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Doctrine of Desuetude –Addressing the Constitutional Minefield

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Abstract

Ever since India became independent in 1947, major reforms have taken place with respect to many aspects of our day-to-day life. Despite this, several of the laws so passed have not adequately led to the advancement of our country. In addition, statutes are often complex, and therefore cannot be understood by the common man. Ironically, the laws that are enacted for the betterment of the citizens are structured and compiled in such a manner, so as to lead to circuitous statutes laden with several technical terms, discouraging the same very people of the country from taking any legal recourse. The law commission has come out with many far-reaching reports to repeal numerous irrelevant laws, which have given rise to considerable confusion in the minds of citizens as well as the litigants. However, the government has not been very proactive on this front, taking shelter under Article 372 of our Constitution which provides the basis for the continuation of such redundant laws. Most of these laws no longer serve their original purposes, given the change in context.

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This article highlights the problems that are caused by such laws. Further, it gives an insight into the applicability of the doctrine of desuetude and how the judiciary has favoured its applicability to simplify matters relating to the functioning of these laws.

Keywords: Desuetude, Modernization, Progression, Redundancy, Reforms.

I. Introduction

The Government, in recent times, has repealed several laws which have lost their importance and utility, despite having found a place in the statute books for a very long time. The Repealing and Amending (Fourth) Bill, was introduced on 27th July, 2015, in the Parliament, to further the cause of lowering the burden of redundant laws on the citizens of the country. Like its predecessors, the Repealing and Amending (Second) Act, 2015[1] and the Repealing and Amending (Third) Act, 2015,[2] the latest Bill aims at repealing certain dead Acts, which no longer find relevant application in the present context. The Bill is awaiting approval in the houses of Parliament.

There are about three thousand central statues which have become obsolete, redundant or repetitive and are still operative in the legal machinery.[3] There is a twofold challenge faced by such laws: firstly, they have lost their relevance because of changes in the political, social and economic milieu; and secondly, the administration of such laws has led to the creation of several unnecessary authorities and permissions.[4.] Therefore, the

[1] The Repealing and Amending (Second) Act, 2015, available at http://www.prsindia.org/uploads/media/Repealing%20and%20amending/Repealing%20and%20amending%20second%20act,%202015.pdf.

[2] The Repealing and Amending (Third) Act, 2015, available at http://www.prsindia.org/uploads/media/Repealing%20and%20amending/Repealing%20and%20Amending%20(3rd)%20Bill.pdf.

[3] Amol Parth, *Narendra Modi should repeal these obsolete laws*, (Oct. 2014), available at http://www.niticentral.com/2014/10/31/narendra-modi-repeal-obsolete-laws-240252.html.

4 *Id*.

legislature along with the judiciary of the country, through mutual cooperation has to take effective action against this hegemony of old laws.

II. Applicability of Doctrine of Desuetude

Over the years, there has been a realization in the legal machinery to eradicate redundant laws, for better functioning. In order to do the same, the 'doctrine of desuetude' offers a possible solution, that is, whenever a case comes up before the judiciary with respect to a redundant law, the judiciary takes an action independently and by the application of this doctrine, that law is declared as dead letter.

The doctrine of desuetude holds that if a statute or a treaty is left unenforced for a prolonged period of time, the courts will no longer regard it as having any legal effect, even though it has not been repealed.[5] The jurisprudential meaning of "desuetude" is that long and continued non-use of law renders it invalid, at least in the sense that courts will no longer tolerate punishing its violators or transgressors.[6]

As enunciated by Lord Mackay, "desuetude requires for its operation a considerable period, not merely of neglect, but of contrary usage, of such character as practically inferring the completely established habit of the community, as to set up a counter law to establish a "quasi repeal".[7] Desuetude is a tool with which the judiciary could force the legislature to reconsider an obsolescent and a constitutionally problematic statute.[8]

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[5] BLACK'S LAW DICTIONARY, 479 (West Group, 8th ed. 2004).

[6] Justice Jitendra N. Bhatt, *Dynamics and Dimension of Doctrine of Desuetude*, (2004) 4 SCC (Jour.) 21.

[7] Brown v. Magistrate of Edinburgh, 1931 SLT 456.

[8] *Desuetude*, 7 HARV. L. REV, 119 (2006), available at, http://www.jstor.org/stable/4093616.

