

# Crystals and Mud: The Evolution of the Transfer of Property Act in Colonial India

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## Introduction

Under the British, the period between 1861 and 1887 was significant for India. The government enacted several statutes concerning various substantive common law areas, and one of them was the Transfer of Property Act (hereinafter, “TPA”), 1882. With this legislative exercise, the Crown was aiming to establish its political and sovereign dominance over the Indian territory by codifying the English common law in the form of “wise, clear, and ascertainable” provisions. With such crystalline (crystal-like) provisions, the crown intended to preclude the Indian judiciary from flexibility of further development. However, this intention was not successful, and subsequently, the crystalline nature of these laws diluted. With the circumstance-based application, like equity, the TPA became a mixture of crystalline and muddy provisions.

This paper is a reflection on Carol M. Rose’s concept of “crystals” and “mud” in the context of the TPA. It starts with explaining the meaning of “crystals” and “mud,” followed by the appreciation of Carol’s claim of oscillation, where, according to her, there is a perpetual cycle of shifting between clear rules (crystals) and flexible standards (mud). Then, the paper goes on to trace this pattern of shifting in the TPA by contrasting a few significant changes from the year of its enactment, i.e., 1882, to the major amendment done in 1929. Then, it acknowledges the pattern of “crystals” becoming “mud” and “mud” becoming “crystals,” similar to Carol’s claim. However, it argues that this process is not of oscillation but of “sedimentation.”

## “Crystals” and “mud”

In the realm of law and property, Carol M. Rose presents an analogy between two contrasting concepts, “crystals” and “mud.” “Crystals” symbolize clarity and precision, like the well-defined rules and entitlements that govern our interactions and transactions. They enable us to navigate our social landscape with confidence, knowing where we stand and facilitating the negotiation of agreements without conflict. Conversely,

“mud” embodies the murky realm of uncertain and ambiguous doctrines. It symbolizes the uncertainty that arises when these clear entitlements become blurred or substituted with vague rules of decision-making.

Carol suggests that the benefit of “crystals” lies in their precision in defining obligations and safeguarding interests, particularly evident in property laws. While these advantages for sure exist, it’s important to recognize that there are limitations to such precision. Although these laws provide clarity, their strictness can hinder the law’s ability to adjust and develop according to the changing needs of society. This issue is illustrated by Section 40 of the TPA.

Section 40, influenced by the Tulk v. Moxay case, aimed to deal with situations where a third party had the right to restrict property use and enforce both positive (that require the transferee to act, usually involving expenditure) and negative (that limit the transferee) covenants. However, later, English courts made a modification and limited the application of this rule to only negative covenants, excluding positive ones. Similar adjustments were made in other common-law jurisdictions. Yet, in India, the precise wording of this section, particularly the phrase “compel its enjoyment in a particular manner,” inherently suggested the inclusion of positive covenants as well. Consequently, Indian courts struggled to reconcile these wordings with the evolving interpretation in England, as they were bound by the statutory language. It was only in 1929 that the British government acknowledged and corrected this confusion by removing problematic phrases. This delay in legal evolution highlights the drawback of overly precise legislation, which prioritizes certainty over adaptability. If the provision had used more flexible language, courts could have promptly addressed emerging issues, fostering a fairer legal framework.

Now, from a legal realist perspective, the concept of “mud” also holds a lot of significance. Legal realists argue that while crystals provide clarity, they may not always align with the complexities of real-world scenarios. In many cases, adhering strictly to rigid rules may lead to injustices or inequitable outcomes. Therefore, navigating through the “mud” of ambiguity allows for a more equitable consideration of individual circumstances, ultimately better serving the ends of justice.

### **Oscillation of “crystals” and “mud”**

Carol’s theory of oscillation illustrates an interplay between two seemingly contrasting elements within the realm of law: crystals and mud. She observes a recurring pattern characterized by a fluctuation or a back-and-forth movement, wherein, despite the establishment of clear and concrete legal norms, there is a noticeable tendency for ambiguity to creep in as exceptions are granted to address specific circumstances. For instance, courts may consider a crystalline provision as inequitable to parties and

interpret it flexibly. Over time, this ambiguity accumulates, resulting in a murky landscape of rights and obligations, rendering clarity elusive across various legal relationships. Consequently, legislators often feel compelled to adapt or reinterpret these rules, initiating a cycle of oscillation between strict adherence and flexibility. This phenomenon is exemplified in domains like mortgage law, where a perpetual cycle of imposing regulations followed by subsequent relaxation unfolds. Such oscillation is primarily driven by the courts' pursuit of fairness and the prevention of undue hardship. Carol posits that this oscillation between crystalline rigidity and muddy flexibility constitutes an enduring and inevitable process within the legal system.

