criminal Law). The term “entity” includes state organs, state-owned companies, enterprises, institutions, and people’s organizations (Article 391 of the Criminal Law).

The term “non-state functionary” means any person or entity that is not a “state functionary” or an “entity” as defined in the *Criminal Law*. Generally speaking, the criminal sanctions for bribery offences involving state functionaries are more severe than those involving non-state functionaries.

#### 4.3. Official bribery and commercial bribery

The Criminal Law distinguishes between two types of bribery: official bribery and commercial bribery.

Official bribery is the criminal offence of giving, accepting, soliciting or introducing a bribe to or by state functionaries. One of the parties involved in the offence of official bribery must be a state functionary and a government related entity.

Commercial bribery includes giving a bribe and accepting a bribe. Here, none of the parties involved is government related. Accepting a bribe by a private-owned entity shall not constitute a criminal offense.

Commercial bribery is also prohibited by the Anti-Unfair Competition Law of the People’s Republic of China (1993, hereafter “the Anti-Unfair Competition Law”) which defines commercial bribery as business operators using money, assets, or other means to bribe counter parties to sell or purchase goods. Commercial bribery includes kickbacks provided covertly and off the books. No monetary threshold for initiating an administrative investigation against commercial bribery is stipulated under the Anti-Unfair Competition Law (Liu 2016).

#### 4.4. Bribe-giving and bribe-receiving

Under the *Criminal Law*, both the offering and receiving of bribes constitute serious criminal offences in China. The offences are usually categorised as “bribe-



giving” or “bribe-accepting” offences. The statutory offences include offering of a bribe to a state functionary (Article 389); offering of a bribe to a non-state functionary (Article 164); offering of a bribe to a foreign official or an officer of a public international organization (Article 164); offering of a bribe to an entity (Article 391); offering of a bribe by an entity (Article 393); offering of a bribe to a close relative of, or any person close to, a current or former state functionary (Article 391); introduction to a state functionary of an opportunity to receive a bribe (Article 392); acceptance of a bribe by a state functionary (Article 385); acceptance of a bribe by a close relative of, or any person close to, a current or former state functionary (Article 388); acceptance of a bribe by a non-state functionary (Article 163); and acceptance of a bribe by an entity (Article 387).

The Ninth Amendment to the *Criminal Law of the People’s Republic of China* (2015, hereafter “the Ninth Amendment”) focuses on empowering judicial organs to more effectively combat corruption. In addition to introducing a new offence of “offering a bribe to a close relative of, or any person close to, a current or former state functionary”; these amendments expand the scope of monetary penalties as punishment for bribery offences; add monetary fines to almost all corruption/bribe-related offences; replace specific monetary thresholds for sentencing considerations with more general standards, such as “relatively large”; “huge” and “especially huge”; and, raise the bar for mitigating circumstances to apply for reduced sentencing.

The 2016 SPC and SPP Judicial Interpretation provides further clarification to the Ninth Amendment regarding corruption and bribery crimes. In principle, the 2016 SPC and SPP Judicial Interpretation expands the definition of bribes to include certain intangible benefits; adjusts monetary thresholds for bribery prosecutions and sentencing, including raising the thresholds for bribes involving government officials and non-government officials; clarifies that a thank-you gift after improper benefits are sought still constitutes bribery; and clarifies when leniency may be given and provides additional details on the requirements and benefits of voluntary disclosure.

#### 4.4.1. “Bribe-giving” offences

The *Criminal Law* generally prohibits an individual or entity from giving “money or property” to a state functionary, a close relative of, or any person close to, a current or former state functionary, a non-state functionary or an entity for the purpose of obtaining “improper benefits”

However, a person who gives money or property to a state functionary due to pressure or solicitation from that state functionary but who receives no improper benefit shall not be regarded as having committed the crime of offering a bribe (Article 389 of the Criminal Law).

The Eighth Amendment to the *Criminal Law of the People's Republic of China* (2011, hereafter "the Eighth Amendment") extended the scope of commercial bribery to include illicit payments to foreign officials. The *Criminal Law* now also criminalizes the "giving of money or property to any foreign official or officer of a public international organisation" for the purpose of seeking "improper commercial benefits" (Article 164 of the Criminal Law). The inclusion of foreign officials in the definition extends the reach of China's anti-corruption laws beyond the country's borders, although the distinction between "improper commercial benefits" and "improper benefits" means that the scope of punishable actions involving foreign officials is slightly narrower than those where personnel of Chinese entities, as defined in the *Criminal Law*, are the recipients of bribes (Xu, Palmer and Wang 2017).

