



Adapting the rule against perpetuity with 21st Century

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Abstract

India has undergone a seismic shift when it comes to Property Law. Derecognizing property rights as fundamental right to following a restrictive and gender-biased approach in deciding the ownership of property to finally acknowledging and having a progressive attitude towards property laws, India has constantly reformed and revamped its laws in this domain.

One such arc of this saga circumscribes around the category of unborn person. As surprising as it may seem, Transfer of Property Act, subject to Rule against Perpetuity as given in Section 13 and read with Section 14 allows for transfers which are made or created for the benefit of the unborn.

The aim of this paper is to first trace the history and the rationale behind existence of this common rule in order to put forward the view that despite having rigid application, the need for this rule cannot be undermined. However, there does exist a need to reform the rule as there are grave complications that supplement this rule.

Keywords: adapting, rule against perpetuity, 21st century

Introduction

“No interest is good, unless it must vest if at all, not later than twenty-one years and after some life in being at the creation of the interest ^[1].”

The law requires for the property to vest with someone and not remain in abeyance. The culmination of any property is alienability and for this to be triumphed, the Indian law requires for the property to ultimately vest with someone which should not be beyond the prescribed period.

Many countries have already either reformed or abolished the rule mainly because the rule in its original existence was not really yielding benefits. The rule has not only been a constant moot point ^[2] but also has an inherent problem which now needs to be rectified. The rule has too much reliance on remote future in the sense that when applying the rule to consider the validity of any transfer, all future contingencies have to be considered and if the rule fails any one, the whole transfer becomes void. The validity of transfer is only verified when the transfer is about to happen.

Research Methodology

Primarily, doctrinal research was relied upon as the topic with which the research paper deals with could not have been explored by an experimental study. After an in-depth analysis of the primary research, secondary sources were used to give examples and illustrations. Various landmark cases and journals were analyzed in order to carefully list down the problem and the solution. The scope of the paper is only confined to one specific legislation i.e., Transfer of Property Act, 1882.

For example

if there is transfer that has to take place via a will, the validity of such transfer can only be verified upon the death of the testator and not before that, hence creating difficulties and from a practical standpoint, this is not a situation which contributes towards boosting of economy of any country,

which is why there have been significant reformations in the rule adopted by many countries ^[3].

After elucidating the current rule of perpetuity, the paper postulates two major criticisms against the rule. One being that the rule is applied by looking at the language of the deed and not the actual events and the other being that the invalidity of the whole transfer produces harsh results. The paper also recommends the possible reforms, which have already been suggested by many authors in their paper and accepted by various other states. Wait and see doctrine and cy-pres doctrine are the recommendations made. The former promulgates that the courts should give decisions based upon the facts as and when they appear and the latter includes rewriting, as per the intention of the transferor, that part of the deed which makes the transfer invalid due to a technical glitch which broadly encompasses the language that is used to draft such transfers.

Rule Against Perpetuity

As the name intimates, the rule was devised to pave way for smooth and active circulation of property by disallowing the perpetual control over property by anyone. Being one of the products of the common law, the rule was adopted by almost all civilized nations as the reasons which justified its subsistence were imagined to be coherent at that time.

Stemming from the common law, the Rule Against Perpetuity was solidified in 19th century, a time period during which the end goal of any property was considered to be alienability and any transfer which constrained that was looked down upon ^[4]. The definition promulgated by John Chipman Gray is pivotal in understanding the precise meaning of this rule.

““No interest is good, unless it must vest if at all, not later than twenty-one years and after some life in being at the creation of the interest ^[5].”

The literal interpretation of the definition illuminates that the Rule Against Perpetuity essentially is a rule concerned with vesting of interests. The rule requires any given interest

to vest within a certain period of time and that time is life interest plus 21 years. Any interest which is not vesting within this time period will be struck by Rule Against Perpetuity and hence will be void, thereby making the transfer invalid.

Understanding this rule with the help of an example

A makes a transfer of his property to B for life and after that to C's child when he/she attains the age of 30 years old. B dies in 2000 and C's child D is born in 2001.

