UNTANGLING THE CONSTITUTIONAL LABYRINTH

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Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.[1]

I Prelude

The tradition of analytical jurisprudence, from John Austin and Hans Kelsen onwards, highlights, in all its complexity, the basic notion that constitutions constitute a 'higher law' governing all forms of authoritative legal enunciations and performances.[2] In a sense, a constitution is an 'attempt by the society to limit itself to protect the values it most cherishes'.[3] In fact, it is an attempt by the society 'to tie its own hand, to limit its ability to fall prey to weaknesses that might harm or undermine cherished values'.[4] In India, we the people, adopted and gave to ourselves a constitution which recognises certain basic fundamental rights of the individuals under Part III.[5] The underlying

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1 W H Auden, *Collected Poems*, (1976: 208).

2 Upendra Baxi, 'The (Im) possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism' in Zoya Hasan et al (ed), *India's Living Constitution*, 32 (2002). According to Upendra Baxi, 'In an era of global digital capitalism one may, further, conceptualize constitutions in terms of hardware and software programming of codes of justice and of injustice. On this view, notions of justice are programmed into the constitutional hardware as well as software, which determine the (im) possibility of justice under constitutions. The "hardware" is the stuff that constitutes the materiality of state power, the institutions and apparatuses of governance, the "web of coercion" and the state as a "war machine".'

3 Erwin Chemerwinsky, *Constitutional Law*, 7 (2006).

4 Ibid. 'History teaches that the passion of the moment can cause people to sacrifice even the most basic principles of liberty and justice. The constitution enumerates basic values—regular election, separation of powers, individual rights, equality,- and makes changes or departure very difficult.'

5 Articles 12-35. Our constitution enacted the fundamental rights following the United States precedent. H M Seervai says 'The historical and political developments in India made it inevitable that a Bill of Rights, or Fundamental Rights, as we call them, should be enacted in our Constitution.' See, H M Seervai, *Constitutional Law of India*, Vol 1, 349 (2005).

idea in entrenching certain basic and Fundamental Rights is to take them out of the reach of transient political majorities. It has, therefore, came to be regarded as essential that these rights be entrenched in such a way that they may not be violated, tampered or interfered with by an oppressive government. These rights put fetters upon the governmental actions[6] that are likely to infringe upon the fundamental rights which find a pristine place in our constitution. The constitutional scheme uses Article 13 as the bulwark against any infringement upon the fundamental rights. It gives teeth to the fundamental rights by making them justiciable.[7] It arms the judiciary with the power of judicial review[8] and makes it the guardian, protector and the interpreter of the fundamental rights. It, in essence, confers power as well as casts an obligation on the courts to declare a law void if it is found to be inconsistent with a fundamental right.[9] Framers of the Constitution of India took great care and caution in weaving the delicate fabric of Article 13. And, it becomes apparent when the labyrinthine framing of the article reveals that the word law(s) has been used ten times, each time having a new colour depending upon the context in which it has been used. The meaning of law within the bounds of four clauses changes its colour with beauteous brevity.[10] Amid the myriad constitutional provisions, it shows signs of a chameleon, a constitutional chameleon! This paper, therefore, intends to bring to the fore the

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6 The governmental action implies that the State as broadly defined under Article 12 cannot take any action that threatens the exercise of fundamental rights. The word 'State' 'includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.'

7 See, M P Jain, *Indian Constitutional Law*, 827(2005).

8 This power is exercised by the Supreme Court under Article 32 and by the High Courts under Article 226.

9 The fundamental rights cannot be infringed either by enacting a law or through administrative action.

10 Beginning with Clause(1), the word 'law' refers to the existing or pre-constitutional laws while Clause(2) is concerned with post-constitutional laws made by the State(as defined under Article 12). The lengthier Clause (3) provides what will be included within the meaning of 'law' as has been used in the previous two clauses. It mandates that the laws must have the force of law, an expression that requires looking beyond the bounds of Article 13, and therefore, the word law has a different connotation as used in the above expression. The import of the expression may have to be determined jurisprudentially looking at the various meanings of law that have been given by the legal scholars and jurists. This aspect of law has been discussion in detail in this paper. Besides, it also provides the meaning of what would amount to 'laws in force'. Clause (4) provides that the term 'law' in Article 13 excludes an amendment to the constitution made under Article 368. (See, *Shankri Prasad v Union of India*, AIR 1951 SC 458; *Golaknath v State of Punjab*, AIR 1967 SC 1643; *Kesavananda Bharati v State of Kerala*, AIR 1973 SC 1461).

niceties and the nuances that inform the meaning of law under Article 13 of the constitution. And while doing so, it also aims to look at the consequent implications that bear profound importance in understanding the import of constitutional provisions and their limitations.[11]

II Meaning of law: a short jurisprudential detour

The sphere of law is so wide that it pervades every walk of life. It changes its colour and contour depending upon the context. What constitutes law has invigorated many a debate. Legal and juristic meanings of law have different connotations developed over a period of time. Soper says that a citizen's 'main concern is to know the probable consequences of past or contemplated action. For that it is enough to know that law is, roughly, *a set of directives issued or accepted by officials who enforce the directives with organized sanctions*.'[12] However, when we delve deep into various legal theories, we get to see the lack of perspicuity that pervades the jurisprudential discourse. What constitute among the behavioural codes by which groups or individuals in society live has been defined by legal philosophers in three different ways. Austin defined it as the command of the sovereign. He believed that the matter of jurisprudence is positive law; law, simply and strictly so called, or law set by political superiors to political inferiors. A careful reading of his theory reveals that he 'has not denied a role for natural law, but has sidetracked it. In some sense Austin is legal pluralist: his *positive theory of law is a theory of law of only one sort of law: the commands of the political superiors to the political inferiors in an independent political society*.'[13] He was aware of the existence of customs and moral prescriptions that played a vital and dominant role in regulating people's conduct and behaviour. Natural law theory dealt with question of law in way that was different from the way positivists defined law. Those who believe in this theory say that 'law is the application within a state or other community of rules that are derived from universal principles of morality rooted in turn in revealed religion or reason or a kind of ethical communal sensibility'.[14] To Aquinas, law is 'an ordinance of reason for the common good, made by him who has care of the community'.[15] Both these approaches to defining law find culmination in H L A Hart's