### *A. Contextualising the Transfer of Property Act, 1881*

In order to trace the concept of “crystals” and “mud” in the context of the TPA, it is essential to scrutinize its legislative evolution. Since its inception in 1882, the TPA has undergone numerous amendments. However, the revisions introduced by Act 20 of 1929 hold particular importance, as they were the result of recommendations put forth by a special committee. In exploring these concepts, this paper will concentrate on provisions related to notice, part-performance, and transfer to class, as these were notably influenced by the aforementioned amendment.

#### **I. Notice**

Under the TPA, the concept of notice is pivotal, especially within sections 39, 40, and 43, which delineate the rights and duties of parties in property transactions. Initially, upon its enactment in 1882, Section 3 of the TPA (interpretation clause) provided a clear, unequivocal, and crystalline definition of notice. It stated that notice existed when one either had actual knowledge of something or should have known it had they been diligent. This definition offered a straightforward criterion for establishing notice, either through actual awareness (you know it for sure) or constructive awareness (you should have known if you looked).

Now, there was smooth application of this definition by courts in cases concerning Sections 39, 40, and 43, etc. However, complications arose with the introduction of the Registration Act of 1908, which mandated registration for the transfer of immovable property, except for transactions of nominal value. This mandatory registration raised uncertainties regarding its impact on the definition of notice under the TPA. Since the TPA did not explicitly address this, it was unclear whether such registration constituted default constructive notice. Courts held varying opinions on this matter, with some considering registration as default notice and others depending on the circumstances of each case.

Courts viewing registration as default notice deemed the existing TPA provision inadequate, arguing that failing to recognize registration as notice would unfairly disadvantage parties. The reasoning used by them was that if we consider a situation where A owns a house and mortgages it to B, and later, without B's knowledge, A mortgages the same house to C. Now, if registration is considered a notice, then B's interests are better protected. B would be aware of the new mortgage taken by C on the property. This knowledge allows B to take appropriate actions to protect their interests. However, if registration alone does not constitute notice to B, then B's interests are potentially at risk. B might not be aware of the new mortgage taken by C on the property. Without this knowledge, B might not take any precautionary measures to protect their interests. Hence, according to them, not considering registration as notice would be inequitable to B because he is not able to protect his interests.

Equity further complicated matters by blurring the clarity of Section 3's crystalline definition with its flexible approach. The question of whether registration constituted default constructive notice became muddled with different court interpretations, leading to confusion regarding the provision's application. This ambiguity left mortgagors uncertain about whether registering a transfer sufficed as notice to mortgagees or if additional communication was necessary.

To address this ambiguity, the legislature amended the provision with the Transfer of Property (Amendment) Act of 1929. By revising Explanation 1 to Section 3, the legislature clarified that the registration of compulsorily registrable documents (such as immovable property) would constitute constructive notice. This legislative action demonstrates how the legislature utilized the "mud" of equity to fill the gaps in the "crystal" of Section 3, transforming the murky waters of ambiguity back into clear crystals of legal provision.

## **II. Part-performance**

Consider a situation where A agrees to sell a flat to B, with B paying in two instalments. They agree that B will get possession after the first instalment, but the transfer will only occur after the second. However, before the second instalment, A receives a better offer from C, and as the title is still with A, he cancels the contract with B and sells the flat to C instead. This situation brings attention to the concept of part-performance, where parties have begun fulfilling their obligations but haven't completed them entirely.

In 1882, when TPA was enacted, there was no such provision addressing part-performance. The statutory provisions were clear and unambiguous ("crystals") and required two things for a valid transfer– the registration and the execution (as distinguished from the contract) of the instrument of transfer. However, this posed a

dilemma: what if the intention to transfer was acted upon, with the transferee taking possession and fulfilling some of their part, but the formalities (registration and execution) were not completed?

This dilemma led to conflicting responses from the courts. Some High Courts prioritized the statutory provisions and disregarded the transferee's interests in part-performance, while others favoured equity over statutory law. Under equity, the courts applied the doctrine of part-performance, where the transferor is debarred from enforcing any right against the transferee if he has completed some part of his performance (subject to other conditions). Additionally, the Privy Council also recognized the equitable interests of transferees. For instance, in *Mahomed Musa v. Aghora Kumar Ganguli* (1914), the Privy Council emphasized the doctrine of estoppel and ruled in favour of the transferees, upholding the doctrine of part-performance. However, the uncertainty prevailed because, in subsequent cases, the Privy Council occasionally reverted to emphasizing statutory provisions over equitable principles.

From 1882 to 1926, no consensus was reached on the applicability of the part-performance doctrine. With conflicting interpretations, the clarity of transfers became murky "mud," requiring resolution. To address this, the legislature introduced Section 53A (Part-performance) in the TPA with the 1929 amendment, codifying the doctrine of part-performance and restoring clarity to transfer law. Section 53A is crystalline and clearly lays down specific conditions where the doctrine of part-performance will be applied for the protection of the transferee.