Applying the Rule Against Perpetuity here, the transfer cannot be held to be valid because as per the rule the interest has to vest within the period of existing life plus 21 years. Here, D will get the vested interest when he turns 30 years old i.e., in 2031 whereas B died in 2000 and adding 21 years to that, the property should have been vested by the year 2021^[6].

The case of Duke of Norfolk ^[7] was the first case which discussed Rule Against Perpetuity and it was finally implemented in *Re Hollis Hospital case* ^[8]. However, as countries progressed and developed, significant apprehensions have been extended against the rule and reasons for which it was concocted in the first place. Particularly, it is the harshness of the rule which is disfavored and it has been explained by Professor Gray ^[9]. The difficulty in understanding the rule has led even the courts to believe that the rule is mechanical and complex ^[10].

Before delving deep into the topical trends, it is imperative to appreciate the intention and the purpose of the rule, in order to decide whether the rule requires a complete abolition or slight reformation.

▪ End goal of property: Alienability

An economic justification for the rule is that it is formulated in a way that it averts the property from being rendered inalienable. A country's economic progress, to a large extent, is contingent upon its practice and culture of trade and commerce. Having the liberty to alienate the property as and when one wants is one of the many ways in which free circulation of property can be warranted. Rule of Perpetuity in its essence prohibits the creation of future remote interest by making the vesting of property at some time, a mandate. A contingent future interest is discouraged due to the stringent application of the rule because of the axiomatic premise that in all cases, it ushers towards making the property unproductive. Looking from the lens of an utilitarianist like Bentham ^[11], a property's value can only be realized when the utility of it is maximized in the sense that large number of people gain benefits from it. According to this theory, it is utility which is placed at the top of the pyramid based on which any law is justified. Coming to Rule of Perpetuity, the theory of utilitarianism will try and struck that balance between the desires of past generations and the needs of the future generation by making way for the law which provides best results in terms of utility ^[12].

There have been arguments pioneering that the premise on which the justification of the rule is based upon, is in itself flawed. While the argument that contingent future interest blocks the property was justified back then, today, there have been instances where even a vested interest in property can render it inalienable. The backbone of this notion is simply that any property which is blocked up for the purpose of keeping the property inside family in order to

create dynasties will not exactly count as an alienable property ^[13].

▪ Control by Dead Man

Backed by a robust, public policy reason which puts forward the view that no man should be able to control the alienability of the property from his grave as it destroys the liberty of future generations to use the property ^[14], it was a common practice during the 17th century for people to tie up the property in their family for generations to come by restricting the right to alienability. It served as a means for the end goal which was to create enormous and wealthy dynasties. The instrument of transfer was drafted in a way which gave future generations limited rights and hence the dead was able to exercise his control even from beyond the grave. The power exercised by the dead hand was what the Rule against Perpetuity was seeking to restrict.

Some unpopular arguments were that since a man has worked hard enough for the property over which he has absolute right, he should be allowed to decide the future rights over it. His right to decide, varying from questions of who will be the owner to what type of right will be given, should not be constrained in any sense. This is justified from a neo-libertarianism perspective which advances "forever" control on consumption of property by an absolute owner. In simple words, the absolute owner of a given property has the right to decide consumption of property in any manner that he sees fit and exercises control over that property forever, even after his death ^[15]. The justification for this as explained by Locke is that when a man uses his sweat and labor to create or own something, he has the ultimate freedom to decide what he wants to do with it, including the restrictions that he might put on the use of property ^[16].

While till date, the true reason for which the rule was voiced is not crystal clear, the purpose and object of the rule cannot be subdued for mere lack of clarity. The rule propounds to restrict non-living person from exerting control over the future generations ^[17] and helps in furtherance of the principle of alienability in some sense. It helps in creating a bridge between two polarized perspectives and seeks to achieve a middle ground. On one hand, the testator should be allowed to freely dispose the property in any manner that he wishes to and on the other, the rights of future generations cannot be curtailed according to the whims and fancies of the dead. The dead should not be able to curtail the individualism and autonomy of the living men. As accurately pointed out by Arthur Hobhouse, "The property is not the property of the dead but of the living ^[18]." To give full control to someone who does not even exist will only make the property less useful and desirable. Hence, there is a need for a balance between the rights of the owner of the property and the larger societal goal of making property useful and valuable, which is yet another reason to move towards the direction of reformation of the rule and not abolition.