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11 Reading of Article 13, especially the way the word 'law' has been used in the Article, reminded me of what Hohfeld said about the word 'right'. It inspired me to look at the intricacies that underlie the broad contours of Article 13. As has been discussed, the meaning of law seems to be changing its colour and contour every time it appears in a new clause within the article. I have tried to look at various aspects that are relevant to the understanding of meaning of law under Article 13 of the Constitution.

12 Philip Soper, *A Theory of Law*, 4 (1984).

13 See, Norman F Cantor, *Imagining the Law*, 1 (2000).

14 See, *Supra* note 11.

15 Soper op cit at 55.

concept of law. His elucidation of law is a critique of the command theory as advanced by Bentham and Austin. His analysis is in fact a 'revised positivism' which builds upon the 'failure' of classical positivism. However, it stands in its own right as a distinct account of the jurisprudential character of positive law. Through his theory he tried to have 'a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomenon'. Hart observes that 'The most general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in some sense obligatory.'[16] His theory of law comprises primary and secondary rules.[17] Primary rules are duty imposing rules and the secondary rules are power conferring rules which take care of three drawbacks that are noticeable in a pre-legal society which possesses only primary rules. Thus he identifies the '… modern legal system as a union of what he terms as primary and secondary rules. The idea of a rule replaces the concept of the orders of the sovereign as the central focus of legal positivism…'.[18] He described law as the union of primary and secondary rules. Cotterrell observes:[19]

> Hart's legal theory portrays *law as a self-regulating system of rules*. The rule of recognition and other secondary rules are seen as governing the entire process of production, interpretation, enforcement, amendment and repeals of rules within the legal system….Hart's *image of law is that of a system in which rules govern power-holders; in which rules, rather that people, govern.* What is, indeed, implied here is an aspect of the deeply resonant political symbol so obviously missing from Austin's jurisprudence- the symbol of the rule of law, a "*government of laws and not of men*". (Emphasis added).

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16 See, Hilaire McCoubry & Nigel D White, *Textbook on Jurisprudence*, 33 (2002).

17 To him the idea of obligation is at the core of rule. A rule has an internal aspect, i.e people use it as a standard by which to judge and condemn deviations. The rules of obligation are distinguishable from other rules in that they are supported by great social pressure because they are felt to be necessary to maintain society. See, R W M Dias, *Jurisprudence,* 351-356(1994).

18 H L A Hart, *The Concept of Law,* 6 (1961). 'The key words are, of course, "in some sense" and Hart denies that the classical positivist model of law, as an implicitly coercive expression of political power, sufficiently accounts for the character of law as an obligation-imposing social phenomenon. Hart also argues that an equation of obligatory characteristic of positive law with moral obligation is equally inadequate and thus rejects naturalistic theory on the ground that it insufficiently distinguishes the particular character of legal obligation.'

19 Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, 99 (1989).

R M Dworkin attacked positivism using 'HLA Hart's version as a target'. His notion of law differs from the one held by Hart as being a combination of primary and secondary rules. He writes:[20]

> …when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules but operate differently as principles, policies, and other sorts of standards. Positivism …is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important roles of these standards that are not rules.

David Pannick says according to Dworkin 'Law is neither merely the rights and duties created by legislation, custom and pre-cedent; nor is law merely the edicts of natural law or morality. Rather, law is the body of rights given expression to in legislation, custom and precedent, plus the political and moral rights that are implied by the political theory that best explains and justifies the existing legislation, custom and precedent.'[21]

Article 13: an overview and some observations

Article 13 provides the meaning of 'law'. However, this meaning does not extend beyond Part III of the Constitution. It in detail lays down the scope of 'law' and while doing so makes it clear that under what circumstances the pre-constitutional as well as post constitutional laws shall be valid or void.[22] To put it simply, the guiding light is if the *laws are inconsistent with or in derogation of the fundamental rights.*

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[20] R M Dworkin, *Taking Rights Seriously*, 22 (1977).

[21] David Pannick, '*A Note on Dworkin and Precedent*', 43 MLR36-44 (1980).

[22] Article 13. Laws inconsistent with or in derogation of the fundamental rights.—
(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
(3) In this article, unless the context otherwise requires,—
(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

This clearly puts a definite limitation on the wide legislative powers given by Article 246. It is certainly within the competency of the Court to judge and declare whether there has been any contravention of this limitation.

The legislative power of the parliament and the State legislature has been subjected to two limitations:

1. The law must be within the legislative competence;
2. The law must be subject to the provisions of the Constitution and must not take away or abridge the rights conferred under Part III.

