

EFFECTS OF REMOVING CONSTITUTIONALITY FROM PRE-CONSTITUTIONAL LAWS

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Abstract

This research paper explores the complex and multifaceted implications of removing constitutionality from pre-constitutional laws in a democratic society. The concept of pre-constitutional laws refers to legal norms and statutes that were enacted before the adoption of a constitution and are therefore not subject to constitutional review. The paper discusses the potential consequences of reevaluating and potentially revoking the constitutionality of these laws, with a focus on its legal, social, and political ramifications. It analyzes landmark cases from various jurisdictions to showcase the diversity of approaches in addressing this issue.

The analysis is guided by various legal theories, aiming to provide a comprehensive understanding of this complex issue. It delves into the inherent tension between historical legal norms and contemporary constitutional principles, as well as the potential challenges and opportunities that arise from altering the status of pre-constitutional laws in a modern legal framework. This research contributes to the ongoing discourse on the evolving relationship between past legal structures and the constitutional order of a democratic society, shedding light on the practicality and desirability of removing constitutionality from pre-constitutional laws.

Keywords: Pre-constitutional laws, Constitutionality, Legal norms, Constitutional review, Democratic society, Legal implications.

Introduction

Pre-constitutional laws constitute an intriguing facet of legal systems in democratic societies, raising questions about their compatibility with contemporary constitutional principles. This introduction provides an overview of the background and context of pre-constitutional laws, underscores the need to reevaluate their constitutionality, and outlines the scope and objectives of this research paper.

Background and Context of Pre-Constitutional Laws:

Pre-constitutional laws refer to legal norms and statutes that were enacted before the adoption of a constitution. These laws, originating from a historical context, are typically not subject to constitutional review. They often embody norms, practices, and values that may no longer align with modern constitutional standards. The existence of pre-constitutional laws presents a conundrum in democratic societies that prioritize the rule of law and constitutional supremacy. This dichotomy between historical legal norms and contemporary constitutional principles necessitates a comprehensive examination.

The Need to Reevaluate Constitutionality

The need to reevaluate the constitutionality of pre-constitutional laws arises from the tension between past legal structures and the evolving constitutional order of a democratic society. As the principles and values embedded in a constitution evolve over time, pre-constitutional laws may become incongruous with the legal and social standards of the present.¹ This misalignment can result in legal ambiguities, social injustices, and challenges to the supremacy of the constitution. Thus, it becomes imperative to reconsider the constitutionality of pre-constitutional laws to maintain the integrity and consistency of the legal system.

Scope and Objectives of the Paper

This research paper aims to explore the multifaceted implications of removing constitutionality from pre-constitutional laws. It will delve into the legal, social, and political ramifications of such reevaluation, drawing insights from case studies and legal theories. The primary objectives include:

1. Analyzing the historical and legal context of pre-constitutional laws.
2. Assessing the reasons and justifications for reevaluating their constitutionality.
3. Examining the practical challenges and opportunities associated with this reevaluation.
4. Offering a comprehensive understanding of the complex issues surrounding pre-constitutional laws and their constitutionality.

¹ Choudhry, Sujit, et al., editors. The Oxford Handbook of the Indian Constitution. Oxford University Press, 2016. Accessed 8 November 2023.

5. Contributing to the ongoing discourse on the evolving relationship between past legal structures and the constitutional order in democratic societies.

An overview of 2 landmark cases that deal with removing constitutionality from pre-constitutional laws

1. Joseph Shine v. Union of India

Background:

The Joseph Shine Case, decided by the Supreme Court of India in September 2018, was a landmark judgment related to adultery laws in India. Section 497 of the Indian Penal Code (IPC) criminalized adultery, making it an offense for a man to have sexual relations with a married woman without the consent of her husband. This law was viewed as discriminatory, as it only penalized men, treating women as passive victims.

Overview:

In this case, Joseph Shine, a non-resident Indian, challenged the constitutionality of Section 497 of the IPC, arguing that it violated fundamental rights such as equality and non-discrimination. The Supreme Court, led by a five-judge bench, examined the law's constitutionality in light of Articles 14 (Right to Equality), 15 (Prohibition of Discrimination), and 21 (Right to Life) of the Indian Constitution.

Key Outcomes:

1. The Supreme Court declared Section 497 of the IPC unconstitutional as it violated the right to equality by treating women as property of their husbands.
2. The court also held that Section 198(2) of the CrPC, which required the husband to file a complaint in cases of adultery, was arbitrary and unjust.
3. The judgment decriminalized adultery, making it no longer a criminal offense in India.