Despite being infected by criticisms, the significance of the rule cannot be diluted. As correctly pointed out by Jarman ^[19], William David Lewis ^[20] and John Chipman Gray ^[21], the reasons for which the rule was concocted in the first place have to be appreciated. Their justifications for advocating for this rule were distinct but helps in reaching to the conclusion that abolition of rule is not something which is desirable. If there were no Rule of Perpetuity, the very essence of trade and commerce i.e., free and active

circulation of property would have come to a standstill. Even if a minuscule portion of a property is tied up, the bearing that it would have on the trade activities along with economy of a country would be severe ^[22]. A property will be valuable only if an individual who owns it can extract some monetary benefit out of it ^[23]. To be able to freely enjoy the property, it is necessary that interest in the property vests fully with that person and hence for this very reason, alienability is favored and protected. The Rule Against Perpetuity aims at furthering the goal of alienability, which brings us to the conclusion that the rule need not be abolished but just reformed.

Before probing into the possible reforms of the rule, a conceptual and simpler understanding of this mechanical rule is discussed.

Existing Policy as per Indian Context

Section 13

Transfer for benefit of unborn person. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property ^[24].

Section 14

Rule against perpetuity. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong ^[25].

Section 14 of the Transfer of Property Act, 1882, lays down the rule and can be understood when read with section 13 ^[26]. The former lays down the maximum time period at which the property must vest with the unborn and the latter provides for the means of transfer and the subject matter of the transfer. There are certain conditions that need to be fulfilled for the rule to apply.

1. There must be a transfer of property.
2. When it comes to the transfer for the benefit of unborn, the interest mandatorily needs to be absolute.
3. Direct transfers to unborn being prohibited, the only way to transfer for the benefit of unborn is by transferring limited interest to living persons first.
4. Existence of ultimate beneficiary before the death of last preceding living person is a prerequisite for the transfer to stand valid.
5. The maximum period for which the vesting of interest can be postponed is what is governed by Rule of Perpetuity. It has 2 components i.e., biological component which means life in being and temporal component which is 18 years. It has been decided by judicial interpretation that for the purpose of section 13 and 14, the period of minority is only till 18 years ^[27].

Comparative Analysis

The rule adopted in India marginally digresses from what has been adopted in the English law. A holistic reading of section 13 and 14 forbids the transfer of limited interest in favor of unborn, whereas such transfer is permitted in English law. To simplify it further, as per English law, a limited interest can be created for an unborn which would

later ultimately vest with another unborn ^[28], but the same is not allowed for when it comes to Indian Law. As per the language that is used in Section 13, “unless it extends to the whole of the remaining interest of the transferor in the property ^[29]”, it can be interpreted that for a transfer in favour of unborn to be valid, the prerequisite is that an unborn should acquire the vested interest as soon as birth takes place, however the possession can be postponed which shall not be beyond the addition of biological and temporal component.

Illustrations

Example 1

A transfers his property to his son B by creating a will and then the ultimate and absolute transfer to B's son C. This transfer will surpass the rule of perpetuity as the unborn will get the absolute rights over the property and the interest will vest as soon as C is born.

Example 2

By creating a trust for B, the transferor intends to completely transfer it to this grandson i.e., B's son. However, the transfer will only take place when B's son turns 18 years old.

This is also in synch with the rule as the vesting is not postponed beyond the accepted time period. The vesting of interest will take place once B's son turns 18 years old. If before that the son dies, the property will revert back to either the transferor or his heirs, whatever the case may be.

Example 3

A grandfather by way of will transferred a limited right over his property to first his son A, then to his son B and then ultimately the interest was to be vested with his grandson i.e., such unborn who should first attain the age of 21 years. This transfer will be absolutely void because of the fact that the vesting of interest is delayed for 21 years, which stands against the Rule of Perpetuity. The minority period is 18 years and the deed states that the vesting can take place when the grandson turns 21 years.