#### 4.4.2. "Bribe-accepting" offences

State functionaries, close relatives of, or any persons close to state functionaries, non-state functionaries and entities are all prohibited from accepting money or property or making use of their position to provide improper benefits to a person seeking such improper benefits.

#### 4.5. Monetary thresholds for enforcement

As mentioned above, the Ninth Amendment replaced the previous thresholds for commencing an investigation into offences with more general standards such as "relatively large," "huge," and "especially huge" (Article 383 of the Criminal Law). The 2016 SPC and SPP Judicial Interpretation re-establishes the monetary thresholds and standards for bribery-related prosecution and sentencing. The minimum bar for most prosecutions of offering bribes to state functionaries has been raised to 30,000 yuan, and that of offering bribes to non-state functionaries has been raised to 60,000 yuan (Articles 1 and 7 of the 2016 SPC and SPP Judicial Interpretation) (Xu, Palmer and Wang 2017).

## 5. Conclusion

In Chinese society, gift-giving and gift-receiving are two sides of a behavior in sophisticated social relations. Gift exchange in real sense takes place among people within a same generation or with a similar social status. Gift from senior generation to younger generation, and vice versa, can have different social meaning and different social meaning. Usually they are not mutual at the same time, without return taking place shortly afterwards. Gift-giving to people with higher social status, particularly to State officials, is not expected to have any return in tangible gift, but will be expressed in potential benefits in job-seeking, promotion of post, winning a bid-

ding, etc, in the future. Bribery in the form of a gift with small value may not be punished according to law.

As a traditional practice, material Support provided by parents to their children before their marriage or during the contract of their marriage, can be great help for the younger generation to meet material demand in starting a new family life in Chinese society. When marriage rate was low, there was not so much a problem. With the development of Chinese economy in recent 40 years, urbanization, frequent migration of people, and change of values lead to a sharp rise in divorce rate. Valuable gift given by senior generation to younger generation can be a focal point in separation of property between the divorcing young couples. As a result of such a development, different rules, taking into account the details of traditional culture, have been developed in Chinese law.

In Chinese law, the offence of bribery can be convicted based on such elements as the identification of the offeror and the offeree of the gift, the content of the gift, the purpose of the gift and the real value of the gift. All these aspects have changed over the years due to the fact that bribery has been more and more sophisticated and harder and harder to be identified.

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## ARTICULOS/ARTICLES

Gift-Giving in Society, Marriage and Its Nature in Law Enforcement in China / La donación en sociedad, el matrimonio y su naturaleza en la aplicación de la ley en China Xingan Li .....	Págs 9-26
“Impresiones en azul”. La cianotipia como agente catalizador de la mejora psicosocial y fomento de la comunicación de las personas con demencia temprana / “Impressions in blue”. The cyanotype as agent of change for the psychosocial improvement and the encouragement of social communication for people with early dementia M <sup>a</sup> del Carmen Moreno Sáez .....	Págs 27-45
Field by any means necessary: Using technology in field education / Prácticas por cualquier medio necesario: Uso de la tecnología en prácticas Jennifer Harrison, Kristen Burns, Erica Ongstad .....	Págs 47-54
El involucramiento familiar en el marco de la relación Familia-Escuela. Un análisis desde el Equipo de Gestión Escolar en una Escuela Municipal chilena / Family involvement from a school family relationship framework. An analysis from the perspective of an administrative team in a municipal school in Chile Alejandra Santana López, Taly Reininger Pollak .....	Págs 55-74
Una aproximación psicológica a la complejidad ambiental: Especificación de un modelo de estrés y resiliencia comunitaria / A psychological approach to environmental complexity: Specifying a stress model and community resilience Cruz García Lirios, Margarita Juárez Nájera, Francisco Rubén Sandoval Vázquez, José Marcos Bustos Aguayo ..	Págs 75-95
El papel de las externalidades de capital humano en un modelo de crecimiento endógeno para México / The role of human capital externalities in an endogenous growth model for Mexico Ana Beatriz Carrera Aguilar, Arturo Robles Valencia .....	Págs 97-113

## RESEÑAS/REVIEWS

Alfonso Echazarra. (2014). La delincuencia en los barrios. Percepciones y reacciones / Crime in the neighborhoods. Perceptions and reactions (por M <sup>a</sup> Ángeles Hernández Prados) .....	Págs 115-117
Cristina de Alba Galvan. Habilidades de comunicación y promoción de conductas adaptadas de la persona con discapacidad / Communications skills and promoting adaptive behaviors in persons with disabilities (por Ana Lucía Hernández Sánchez) .....	Págs 119-120