Both these limitations being justifiable, the courts can decide if either of the limitations has been transgressed by the legislature of the Parliament. The power derived from Articles 245 and 246 to make law has to be exercised keeping in view the limitations delineated under Article 13 of the Constitution. This power is subject to the above limitations. In fact, this article equips the courts with the power of judicial review by making the Part III rights justiciable.[23] That is courts have been entrusted under the Indian constitution with the power to decide the question of justiciability[24] as is perspicuous from the provisions contained under Article 13. 'In order to keep the executive/legislature within the limits assigned to their authority under the constitution the interpretation of laws is the proper and peculiar province of the judiciary. Constitution is the "will" of the people, whereas the statutory laws are the creation of legislators who are the elected representatives of the people - declared in the constitution - the will of the people must prevail.'[25] And therefore if it is found that an order passed is violative of fundamental rights, was arbitrary and discriminatory,

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(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

[23] Explaining the import of the term 'justiciable' in the context of American Constitution, Christopher N May and Allan Ides observe: 'Stated very broadly, a matter is deemed justiciable, ie one over which an Article III court may exercise authority if it possesses a sufficient number of those characteristics historically associated with the judicial function of dispute resolution' Christopher N May and Allan Ides, *Constitutional Law- Power and Federalism*, 93 (2004).

[24] *Aetna Life Ins Co v Haworth*, 300 US 227,240-241(1937), where it was observed that '[A] justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from that is hypothetical or moot'. 'The term justiciability refers to a body of judicially created doctrines that define and limit the circumstances under which an Article III federal court may exercise its constitutional authority, including its authority to engage in judicial review'.

[25] *A K Gopalan v State of Madras*, AIR 1950 SC 27(107). In this respect the Court has supremacy over the legislature.

hardship was caused to the affected persons as a result of the order, quashing is the normal rule, there being no ground for condoning the breach of fundamental rights. A well-known authority on Indian Constitution observes:[26]

> Article 13 lays down that what would otherwise been implied, ie the supremacy of the fundamental rights over any other law in case of inconsistency between the two. It could also mean that *the constitution makers intended to confine the application of fundamental rights to what is stated in this article.* Thus, for example, pre-constitutional laws shall be invalid only to the extent they fall within the category of "laws in force". As uncodified personal laws do not fall within that category, it could be argued that they were not intended to become invalid on the ground of any inconsistency with the fundamental rights. (Emphasis added.)

In giving to themselves the Constitution, *the people have reserved the fundamental freedoms to themselves. Article 13 merely incorporates that reservation. The article is not the source of protection of fundamental rights, but the expression of reservation.*[27]In *A K Gopalan v State of Madras,*[28] the Supreme Court observed:

> *The inclusion of Article 13(1) and (2) in the constitution appears to be a matter of abundant caution*. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment to the extent it transgresses the limits, invalid. The existence of Article 13(1) and (2) in the Constitution therefore is not material for the decision of the question what fundamental right is given and to what extent it is permitted to be abridged by the Constitution. (Emphasis added.)

The reason, as D D Basu opines, is 'that the very adoption of written constitution with a Bill of Rights and judicial review implies that Courts shall have the power to strike down a law which contravenes a fundamental right or some other limitation imposed by the constitution'.[29]

IV Force of law

Clause 3(a) of Article 13 gives an inclusive definition of law to be used 'in this Article' and therefore the meaning of law given in the above clause extends to both the pre- and post-constitutional laws. It mandates such laws to have the 'force of law'. Interestingly, constitution is silent as to the meaning of this expression. The

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26 Mahendra P Singh, *v* N Shukla's Constitution of India, 36 (2008).

27 *Golak Nath v State of Punjab*, AIR 1967 SC 1643.

28 (1950) SCR 88, 100. Per Kania, CJ.

29 D D Basu, *Commentary on the Constitution of India*, 689, Vol 1(2007).

expression, therefore, requires both judicial as well as jurisprudential exploration to understand its meaning.

Norman F Cantor is of the view that 'Law is the system of *state-enforced* rules by which relatively large civil societies and political entities operate. This programmed social functioning is backed by a politically sovereign body'[30] Friedman avoids 'an attempt at "definition" of law', and comes out with his concept of law when he says:[31]

> …concept of law means a norm of conduct set for a given society - and accepted by it as binding—by an authority equipped with the power to lay down norms of a degree of general application and *to enforce them by a variety of sanctions*. (Emphasis added.)

The element of force backing the words of law has been consistent element in most of the attempts that have been made to outline the content of law. Classical positivist like Kelsen who talks about the norms and normative order, also emphasises that law requires some kind of coercion in order to see that there is an obedience of the law. Law is a coercive order. He says:[32]

> It follows that a legal order may be characterised as a coercive order, even though not all its forms stipulate coercive acts…law is the primary norm which stipulates the sanction.

The laws made by the state have always the backing of the machinery that ensures that such laws are obeyed as can be seen in the myriad state made laws which prescribe the measures that can be initiated in case of disobedience of the law. That is, there is always the *force* that gives life to the law enacted or made by the state. This force may be said to be the force of law, a force that makes sure that law has the requisite effectiveness among those for whom it is made. Besides the state-made laws there are other categories of practices that find the protection and recognition of the state. These may include the customs and usage of people that form the lifeline of societal existence. They are *laws* that precede the positive law. They are prevalent among the people. They regulate the conduct of the individuals as they enjoy the acceptance of people who generally regard them as binding their behaviour. And, when such practices get the protective backing of the state, their enforceability acquires a new vigour and life.

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30 See, *supra* note 12.

31 Friedman, *Legal Theory*, 16(2004).

32 David Schiff, 'Modern Positivism: Kelsen's Pure Theory of Law', in James Penner et al (ed), *Jurisprudence and Legal Theory*, 195-196 (2005). To Kelsen, 'Norm' is the meaning of an act by which certain behavior is commanded, permitted, or authorised. To put it simply, it implies what one should do or may or can do.