Impact:

The Joseph Shine Case marked a significant shift in India's legal landscape, emphasizing the importance of gender equality and individual autonomy in personal relationships. It removed an archaic law that was often used as a tool for blackmail and extortion in marital disputes.

2. Navtej Singh Johar v. Union of India

Background:

The Navtej Singh Johar Case, decided by the Supreme Court of India in September 2018, was a pivotal judgment related to the decriminalization of homosexuality in India. It challenged Section 377 of the Indian Penal Code (IPC), which criminalized consensual sexual acts between individuals of the same sex.

Overview:

Navtej Singh Johar, along with other petitioners, approached the Supreme Court to challenge the constitutionality of Section 377 of the IPC. They argued that this provision violated their fundamental rights, including the right to privacy, dignity, and equality, enshrined in the Indian Constitution.

Key Outcomes:

1. The Supreme Court declared that Section 377 of the IPC was unconstitutional insofar as it criminalized consensual sexual acts between adults of the same sex.
2. The judgment recognized the importance of individual autonomy and the right to love and express one's sexual orientation without fear of discrimination or prosecution.
3. The court held that homosexuality was a natural variation of human sexuality and deserved constitutional protection.

Impact:

The Navtej Singh Johar Case was a watershed moment for LGBTQ+ rights in India. It not only decriminalized homosexuality but also laid the groundwork for greater acceptance and inclusion of the LGBTQ+ community in the country. The judgment emphasized the principles of equality, non-discrimination, and individual freedom, contributing to a more inclusive and diverse society.

Pre-Constitutional Laws in India

Pre-constitutional laws in India refer to legal norms, statutes, and legal traditions that were in existence before the adoption of the Indian Constitution in 1950. These laws had their historical origins and evolved over centuries, ultimately shaping the legal framework of independent India. Understanding the historical origins of pre-constitutional laws, the impact of colonial-era laws, and the evolving concept of Indian constitutionalism sheds light on the need for their reevaluation.

1. Historical Origins of Pre-Constitutional Laws

Pre-conventional laws in India have deep historical roots, dating back to ancient civilizations such as the Indus Valley and the Mauryan and Gupta empires. Legal texts, known as "Dharmashastras" and "Smritis," provided the foundation for customary law and governance. The British colonial rule in India significantly influenced the legal landscape, introducing concepts of common law and statutes.

2. Colonial-Era Laws, Their Intent, and Impact

The British colonial era marked a transformative period in Indian legal history. The intent of colonial-era laws was to establish a legal framework that served British colonial interests, maintained social order, and facilitated administration. Key legislations included the Indian Penal Code (IPC) and the Indian Contract Act, which were enacted in the mid-19th century.

The impact of these laws was profound. They replaced traditional Indian legal systems and introduced British legal principles. While they brought certain uniformity and codification, they also led to significant legal changes, sometimes at the expense of indigenous customs and practices. For example, the IPC criminalized practices such as sati (widow immolation) and human sacrifice.

3. The Evolution of Indian Constitutionalism and the Need for Reevaluation

The Indian Constitution, adopted in 1950, marked a pivotal moment in the nation's history. It laid the foundation for a democratic, secular, and socialist republic. The principles enshrined in the constitution emphasized fundamental rights, equality, and justice for all citizens. However, many pre-constitutional laws, inherited from the colonial period, did not align with these principles.

Legal Implications

1. Constitutional Review in Indian Jurisprudence

Constitutional review is a fundamental aspect of the Indian legal system, and it involves the examination of laws and governmental actions to ensure their conformity with the Indian

Constitution. The Indian judiciary, primarily the Supreme Court, is entrusted with the power of judicial review. This power allows the courts to declare laws or government actions unconstitutional if they violate the principles enshrined in the Constitution.

2. The Legal Reasoning and Arguments in Joseph Shine Case

In the Joseph Shine Case, the primary legal reasoning and arguments revolved around the constitutionality of Section 497 of the Indian Penal Code (IPC), which criminalized adultery.

The central arguments included:

- Violation of the right to equality (Article 14): The petitioners contended that Section 497 discriminated against men, treating them as the sole wrongdoers in cases of adultery. This was seen as a violation of the right to equality.
- Lack of a valid justification: The law was challenged for not having a reasonable and justifiable purpose, as it failed to protect women's rights and was based on outdated societal norms.
- Discrimination against women: The petitioners argued that Section 497 reduced women to the status of property, with no agency in matters of adultery. This was considered a violation of women's dignity and individual autonomy.

