Old is Not Always Gold – A Case Study on Repealing Statutes

Bibek Debroy and Aparajita Gupta

There is a quote from Publius Tacitus (Gaius Cornelius Tacitus), author of several texts, including "Annals". As commonly cited in English, the quote goes, "The more corrupt a State, the more numerous the laws". That's not quite correct. Tacitus wrote, "*Corruptissima re publica plurimae leges*".[1] We indeed have a clause about a corrupt State and another clause about plurality of laws. But there was no obvious causation in Tacitus. One could equally well translate this as, "The more numerous the laws, the more corrupt a State". However, the correlation is not in doubt.

"Rule of law" isn't an easy expression to define, quantify and measure, though attempts have been made. Across various organizations that have sought to measure it, indicators like speediness of the judicial process, intellectual property right protection, fairness of the judicial process, protection of private property, judicial independence, police efficiency, incidence of crime, enforcement of court orders, conviction rates, contract enforcement and trafficking have been used. These also tend to figure in assorted cross-country indicators of governance. The World Bank's Doing Business indicators seeks to measure some aspects of the legal regime, such as dealing with construction permits, registering property, enforcing contracts, resolving insolvency and labour market regulation.[2] In 2006, the United Nations set up a Commission on Legal Empowerment for the Poor (CLEP) and this submitted a report in 2008, with a focus on access to justice, property rights, labour rights and business rights.[3] Describing "rule of law" in general terms is easy. Quantifying it is much more difficult, especially since data on something that is difficult to measure are not easy to obtain. Some data can only be perception-based, drawn from subjective responses to questionnaires. They are not hard data. A word of caution is also required about cross-country comparisons across different types of legal regimes. After all, all the indicators involve some value judgements. For instance, is it better to have swift dispute resolution, regardless of whether principles of natural justice have been followed? That is inherently a value judgement.

Governments are elected to pass laws and all laws involve curbs on individual freedom. As a collective body, aggregated from individuals, those curbs are accepted by society because they result in the greater "common good", however defined. Behaviour, so to speak, is modified and incentivized to conform to a certain standard. How many "laws" are there in India? For several reasons, that is not a very easy question to answer. First, law is not always statutory in nature. Traditionally, legal regimes are divided into common and civil law jurisdictions. In the former, and India belongs to this category, law is not always codified. Though difference between the two kinds of jurisdictions is getting blurred, with codification in common law countries, there are common law strands in India and case law

[1] *Annals, Book* III.27.

[2] http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB16-Chapters/DB16-About-Doing-Business.pdf

[3] http://www.unrol.org/files/Making_the_Law_Work_for_Everyone.pdf

sometimes determines "law". Second, there is the category of administrative law, executive in nature. This is not statutory law, though it often obtains its sanction from some statutory law. Rules and orders belong to this category.[4] Third, both Union government and State governments can legislate. Within Union government, courtesy India Code, we now know exactly how many Union government statutes there are. But one still has to figure out whether one is going to count principal Acts alone, or whether one is going to count amending Acts too. There have been several attempts to count (and suggest repeal) of old laws. One such recent attempt was the Ramanujam Committee, set up by PMO in September 2014 to identify Union-government statutes that could be repealed.[5] (There were four Law Commission Reports too.)[6] The Ramanujam Committee told us that 380 statutes, enacted between 1834 and 1949, still remained on statute books. There were another 2,401 statutes, enacted after 1950. That's a listing of 2,781 Union-level statutes. Note that following common law traditions, India doesn't have a system of desuetude. Therefore, statutes are open-ended. They continue to remain on statute books, unless they are specifically identified for repeal. Fourth, no one has a precise figure about the number of State-level statutes. We don't yet have the counterpart of India Code there.