The actual interpretation of the rule is governed by what is written in the deed and not what actually happened. This is exactly from where the following criticisms against the rule stems.

Criticisms Against the Rule

1. Language of the deed holds priority over the actual events

The rule is applied only in the case of future interests. This is why there is a possibility of conflict between what the transferor might have thought and imagined which helped him in deciding the deed and what actually happens at that time. The roots of the rule talk about what might happen and not what has actually happened.

Illustration 1

In the year 1960, A transfers the property to B for life and the interest vests absolutely with his unborn son C, after he attains the age of 21 years. Now, C takes birth in 1961 and B dies in 1982.

Applying the Rule of Perpetuity, the language of deed will take precedence over the actual events, thereby making the transfer absolutely void. If one was to see the actual events, the property would have become alienable after 22 years,

had the transfer been declared valid.

Illustration 2

In the year 1960, A transfers the property to B for life and the absolute interest to B's unborn son C, after he attains the age of 18 years. While B died in 2010, C was born in 1985. Going by the language of the deed, the transfer is valid and would not be hit by the rule of perpetuity. However, when actual events are looked at, C will get a vested interest in the property in the year 2003 as it is in the year 2003 that he will turn 18 years old. Calculating from the date of actual transfer, it would be after 43 years that the property will become alienable.

This is why the rule is not exactly serving the purpose for which it was laid down in the first place. The remoteness of the rule is guided by the possible events and not actual events^[30]. The inalienability of the property which it was targeting somehow gets a blanket cover from within the interpretation of the rule itself. From a practical, marketable and economical point of view, the property in Illustration 1 is more alienable and desired than the one stated in Illustration 2. It is not the rule which is defected, it is the interpretation of the rule which is to be blamed.

▪ Wait and See Doctrine

To rectify the defect and make the application of the rule not only simpler but in line with the intention of the transferor, this paper suggests the introduction of "wait and see" reform. It is one of the reforms that was strongly put forward by Professor W. Barton Leach^[31] during the mid 20th century. This doctrine has been accepted statutorily^[32] and jurisprudentially^[33]. It was introduced as a saving clause, mitigating the harshness of the Rule Against Perpetuity^[34]. The Rule Against Perpetuity is interpreted in a way that it tries to eliminate uncertainty by contemplating different possible scenarios. Sometimes, the transfer is made void based upon the events which are highly unlikely to occur, but there is just a mere possibility that it might happen. Wait and see doctrine tends to solve that problem. Introduced as a revolutionary step first in the case of *Three rivers rock*^[35], the doctrine shifted the paradigm from possible events to actual events. The essence of this doctrine captures the actual turn of events rather than contemplating remote possibilities. The doctrine permits the courts to check the validity of a transfer based upon the actual facts as and when they develop, though the time permissible according to Rule Against Perpetuities continues to be the outmost limit. After much debates and criticisms against this reformation^[36], it was admitted that it is much better to wait and see what actually happens and then decide the nature of the transfer than to decide by considering remotest of the possibilities, which as a result provides for harsh decisions. Keeping in mind the main purpose of the Rule Against Perpetuity, which was to ensure that the property is not rendered inalienable and tied up in someone's hands for too long, restricting the active and free circulation of the property, which in turn would have a drastic effect on the trade and commerce of any country, the wait and see reformation will only try to not let the transfer frustrate just because of a far-fetched possibility.

To not construct another doctrine which thrives on the uncertainty clause, many countries have gone for a 90-year waiting period, calculated on the basis of studies which concluded that it is a reasonable period in which an interest

must vest^[37]. The underlying principle is that if within the 90 years, the interest vests, the transfer will stand valid and if not then it will be void. The wait and see doctrine become applicable only if the transfer is void due to the functionality of the Rule Against Perpetuity. Any decision about the transfer must be made according to the facts as and when they come and not on the basis of "what might happen" approach. It will help in not only saving the transfers which become void just because of the language i.e., poor drafting of the deed but also in easing the harsh effect of the Rule Against Perpetuity.

