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THE DOCTRINE OF ECLIPSE IN CONSTITUTIONAL LAW: A CRITICAL REAPPRAISAL OF ITS CONTEMPORARY SCOPE AND RELEVANCE

Sushila Rao*

This paper delineates the evolution of the Doctrine of Eclipse through judicial pronouncements by exploring its fundamental premises, and then delves into the contentious issue of extending its applicability to post-Constitutional laws. Eminent jurists posit themselves on opposing extremes of the academic spectrum on this point, and contradictory judicial pronouncements add to the confusion. The author submits that much of this debate has centered around whether any distinction can be made between laws void for lack of legislative competence and those void for violating constitutional limitations on legislative power, and whether the word "void" in Article 13(2) is to be accorded a meaning different from the meaning attached to it in Article 13(1); and seeks to explore these controversies in an attempt to clarify the current legal position. Finally, the author seeks to highlight one of the most crucial, yet, in India, often ignored features of the Doctrine, namely, its relevance as a tool for resolution of Centre-State disputes under Articles 251 and 254, and to reflect on whether it has outlived its utility.

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I. INTRODUCTION

"Judicial Review" is defined as the interposition of judicial restraint on the legislative and executive organs of the Government.¹ It is the "overseeing by the judiciary of the exercise of powers by other co-ordinate organs of government with a view to ensuring that they remain confined to the limits drawn upon their powers by the Constitution."² The concept has its origins in the theory of limited Government and the theory of two laws - the ordinary and the Supreme (i.e., the Constitution) - which entails that any act of the ordinary law-making bodies that contravenes the provisions of the Supreme Law must be void, and there must be some organ possessing the power or authority to pronounce such legislative acts void.³

With the adoption of a written Constitution and the incorporation of Part III conferring Fundamental Rights therein, it was inevitable that the validity of all

¹ H.K. SAHARAY, *THE CONSTITUTION OF INDIA: AN ANALYTICAL APPROACH* 57 (2001).

² S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA* 1 (2002).

³ See M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 1822-23 (2003) [hereinafter Jain]. See generally the historic case of *Marbury v. Madison*, 2 US L. Ed. 60 (1803), which established this doctrine in the United States. Constitutional supremacy is an accepted canon of Constitutional law, and is enshrined in Constitutions the world over. For instance, Article 98 of the Japanese Constitution provides:

This Constitution shall be the Supreme Law of the State, and no public law or ordinance or Imperial transcript or other act of Government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

CONSTITUTION OF JAPAN, available at <http://www.solon.org/Constitutions/Japan/English/english-Constitution.html> (last visited March 18, 2006).

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laws in India would be tested on the touchstone of the Constitution. Nevertheless, the Constitution-makers included an explicit guarantee of the justiciability of fundamental rights in Article 13,⁴ which has been invoked on numerous occasions for declaring laws contravening them void. Courts have evolved various doctrines like the doctrines of severability, prospective overruling, and acquiescence, for the purposes of effecuating this Article.⁵ The Doctrine of Eclipse (“the Doctrine”) is one such principle, based on the premise that fundamental rights are prospective in nature. As a result of its operation, “an existing law inconsistent with a fundamental right, though it becomes inoperative from the date of commencement of the Constitution, is not dead altogether.”⁶ Hence, in essence, the Doctrine seeks to address the following quandary: If a law is declared null and void for infringing on a fundamental right, and then that fundamental right is itself amended such that the law is purged of any inconsistency with it, does the law *necessarily* have to be re-enacted afresh, or can it revive automatically from the date of the amendment? In other words, what is the precise nature of the operation of the Doctrine in the face of the general rule that a Statute void for unconstitutionality is *non-est* and “notionally obliterated” from the Statute Book?⁷ Inherent in the application of the Doctrine to such questions is the predicament of conflicting priorities. What is to be determined here is whether, for the purpose of avoiding the administrative difficulties and expenditure involved in re-enacting a law, a law which was held void on the very sensitive and potent ground of violation of fundamental rights should, under special circumstances be permitted to revive automatically. This also raises some profound questions about legislative competence and the interference of courts in law making. These are the issues that this paper seeks to address. In doing so, the first part of this paper definitively traces the origin and fruition of the Doctrine through judicial pronouncements,

⁴ CONSTITUTION OF INDIA, 1950, Article 13 reads:

13. Laws inconsistent with or in derogation of the fundamental rights.

(1) All laws in force in the territory of Indian 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.

⁵ V.N. SHUKLA’S THE CONSTITUTION OF INDIA 29-32 (M.P. Singh ed., 2001).

⁶ P. RAMANATH AIYAR’S THE LAW LEXICON 585 (Justice Y.V. Chandrachud et al. eds., 2002). See the Supreme Court’s discussion of the doctrine in *Bhikaji Narain Dhakras v. State of Madhya Pradesh*, A.I.R. 1955 S.C. 781.