What does reforming the legal system mean? There are several dimensions. First, there is the simple matter of old laws. Other countries also have old laws. We can laugh at old laws. Surely, they do no harm. Not quite, they can be used to harass people. The 1949 East Punjab Agricultural Pests, Diseases and Noxious Weeds Act applies to Delhi. According to this, if Delhi is invaded by locusts, the District Magistrate will announce the invasion by beating of drums and every able-bodied person has to cooperate in fighting locusts. There is the Aircraft Act of 1934. Stated simply, given definition of "aircraft", one needs a government license to fly kites (of the literal kind). The Sarais Act of 1867 enjoins sarai-keepers to give free drinks of waters to passers-by and can be made applicable to hotels. About 200 statutes from the 19th century still exist on statute books, often with colonial overtones. It is surprising these weren't examined and junked in 1950, when the Constitution came into effect. (There was a perfunctory attempt in 1960/61 and a more serious attempt in 2001/2002.) The Ramanujam Committee identified 1,741 such old statutes for repeal. This includes Bengal Districts Act of 1836, which empowers Bengal to create as many districts as it wants. Does one need a law for this? Ordinances from 1949 still remained on the books. More and more reports - what action has been taken? That's a legitimate question to ask. In May 2015, several such old Union-level statutes were repealed through two Acts and a third Bill is pending. (The details exist on the Legislative Department's website.[7])

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[4] The 2nd Administrative Reforms Commission was set up in 2005 and several of its recommendations concern administrative law. There were 15 Reports, spanning G2C, G2B and G2G transactions. Most discussions of administrative law tend to focus only on G2B transactions. Between 1966 and the mid-1970s, the 1st Administrative Reforms Commission submitted 20 Reports. The Reports of the 2nd Administrative Reforms Commission and the status of implementation are available at http://darpg.nic.in/ArticleContent.aspx?category=311

[5] http://cdnpmindia.nic.in/wp-content/uploads/2015/01/Extracts-of-the-Committee-of-the-Report-Vol.I-.pdf

[6] Reports 248 to 251 of 2014, http://www.lawcommissionofindia.nic.in/main.htm#a7

[7] http://lawmin.nic.in/ld/Repeal.htm

Second, revamping old laws isn't always that simple. Rare is the case when one can repeal a statute in its entirety. If that is the case, as in the instances mentioned above, a simple repealing Bill will do. More often, there is an old section in the statute. That needs to be scrapped or amended, while retaining the main statute. This requires a scrutiny of the statute, section by section and is much more time-consuming. Consider Section 69(1)(a) of the Transfer of Property Act of 1882. "A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section have power to sell or concur in selling the mortgaged property or any part thereof, in default of payment of the mortgage-money, without the intervention of the court, in the following cases and in no others, namely,- (a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mohammedan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government, in the Official Gazette." In similar vein, there are several sections from the Indian Penal Code of 1860. Moving on to the administrative law domain, one might want to retain Essential Commodities Act of 1955, but scrap several orders issued under it, at the level of the Union government and at the level of the States.

Third, and this is related a bit to the second issue, in the same area, statutes may not have been enacted at the same point in time. Therefore, definitions may not be uniform. A good example is labour laws. Depending on how one counts, there are around 50 Union-level statutes that directly deal with labour, more if you count indirect ones. These don't agree on definitions like "wages", "child", "workman" etc. Since the case law has also evolved separately, that too varies, causing further confusion. These statutes need to be harmonized and unified. For labour laws, the eventual intention is to unify them under four heads of wage-related, social-security related, safety-related and industrial relations-related statutes. In passing, laws haven't always been drafted well. There are problems with language. Bad drafting leads to disputes and interpretation by courts. In other parts of the world, there has been a plain English movement, so that laws are written in simple language. This has still left India relatively untouched. As an example, consider the various orders issued under the Criminal Procedure Code. Can't these be made simpler and more intelligible?

Fourth, India has been described as a country that is over-legislated and under-governed, reminiscent of Tacitus. Both in Parliament and Legislative Assemblies, there is an attempt to solve every problem under the sun through legislation, even though that legislation can't be enforced. Hence, there is excessive government intervention through statutes. Why should the Delhi Shop and Establishments Act of 1954 specify which part of the city will be subjected to shop closures on which day? The Shops and Establishments Act is on a State subject, so other States have mirror images of this. Is the objective to ensure children of working mothers have access to a crèche, or is the intention to have a crèche within factory premises, as rules under Factories Act of 1948 mandate? This is sometimes perceived as taking ideological positions on degree of government intervention, but there is a better way of looking at the issue. Before passing any legislation, one should ask the following questions. Why is this statute needed? What are the costs if it is not enacted? What are the benefits and costs from enacting it? This is ostensibly meant to be addressed in "Statement of Objects and

Reasons" that accompany any piece of legislation, but this is undertaken very perfunctorily. If done properly, as some other countries have, we will have fewer laws and better laws, especially when we combine this with desuetude principles.

