THE NEED FOR NEW THINKING ON ANCIENT LAWS

Abstract: This article will consider the differing judgments of the Irish Superior Courts on the question of desuetude, the concept of a law ceasing to apply due to disuse or non-enforcement over a period of time. This is an important question, given the retention of certain ancient statutes by the Statute Law Revision Acts. The article will take a broad approach, considering both statute law and common law, and will consider the approach of the courts in the United Kingdom. Having reviewed the case-law, outline options for a coherent doctrine of desuetude will be considered.

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Introduction

There is no clear doctrine in Ireland of desuetude. Although the term desuetude may be used to describe cases where the subject-matter of a law becomes redundant (as in *The State (Feeley) v O'Dea*,[1] discussed below), this should be distinguished from the concept of a law *itself* no longer having validity. For the purposes of this article, desuetude may be defined as the principle that a law itself can cease to apply due to disuse or non-enforcement over a lengthy period.

Given the antiquity of our legal system, and the considerable volume of retained pre-independence statute and case-law, lack of clarity on this subject creates difficulties from time to time. It has, for example, cropped up in the law on third-party funding of litigation (examined in the Kelly Report[2] and subject to a Law Reform Commission Consultation).[3] In a decision with significant ramifications for litigants at all levels, the Supreme Court in *Persona Digital Telephony Ltd. and anor. v Minister for Public Enterprise and ors* held that the prohibitions on maintenance and champerty embodied in the Maintenance and Embracery Acts of 1540 and 1634 still apply.[4]

The existence of gaps in statutory record-keeping poses the tantalising question of what would happen were a long-forgotten statute to be 're-discovered'. The prospect is not as fanciful as it may appear. The concept of an Irish Statute Book that codifies all applicable law in Ireland seems to date back to 1572, when some 169 statutes were included.[5] While this formed the basis of the Irish Statute Book that continues to this day, it did not purport to list all pre-existing laws in force at the time.[6] Among the statutes left out was the Marriage

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[1] [1986] IR 687 (HC).
[2] Review of the Administration of Civil Justice – Report, 30 October 2020, 324 <https://assets.gov.ie/100652/b58fe900-812e-43f2-ad8d-409a86e7c871.pdf > accessed 26 March 2024.
[3] Press Release, 'Law Reform Commission publishes Consultation Paper on Third-Party Litigation Funding' (17 July 2023) <https://www.lawreform.ie/news/law-reform-commission-publishes-consultation-paper-on-third-party-funding.1117.html > accessed 26 March 2024.
[4] [2017] IESC 27.
[5] Maebh Harding, 'The Curious Incident of the Marriage Act (No. 2) 1537 and the Irish Statute Book' (2012) 32(1) Legal Studies 78.
[6] ibid.

Act (No. 2) 1537, which defined prohibited degrees of affinity.[7] It was not until 2002 that the law was printed for the first time, in the fifth and final volume of the early Irish Statutes series.[8] Dr Meabh Harding warns of the risk of '*catastrophic modern consequences'* when a previously overlooked law can resurface in such a manner.[9]

Case Law in Ireland

The days before commercial radio was legal saw numerous 'pirate' radio stations operate illegally, although in practice they were generally treated benignly by the authorities. When Radio Nova, one such station, was raided by the authorities in 1983, the company protested to the courts that it had been allowed broadcast without interference since its establishment in 1981.[10] It sought injunctive relief prohibiting the respondents from enforcing their powers under the Wireless Telegraphy Act 1926, stressing that this would risk the jobs of 50 people. While the High Court, Murphy J, expressed considerable sympathy for those who would be affected, the Court emphasised that:

> the effect of a Statute is clear. It does not wither away from lack of use and it cannot be repealed, waived or abandoned even by the express decision or agreement of the Executive or any administrator still less by any implicit representation by public representatives or State agency.[11]

The case accordingly was an unequivocal affirmation of the principle - *dormit aliquando lex moritur nunquam,* a law sometimes sleeps, but it never dies.