This doctrine when applied by the courts is an act of co-operation by the judiciary, which they owe to the legislature, as they relieve them from the burden of repealing statues which are not at all useful in the modern era.[9] The purpose of this is the abrogation of those statutes, which no longer reflect the goals and the values of the society and are being ignored at large.[10]

III. Applicability of the doctrine on Civil Law System

Whenever, the question of the applicability of a doctrine arises, one should always look at the effects that it will have on the two paradigms of a legal system i.e. civil law and common law. Both laws have different consequences when either of them is violated. The concern arises once the doctrine is applied, as the modus operandi of both the systems is different. Thus, it becomes pertinent to consider the effects of the doctrine, when it is sought to be applied.

The arguments stated earlier in this paper advocating the applicability of the doctrine stand wholly negated in civil law as it relies on making customary law redundant, which is foreign to the civil law tradition, although the irrelevancy of a civil law by the passage of time cannot be negated.[11]

In civil law, the application of such a doctrine has been advocated by theoretical writers more than the courts operating in such a system.[12] Misguided application of this doctrine in this system will lead to chaos. The more efficacious way of applying this doctrine is by thorough revision of the statute, so that there is no room for fear of having unintentional changes.[13] Therefore, when

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[9] *Id*.

[10] Mark Peter Henriques, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 5 VA. L. REV, 76 (1990), available at http://www.jstor.org/stable/1073157.

[11] *Supra* note 9 at 3.

[12] *Judicial Abrogation of the Obsolete Statute: A Comparative Study*,7 HARV. L. REV, 64 (1951), available at http://www.jstor.org/stable/1336505.

[13] *Id*.

applied in a civil law system cautiously, this doctrine can relieve the burden of the statute book.

IV. The Safeguard of Article 372 of the Constitution of India.

The applicability of this doctrine is very much dependent on the effect of Article 372 of the Constitution. It is the continuing force behind the existence of any pre-constitutional law of our country. The difference between this constitutional provision and the aforesaid doctrine is that, one is codified as the ground norm of the country, while the other is evolved through judicial activism and scholarly writings.

The aforesaid constitutional provision provides for "the continuance in force of existing laws and their adaption",[14] thereby making all laws which are in force before the commencement of the Constitution, to continue in operation until altered, repealed or amended by a competent legislature or other competent authority. Article 372 incorporates the theory of adoption of laws issued by a previous sovereign, by the present sovereign, by tacitly showing that he/she continues to exercise the will of his/her predecessors.[15]

An existing law continues to be valid, even though the legislative power with respect to the subject-matter of the existing law might be in a different list of the Constitution from the list under which it would have fallen under the Government of India Act, 1935. However, after the Constitution came into force, an existing law could be amended or repealed only by the legislature which would be competent to enact that law, if it were to be newly enacted.[16]

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[14] THE CONSTITUTION OF INDIA, Art. 372(1).

[15] DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA , 537 (Lexis Nexis Butterworths Wadhwa, Nagpur, 8th ed, Vol. 10).

[16] Kerala State Electricity Board v. The Indian Aluminium Co. Ltd., AIR 1976 SC 1031.

In the case of *Hemlata P. v. Government of Andhra Pradesh*[17], the court quoted Thomas Hobbes from his work 'Leviathan', "*The Legislator is he not by whose authority the laws were first made, but by whose authority they continue to be in force*."

A law in force means any non-repealed law enacted by a competent legislature, which was in existence at the commencement of the Constitution. According to Article 372 (1), it continues to be in force in any part of India or any particular area of India or of the state.[18] Therefore, if the pre-constitutional law was made by a competent authority, it will not cease to continue merely because that authority has lost its legislative competence over the subject-matter.[19] The effectiveness of a law, while it does not per se determine legal validity, nevertheless is an important factor that must be considered.

> *"Age cannot wither an Act of Parliament, and at no time, so far as I am aware, has it ever been admitted in our jurisprudence that a statute might become inoperative through obsolescence. The learned author mentions that there was at one time a theory which, in the name of 'non-observance', came very near to the doctrine of desuetude, that if a statute had been in existence for any considerable period without ever being put into operation, it may be of little or no effect. The rule concerning desuetude has always met with such general disfavour that it seems hardly profitable to discuss it further."*[20]

The doctrine of separation of powers is often argued as a reason to uphold this constitutional provision. As the legislature has incorporated this provision, it is the burden of the judiciary to apply the doctrine on a case to case basis. Therefore, if a statute which has been formulated by the legislature is being rendered as 'dead letter' by the judiciary, with the application of this doctrine,

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[17] *Hemlata P*, AIR 1976 AP 375.