The Supreme Court, in its judgment, concurred with these arguments, holding that Section 497 violated the right to equality and, therefore, was unconstitutional.

3. The Legal Reasoning and Arguments in Navtej Singh Johar Case

In the Navtej Singh Johar Case, the primary legal reasoning and arguments were centered on the constitutionality of Section 377 of the Indian Penal Code (IPC), which criminalized consensual homosexual acts. The key arguments included:

- Violation of the right to privacy (Article 21): The petitioners contended that Section 377 intruded upon an individual's right to privacy and personal autonomy by criminalizing private consensual sexual acts.
- Dignity and equality (Article 21 and Article 14): The law was challenged for stigmatizing and criminalizing individuals based on their sexual orientation, leading to a violation of their dignity and equality.

- Outdated and discriminatory: The petitioners argued that Section 377 was a colonial-era law that had no place in a modern, democratic society, as it perpetuated discrimination and intolerance.

The Supreme Court, in a historic judgment, agreed with these arguments and held that Section 377 was unconstitutional to the extent that it criminalized consensual homosexual acts.

4. The Nullification of Laws Found to Be in Conflict with the Constitution

When a law is found to be in conflict with the Indian Constitution, the court's decision nullifies the specific provisions or the entire law that is found to be unconstitutional. This nullification means that the law can no longer be enforced or relied upon as a legal basis. The judiciary's role in nullifying laws that violate constitutional principles is crucial for upholding the supremacy of the Constitution and ensuring the protection of fundamental rights.

5. Constitutional Amendments and Their Role in the Process

In India, constitutional amendments can be used to modify or repeal provisions of the Constitution, including those that have been declared unconstitutional by the courts. However, amending the Constitution is a complex and rigorous process, as it requires a two-thirds majority in both houses of Parliament or a special majority in the case of certain amendments.

Amendments can be used to bring pre-existing laws in line with the Constitution or to introduce new legal provisions. However, the judiciary's power of judicial review remains a critical check on legislative actions, ensuring that constitutional amendments themselves do not violate the basic structure of the Constitution or fundamental rights.² Consequently, the interplay between constitutional amendments and judicial review is essential for maintaining the integrity of the Indian legal system.

Social Implications

1. Impact on Individual Rights and Personal Autonomy

²Roznai, Yaniv. Unconstitutional Constitutional Amendments: The Limits of Amendment Powers. Oxford University Press, 2017. Accessed 8 November 2023.

Legal reforms, such as those seen in the Joseph Shine Case and the Navtej Singh Johar Case, have significant social implications, particularly in terms of individual rights and personal autonomy. The impact is twofold:

a. *Protection of Personal Autonomy*: These legal changes protect individuals' autonomy in their personal lives. In the Joseph Shine Case, the decriminalization of adultery reaffirmed the principle that adults have the right to make their own choices regarding their relationships and intimate matters without state interference. This change empowered individuals to exercise their personal autonomy without fear of criminal sanctions.

b. *Recognition of Diverse Sexual Orientations*: In the Navtej Singh Johar Case, the decriminalization of consensual homosexual acts recognized the dignity and autonomy of individuals with diverse sexual orientations. It allowed them to express their sexual identity without the threat of criminal prosecution, fostering a more inclusive and diverse society.

2. Significance of Gender Equality and Sexual Freedom

The legal reforms in these cases also hold immense significance for gender equality and sexual freedom:

a. *Gender Equality*: The Joseph Shine Case challenged the discriminatory nature of Section 497 of the IPC, which had treated women as passive victims of adultery. The ruling highlighted the importance of gender equality, recognizing that both men and women should be held equally accountable for their actions. It addressed deeply ingrained gender stereotypes and norms, promoting a more equitable society.

b. *Sexual Freedom*: The Navtej Singh Johar Case recognized that criminalizing consensual same-sex relationships was a violation of sexual freedom. It acknowledged that individuals have the right to express their sexual orientations without fear of persecution. This legal change celebrated diversity and affirmed the principle of sexual freedom for all.

3. Enhanced Protection of Human Rights

The legal reforms discussed in these cases result in an enhanced protection of human rights:

a. *Right to Privacy*: Both cases underscored the right to privacy as a fundamental human right. They recognized that the state should not intrude into the private lives and relationships of individuals without justifiable cause, thereby strengthening the protection of this essential right.

b. *Non-Discrimination*: The cases upheld the principle of non-discrimination based on gender and sexual orientation. By decriminalizing actions that had been discriminatory, they advanced the broader human rights agenda, emphasizing equality and non-discrimination as core principles.