In *The State (Feeley) v O 'Dea,*[12] the High Court considered the validity of a District Court trial for theft, which was challenged on the basis that the Court had been convened in the premises of a hotel. Counsel argued that as the hotel was licenced to sell liquor, it could not be a venue for a trial because the Petty Sessions (Ireland) Act 1851 provided that Petty Sessions 'shall not be in a House where spiritous or fermented liquors are sold'.[13] The High Court, Keane J, analysed the statute and noted that the provision was in the context of a specific system of local taxation that had been abolished.[14] Accordingly, it was held that the statute pleaded could not avail the accused. As to its precise legal status, the Court suggested that it could be said to have fallen into a 'limbo of desuetude' with nothing left upon which to operate.[15]

The view is expressed in *Kelly: The Irish Constitution* that the *Feeley* and *Nova* decisions 'seem irreconcilable' on desuetude.[16] An alternative view would be that *Feeley* was directed at a somewhat different question, as the Court did not hold that the relevant provision had wasted away due to non-enforcement. Indeed, there will always be situations where the circumstances preclude a particular law from being invoked, whether the law is ancient or modern.

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[7] ibid 18.
[8] ibid 10.
[9] ibid 21.
[10] *Nova Media Services Ltd v Minister for Posts and Telegraphs, Ireland and the Attorney* General [1984] ILRM 161.
[11] ibid 169.
[12] [1986] IR 687 (HC).
[13] ibid 689.
[14] ibid 690.
[15] ibid 692. The Court adopted the phrase 'limbo of desuetude' from the judgment of Henchy J in the 1981 Supreme Court decision in *Waterford Harbour Commissioners v British Railways Board* [1979] ILRM 296, at 353.
[16] David Kenny and others, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) 1003.

Neither case was appealed, and it appears that it was not until 2004 that the Supreme Court gave substantive consideration to the question of desuetude, in *Attorney General v Hilton.*[17] This concerned Mr Hilton's requested extradition to the United Kingdom to face trial on charges of defrauding the Revenue, based on alleged manipulation of VAT returns and other charges.[18] Overturning the High Court decision, the Supreme Court (Denham J, Hardiman and McGuinness JJ concurring) halted the extradition on the grounds that there was no corresponding offence under Irish law.

The Attorney General had argued that there was indeed such an offence, citing the Criminal Justice (Theft and Fraud Offences) Act 2001, section 3(2) of which provides: 'Any offence at common law of larceny, burglary, robbery, cheating (except in relation to the public revenue), extortion under colour of office and forgery is abolished.'

Given the express reference to the common law offence of cheating the Revenue not being abolished, it was submitted that the offence continued to exist.[19] However, it was noted that no prosecutions seemed to have been brought in the previous 100 years.[20] Denham J held that this was critical, stating that '[a]nalysis of the possibility that the offence is extant has to be conducted in light of practice of the last 100 years'.[21]

She concluded in somewhat acerbic terms:

> There is a degree of fantasy in this case. The court was referred to an offence which probably existed in the late 1890s. It has not been utilised in Irish prosecutions since.
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> [...]
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> Not wishing to adopt an *Alice in Wonderland* approach, or to legislate, I am satisfied that the law is so vague and uncertain as to lead to the only possible conclusion being that no Irish common law offence of cheating the public revenue, however admirable such a law might be, exists.[22]

In *Persona Digital,* the Supreme Court considered whether the ancient prohibitions on maintenance and champerty still stood. The plaintiffs had entered into a third-party funding arrangement to fund their intended proceedings against the defendants,[23] who contested the arrangement's validity.

Reliance was placed on the common-law position that investing for profit in the litigation of another was both criminal and tortious.[24] This was reflected by the Statute of Conspiracy (Maintenance and Champerty) from the fourteenth century and the Maintenance and Embracery Acts 1540 and 1634,[25] all retained by the Statute Law Revision Act 2007.[26]

Section 3 of the 1634 Act was quoted as follows:

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[17] [2004] IESC 51, [2005] 2 IR 374 (SC).
[18] ibid 376.
[19] ibid 377.
[20] ibid.
[21] ibid 381.
[22] ibid 382.
[23] *Persona Digital* (n 4) Denham CJ [6].
[24] ibid [9].
[25] ibid [22].
[26] ibid.

> [N]o manner of person or persons, of what esteate, degree or condition soever he or they be, doe hereafter unlawfully maintaine or cause or procure any unlawful maintenance in any action, demaund, suite or complaint in any of the Kings courts of the chancery, castle-chamber, or elsewhere within this his Highnesse Realme of Ireland.