V Doctrine of severability

The doctrine of severability is an important aspect of understanding the import of Article 13. Any resort to this doctrine can be had when it becomes apparent that a part of any law offends the constitution. In the context of Indian Constitution, it is the part dealing with fundamental rights that is the determining factor as to when a law will be subjected to the above doctrine. DD Basu says that 'doctrine of severability is nothing but the common law rule of *ultra vires* imported in the realm of constitutional law'.[33] Simply put, this doctrine means that if any particular provision of the statute is unconstitutional and that provision is independent of or severable from the rest, only the offending provision will be declared invalid by the Court and if it is not separable, the whole of the statute shall fail.[34] However, in *Poindexter v Greenhow*,[35] the American Supreme Court held that the doctrine cannot be applied to 'substitute for the law intended by the Legislature one they may never been willing, by itself, to enact'.

Indian constitution

Under the Indian constitution, Clauses (1) and (2) two provide for the application of the above doctrine. Both the clauses deal with the contravention of fundamental rights as contained in the Part III. The two clauses provide:

1 All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

2 The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

The doctrine simply implies that where only a part of the offending law is inconsistent with or contravenes the fundamental rights, it is *that* part only that shall be declared to be void, and not the entire law. And the voidness is circumscribed by the expressions '*to the extent of the contravention'* and *'to the extent of such inconsistency'*. That is, the application of the doctrine separates the invalid part of the law from the valid part. The resultant implication is that the valid part of the law continues to be *law* while

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33 D D Basu, *Human Rights in Constitutional Law*, 217(1994). Also see, *Fielding v Thomas*, (1896) AC 600; *Great W Saddlery v R*, (1921) 2 AC 91.

34 *Pollock v Farmers' Loan & Trust Co,* (1895) 158 US 635*; Lynch v US,* (1933)292 US 571. In *El Paso R* Co *v Gutierrez,* (1909) 215 US, 87, it was held that if the Court finds that an offending portion of the statute to be severable, it will be the duty of the Court to declare only the offending part invalid and maintain the rest of the statute.

35 (1885)114 US 270.

that part of it which offends the constitution ceases to have the content of law. It no longer remains a law. H M Seervai observes:[36]

> When a law is impugned as violating constitutional limitations, it may be possible to save the law by applying the principle of severability. There are two types of severability … the provision violating the Constitutional limitations may be distinct and severable, and the Court would uphold the rest of the Act by severing such distinct provisions and declaring them void. But the impugned law may be one and inseverable; so that no specific provision of the Act could be declared to void. In such circumstances, the doctrine of severability in application or enforcement would apply.

When the provisions of the impugned law are so interwoven that they are not severable, then the entire law, say the Act, is *ultra vires*. The Privy Council in *re Initiative and Referendum Acts,* observed:[37]

> A particular section of an Act may not be an isolated and independent clause, and may form part of one connected indissoluble scheme for the attainment of a definite object; in which case it would have to be considered as an inseparable part of the whole. A law which is ultra vires in part only may thereby become ultra vires in the whole, if the object of the Act cannot at all be attained by excluding the bad part.

In *AK Gopalan v State of Madras*,[38] s 14 of the *Prevention Detention Act 1950* was declared to be *ultra vires* by the Supreme Court. The Court observed that 'the impugned Act minus this Section can remain unaffected. The omission of this section will not change the nature of the structure of the legislation. Therefore, the decision that Section 14 is *ultra vires* does not affect the validity of the rest of the Act.' However, the court has no jurisdiction to redraft the legislation. The court cannot sever one single provision which covers valid as well as invalid subjects in order to save some portion of it. In *RMDC v Union of India*[39] the *Prize Competition Act 1955* was challenged on the ground of violation of the fundamental rights of the petitioners as secured under Article 19(1)(g) the court held that the provision of the Act were severable. It observed, as has been previously discussed, that when a statute was in part void, it would be enforced as regards the rest, if that was severable from what was invalid.[40] Separability is a question of substance, not of form. Hence, while the substance is to be determined

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36 H M Seervai, *Constitutional Law of India*, 421(1991).

37 AIR 1919 P C 145.

38 **(**1950) SCJ 174.

39 (1957) SCR 930.

40 Also see, *Punjab Province v Daulat*, (1942) FCR 1; *Chintaman Rao v State of Madhya Pradesh*, (1950) SCR 759 ; *State of Bombay v F N Balsara*, (1951) SCR 682. *State of Bihar v Kameshwar Prasad,* AIR 1952 SCR 889 ; *Harakcahand v Union of India* AIR 1970 SC 1453 at 1468.

from the provisions of the statute as a whole, it will also be legitimate to take into account the history of the legislation and its object, apart from its enacting provisions, title, and preamble.[41]

VI Doctrine of eclipse

The above doctrine is important as regards the validation of void laws. Certain existing laws sometimes may get eclipsed by reason of their clash with the exercise of fundamental rights contained under Part III of the Constitution. There are certain pertinent questions in this context like whether the doctrine of eclipse applies only to the pre-constitutional laws or to the post-constitutional laws also, whether the laws in force before the commencement of the constitution become void *ab initio* or void *in toto* if they are inconsistent with a fundamental right. And also what about the persons whose rights it does not affect: does the voidness of the law depend upon the person whose fundamental rights it contravenes? The guiding light can be traced to Article 13 which provides *inter alia* that 'All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.' The voidness of such law is limited to the extent of inconsistency with the provisions of Part III of the Constitution. The voidness of law under Clause (1) does not imply voidness *ab initio.* In *Keshavan Madhav Menon v State of Bombay*[42] the effect of Article 13(1) was in question before the Court. The Court had to decide the import of Article 13 in this case. The broad issue in this case was whether a prosecution commenced before the commencement of the Constitution, could be continued after the Constitution came into force if the concerned Act became void given that it violated Article 19(1) (a) and (2) of the Constitution. Das J observed that the prosecution could be continued because the provisions of the constitution were not retrospective provided they were explicitly so declared.