4. Public Awareness and Education Regarding Legal Reforms

Legal reforms in these cases also have an educational and awareness-raising dimension:

a. *Public Awareness*: The landmark nature of these judgments generated significant public awareness and discussion. They brought issues of gender equality and LGBTQ+ rights into the mainstream discourse, encouraging open dialogue and debate on these matters.

b. *Education and Sensitization*: These legal changes called for educational and sensitization efforts within society.³ By raising awareness about the rights and dignity of all individuals, they paved the way for more inclusive and empathetic societies. Educational initiatives and awareness campaigns play a vital role in ensuring that these legal reforms are not only reflected in laws but also respected and celebrated in the broader social context.

The social implications of the legal reforms in the Joseph Shine Case and the Navtej Singh Johar Case are profound, promoting individual rights, gender equality, sexual freedom, and human rights protection. They also underline the importance of public awareness and education in ensuring that these changes are embraced and integrated into the fabric of society.

Political Ramifications

1. Political Debates and Controversies Surrounding These Cases

The legal reforms in cases like the Joseph Shine Case and the Navtej Singh Johar Case have given rise to significant political debates and controversies in India:

³ TREANOR JUDICIAL REVIEW BEFORE MARBURY 58 STAN. L. REV. 455 12/1/2005 Pg 554-560

- *Adultery Law*: The decriminalization of adultery in the Joseph Shine Case sparked discussions on the traditional societal values and the role of the state in regulating personal relationships. While many welcomed the change as a progressive step, others raised concerns about the potential impact on the institution of marriage and family.
- *Section 377*: The striking down of Section 377 in the Navtej Singh Johar Case led to polarized debates. Supporters of LGBTQ+ rights hailed it as a victory for human rights, while opponents argued that it went against cultural and religious norms.

2. Opposition and Support from Political Parties and Interest Groups

- *Opposition*: In both cases, there were political parties, religious organizations, and interest groups that opposed the legal reforms. Some conservative groups argued that these changes contradicted traditional values and societal norms. Certain political parties aligned with conservative ideologies expressed concerns about a perceived erosion of cultural and moral values.
- *Support*: On the other hand, various political parties and interest groups supported the legal reforms. They viewed these decisions as necessary steps toward gender equality, individual rights, and LGBTQ+ inclusion. Several human rights organizations and progressive political parties endorsed the judgments and called for further legal and social reforms.

3. The Role of the Judiciary in Balancing Political and Legal Considerations

The judiciary in India plays a crucial role in balancing political and legal considerations, particularly in cases involving social and moral issues:

- *Impartial Adjudication*: The judiciary is expected to adjudicate cases based on legal principles, constitutional rights, and precedents. In both the Joseph Shine Case and the Navtej Singh Johar Case, the courts demonstrated their commitment to upholding fundamental rights and the Constitution, irrespective of political pressures.
- *Legal Interpretation*: The judiciary interprets the Constitution and the law in a manner that safeguards individual rights and liberties. The judgments in these cases were grounded in the

principles of equality, dignity, and non-discrimination, which are essential aspects of the Indian Constitution.

- *Balance Between Legal and Political Aspects*: The courts strike a balance between recognizing individual rights and addressing political and societal concerns. They aim to harmonize legal principles with political realities, ensuring that constitutional values are upheld while taking into account broader societal implications.

4. Safeguards Against Potential Political Misuse of the Process

To safeguard against potential political misuse of the legal process, India's legal system incorporates several key elements:

- *Independence of the Judiciary*: The Indian judiciary is independent of the executive and legislative branches, which is vital in preventing undue political interference in legal matters.
- *Due Process*: Legal proceedings are governed by established due process and fair trial principles, ensuring that political interests do not compromise the fairness of the process.
- *Judicial Review*: The power of judicial review allows the judiciary to nullify laws or government actions that are found to be unconstitutional, protecting individual rights from political overreach.
- *Public Scrutiny*: Legal decisions are subject to public scrutiny, media attention, and civil society engagement. This transparency helps ensure accountability and minimizes the potential for political misuse.

Effects and Implications of Removing Constitutionality

The removal of constitutionality from pre-constitutional laws carries multifaceted effects and implications. It necessitates a comprehensive examination of each law on a case-by-case basis, considering its historical context, societal relevance, and alignment with contemporary constitutional principles. The effects of this process can include:

- *Legal Clarity*: The removal of constitutionality can bring legal clarity, eliminating outdated or contradictory provisions that may lead to ambiguity and legal disputes.
- *Social Transformation*: It can pave the way for social transformation by challenging discriminatory or regressive norms and practices embedded in pre-constitutional laws.