[18] Jatindra v. Lala Prasad, AIR 1956 Pat. 469.

[19] Patankar v. Sastry, AIR 1961 SC 272.

[20] C K ALLEN, LAW IN THE MAKING, 452 (Oxford Clarendon Press, 5th ed.).

it results in the infringement of the doctrine of separation of powers[21]. In the case of *State of Maharashtra* v. *Narayan Shamrao Puranik* it has been held, that a statute can be abrogated only by an express or implied repeal. It cannot fall into desuetude or become inoperative through obsolescence or by lapse of time.[22]

It was also held by the court that merely because there is a delay, either by the administration or there were different forces at work, which forestalled the implementation of a particular provision, the legislation will not become a dead letter in the statute book. By applying the principle of desuetude, this court cannot kill a welfare measure enacted by the Act of the Parliament. Unless the Parliament repeals the provisions, the question of applying the principle of desuetude to the impugned provisions will not arise.[23] The doctrine of desuetude has been rejected by the Hon'ble Courts from time to time.[24] In the case of *Seth Srenikbhai Kasturbhai and Ors. etc.* v. *Seth Chandulal Kasturchand and Ors.*, the Court refused to entertain the doctrine on the grounds of non-applicability of the Act for forty years.[25]

V. Change in Judicial Trends

The above stated judicial pronouncements where desuetude has been rejected in order to uphold Article 372 of the Constitution, has laid down a difficult path for the doctrine to achieve its purpose of rendering redundant laws as 'dead letters'. However, there has been a shift in the judicial trend as steps are being taken by the judiciary to relieve the common man from the unnecessary

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[21] *Supra* note 9 at 3.

[22] *Narayan ShamraoPuranik*, (1982) 3 SCC 519.

[23] The Planters Association of Tamil Nadu v. The Secretary to Government, Labour& Employment Department, In The High Court Of Madras, W.P.No.30368 of 2007 and M.P.No.1 of 2007, Decided on 5/6/2012.

[24] Bijitsawa Rout v. State of West Bengal &Ors., (2013) 1 CALLT 652 (HC).

[25] *Seth Srenikbhai Kasturbhai*, AIR 1997 Pat. 179.

burden of the statute book. American courts, which have always distanced themselves from deciding cases solely on desuetude, have also modified their approach to a great extent.[26] In the case of *Committee of Legal Ethics* v. *Printz,* the court laid down a three part inquiry so as to render a penal statute redundant by way of abrogation through desuetude.[27] Even the U.S. Supreme Court has invalidated laws through the same means, an important example being the law which penalized homosexual acts between consenting adults[28].

The looking glass of the Indian Courts is also changing. In an array of its pronouncements, it can be seen that the trend is more inclined towards the applicability of the doctrine. In the case of *In re Chockalingam Chettier*, the court declared that the Fugitive Offenders Act, 1881 was no longer applicable to India and is a dead letter.[29] It was also held in the case of *Municipal Corporation of Pune* v. *Bharat Forge Co. Ltd* that though, in India the doctrine of desuetude does not appear to have been used so far to hold that any statute has stood repealed because of this process, the court doesn't find an objection in principle on the basis of this with respect to its application to apply this doctrine to other statutes.[30] The reason for this is that a citizen should know that, despite a statute having been in disuse for a long duration and a contrary practice being in use, he is still required to act as per the 'dead letter'.

'Doctrine of desuetude' could abrogate an enacted law only in the case of non-application of a written law during a long period.[31] This doctrine should be applied in the case where even schemes are not in operation for a long time.[32] For instance, if a notification

[26] Mark, *supra* note 11 at 3.

[27] *Committee of Legal Ethics,* 416 SE 2d 720 (W. Va. 1992).

[28] Lawrence v. Texas, 539 US 558 (2003).

[29] *Chockalingam Chettier*, AIR 1960 Mad. 548.

[30] *Bharat Forge Co. Ltd*, 1995 SCC (3) 434.

[31] Haryana State Lotteries &Ors. v. Govt. of NCT Delhi &Ors., 1998 (46) RJ397.

[32] Abdul Hai Khan v. Subal Chandra Bose, AIR 2002 SC 1742.

has not been acted upon for twenty years, it should be taken as a dead letter and the doctrine of desuetude should apply.[33] Therefore, these are some of the instances, where the judiciary has declared laws as 'dead letters' pertaining to the present legal system of our country, however, much is yet to be done in this regard.