⁷ See Venkataraman, *The Status of an Unconstitutional Statute*, 2 J. IND. L. INST. 401 (1960).

by exploring its fundamental premises. The second part delves into the litigious issue of extending its applicability to post-Constitutional laws.

An extremely vital aspect of the Doctrine – which, in India, has thus far been largely overlooked by legal theorists and practitioners alike – is its crucial role in the *federal framework*. A survey of the principal federations in the Anglo-American world shows that the Doctrine has been used primarily in cases where the enacting legislature undoubtedly had the power to enact a law, but the law was rendered inoperative because of supervening impossibilities, arising in the form of other incompatible laws enacted by legislatures having superior powers to enact such laws. A complete demarcation of powers between the federal and state spheres is neither feasible nor desirable in a federal polity. Necessarily, therefore, there must be provision for a sphere wherein concurrent powers are exercised by the federal and the state legislatures. It is in this area, that occasions for the use of the Doctrine have arisen. Since both legislatures undoubtedly have the competence to enact laws, in case both of them choose to exercise their powers, intriguing constitutional questions arise as to the status of the “lesser” State law. Is it rendered null and void, or does the possibility of its prospective revival subsist? Here, the Doctrine serves as a convenient mechanism for resolving potential Centre-State disputes, in the event of repugnancy between Central and State Acts. Drawing upon the analysis of the working of the Doctrine in the area of fundamental rights violations, this absorbing facet will also be examined in detail by the author in the final part of this paper.

II. TRACING THE GENESIS AND EVOLUTION OF THE DOCTRINE

A. The Decision in Keshavan

In India, the Doctrine of Eclipse has been referred to, most frequently, in cases involving alleged violations of fundamental rights. Questions regarding the retrospectivity of these rights and the import of the word “void” in Article 13(1) of the Constitution, came up for deliberation in the leading case of *Keshavan Madhava Menon v. State of Bombay*,⁸ wherein a prosecution proceeding was initiated against the appellant under the Indian Press (Emergency Powers) Act, 1931, in respect of a pamphlet published in 1949. The present Constitution came into force during the pendency of the proceedings. The appellant pleaded that the impugned section of the 1931 Act was in contravention of Article 19(1)(a) of the

⁸ A.I.R. 1951 S.C. 128.

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Constitution, and by virtue of Article 13(1), was void. Hence, it was argued that the proceedings against him could not be continued. This case raised several challenging issues with respect to the Doctrine, as analysed below.

(i) The Retrospectivity of Fundamental Rights

It is now well settled that the Constitution has no retrospective effect.⁹ However, one of the basic questions related to the origin of the Doctrine of Eclipse that was raised in *Keshavan*, was whether fundamental rights are retrospective in operation. Article 13(1) provides that all pre-Constitutional laws, in so far as they are inconsistent with fundamental rights, are void. If fundamental rights are retrospective, then all pre-Constitutional laws inconsistent with fundamental rights must be void *ab initio*.

On this point, in *Keshavan*, both Das and Mahajan, JJ., maintained that fundamental rights, including the freedom of speech and expression, were granted for the first time by the Constitution and that in September 1949, when proceedings were initiated, the appellant did not enjoy these rights.¹⁰ Hence, it was established that, as fundamental rights became operative only on, and from the date of the Constitution coming into force, the question of inconsistency of the existing laws with those rights must necessarily arise only on and from such date.

(ii) The Prospective Nature of Article 13(1)

Turning specifically to Article 13(1), the Court further held that every statute is *prima facie* prospective unless it is expressly or by necessary implication made retrospective. According to him, there was nothing in the language of Article 13(1), to suggest that there was an intention to give it retrospective operation. In fact, the Court was of the opinion that the language clearly points the other way. It was therefore held that Article 13(1) can have no retrospective effect, but is wholly prospective in operation.¹¹ This interpretation has been upheld in subsequent cases.¹²

⁹ *State of Bombay v. F.N. Balsara*, A.I.R. 1951 S.C. 318; *Syed Qasim Razvi v. State of Hyderabad*, A.I.R. 1953 S.C. 156.

¹⁰ *Keshavan*, *supra* note 8, at 130.

¹¹ *Keshavan*, *supra* note 8, at 130.

¹² *See, e.g.*, *Purshottam Govindji Halai v. B.M. Desai*, A.I.R. 1956 S.C. 20; *Pannalal Binjraj v. Union of India*, A.I.R. 1957 S.C. 397.