It is axiomatic from the provisions of the constitution that it has no retrospective effect. Part III of the constitution is prospective.[43] And that being so, the existing laws can become, and can be rendered, void from the date of the commencement of the constitution. An existing law becomes inoperative only from the date of the commencement of the constitution. The very fact that it is inconsistent with the fundamental rights does not make it a dead law. As far as the determination of rights and obligation incurred before commencement of the constitution is concerned, such a

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41 *RMDC v Union of India*, (1957) SCR 930. Also see, *Kihoto Hollohan v Zachilhu*, AIR 1993 SC 412.

42 AIR 1951 SC 128. Also see, *Behram Khurshid Pesikaka v State of Bombay*, AIR 1955 SC 123.

43 In *Pannalal Binjraj v Union of India*, (1957) SCR 233, it was held that Article 13 has retrospective effect.

law is a good law. In *Bhikaji Narayan v State of Madhya Pradesh*,[44] the Supreme Court formulated the doctrine of eclipse thus:

> The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right. The effect of the Constitution (First Amendment) Act, 1951 was to *remove the shadow* and to make the impugned Act free from all blemish or infirmity

Therefore, the doctrine implies that the shadow cast by the fundamental right can be removed by a subsequent amendment to the constitution, and once it is so done, the law in its suspended or eclipsed state is thereby revived. It gets revived, freed from all *blemishes* and *infirmity*. That is, the pre-constitutional laws continue to be *law* though in an eclipsed state. They are inoperative laws whose revival in *post* constitutional period is contingent upon a subsequent amendment that would remove the *shadow*. In *Keshavan Madhava Menon*,[45] Mahajan, C J observed that:

> …the part of the section of an existing law which is unconstitutional is not law, and is null and void. For determining the rights and obligations of citizens the part declared void should be notionally taken to be obliterated from the section for all intents and purposes, though for the determination of the rights and obligations incurred prior to 26 January 1950, and also for the determination of rights of persons who have not been given fundamental rights by the constitution.

H M Seervai comments:[46]

> It is difficult to understand what is meant by "notionally …obliterated" from the section. …it is submitted that there is no scope for an unconstitutional provision being "notionally …obliterated". The theory of eclipse…is quite inconsistent with any obliteration, actual or notional.

Meaning of law: pre- and post-constitutional law tangle

Rival opinions abound as to the application of doctrine of eclipse to pre- and post-constitutional law. The implications of different opinions are profound and have a far-reaching impact on the nature of law as provided under Article 13 of the Constitution. It is the general view that doctrine of eclipse applies only to the pre-constitutional laws, and not to the post-constitutional laws. In *Deep Chand v State of UP*,[47] the Court held:

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44 AIR 1955 SC 781.

45 *Supra* note 41.

46 *Supra* note 4 at 411.

47 AIR 1959 SC 648.

> ...[T]he doctrine of eclipse can be invoked only in the case of law valid when made, but a shadow is cast on it by supervening constitutional inconsistency.

In *Mahendralal Jaini v State,*[48] the Court observed:

> The doctrine of eclipse will apply to pre-Constitutional laws which are governed by Article 13(1) and *would not apply to post-Constitutional laws which are governed by Article 13(2).* Unlike a law governed by Article13 (1) which was valid when made, the law made in contravention of the prohibition contained in Article 13(2) is a stillborn law either wholly or partially depending upon the extent of the contravention. Such law is dead from the beginning and there can be no question of its revival under the doctrine of eclipse… [which]…cannot confer power on the state to enact a law in breach of Article 13(2) which would be the effect of the application of the doctrine of eclipse to post-constitutional laws.

However, interestingly in *Bhikaji*[49] in which the Supreme Court enunciated the doctrine of eclipse, Das ACJ made the following observation that tells a different story:

> All laws, *existing or future*, which are inconsistent with the provisions of Part III or our Constitution, are, by the express provision of article 13, rendered void 'to the extent of such inconsistency'. Such laws were not dead for all purposes. They existed for the purpose of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against non-citizens. It is only as against the citizens that they remained in a dormant or a moribund condition.

It is clearly inferable that the above dictum did not make any distinction between pre- and post-Constitutional laws. H M Seervai has commented that 'It is clear that these observations are not restricted to Art 13 (1), which deals with the pre-Constitutional laws, but also to Art 13(2), which deals with post-Constitutional laws, because the Court did not rest its decision on the distinction made in American decisions between pre-Constitution and post-Constitution laws.'[50] The following submission of Seervai sounds convincing:

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48 AIR 1963 SC 1019.

49 *Supra* note 43.

50 Seervai op cit at 413. Das ACJ in *Bhikaji* observed that 'The American authorities refer only to post-constitutional laws which were inconsistent with the provisions of the constitution….The American authorities, therefore, cannot fully apply to pre-constitutional laws which we were perfectly valid before the Constitution….it must be held that these American authorities can have no application to our Constitution.'

> …[T]he theory of eclipse is based on the premise that a law which violates fundamental rights is not a nullity or void ab initio, but remains unenforceable(that is, in a moribund condition); and secondly, it implicitly recognizes the distinction between a law void for legislative competence and a law void for violating fundamental rights.