VI. Weeding Out Outdated Laws

Periodical review of statutes should be undertaken by the legislature for clearing the dead wood and to prevent inconvenience to the citizens by eliminating laws that have ceased to have any relevance in modern society. As emphasized by Lord Westbury, revision of statutes is for four main objectives that is, renovation, order, easy access to legislation and symmetry.[34] Statutes enacted are growing in bulk which further emphasizes the need for eliminating discordant provisions.

Not many changes have been incorporated in the last three decades. The 20th Law Commission Report on "Obsolete Laws: Warranting Immediate Repeal" has identified 1,145 laws which have the potential to be repealed and 72 laws which should be immediately repealed.[35] In the United States, they have a repealing provision for all Appropriation Acts, while Australia follows immediate repeal of obsolete laws. However, no such condition exists in India.

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[33] NawabShafath Ali Khan v. The District Collector, The Sub Registrar Gudalur, The District Registrar Udhagamandalam and State of Tamil Nadu rep by its Secretary to Government Environment and Forest Department, (W.P. No. 24575 of 2009 Decided On: 12.07.2011).

[34] 148th Law Commission of India Report on the Repeal of Certain Pre-1947 Acts, (1993); 20th Law Commission of India Report on Identification of Obsolete Laws, (1960).

[35] 20th Law Commission of India Report on Identification of Obsolete Laws, (1960).

The need to repeal a particular law may arise for several reasons. For instance, the subject matter of the law is outdated or the purpose of the law has been fulfilled, or a new law has come up to regulate the same purpose[36]. The P.C. Jain Commission on the Review of Administrative Laws had also recommended the repeal of 1,300 central enactments.[37]

Laws have to be looked at harmoniously, that is, from the point of view of all the stakeholders it affects and bring it in line with the objectives of the law. Unfortunately, this has not been the case in the review of legislations. Many laws are being formulated, because of the changing needs of the society; however, the failure in repealing the obsolete laws may present the court with difficulty in dealing with the same.[38] Although change in circumstances is taken as an immediate repeal, frequent interpretations by the judges can also repeal a statute.[39] The court, in most situations, is faced with the problem of whether or not it should apply the given statute or refuse it on the ground of it being obsolete.

VII. Some Legal Cobwebs That Need to be Cleared

Telegraph Wires (Unlawful Possession) Act, 1950 - This Act regulated the illegal possession of telegraph wires. The last telegram was sent on 15th July, 2013 after which the telegraph facilities were completely shut down. Hence, this Act should be repealed because the subject matter for which it was passed no longer exists

Forfeited Deposits Act, 1850 - The main purpose of this Act was to prevent tenure-holders from taking unfair advantage of the regulation which allowed forfeited money of land sales to be

[36] Adkins v. Children's Hospital,26I U. S. 525 (I923).

[37] Law Commission of India, *Obsolete Laws: Warranting Immediate Repeal" (Third Interim Report),* Report No. 250 (2014), available at http://lawcommissionofindia.nic.in/reports/Report_No.250_signed_copy.pdf.

[38] N.C.L REV. 346, 348 (1935).

[39] Reid v. Wilson, [I895] QB 315.

applied as purchase money. It was to be treated as cost of sales and the rest of the amount was to be forfeited to the government. This Act was made for the administrative requirements of the British Government that no longer exists and hence has no validity after 1947.

Hackney Carriages Act, 1879 - The purpose of this Act was to license the wheeled vehicles drawn by animals. There has been no record of this Act being used after independence and must therefore be repealed.

Exchange of Prisoners Act, 1948 - This Act dealt with the agreement between India and Pakistan for the purpose of exchange of prisoners. The Consular Access Agreement signed in May 2008 now governs the exchange of prisoners. Hence, the earlier law should be repealed as per the maxim *leges posteriores priores contrarias abrogant* (later laws abrogate prior contrary laws)

Drugs (Control) Act, 1950 – The subject matter of this legislation was to ensure that essential imported drugs are sold at reasonable prices. However, the Essential Commodities Act, 1955 includes drugs for the same purpose. A Bill was passed to repeal this Act in 2006 but no circumstances have changed as the Bill lapsed. Hence, the government should pass a Bill to repeal this Act.

Weekday Holidays Act, 1942 - The aim of this Act was to provide weekly holidays for people involved in commercial establishments. Shop and Establishment Act, 1961 has come up on the same matter which has made the earlier Act repetitive in nature.

