DEAD-HAND DOMINION: THE RULE AGAINST PERPETUITY APPLICABILITY OF THE RULE IN THE CONTEMPORARY LAW OF PROPERTY

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INTRODUCTION

A glass case in the central hall of the University College, University of London preserves mortal remains of great legal philosopher, Jeremy Bentham. The skeleton is clad in an overcoat that the noble man wore in his life. The excerpt on the outer case reads that "the testator desired to have his preserved figure, on certain occasions, placed in a chair at gatherings of his friends and disciples, for the purpose of commemorating his philosophy." The practice is still followed in the University gatherings where the hand of the dead reins the show. One could only imagine the extraordinary scene where the dead hand heads the present beings.

This continuous control by the dead hand is not considered a philosophical subject in its nature. Property, much less complicated device, however, is being restricted from adhering to the commands of the testator who acquired or inherited it, and who by way of his will, uses the trust for limiting the future interests created in the property by imposing certain conditions.

The Rule against Perpetuity in Common Law means that every future interest must vest, if at all, within a period measured by the lives of definite persons in existence at the time of the creation of the future interest, and twenty-one years thereafter, and every such interest is void in its creation if it may by any possibility vest at a more remote time.[1] The rule is based on the principle that all contrivances shall be void which tend to place the property forever beyond the reach of the exercise of the power of alienation. This rule is defined in Section 14 of The Transfer of Property Act, 1882 in India. Section 14 however differs from the Common Law in

[1] More precisely, the Rule against Remoteness of Vesting; Law Commission Consultation No 133, October 1993.

limiting the age within which the property would be transferred to the final successor to eighteen years, which should also include the gestation period of the unborn child. The Rule against Perpetuity in effect restricts the creation of contingent future interest. John Chipman Gray famously summarized the Rule against Perpetuity as: "No interest is good, unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[2] This research paper critiques the validity of the Rule against Perpetuity in the contemporary times considering the evolution of Trust laws, imposition of estate taxes and stemming of contradictions within the Rule due to inherent defects.

ORIGINS OF THE RULE AND MODERN TRUST LAWS IN COMMON LAW NATIONS

The issue of Perpetuity first emerged in the case of *Duke of Norfolk*[3] in England. Lord Chancellor Nottingham observed that the perpetuity is a settlement of the state by such reminders that must continue as the perpetual clogs upon the estate which are against the reason and policy of the law, and therefore not to be endured. Why exactly was perpetuity against the policy and reason of law was further observed by Justice Byrne in *In Re Hollis' Hospital*[4] case when he said that the Rule against Perpetuity is a restraint on trade and commerce and thus contrary to the public policy. He cited the Free Market Theory of Adam Smith and also the case of Duke of Norfolk. He explained that limited future interest may bar the successors of property from alienating it. This would result in accumulation of property within specific families. The free and active circulation of property, which is one of the springs and consequences of commerce would be restricted and the improvement of property would be checked. Therefore, what could be construed as the essence of Rule against Perpetuity from the cases that crystallized the issue is that this Rule furthers alienability that is required to make property productive and increase the societal income.

Most transactions in the modern day property transfers take place by creating an equitable interest in a Trust. A well-drafted modern trust instrument would provide for the broad provisions of sale and reinvestment. Back in the day, the trust instrument was void of expressed authorization that limited the trustee's powers of sale and reinvestment of the property settled.

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[2] Gray, The Rule against Perpetuities 191 (4th ed. 1942).
[3] *Duke of Norfolk's* case (1682) 3 Ch Cas 1.
[4] *In Re Hollis' Hospital* 2 Ch. 540, 553 (1899).

The continuous developments in jurisprudence in the field of trust however has now widely amplified the powers of trustee to opt from an array of options a mode to make property productive. Trustees however, have to adhere to the "Prudent man rule" while selling or reinvesting the property in order to make it productive.

The Prudent Man Rule was formulated by Justice Samuel Putnam in 1830 in the case of *Harvard College v Amory*[5]. He stated that a fiduciary to the trust is required to keep the following factors in mind while investing trust assets: the needs of beneficiaries, the need to preserve the estate and the amount and regularity of income. He declared that the trustee will have to invest the trust asset as a prudent man would invest his own property. This rule seeks to allow the trustee to take affirmative actions to avoid rendering the trust property unproductive. It does not, however, allow him to take unreasonable risk in the investment for extra growth.