Counsel on behalf of the plaintiffs protested that the statutes were 'difficult to understand' and had, in their submission, merely been retained in 2007 in exercise of caution.[27] In addition, there was no evidence of any prosecution having been brought since the foundation of the State.[28] However, Denham CJ was satisfied based on the wording of the 1634 Act that the common-law offences were extant.[29] She noted that while there had not been any prosecutions in recent years, there was case-law from the High Court affirming that there was a ban on the relevant third-party funding arrangements.

It is submitted that, while this may well be a persuasive argument in itself, it is not one that is easy to reconcile with the Supreme Court's judgment in *Hilton*. While in that case Denham J had held that an assessment of continuing validity 'has to be conducted in light of practice of the last 100 years',[30] this was not repeated in *Persona Digital*. If 'practice' is taken to refer to the bringing of prosecutions, then this would seem to be inconsistent. However, this may be too narrow a reading, given the existence of other judgments in relatively recent years affirming the existence of restrictions on third-party funding, even if not in the context of an actual prosecution. In addition, it could be argued that the 'last 100 years' reference in *Hilton* was *obiter* in reaching the ultimate conclusion, given the emphasis placed on the vagueness of the supposed offence of defrauding the public revenue.

The Courts in *Alary v Cork County Council* had the opportunity to consider the interesting question of whether the Magna Carta Hiberniae 1216 continued to apply.[31] As its name implies, the Magna Carta Hiberniae was the version of the English Magna Carta adapted to Ireland. The proceedings were brought by a trader prosecuted for trading without a licence,[32] pursuant to the Casual Trading Act 1995. Reliance was placed by the trader on the guarantee in Magna Carta Hiberniae that merchants could 'buy and sell, without all the evil extortions, by the old and rightful customs'. He drew attention to the fact that the Charter had been expressed as retained by the Statute Law Revision Act 2007.[33]

The Court of Appeal did not discount the possibility that the 1216 Charter could, in principle, still apply, but did not consider that its provisions would assist the appellant in any event:

> The Act of 1995 enjoys the presumption of constitutionality, and the Bye-laws have been made pursuant to the provisions of that Act. Whatever the status of the Magna Carta Hiberniae 1216 (and there appear to be differing views on that issue) any rights conferred on the appellant by that instrument were and are subject to regulation (up to and including abrogation or repeal) by or under laws made by the Oireachtas. Magna Carta Hiberniae does not have any form of constitutional or quasi-constitutional status and, even if it has the force of law, its provisions do not trump

[27] ibid [14].
[28] *Persona Digital* (n 4) Dunne J.
[29] *Persona Digital* (n 4) Denham CJ [24].
[30] *Hilton* (n 17) 381.
[31] [2021] IECA 84.
[32] ibid [1].
[33] ibid [17].

> or override the provisions of the Casual Trading Act, 1995 or Bye-laws duly made under that Act. On the contrary, any rights that may arise under Magna Carta Hiberniae are necessarily modified and restricted by the Act of 1995 and by such Bye-laws.

England and Wales Jurisprudence

While the Magna Carta occupies a prominent position in English legal history, certainly more so than its Irish equivalent does in this jurisdiction, it rarely seems to be cited. Nevertheless, provisions that have not been repealed are still law and can be relied upon in the appropriate circumstances. In a 2022 case, concerning a Parole Board hearing that had been delayed by administrative error, it was confirmed that Chapter 29 of Magna Carta 1297 (relating to the right not to be unlawfully imprisoned) continued to have the force of law.[34]

This reflects the generally unequivocal approach the Courts of England and Wales have taken to the continuing application of ancient laws, unless expressly repealed. As noted in *Jowitt's Dictionary of English Law,*[35] a law does not cease to have effect in England and Wales merely because it has lain dormant. (In Scotland, laws that have for a long time been disregarded in practice may be said to have been repealed by desuetude.)[36]

A particularly famous example was the trial and execution of William Joyce (popularly known as 'Lord Haw-Haw') in 1946 based on the ancient Treason Act of 1351. His conviction was controversial, because while it was indisputable that he had been a propagandist for the Nazi regime, he was not actually a British subject.[37]