Fifth, since this is about reform of the legal system too, one should mention speed of dispute resolution. Excluding quasi-judicial forums, there are more than 30 million cases stuck in Indian courts. Around 65,000 cases are pending in Supreme Court, 4.5 million in High Courts and 26 million in Lower Courts. Two-thirds of the backlog in High Courts is of civil cases and two-thirds of the backlog in Lower Courts is of criminal cases. 26% of cases, more than 8.5 million, are more than 5 years' old. There are generic issues and general solutions connected with reducing backlog, both on the supply-side and the demand-side. That difference should be illustrated with an example. More courts, or better usage of existing courts, is a supply-side measure. Using alternative methods of dispute resolution more is a demand-side measure. But, in addition, some specific focus is also needed. For instance, government litigation policy for civil cases crowds out citizens from using the court system, though Section 89 of Code of Civil Procedure allows out-of-court settlements. There are estimates that the government is a litigant in 60% of civil cases. Other than Negotiable Instruments Act, one should focus on Motor Accidents Claims Tribunal (MACT) cases, petty cases, old cases and cases related to excise. Many 'crimes' under Special and Local Laws (SLL) should no longer be 'crimes' in a climate of liberalisation. If one fixes Allahabad (another Bench), Madras, Bombay, Calcutta and Punjab and Haryana, one will solve 60% of the backlog problem in High Courts. Similarly, 70% of the backlog problem in Lower Courts can be resolved by focusing on Uttar Pradesh, Maharashtra, Gujarat, West Bengal, Bihar, Karnataka and Rajasthan.

There is also the matter of police reform, which bears some mention. Under the Constitution, as well as the Police Act of 1861, police is a state subject. However, as should be obvious, police reforms aren't only about the IPS or gazetted officers under state police services. That's around 1 per cent of the total police strength. About 88 per cent is constabulary and another 11 per cent is what is called upper subordinates (inspectors, SIs, ASIs). While there are some state-level variations, constables are generally recruited through boards, and SIs/ ASIs through the SPSCs. These are the equivalents of the village police in early British days. Colonial police commission reports (such as of 1902-03) weren't that concerned with recruitment to these, since these posts (that is, their equivalents) were hereditary. They were more concerned with what we would today call gazetted appointments. Plenty has been written about police reforms in India, especially after the Prakash Singh case of 1996. Rather oddly, this discourse and Central (model act) and state-level legislation (proposed and actual) have little on appointments to upper subordinates and constabulary. There is stuff on senior-level appointments and transfers/ postings at all levels. There are recommendations on providing incentives and training for upper subordinates and constabulary. Whether it is the recruitment of upper subordinates (SPSCs) or constabulary (boards), the principles are similar. Minimum educational and physical qualifications are prescribed; these vary between states, especially for the educational part. For specific categories, deviations are permitted from the minimum. Physical examinations are followed by written tests and interviews.

Stated thus, it is no different from any entry-level requirement anywhere. There are ways to reduce corruption in each of the three stages - physical, written, interview. There is scope to place information in the public domain and allow external scrutiny, and to reduce the powers of SPSCs and recruitment boards. The 2006 Model Police Act didn't probe this enough, because that was supposed to be done through government rules. All it said was, "The direct recruitments to non-gazetted ranks in the Police Service shall be made through a state-level Police Recruitment Board by a transparent process, adopting well-codified and scientific systems and procedures which shall be notified through appropriate rules framed by the State Government." We do need a Police Recruitment Board. But through rules, we also need its powers to be curbed. That's the transparency part.

These remarks motivate the rest of this paper, which focuses on repealing old laws, where statutes can be repealed in their entirety and in some cases repealing certain sections only.