In American Law, the trustees are not only empowered to sale and reinvest the trust asset, but the Law requires them to do so. One of the duties imposed by the law upon the trustees is to use reasonable care in making the trust property productive.[6] In numerous states, even the absence of expressed provision in the trust instrument could not stop the trustee to sell or reinvest the trust asset land if it could be made productive in the process.[7] The English Trustee Act of 1925 provides a similar provision in which the courts would provide necessary powers for sale, lease, mortgage, invest, et cetera of the property that should be made more productive and whose trust instrument does not empower the trustee to do so.

The law of trust in India is governed by the Indian Trust Act, 1882. Indian Trust Act essentially has a rigid framework with regard to the selling of the Trust property. However, the jurisprudence on the matter has started following the English and American trend. Section 37 of the Act says that the trustee could sell the trust property only when he is empowered by the trust instrument to do so. The change in trend however assumed force in 1918 when in *In Re Shirinbai Merwanji Dalal*[8], it was laid down that in case the situation is desperate or there is no income from the trust or the trust property is in urgent need of repairs, the Courts may permit the sale of trust property. The rule laid down in this case was further observed and applied in

[5] *Harvard College v Amory* (1830) 26 Mass (9 Pick) 446.
[6] Restatement of Law of Trusts, 181 (1935).
[7] Simes, Handbook on the Law of Future Interests C.25 (1951).
[8] *In Re Shirinbai Merwanji Dalal* (1919) 21 BOMLR 41.

the case of *In Re D.V. Gundappa*[9]. The courts were trying to encapsulate the power to sell the trust property within section 36 of the Indian Trust Act which provides General Authority of Trustees for the realization, benefit or protection of trust property. Subsequently, in the case of *Misrilal Raidani v Netaichand Nandi*[10], the Court held that in case that the trust instrument limits the trustee to sell the property even in desperate situations where either the property is being rendered unproductive or when the trustee is incurring heavy costs for the maintenance of the property, he can come to Court to ask for its chancery jurisdiction and give permission for the sale. However, in sufficient cases, the Courts have also disallowed the sale in the absence of an explicit provision in the trust instrument. Therefore, the jurisprudence in Indian law, though broadly contained by the letter of the law, seems to be slowly progressing towards the spirit of the General Common Law in this regard.

Transfer through trust, the most prevalent medium of intergenerational transfer of property, is thus governed by well appreciated laws in most of the Common Law countries that allow sale and reinvestment of Trust Assets even in the absence of specific provision in Trust Instrument. In other countries, the trend is slowly progressing towards the former as in the world of globalization transforming the entire earth into one whole village, witnessing unprecedented growth rates in the global population, the public policy cannot afford to have an unproductive land for a considerable amount of time. The Rule against Perpetuity, in the presence of these specific provisions, loses its essence as the purpose it aims to serve is replaced by the specific provisions of the precise Trust laws. Therefore, even the contingent future interest is consistent with alienation and productivity of property.

THREAT TO PUBLIC WELFARE AND ESTATE TAXES

If inalienability does not render the property unproductive, then what public policy justifies it? Professor Leach once tried answering that question when he said: "Rule intends to remove threat to the public welfare from the family dynasties built either on great landed estates or on great capital wealth."[11] Accumulation of wealth within families has been referred to as Carnegie Effect by Andrew Carnegie. He claims that through Carnegie Effect, parents deadens the energies and talents of the Son and tempts him to live a less useful life. To begin with, the threat

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[9] *In Re D.V. Gundappa* AIR 1951 Kant 6.
[10] *Misrilal Raidani v Netaichand Nandi* AIR 1934 Cal 372.
[11] *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 Harv. L. Rev. 721, 727 (1952).

of mobilization of wealth has been significantly removed by imposing income, estate and inheritance taxes. Winston Churchill argued in 1935 that "estate taxes are a certain corrective against the development of the race of idle rich."[12] England surged Estate Tax to forty percent after the war against Hitler. Revenue from Estate Tax amounted to over twenty billion dollars in 2014 in United States.[13] India abolished Estate Tax in 1986. The rich poor gulf in the country however widened from one percent holding forty two percent wealth in 1975 to one percent holding seventy three percent wealth in 2017.[14] This has also lead to concentration of benefits of economic growth only in few hands in the country. Hence, reduction in direct taxes and reintroduction of Estate Tax in India could stricture the rich poor divide by fulfilling the conditions of the social contract by imposing greater obligation on the people enjoying privileged position.