In less extreme circumstances, *R v Brittain*[38] considered the prohibition on forcible entry contrary to the Forcible Entry Act 1381. The accused had forcibly entered a private premises, albeit without any intention to 'occupy' the property. In appealing the conviction, counsel for the defendants strongly emphasised that there had been no record of any prosecution absent an intent to occupy in the almost 600 years since the statute was enacted.[39] The Court analysed the statute as translated into English from the Norman French and concluded that such a prosecution was nonetheless comprehended by the purpose of the statute.[40] Accordingly, the appeal was refused.[41] By contrast, the Irish Attorney General reportedly advised in 1955 that the same law was incapable of modern enforcement and could no longer be deemed to apply.[42]

More recently, the UK Supreme Court was called on in *R (Miller) v The Prime Minister* to consider the validity of the Respondent's purported prorogation of Parliament.[43] Critical to the issue was how article 9 of the Bill of Rights 1688 was to be interpreted, as it precluded judicial intervention in the proceedings of Parliament[44], providing '[t]hat the Freedome of

[34] *Adams v Parole Board for England and Wales* [2022] EWHC 3406 [40].
[35] Daniel Greenberg, *Jowitt's Dictionary of English Law* (4th edn, Sweet & Maxwell 2015) Vol 1, 732, 733.
[36] ibid.
[37] W.H. Lawrence, 'Rex v Lord Law-Haw' (1950) 2(1) Hastings Law Journal 78.
[38] [1972] 1 Q.B. 357.
[39] ibid 360.
[40] ibid.
[41] ibid 361.
[42] W.N. Ownsborough, 'Introduction' in *The Irish Statutes 1310 - 1800* (revised edn, Round Hall Press Ltd 1995).
[43] [2019] UKSC 41.
[44] ibid [64].

Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.'

The Court decided that its intervention would not be unlawful, as prorogation was not a proceeding within Parliament, but on the contrary, represented the end of such proceedings.[45] The judgment makes no reference to any argument that the Bill of Rights of 1688 had fallen into desuetude due to how old it is.

Possible Solutions

These authorities provide a basis for examining how a coherent doctrine of desuetude might be constructed. I propose there are three broad approaches. The first would be to hold that a law falls into desuetude after a defined period of time. The second would be to accept that desuetude applies in principle without specifying a particular timeframe. The third would be to follow the approach of the courts in England and Wales.

Holding that a law falls into desuetude after a defined timeframe would have the benefit of providing an objective benchmark for determining whether a law still applies. However, the objectivity of such an approach could come at the cost of being arbitrary and leading to capricious results. If the validity of rights and obligations as a matter of civil law was subject to use within, for example, the previous 100 years, it would arguably infringe the equality of citizens under Article 40.1 of the Constitution. Of course, there are many time-based restrictions on the exercise of legal rights, such as the Statute of Limitations 1957. Equitable rights are similarly delimited by the principle that delay defeats equity.[46] However, the critical difference is that these limitations penalise delay on the part of the individual whose rights have allegedly been infringed. It seems invidious that a citizen should not be able to invoke laws and the rights and obligations they create where, after 100 years or some other fixed period, no *other* person has invoked them.

The sharp arbitrariness of such a timeframe could be avoided by accepting desuetude may apply without reference to a precise temporal threshold. This is appealing as it seems to reflect the intuitive sentiment that laws simply cannot be regarded as extant when they have been forgotten about for centuries. Unfortunately, the very generality of this approach that may make it seem reasonable may create serious difficulties in terms of legal certainty.

Perhaps it seems obvious that a law as old as Magna Carta Hiberniae 1216 has fallen into desuetude, whereas a law just passed has not, but what about marginal cases? Essentially the problem is a form of the '*Sorites* paradox' that has exercised philosophers for centuries. One hundred thousand grains of sand clearly constitutes a heap of sand and a single grain does not, but there is no easy way of discerning the point at which a number of grains becomes a heap.

One option could be to incorporate an additional requirement, so that a law does not simply cease to be valid due to a prolonged period of disuse. The Scottish conception of desuetude requires an extended period of contrary use, as per Lord MacKay in *Brown v Edinburgh Magistrates*[47]

[45] ibid [68].
[46] *Smith v Clay* [1767] 3 Bro CC 646.
[47] [1931] S.L.T. 456, 458

> I hold it clear in law that desuetude requires for its operation a very considerable period, not merely of neglect, but of contrary usage of such a character as practically to infer such completely established habit of the community as to set up a counter law or establish a quasi-repeal.