DD Basu is of the view that as far as post-constitutional laws are concerned, the doctrine of eclipse is not applicable.[51] The same view is also shared by MP Jain.[52]

Be that as it may, in the *State of Gujarat v Shri Ambica Mills*,[53] though the doctrine of eclipse was not an issue, the Court through its decision made it clear that the doctrine applies to both the pre-constitutional as well as post-constitutional laws. Mathew J observed that '…any statement that a law which takes away or abridges fundamental rights conferred under Part III is still born or null or void requires qualification *in certain situations*. Although the general rule is that a statute declared unconstitutional is void at all times and that its invalidity must be recognised and acknowledged for all purposes and is no law and nullity, this neither universal nor absolutely true, and there are many exceptions to it.'[54] It is submitted that the view which holds that 'void' under Article 13(2) can only be void against persons whose fundamental rights are taken away or abridged by law, seems reasonable and convincing. The law might be 'still born' so far as the persons, entities or denominations whose fundamental rights are taken away or abridged but there is no reason why the law should be void or still born as against those who have no such rights.[55] Mathew J in *Ambica Mills* makes a valid point when he reasons:[56]

> …[T]he real reason why it (pre-constitutional law) remains operative as against non-citizens is that it is void only to the extent of its inconsistency with the rights conferred under Article 19 and that its voidness is, therefore, confined to citizens, as, *ex hypothesi*, the law became inconsistent with their fundamental rights alone. If that be so, *we see no reason why a post-constitutional law which takes away or abridges the rights conferred by Article 19 should not be operative in regard to the non-citizens as it void only to the extent of the contravention of the rights conferred on citizens,* namely, those under Article 19.

'The "voidness" of pre-Constitution and post-Constitution laws to the extent of contravention of fundamental rights, proclaimed by Article 13(1) and 13(2) of the constitution has generated much judicial controversy and confusion. One question

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51 DD Basu, *Commentary on the Constitution of India*, Vol 1, 692 (2007).

52 *Supra* note 6.

53 AIR 1974 SC 1300.

54 Ibid.

55 *Cf* Jain op cit at 849.

56 Ibid. Para 43.

pertains to the *scope* of voidness of such laws. Despite the rather lavish use of expressions such as "stillborn", law void *ab initio*, *non-est*, "obliteration from the statute book" and "repeal", it has been acknowledged by the Court, in a along line decisions, that the voidness arising out of violation of rights conferred upon citizens does not entail voidness for all purposes. *Such law may apply in full force to non-citizens.'*[57] As to the question of deciding the voidness of law, ie when does a law become void, we need to make a distinction between voidness and unenforceability. Does a law which is unconstitutional on the ground of lack of legislative competence, stand on the same footing as the law which is violative of constitutional prohibitions? Justice Venkatarama Iyer made a distinction between a law made without legislative competence and a law which violated constitutional limitations on legislative power. The former would be 'absolutely' null and void and *non est*; *the* latter was simply 'unenforceable'. The unenforceability arises out of the fact that it is eclipsed by the provisions of fundamental rights. When the long shadow of eclipse is removed, this type of law will be automatically revived from the date of removal, and even retrospectively, if it were to be so provided. On the other hand, a law void for lack of legislative competence does not so revive upon provision of such competence; it has to be re-enacted.[58] Seervai observes:[59]

> …[T]here is a clear distinction between lack of power and disregarding a restriction on power as regards a part of the subject matter of that power…and the most important result of this distinction is that a legislature having a legislative power can legislate conditionally on the limitation on its power being removed, whereas a legislature not possessing legislative power cannot legislate at all.

VII Article 13 and "judicial decisions"

In *Ashok Kumar Gupta v Union of India*,[60] Supreme Court observed that 'Judgment or order is not a legislative Act which is void under Article 13(2) but a judicial tool by which the effect of judgment was given.' It further elaborated:

> It is true that Art. 13(1) deals with pre-Constitutional law and if it is inconsistent with fundamental rights, it becomes void from 26. 01.1950… and if a post-Constitutional governed by Art.13 (2) violates fundamental rights, it becomes void from its inception. *Either case deals with statute law and not the law declared by this Court under Article 141 and directions / orders under Article 142.* (Emphasis added).

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57 Upendra Baxi, *KK Mathew on Democracy, Equality, and Freedom*, XXXV (1978).

58 Ibid at XXXVI.

59 Seervai op cit at 421.

60 (1997)5 SCC 201 at 248.

Article 141 provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The expression 'law declared' is wider than the 'law found or made' and implies the law creating role of the Court and it becomes binding on the State. On Article 142, the court has observed that 'the power exists as a separate and independent basis of jurisdiction, apart from the statutes'.[61] 'This plenary jurisdiction is, thus residual source of power which this Court may draw upon as necessary whenever is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law.'[62] The power conferred by Article 142 is curative in nature and complementary to those powers specifically conferred on the Courts by the statutes. Article 142 is conceived to meet situations which cannot be effectively and appropriately tackled by the existing provisions law. It is notable that though the judiciary is an organ of the State like the executive and the legislature, it has not been included within the meaning of state as provided under Article 12. Should this be construed as meaning that judiciary was not intended to be included in the concept of state? This question assumes importance in that the 'actions of any of the bodies comprised within the term "state" as defined in Article 12 can be challenged before the courts on the ground of violating Fundamental Rights'.

It is taken to be a settled position that while exercising its non-judicial functions, the courts fall within the meaning of state and while performing judicial functions they would not be included within the meaning of state as defined under Article 12 of the Constitution. That is, the rule making-power would be within the sweep of the expression 'State', but not the performance of judicial function. It has been argued that '…in the exercise of judicial functions courts are required to determine the scope of fundamental rights vis-à-vis a legislative or executive action. Unless their power to perform that function is excluded or restricted by the constitution or any other law they are competent to make rights or wrong law. A wrong determination in such a case does not constitute a breach of any fundamental right by the court. It is genuine mistake which it is competent to, though it must not, make.'[63]

H M Seervai vehemently argues that judiciary is included within the meaning of State as provided under Article 12:[64]

> Article 12 which defines "the State" for the purpose of Part III, does not expressly exclude the judiciary, and though Article 12 does not expressly include the judiciary, it is submitted that the judiciary, with the legislature and

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61 M P Singh, *N Shukla's Constitution of India*, 454-458 (2003).