### **III. Transfer to a Class**

When a gift is directed to a person, the straightforward guidelines outlined in sections 13 and 14 of the TPA are applicable. However, when the beneficiaries constitute a group or class, more detailed provisions apply. Section 15 of the TPA addresses the transfer to a class, wherein certain members may fall under the purview of Sections 13 and 14, governing transfers to the unborn and the rule against perpetuity, respectively.

Section 13, in particular, lays down the conditions required for transfer for the benefit of the unborn, whereas Section 14 says that the period of in alienation cannot be more than the lifetime of one or more persons living at the time of transfer and the minority (age of 18 years) of the unborn. As discussed before, the inception of the TPA in 1882 coincided with India's colonial status under British rule. Hence, its laws were heavily influenced by English jurisprudence, evident in Section 15. This provision was adapted from English law, enunciated in the leading case of *Leake v. Robinson* (1817). In *Leake*, it was established that if a gift is made to a class, any member of which may need to be identified beyond the bounds of perpetuity, the entire gift becomes void.

This precedent had significant implications. For instance, if a property was gifted to B for their lifetime and subsequently to all of B's children who would turn 25 in the future, the whole gift could be rendered void if B had additional children beyond the perpetuity period, violating Section 14. Professor Leach criticized this approach as “guilt by association,” arguing that it unfairly deprived legitimate beneficiaries of their rights. According to Prof. Leach, the rule set forth in *Leake v. Robinson* was both practically and analytically flawed, reduced to a mere “mechanical [reference]” by authorities. Furthermore, he elaborated that despite the rational recourse to the doctrine of severability, the rule irrationally deprived other members of the class for whom the gift was intended of the right to transfer.

Section 15 of the TPA, as in the 1882 enactment, followed this English precedent and voided a gift “as regards the whole class” if the terms conflicted with Sections 13 and 14 for certain members of the class. This application of the irrational rule raised equitable concerns in judicial proceedings. Despite a crystalline provision that said the whole class must be deprived of the benefit, many courts, such as the Privy Council in the case of *Rai Bishan Chand v. Asvardia Koer*, diverged from the rule and ruled differently.

Recognizing this “error,” the legislature amended Section 15 in 1929. The amendment replaced the phrase “as regards the whole class” with “in regard to those persons only and not in regard to the whole class,” thus rectifying the previous error and restoring clarity to the provision.<sup>Top of Form</sup>

#### **IV. Oscillation or Sedimentation?**

The legislative journey of the aforementioned sections of TPA suggests a semblance of Carol's oscillation concept, with a back-and-forth motion between crystalline legislative rules and the introduction of ambiguity by judges. However, a more fitting framework to explain this process is Henry E. Smith's concept of sedimentation.

In this framework, similar to oscillation initially, the flexibility and open interpretation introduced by judges gradually solidify into law. However, unlike oscillation, where crystallization and muddiness alternate, in sedimentation, muddiness persists alongside crystallization due to the continual emergence of new forms of opportunism, necessitating ongoing vigilance. Here, both clear rules (crystals) and flexible standards (mud) coexist in equilibrium, where muddiness can be viewed as a moving frontier, leaving behind sediment or even crystallizing new rules in its wake as it adapts to the ever-changing legal landscape.

One example that illustrates why sedimentation is a better framework than oscillation is the evolution of the doctrine of part performance under the TPA. Initially, the law was rigid, requiring registration and execution for a valid transfer, reflecting a crystalline approach. However, courts, influenced by equity, recognized the hardships this created, leading to inconsistent rulings that muddied the clarity of the law. Over time, instead of oscillating back to rigidity, the legislature codified part-performance in Section 53A through the 1929 amendment. This did not simply revert back to clarity but incorporated equitable considerations into a structured legal rule, demonstrating sedimentation, where legal principles do not merely swing between clarity and flexibility but accumulate and integrate new elements to address evolving needs. Thus, rather than an oscillation between strict rules and exceptions, the law matured by layering equitable principles into its statutory framework.

Smith explains that equity, while acting as a “safety valve” against opportunism, sometimes turns fixed rules into flexible standards but never stops working. It is not an oscillation, where equity does the work and goes into a dormant stage, but is a situation of equilibrium where it always runs parallel to the road of statute law.

## **Conclusion**

The TPA's evolution from 1882 to the 1929 amendments reflects a delicate balance between clarity and flexibility in the legal system. Initially focused on establishing clear rules, the TPA encountered challenges as courts struggled with complexities and equity considerations. The “crystals” and “mud” analogy aptly capture this tension: while clear rules offer stability, they can impede adaptation, whereas flexibility allows for fairness but may result in inconsistency. The amendments in 1929 aimed to clarify ambiguities and strike a balance. They addressed issues like notice, part-performance, and transfer to a class, aiming to establish a fair and predictable legal framework. Consequently, rather than a cyclical process, legal evolution is better understood as continual adaptation, where clarity and flexibility coexist to navigate complexities while upholding justice.

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