An interesting point to be noted is that the Rule against Perpetuity does not play half as instrumental role as played by Estate Tax in curbing accumulation of wealth and property in the hands of few. This is because of an inherent aspect of the Rule itself. The Rule against Perpetuity applies to contingent interests created only. It does not apply in cases of vesting in interests. Since vesting in interest is not vesting in possession, a vested interest could just as effectively take property out of commerce as a contingent interest.

INHERENT DEFECTS IN PRAGMATIC APPLICATION OF THE RULE

Suppose an estate is entrusted on A for life, then for his children that survive him for their lives and then to be distributed to testator's heirs, to be determined on testator's death. Here, the life interest of A's children is vested as soon as A dies and future interest in testator's heirs is vested at the moment it is created. From the perspective of the modern thriving economies, the problem with such an arrangement is that the marketability outlook is most likely to dissuade people to buy such estates. Practically, the estate in question is frozen not just for the lives in being and twenty one years or eighteen years in the case of India, but for the life in being plus the lives of people unborn when the testator dies. The extended time gap in the latter case limits the scope of the Rule that it intends to ensure which is continuous exchange of hands holding the property.

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[12] Emil Rechsteiner, *Eccornucopia: Restoring Fairness and Prosperity in America* (First published May 15, 2014).

[13] OMB Report (Office of Management and Budget), 2015.

[14] Oxfam Report, *Reward Work, Not Wealth*, 2018.

What this example also highlights is the feudal notion that the Rule against Perpetuity entails and that the modern law is still toeing. In the bygone age, when agriculture was the primary production activity and commerce largely rotated around agricultural produce, feudal mindset was that the land was the only source of income and wealth. However, such rustic mindset should be suitably challenged in the framework and structure of modern economies where a large proportion of international produce comes from the production of intellectual property.

Certain exceptions to the Rule against Perpetuity open up the scope for critical comment. Rights of reversion and re-entry are not covered within the ambit of Rule against Perpetuity. Though English Courts encapsulated both these rights within the Rule against Perpetuity overtime[15], American Courts are still following the traditional law. This exclusion has brought about absurdity in the application of the law. For instance, if A conveys land to X and his heirs, but if it is not used for office purpose, then to Y and his heirs, then the interest of Y is bad by the application of the Rule; but if A conveys land to X and his heirs first, and then later transfers the possibility of reversion to Y and his heirs in case the land is not used for office purpose, then the settlement is legal even though it effectively produces the same result. This is because even though the possibility of reversion is inalienable, same effect could be produced by conveying the possibility of reversion with warranties. It was held in the case of *Brown v Independent Baptist Church of Woburn*[16] that such an arrangement could be validly executed through a will. Therefore, the exceptions to the Rule against Perpetuity emasculates the Rule and further weakens its relevance that previously stood on a slippery slope.

CONCLUSION

The Rule against Perpetuity is thus void of the need and spirit that envisioned it in the 17th century. Right of the trustee to sell and reinvest the trust asset shows the evolving nature of the laws as per contemporary requirements. Imposition of estate and inheritance taxes dissuades accumulation of property within dynastic families. The exceptions to the Rule against Perpetuity restricts its own scope by way of peculiar arrangements. Therefore, the Rule against Perpetuity functions as a remnant of the dead legal, social and economic structure and has failed to keep

[15] *In Re Da Costa* (1912) 1 Ch. 337; Hopper v Corporation of Liverpool, 88 Sol. Jour. 213 (1944).
[16] *Brown v Independent Baptist Church of Woburn* (1950) 91 N.E.2d 922.

pace with the evolution happening in these realms. Hence, the Rule should be considered for revocation.