"Our country suffers from an excess of old and unnecessary laws which obstruct people and businesses. We began the exercise of identifying unnecessary laws and repealing them. 1,827 Central laws have been identified for repeal. Out of these, 125 have already been repealed. Bills for repealing another 758 have been passed by the Lok Sabha and are awaiting the approval of the Upper House." This is from the Prime Minister's speech at the Economic Times Global Business Summit held this year.[8]

As per the afore-mentioned Ramanujam Committee, 2,781 Central Acts were in existence as on 15 October 2014. Out of these, it recommended the repeal of 1,741 Central Acts. Of these 1,741 Acts, 340 were Central Acts on State subjects that had to be repealed by the respective state legislatures. Given these recommendations, two repealing laws, namely the Repealing and Amending Act, 2015 and the Repealing and Amending (Second) Act, 2015 were enacted by Parliament. While the first statute repealed 35 unwanted laws, the second one repealed 90 obsolete laws. The Repealing and Amending (Third) Bill, 2015 has been passed by the Lok Sabha. This Bill seeks to repeal 295 more laws. Additionally, the Appropriation Acts (Repeal) Bill, 2015, which seeks to repeal 758 laws, has been passed by the Lok Sabha. Tables 1 and 2 illustrate what this exercise has achieved. Table 1 is about Union laws in areas that are Union/Centre domain under the Seventh Schedule. Table 2 is about Union laws on State subjects, which have to be repealed by State Legislatures. In both cases, the tables categorize the statutes under some heads. While there is some subjectivity in choice of these heads, they do give us a flavour of what kinds of statures have been repealed and will be repealed. In some instances, a statute could have been included under more than one head. But it has been included under only one head, to avoid double counting. Neither table gives us information on what statutes still remain. (That will be done in a separate exercise.) This paper's focus is only on "old laws" that can be repealed. After the first two repealing Acts have been passed, 1,318 Acts still remained for repeal. And after the two pending Repealing Bills are passed, 411 Acts will remain. Therefore, a considerable amount of progress has been made on implementing the recommendations. That's not the case for Table 2, where the action lies with the States. The number of statutes still due for repeal remains at 339/340.

[8] 29 January 2016.

Table 1: Union laws on Centre's subjects

S. No.	Categories	Total number of statutes left to be repealed after the two Repeal Acts	Total number of statutes left to be repealed after the two Bills are passed
1.	Tax, excise, grants, tariff, finance, duties, stamp, fiscal responsibility	130	101
2.	Repeal and amending Act	54	39
3.	Acquisition of undertakings/ acquisition and transfer of undertakings, acquisition of shares, nationalization, takeover of management	58	37
4.	Land, revenue, tenancy, agriculture, agricultural produce, livestock, animal husbandry, property, building, eviction	28	22
5.	Security (internal and external), preventive detention	27	22
6.	Extension and revocation of extension of laws	19	16
7.	Cess	18	16
8.	Government employment, executive related, citizen entitlement, procurement, ombudsman	19	16
9.	Administration and development of areas	16	15
10.	Banking, debt, deposit, securities, funds, financial frauds	25	15
11.	Criminal law and Offences	15	14
12.	Infrastructure, transport and energy related	50	13
13.	Academic institutions, education	21	12
14.	Marriage and dissolution and personal law related	8	8
15.	Cultural and historical monuments and institutions	9	7
16.	Labour, workers, labour disputes, social security, street vendors	27	7

17.	Legislature	13	7
18.	Suit, court, civil procedure, arbitration, consumer protection, judiciary related	11	6
19.	Social legislations (removal of caste disabilities, untouchability, human rights related, disabled, commissions)	24	6
20.	Contracts, torts, insurance, company law	19	5
21.	Restoration, rehabilitation of people, juveniles, disaster relief	8	5
22.	IPR	5	3
23.	Medical, pharmaceuticals, drugs, health	15	2
24.	Environment, water, forests and wildlife related	10	2
25.	Tolls	2	2
26.	Press, media, communications and publishing	15	2
27.	Citizenship, Emigration to and Expulsion from India	4	2
28.	Records	2	2
29.	Charitable and Religious Institutions, Cooperative societies	5	2
30.	Food and beverages	10	2
31.	Industries, industrial disputes, trade and commerce, investment, tourism	10	1
32.	International relations	2	1
33.	Professionals related including entrance	8	1
34.	Appropriation Acts (Central ones including for Railways and Vote on Account)	624	0
35.	Essential commodities	7	0