62 *Supra* note 6 at 267.

63 *Supra* note 60 at 27.

64 *Supra* note 4 at 393.

> the executive, is included in the ordinary meaning of a "State" as one of the three great departments of a State; and further, that the ordinary meaning is not outside the inclusive definition of "the State" given in Article 12. This conclusion is supported by Art.13 which declares that any law, rule, regulation and the like, which violates fundamental rights, void. The judiciary in India has the rule making-power and if it were not "the State" for the purpose of Part III…rules made by the courts could not be impugned as violating fundamental rights.

Since Article 13 of our Constitution, declaring unconstitutional legislative acts to be void, has been inserted only by way of abundant caution, there is nothing in the Constitution to exclude from the purview of Article 12 or Article 32 or 226 judicial proceedings or to assert that a judicial proceeding which is violative of a constitutional guarantee would not be void so as to subject it to a collateral attack in remedial proceedings which are equally guaranteed by the constitution. It is to be noted that the definition of 'law' in Article 13 includes a custom or usage and any custom or usage which contravenes a fundamental right would be void, under Article 13(1). Against this backdrop, if we suppose that 'an inferior court enforces, by its decision, a custom which has become void by reason of contravention of a fundamental right. If an appeal lies from such a decision, the appellate Court would no doubt correct the decision on the merits, if the point is properly placed before it. What happens if there is no right of appeal, and the matter is brought before the Supreme Court or a High Court under its extraordinary jurisdiction under Article 32 or 226? Would the Court refuse relief on the ground that it would not interfere with an error in the decision unless the error is apparent on the face of the record; or should the guardians of Fundamental Rights, perform its duty by reversing the decision which has become a nullity owing to its being founded on a "void" law ?'

In view of the foregoing discussion, any conclusion may seem inconclusive. Still, the views that support the propositions that judiciary should be within the meaning of State as given under Article 12 appears convincing though such a stand may 'lead to multiplicity of proceedings by raising the same issue first in appeal and then in writ proceedings.'

VIII Personal laws

In India there are several personal laws which are by and large non-statutory. They are not in a codified form. And, religion has a strong influence upon these laws. The fact that these have a historical existence that precedes the inception of the constitution, they are likely to come in conflict with the fundamental rights provided under the constitution, which is a product of modern times.

Certain features of these laws have been challenged before the courts many a time. The courts have adopted an equivocal approach. The approach of the court has been:

to hold that personal laws not compatible with fundamental rights;

to deny that personal laws fall within the sweep of Article 13, and therefore, these laws cannot be challenged on the ground of violating fundamental rights.

Gajendragadkar, J in *State of Bombay v Narasu Appu Mali*[65] observed:

> …[T]he framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution (viz, Fundamental rights). They must have been aware that these personal laws needed to be reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of personal laws should be challenged by reason of the Fundamental Rights…and so they did not intend to include these personal laws within the definition of the expression "laws in force".

However it can be argued that 'After the commencement of the constitution, several Acts have been passed by the Parliament and the State Legislatures modifying several aspects of these personal laws. Prima facie, it is difficult to argue that these statutes do not fall within the scope of Art. 13(3) (a).'[66] The obvious reason behind the stand taken by the courts may be that the courts have adopted the policy of non interference in that these matters concern the susceptibilities of the people to whom these laws apply.

Article (1) (a) provides that 'laws in force' include:

laws passed or made by a Legislature

or other competent authority.

This is an inclusive definition. That is, it does not exclude other forms of laws. Therefore, it should also include personal laws.

IX Custom

The three main sources of Hindu Dharma or law are the *Sruti*, the *Smriti* and the Custom. In *Collector of Madura v Moottoo Ramalinga*[67] it was stressed by the court that: 'Under the Hindu system of law, clear proof of usage will outweigh the written text of law. It has been repeatedly stated that a custom may be in derogation of *smriti* law and where proved to exist may supersede that law. The tenacity of family customs even under the strain of migration has been repeatedly recognized in decisions of the

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[65] AIR 1952 Bom 84.Also see, *Daniel Latifi v Union of India*, AIR 2001 SC 3958; *Ahmedabad Women Action Group v Union of India*, AIR 1997 SC 3614.

[66] Jain op cit at 846.

[67] See, *Youth Welfare Federation Rep By Its Chairman, K.J Prasad v Union Of India*, 1996 (4) ALT 1138.

Courts. It may, however, be observed that though local and family custom, if proved to exist, will supersede the general law, the general law will in other respects govern the relations of the parties outside that custom.'

By operation of Article 13(3)(a) of the Constitution law includes custom or usage having the force of law. Article 13(1) declares that the pre-constitutional laws, so far as they are inconsistent with the fundamental rights shall, to the extent of such inconsistency, be void. The object, thereby, is to secure paramountcy to the Constitution and give primacy to fundamental rights. Customs are pre-constitutional and a part of existing laws. They furnish the rules that govern the human conduct. These are observed by classes or groups of people, and exist in every society. Constitution of India includes 'customs' within the meaning of law to be applicable to Part III. Article 13(3)(a) *inter alia* includes custom or usage within the meaning of law. Therefore, a custom must yield to the fundamental rights.[68] However *Madhu Kishwar v State of Bihar*[69] adopted a conservative approach and desisted from declaring a tribal custom as being inconsistent with Article 14, the reason being that to do so 'would bring about chaos in the existing state of law'. The decision of the court assumes importance in the light of Supreme Court's observation in *Narasu Appu Mali case* where it had observed:[70]

> …[I]t is clear that if there is any custom or usage which is in force in India, which is inconsistent with the fundamental rights, that custom or usage is void. "Laws in force" was separately defined in order to emphasize the fact that even though a law may not be in operation at all or may be in operation in particular areas, even so it should be considered to be a law in force for the purpose of Article 13(1)… The Constitution has made it clear that no custom or usage having the force of law can validly be made the basis of any law in future if such custom or usage offends against the fundamental rights.