- Protection of Rights: The process can enhance the protection of fundamental rights and individual liberties, reinforcing the supremacy of the constitution.
- Legal Harmonization: Removing constitutionality facilitates the harmonization of the legal framework with the constitutional values, fostering a just and equitable legal system.

Balancing the Rule of Law with Constitutional Principles

Balancing the rule of law with constitutional principles is a delicate task. While respecting the rule of law, which upholds the stability and predictability of legal systems, it is essential to ensure that pre-constitutional laws do not infringe upon fundamental rights. This balance requires:

- Legal Scrutiny: A rigorous and impartial legal scrutiny of pre-constitutional laws to determine their compatibility with the constitution.
- Gradual Transition: A phased approach to mitigate disruptions while bringing the legal framework in line with constitutional values.
- Safeguarding Legal Certainty: Efforts to ensure that legal reforms maintain legal certainty and predictability for all stakeholders.
- Accountability: Holding accountable those responsible for implementing the reforms to prevent arbitrary or politically motivated decisions.

Ethical and Moral Considerations in the Process

The process of removing constitutionality from pre-constitutional laws should consider ethical and moral dimensions, recognizing that legal reforms have societal consequences. It necessitates:

- Ethical Responsibility: An ethical responsibility to address laws that perpetuate discrimination, injustice, and oppression.
- Moral Compass: Guiding legal reforms by a moral compass that values equality, dignity, and human rights.
- Public Discourse: Encouraging public discourse and dialogue to ensure that ethical and moral considerations align with the values and expectations of society.

Conclusion

In conclusion, the removal of constitutionality from pre-constitutional laws is a vital step in aligning legal systems with contemporary constitutional values. It is imperative for legal systems to evolve in tandem with societal progress, protect fundamental rights, and uphold the rule of law. The significance of addressing pre-constitutional laws lies in their potential to perpetuate inequality, injustice, and outdated norms. By removing constitutionality from such laws, nations can signal their commitment to progress, equality, and the rule of law.

The importance of aligning legal frameworks with constitutional values cannot be overstated. It ensures that the law is a reflection of societal values, promotes human rights, and maintains the credibility and legitimacy of the legal system. A call to action is warranted for further research and policy considerations. The legal community, policymakers, and researchers should work collaboratively to identify and address pre-constitutional laws in need of reform. Continued efforts are essential to strengthen the rule of law, protect fundamental rights, and advance justice. The need for reevaluation of pre-constitutional laws arises from the evolving concept of Indian constitutionalism. These laws may be inconsistent with the fundamental rights guaranteed under the constitution, leading to legal ambiguities, social injustices, and conflicts with the principles of equality and justice. Reevaluating pre-constitutional laws becomes crucial to ensure that the legal framework is in harmony with the constitutional vision of modern India. This reevaluation process aims to address historical injustices, remove archaic provisions, and adapt the legal framework to the changing needs of a democratic and diverse nation. It underscores the ongoing commitment to strengthening the rule of law and upholding constitutional principles in India.

Recommendations

1. Policy Recommendations for Addressing Pre-Constitutional Laws

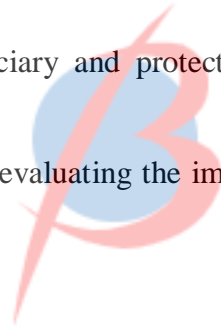
- Establish a dedicated commission or committee for reviewing and reforming pre-constitutional laws.
- Prioritize laws that have a direct impact on fundamental rights, equality, and social justice.
- Develop a clear and transparent process for the assessment and removal of constitutionality from such laws.
- Engage with civil society organizations, legal experts, and marginalized communities to ensure a balanced approach.

2. Promoting Transparency and Public Engagement

- Foster transparency in the reform process by making information and decisions publicly accessible.
- Encourage public engagement through open forums, public consultations, and stakeholder participation.
- Educate the public about the importance of these reforms and their impact on individual rights and societal progress.

3. Strengthening Legal Institutions and the Rule of Law

- Invest in legal education and training for judges, lawyers, and legal professionals to facilitate the reform process.
- Ensure the independence of the judiciary and protect it from political pressures that may compromise its integrity.
- Build mechanisms for monitoring and evaluating the impact of reforms on the rule of law and human rights.



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