Table 2: Union laws on State subjects

S. No.	Categories	Total number of statutes left to be repealed after the two Repeal Acts	Total number of statutes left to be repealed after the Bill is passed
1.	Appropriation Acts (Central ones in respect of States to be repealed by state	257	257

	legislature)		
2.	Land, revenue, tenancy, agriculture, agricultural produce, property (estate)	37	37
3.	Administration and development of areas	12	11
4.	Banking, debt, deposit, securities, encumbrances, bonds	7	7
5.	Security (internal and external)	6	6
6.	Extension and revocation of extension of laws	5	5
7.	Industries, industrial disputes, trade and commerce	4	4
8.	Criminal law and Offences	3	3
9.	Infrastructure, transport and energy related	3	3
10	Tax, excise, grants, tariff, finance	2	2
11	Repeal and amending Act	1	1
12	Labour, workers, labour disputes, social security	1	1
13	Social legislations (removal of caste disabilities, untouchability, human rights related, disabled, commissions)	1	1
14	Charitable and Religious Institutions, Cooperative societies	1	1

However, this does not mean that there has been no action at the level of the States. Two of these warrant a mention. First, Kerala constituted a Law Reforms Committee and a report was submitted in 2002. Ordinance No. 18 of 2005 repealed 697 statutes. In 2009, the Law Reforms Commission (set up subsequently) in its report looked at rectification of defects in existing laws and recommended repeal of unnecessary laws and consolidation of laws. This Commission took note of the Ordinance and recommended the repeal of 107 statutes.[9] In a spirit similar to that of Table 1, Table 3 illustrates what kinds of laws have been recommended for repeal in Kerala.

[9] www.keralalawsect.org.

Table 3: Laws recommended for repeal by Kerala Law Reforms Commission Report (107)

S. No.	Categories	Total number of statutes sought to be repealed
1.	Administration and development of areas	19
2.	Land, revenue, tenancy, agriculture, agricultural produce, property	16
3.	Tax, excise, grants, tariff, finance, stamp	12
4.	Academic institutions, education	10
5.	Repeal, re-enacting and amending Act	8
6.	Environment, water, and wildlife related	6
7.	Social legislations (removal of caste disabilities, untouchability, human rights related, commissions)	6
8.	Charitable and Religious Institutions, Co-operative societies	5
9.	Banking, debt, deposit, securities, funds	4
10.	Miscellaneous	3
11.	Legislature	2
12.	Infrastructure, transport and energy related	2
13.	Suit, court, civil procedure, consumer protection, judiciary related	2
14.	Labour, workers, labour disputes, social security	2
15.	Government employment, executive related	2
16.	Security (internal and external)	1
17.	Industries, industrial disputes, trade and commerce, tourism	1
18.	Essential commodities	1
19.	Sports	1
20.	Medical, pharmaceuticals, drugs, health	1
21.	Food and beverages	1
22.	Acquisition of undertakings/ acquisition and transfer of undertakings, acquisition of shares, nationalization, takeover of management	1
23.	Tolls	1

More recently, in Rajasthan, after a review of the existing laws, the Rajasthan legislature has recently passed the Rajasthan Laws Repealing Act, 2015. This law repeals a total of 248 redundant Acts including Amending Acts. To state the obvious, when a statute is repealed, associated rules are also scrapped. The Rajasthan classification is shown in Table 4.