In *Sheikriyammada Nalla Koya v Administrator, Union Territory of Laccadives,*[71] K K Methew J, as he then was, held that customs which are immoral are opposed to public policy, can neither be recognized nor be enforced. Its angulation and perspectives were stated by the learned judge thus:[72]

> It is admitted that the custom must not be unreasonable or opposed to public policy. But the question is unreasonable to whom? Is a custom which appears unreasonable to the Judge be adjudged so or should he be guided by the

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68 *Dashratha Rama Rao v State of A.P*, AIR 1961 SC 564.

69 AIR 1996 SC1864.

70 http://www.indiankanoon.org/doc/54613/ (last visited on 06.02.10).

71 AIR 1967 Kerala 259.

72 Ibid.

> prevailing public opinion of the community in the place where the custom prevails? It has been said that the Judge should not consult his own standards or predilections but those of the dominant opinion at the given moment, and that in arriving at the decisions the Judge should consider the social consequences of the custom especially in the light of the factual evidence available as to its probable consequences … the Judge should not follow merely the mass opinion when it is clearly in error, but on the contrary he should direct it, not by laying down his own personal and isolated conceptions but by resting upon the opinion of the healthy elements of the population, whose guardians of an ancient tradition, which has proved itself and which serves to inspire not only those of a conservative spirit but also those who desire in a loyal and disinterested spirit to make radical alterations to the organizations of existing society. Thus, the judge is not bound to heed even to the clearly held opinion of the greater majority of the community if he is satisfied that that opinion is abhorrent to right thinking people.

X Amendments: are they law?

The question whether an amendment to the constitution made under Article 368 has a history which can well be described as a roller-coaster ride. Judicial decisions have varied, so have the opinions. To begin with, in *Shankri Prasad v Union of India,*[73] Supreme Court adopted a literal interpretation of the constitution, and observed that an amendment under Article 368 was enacted in the exercise of its constituent power while the term law used under Article 13 referred to the exercise of ordinary legislative power conferred on the Parliament by provisions of the Constitution other than Article 368. Therefore, it was held that Article 13(2) does not affect the amendments made under Article 368.[74] In *Sajjan Singh v State of Rajasthan,*[75] the same question that was raised in *Shankri Prasad* was again raised before the Court, and the majority reiterated the conclusion of *Shankri Prasad.* However, in *L.C. Golaknath v State of Punjab*[76] the majority (6:5) held that an amendment made under Article 368 is a law, and is subject to Article 13. Thus, the earlier two cases, *Shankri Prasad* and *Sajjan Singh*, were overruled. The Constitution (Twenty Fourth Amendment) Act, 1971 inserted the Clause (4) which provided that 'Nothing in this article shall apply to any amendment of this Constitution made under article 368.' The Supreme Court in *Kesavananda Bharati v State of Kerala*[77] upheld the Constitutionality of the above amendment.

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73 AIR 1951 SC 458.

74 The court was of the view that the word 'law' should be taken to refer to rules of regulations made in the exercise of ordinary legislative power**.**

75 AIR 1965 SC 845.

76 AIR 1967 SC 1643.

77 AIR 1973 SC 1461.

Therefore it is settled that 'law' under Article 13 excludes an amendment of the Constitution made under Article 368.

XI In lieu of a conclusion

The foregoing discussion and deliberation reveal that the framers of our Constitution took great care and caution to construct the structure of Article 13, though it was once declared to be an act of 'abundant caution'. Article 13 'gives teeth' to the fundamental rights, and empowers the courts to protect the fundamental rights from any unconstitutional onslaught. The framing of the article suggests that it was intended to broaden the scope of protection of the fundamental rights by incorporating both the pre-Constitutional and post-Constitutional laws. They also laid down other requirements that make them worthy of being called a law. However, notwithstanding the effort so made, confusions and controversies abound as is apparent from the judicial decisions that have interpreted the import and importance of Article 13. Certain expressions used in the article have ample scope of generating invigorated controversies, and they did generate such controversies. Personal laws present one aspect of Article 13 that shows how the interpretations have varied, and so have the opinions. There are cogent arguments that contend that personal laws should be included within the meaning of law under Article 13. The courts have adopted an equivocal approach as has been discussed. However, when one sees the approach of the court in respect of the customs, one wonders as to the reason that compelled the courts to adopt a different approach as regard the personal laws. Besides, given the fact that the definition of law under Article 13 is an inclusive one, it can be argued that other forms of law that are not explicitly not given therein may be read as law.

An amendment made to the constitution under Article 368 shows another aspect of Article 13 that generated a debate as whether they are law within the meaning of given in the Article. Be that as it may, there is no denying the fact that the use of the term law under Article 13 shows its chameleonic character. It can be seen as changing its colour with the variations of context. Despite the shortcomings that give rise to misgivings in the understanding of its import, Article 13 shows how beautifully the framing of the article has been done, taking note of all the seeming implications that may impede any effort to effectuate the goals of fundamental rights under Part III.