Establishing such a period of contrary use would only be relevant to older Scots statutes, and not to any laws passed by the common legislature from 1707 onwards.[48]

There are echoes of the Scottish conception of desuetude in one interpretation of the United States Supreme Court's decision in *Lawrence v Texas*.[49] The decision held that laws prohibiting sexual relations between men were unconstitutional, but the *ratio decidendi* of the decision has been described as somewhat unclear.[50] Cass Sunstein argues that the decision reflects the principle that laws that are not enforced over a lengthy period and that lack public support should not be brought to bear in an arbitrary way on private citizens.[51]

A counter-argument to these approaches could be that even if they narrow the scope of marginal cases somewhat, they do not eliminate them. The question would remain, at what point does a period of contrary usage or non-enforcement become long enough to count? In addition, while it may be attractive to view the question in terms of the values of broader society, the authorities themselves must be subject to the rule of law. To hold that a law falls into desuetude after a certain period of non-enforcement could therefore allow authorities to benefit from defaulting in their responsibilities. In a criminal context, an example might be given by the common-law offence of misconduct in public office, which has reportedly never been prosecuted since independence.[52] However, were those in authority to pursue any such prosecution they would risk creating an adverse precedent for themselves.

In *King v London County Council,*[53] Scrutton LJ stressed this general point, in rejecting the idea that a Council could disregard a law on the grounds of disuse:

> Because a certain number of people do not like an Act and because a good many people disobey it, the Act is therefore 'obsolescent' and no one need pay any attention to it, is a very dangerous proposition to hold in any constitutional country.[54]

In general, the fact that a law has not been invoked for a lengthy period does not mean that it is necessarily irrelevant or out of step with current values. For example, in *Miller* there was a dearth of case-law to assist the UK Supreme Court in interpreting article 9 of the Bill of Rights 1688. However, this was not because it was an unimportant provision, merely that the process leading up to Brexit threw up constitutional issues that had never before needed to be considered by the courts. As the Court noted at the beginning of its judgment, the case 'arises in circumstances which have never arisen before and are unlikely ever to arise again. It is a 'one off'. But our law is used to rising to such challenges and supplies us with the legal tools to enable us to reason to a solution'.[55]

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[48] ibid.
[49] 539 U.S. 558 (2003).
[50] Cass Sunstein, 'What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage' (2003) *John M. Olin Program in Law and Economics Working Paper No. 196*.
[51] ibid 18.
[52] Noel Baker, 'Son of Whiddy Victim Criticises Gardaí for not Pursuing Misconduct Investigation' *Irish Examiner* (4 October 2021) <https://www.irishexaminer.com/news/arid-40713311.html> accessed 3 March 2024.
[53] [1931] 2 K.B. 215.
[54] ibid 226.
[55] *Miller* (n 43) [1].

While the approach of the Courts of England and Wales has the benefit of clarity, it cannot be replicated exactly in Ireland, given that laws predating the 1937 Constitution were only carried forward 'to the extent to which they are not inconsistent' with its provisions (Article 50.1). Therefore, even if ancient laws should not be regarded as repealed simply because of how old they are, it is clear that they do not enjoy the presumption of constitutionality either. They may, for example, not have survived the enactment of the Constitution on grounds of vagueness, as was the case in *King v Attorney General*.[56]

Conclusion

There are a number of different approaches open to the Courts to articulate a coherent doctrine of desuetude, but it is submitted that this must be addressed one way or another. There appears to be a certain tension between the decisions in *Persona Digital* and *Hilton*, and it would assist if greater clarity were brought to the matter. The plaintiffs in *Persona Digital* had to take a case all the way to the Supreme Court simply to establish whether certain laws still existed. While the listing of retained pre-independence laws in the Statute Law Revision Act 2007 is extremely helpful, the Court of Appeal in *Alary* still noted 'differing views' on the status of Magna Carta Hiberniae 1216 (one such law). A clearer approach to desuetude would hopefully provide an answer to those whose rights or obligations are affected by the validity of ancient statutes. It is also an opportunity to consider how the legal system would be able to respond to a situation in which an ancient statute suddenly re-appears, as unlikely as this may seem.

[56] [1981] I.R. 233.