Converts' Marriage Dissolution Act, 1866-It regulated the personal laws and allowed the dissolution of marriage of converts on the ground of desertion or repudiation on religious grounds by spouse. However, the proceedings were to be initiated only by a converted person not his or her spouse. This Act had a very limited scope because of which the 18th Law Commission Report,

1960 recommended its repeal.[40] It can be seen in *Sarla Mudgal v. Union of India* where Supreme Court stated that this law is tantamount to destroying the rights of the other spouse who has not converted his or her religion.[41]

Dramatic Performances Act, 1876- This Act empowers the State Governments to prohibit performances that are defamatory and can cause disaffection amongst the public. This Act was enacted in the colonial times to curb nationalist movements which were instigated due to such performances. Indian democracy has no place for such laws and it is against Article 14 and Article 19 of the Constitution. In *N.V. Sankaran alias Gnani* v. *The State of Tamil Nadu,* various provisions of Tamil Nadu Dramatic Performance Act, 1954 were considered violative of Article 14 and Article 19 of the Constitution and were considered for repeal.[42]

Births, Deaths and Marriages Registration Act, 1886- This Act is against Article 14 of the Constitution as it provides registration of only certain sections of people especially Christians and Parsis. We also have separate laws for this in the form of the Registration of Births and Deaths Act, 1969 and Hindu Marriage Act, 1955 or Special Marriage Act, 1954.

Prevention of Seditious Meetings Act, 1911 - This Act prohibited meetings likely to cause disturbance and public unrest, which they believed was likely to cause sedition. The continuation of this colonial legislation is no longer necessary as there are extensive provisions for sedition in Indian Penal Code, 1960. This legislation is also *ultra vires* Article 19 (1) (a) (b) of the Constitution of India.

Children (Pledging of Labour) Act, 1933 - The purpose of this Act was to stop the pledging of children. However, the proviso to this Act in Section 2 defeats the purpose of this legislation, as it approves child labour if reasonable compensation is paid to the child. As the Act specifically mentions "an agreement made

[40] 20th Law Commission of India, Report on Identification of Obsolete Laws, (1960).

[41] *Sarla Mudgal*, AIR 1995 SC 1531.

[42] *N.V. Sankaran*, 2013 (1) CTC 686.

without detriment to a child, and not made in consideration of any benefit other than reasonable wages to be paid for the child's service' is not prohibited"[43]. In addition, the provisions of the Act are not in tune with Child Labour (Prohibition and Regulation) Act, 1986 which prohibits all kinds of child labour. Hence, the aforementioned law is in conflict with the progressive law.

The recommendations as to the repeal of laws may be viewed with askance, but the difficulties of thorough revision and the fear of creating unintentional changes are the major obstacles that are being faced.[44] With national economies becoming globally interdependent, there is an urgent need to recognize the symbiotic linkages between the economy of the nation and the laws. With liberalization and modernization, the law has to keep pace with changing times, otherwise there will be legal gaps and inconsistencies which can result in grave impediments to the growth and development of our country.

VIII. Conclusion

There are recommendations, judicial pronouncements as well as pending bills in place. However, redundant laws continue to be legally enforceable. These laws, despite their lack of relevance continue to have a permanent place in the statute book. It is therefore, necessary for the co-operation between the judiciary and the legislature, the two very important pillars of democracy.

Further, there is a need for greater awareness to be created amongst people about the existence and continued application of such redundant laws that have lost their purpose and significance. The tussle between the different machineries of governance regarding the implementation and eradication of such

[43] 248th Law Commission of India Report on Obselete laws: Warranting immediate repeal, (2014).

[44] COURTNEY ILBERT, THE MECHANICS OF LAW MAKING 150(Columbia University Press, 1914**).**

laws should be resolved in the greater interest of the public. The judiciary should act *suo moto,* whenever any matter pertaining to such laws come before it, rather than shifting the responsibility to the legislature. The legislature should accordingly co-operate when such disposal has been initiated by the judiciary.

Law should grow with the changing times. There is an urgent need to keep pace and to make laws which reflect the growing needs of our country. The present government has provided a constructive platform for the purpose of weeding out obsolete laws. The judiciary and the legislature should work hand in hand and come out with concrete steps to tackle the problem of redundant laws. An ideal way of speeding up such a process is the application of the doctrine of desuetude, which our legal system is yet to accept. The application of this doctrine is a succinct tool through which the redundant laws can be rendered inapplicable.