Table 4: Laws repealed by the Rajasthan Laws Repealing Act, 2015 (248)

S. No.	Categories	Total number of statutes sought to be repealed
1.	Land, revenue, tenancy, agriculture, agricultural produce, livestock, animal husbandry, property, eviction	54
2.	Administration and development of areas	46
3.	Tax, excise, grants, tariff, finance, duty, stamp, fiscal responsibility	32
4.	Academic institutions, education	32
5.	Government employment, executive related	18
6.	Legislature	12
7.	Charitable and Religious Institutions, Co-operative societies	8
8.	Industries, industrial disputes, trade and commerce, tourism	6
9.	Appropriation Acts	6
10.	Suit, court, civil procedure, consumer protection, judiciary related	5
11.	Acquisition of undertakings/ acquisition and transfer of undertakings, acquisition of shares, nationalization, takeover of management	4
12.	Medical, pharmaceuticals, drugs, health	4
13.	Professionals related	4
14.	Environment, water, and wildlife related	4
15.	Miscellaneous	2
16.	Cultural and historical monuments and institutions	2
17.	Restoration, rehabilitation of people, juveniles, disaster relief	1
18.	Labour, workers, labour disputes, social security, employees, street vendors	1
19.	Natural Resource	1
20.	Tolls	1
21.	Banking, debt, deposit, securities, funds	1
22.	Social legislations (removal of caste disabilities, untouchability, human rights related, commissions)	1

23.	Infrastructure, transport and energy related	1
24.	Records	1
25.	Repeal and amending Act	1

Such ad hoc exercises for repeal of old laws would have been unnecessary had India had a principle of desuetude. The Indian Supreme Court has dealt with the principle in many cases. Before going into whether this doctrine can and does apply in India, it is important to understand the scope of this doctrine. In ***Monnet Ispat and Energy Ltd v. Union Of India and Ors.***[10], the Supreme Court identified the following essentials of the Doctrine of desuetude:

> "… (i) that the statute or legislation has not been in operation for very considerable period and (ii) the contrary practice has been followed over a period of time must be clearly satisfied. Both ingredients are essential and want of anyone of them would not attract the doctrine of desuetude. In other words, a mere neglect of a statute or legislation over a period of time is not sufficient but it must be firmly established that not only the statute or legislation was completely neglected but also the practice contrary to such statute or legislation has been followed for a considerable long period."

In terms of the applicability of this doctrine in India, one of the earliest cases is ***State of Maharashtra v. Narayan Shamrao Puranik & Ors.***[11]. In this case, the Supreme Court did not favour this doctrine for ending laws and held that only express or implied repeal can end a statute. Next, in ***Municipal Corporation for City of Pune v. Bharat Forge Co. Ltd. & Ors.***[12], the Hon'ble Supreme Court of India has held the following at Para 34 :

> "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, we find no objection in principle to apply this doctrine to our statutes as well. This is for the reason that a citizen should know whether, despite a statute having been in disuse for long duration and instead a contrary practice being in use, he is still required to act as per the 'dead letter'. We would think it would advance the cause of justice to accept the application of doctrine of desuetude in our country also. Our soil is ready to accept this principle: indeed, there is need for its implantation, because persons residing in free India, who have assured fundamental rights including what has been stated in Article 21, must be protected from their being, say, prosecuted and punished for violation of a law which has become 'dead letter'. A new path is, therefore, required to be laid and trodden."

Thus, Court had no objection to the application of the doctrine of desuetude to Indian laws. Another case on this issue is the ***Cantonment Board, MHOW and Anr. v. M.P. State Road***

[10] (2012) 11 SCC 1
[11] (1982) 3 SCC 519
[12] (1995) 3 SCC 434

Transport Corporation[13]. In this case, the Court looked at whether the doctrine could be used to bring an end to the Madhya Pradesh Motor Vehicles Taxation Act, 1947. The Court found that the two essentials of the doctrine were not met and therefore the same could not be used in the case. Similarly, the Supreme Court noted that this doctrine was not attracted to the notifications that were in question in ***Monnet Ispat and Energy Ltd v. Union Of India and Ors.***[14].

From the above, it is clear that now, the Supreme Court is open to applying the doctrine of desuetude, but only if its essentials are met. The second of the conditions seems to be extremely difficult to operationalize. Therefore, it seems to us that a far better idea is to incorporate a sunset clause in the text of any new statute.

(Bibek Debroy is Member of the NITI Aayog and Aparajita Gupta is a Young Professional at NITI)

Discliamer: Views are personal and do not necessarily reflect those of NITI Aayog

[13] (1997) 9 SCC 450
[14] (2012) 11 SCC 1