2. Harshness of the rule

Transfers which fail to coexist with the Rule of Perpetuity, gets absolutely void and thus transfer as a whole fails. The intention of the testator completely gets ignored in the process as just because of the stringent application of the rule, the approval of transfer is rejected in its entirety. Not only the transferee becomes the victim but also the transferor. The transfers which becomes invalidated due to the rule, in fact, benefits no one in particular. There is no possibility of reforming the transfer in a way that it becomes valid so as to satisfy the intention of the transferor. Imagine a grandfather whose intention is to make a complete and absolute transfer in favor of his unborn grandson, but due to the poor drafting of the will, somehow, the transfer becomes invalidated because of the language of the deed, the property will not vest with his grandson. It might get transferred to a person to whom the grandfather never wanted to give. In such cases, no heed is paid to the intention of the transferor^[38].

▪ Cy Pres Doctrine

Rule Against Perpetuity is a rule of law and is rigid in its application. There is a need for a counter rule of construction which will ensure that the intention of the transferor does not get subsumed. The courts should try and interpret the instrument of transfer in a way that it does not neglect the wishes of the transferor. The goal should not be to invalidate future transfers, but it should be to make the transfers at par with the law by not turning against the intentions of the transferor completely. This paper, thus suggests another reform i.e., cy pres doctrine.

It entails that to the extent that the intentions of the transferor can be honored, the instrument of the transfer must not fail due to the technical application of the rule of perpetuity. To stay in line with the intention of the transferor, the courts must rewrite that part of the deed which can make the transfer valid as per Rule of Perpetuity. any *mana fide* intention by which the intent is to keep the property tied up in the family must not be watered by this doctrine. For example: Mere postponement of the transfer by let's say 21 years should not invalidate it as whole. Instead, the period should be rewritten or assumed as 18 and the deed must be allowed to stand valid.

Having been advocated by Judge Quarles^[39], the doctrine was pioneered by Professor Leach^[40] too. Many state legislations also have acknowledged the doctrine and are functioning in a better way^[41]. Numerous expensive litigations can be avoided by incorporation of this doctrine. Since the reform includes reworking and rewriting the instrument of transfer, it is not an easy one to accept and imply.

One of the major issue is to whether make this doctrine an

alternate option to wait and see doctrine or to apply it before or after it. Going by the experience of those countries, which have already incorporated this as a statutory reform, the recommended option is to apply *cy pres* after the wait and see doctrine. What lies at the heart of this *cy pres* doctrine is that any interest or transfer which fails to get vested before perpetuity due to the incoherent language of the deed, must be saved by inferring the true intention of the transferor. This doctrine can function as a last resort to try and save the transfer from completely failing.

The more complicated part consists of determining the intentions of the transferor. It can not only be a challenging and daunting task but also open to uncertainty, vagueness and prone to misuse by the transferors to keep their property and wealth tied up in their family for generations to come. To avoid the misuse of doctrine i.e., providing for a way by which people can evade the Rule of Perpetuity, any evidence which can best prove the intention of the transferor must be deliberated. By not opening up the right to invoke *cy pres* doctrine to everyone, the court can limit and restrict the wider application of this doctrine. Only the parties interested i.e., for example, the person having life interest in the property and the unborn who is the ultimate beneficiary can be the ones who have the right to use and invoke the doctrine.

Conclusion

The Rule Against Perpetuities is a complex rule which due to its mechanical operation has always been so harsh upon the transferors and the transferees. Sprung as a common law rule, it became widely popular and then when the economy started revolutionizing, alterations to the rule began. Many countries who adopted the rule in its entirety, began to realize the need for welcoming changes to the rule. The application of the rule was made simpler and much easier to understand and to mitigate the harsh results produced. Some went for statutory reforms while some adopted doctrinal changes, but by one way or the other, significant and constant reformations to the rule did and are taking place. Despite the opposition to these reformatory rules and doctrines^[42], the perpetual evolution of the rule cannot be subsided and ignored.

What was effective in the 17th century, might not be that much effective now due to the perpetual nature of change and hence, the only way to make it workable would be by not making the Rule of Perpetuity, a perpetual rule in itself.

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