(iii) Meaning and implication of “void” in Article 13(1)

In the Supreme Court, the majority, while maintaining that the proceedings under the impugned law could not be quashed, rejected the High Court’s view that the meaning of the word “void” in Article 13(1) amounts to “repeal” of the statute. It was held that the effect of Article 13 is quite different from the effect of the expiry of a temporary statute or its repeal by a subsequent statute. Article 13(1) only has the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal binding force or effect, with respect to the exercise of fundamental rights, on and after the date of the Constitution’s commencement. According to Das J.:

Article 13(1) cannot be read as obliterating the entire operation of the inconsistent laws, or to wipe them out altogether from the statute book, for to do so will be to give them retrospective effect which, we have said, they do not possess. Such laws *exist for all past transactions* and for enforcing all rights and liabilities accrued before the date of the Constitution.¹³ [emphasis added.]

B. Post-Keshavan: Evolution of the Doctrine through Case Law

One of the earliest cases that dealt with the nexus between Article 13(1) and validation of pre-Constitutional laws infringing on fundamental rights was *Behram Khurshid Pesikaka v. State of Bombay*.¹⁴

In this case, the appellant was charged under Section 66(b), Bombay Prohibition Act, 1949 for driving under the influence of alcohol. However, in an earlier case, *State of Bombay v. F.N. Balsara*,¹⁵ section 13(b), Bombay Prohibition Act, 1949, was declared to be void so far as it affected the consumption or use of medicinal and toilet preparations containing alcohol, as it was violative of Article 19(1)(f). It was contended by the appellant in *Behram*, that since in *Balsara* the prohibition on possession and consumption of medicinal and toilet preparations containing alcohol was held to be invalid, therefore, section 66(b) was inoperative and unenforceable so far as such items were concerned. Therefore, the question to be considered in *Behram*, was the effect of the declaration in *Balsara* on the

¹³ *Keshavan*, *supra* note 8, 130.

¹⁴ A.I.R. 1955 S.C. 123.

¹⁵ A.I.R. 1951 S.C. 318.

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Bombay Prohibition Act, 1949. At the initial stage, the Supreme Court judges unanimously agreed that a declaration by a court that part of a section was invalid, did not repeal or amend that section, or add a proviso or exception to it, since repeal or amendment was a legislative function.¹⁶ This compelling constitutional question was, however, referred to a larger Bench, where Mahajan, C.J., held that the part of the section of an existing law which is unconstitutional is not law, and is null and void. It is *notionally obliterated* from the Statute book for the purposes of determining the rights and obligations of citizens. However, the same remains good law when a question arises for determination of rights and obligations incurred before 26 January, 1950.¹⁷ Das, J. dissented and was of the opinion that the effect of *Balsara* was that the prohibition contained in the relevant part of Section 13(b) would be ineffective against, and inapplicable to, a citizen who consumes or uses medicinal and toilet preparations containing alcohol. However, he was opposed to Mahajan, C.J.'s idea that, this part of the section can be taken to be notionally obliterated from the Statute book. The very basis of the *Balsara* declaration, according to him, was that a citizen has the fundamental right to possess or consume medicinal and toilet preparations containing alcohol. Hence, the onus is on the accused to prove that the section which has been declared void should not be applicable to him. If the accused is able to prove that he is a citizen, the *Balsara* decision will ensure that he is not punished.

Authors like Seervai, have severely criticized the reasoning followed by Mahajan, C.J., because of his use of the term "notionally obliterated." According to Seervai, if the view of the Court in *Keshavan* that the term "void" does not mean "repealed", and that Article 13 cannot be read as obliterating the entire operation of inconsistent laws, is taken to be correct, then there is no scope for an unconstitutional provision to be "notionally obliterated."¹⁸ Thus, according to Seervai, the dissenting judgment of Das, J. is the correct statement of the law.

C. The Propounding of the Doctrine

The prospective nature of Article 13(1), and the limited connotation accorded to the word "void" in *Keshavan*, which was expounded by Das, J. in *Behram*, necessitated the enunciation of the Doctrine of Eclipse in the leading case of *Bhikaji Narain Dhakras v. State of Madhya Pradesh*.¹⁹ In this case, the

¹⁶ *Behram*, *supra* note 14. See generally H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 411 (1993) [hereinafter SEERVAI].

¹⁷ *Behram*, *supra* note 14, at 145.

¹⁸ *Seervai*, *supra* note 16, at 412.

¹⁹ A.I.R. 1955 S.C. 781. See JAIN, *supra* note 3, at 992 (2003).

impugned provision allowed for the creation of a Government monopoly in the private transport business. After the coming into force of the Constitution, this provision became void for violating Article 19(1)(g) of the Constitution. However, Article 19(6) was amended in 1951, so as to permit State monopoly in business.²⁰

It was argued on behalf of the petitioners that the impugned Act, being void under Article 13(1), was dead and could not be revived by any subsequent amendment of the Constitution, but had to be re-enacted. This contention was rejected by a unanimous decision of the Supreme Court, which laid down that after the amendment of Article 19(6) in 1951, the constitutional impediment was removed. The Act, therefore, ceased to be unconstitutional, and became revived and enforceable.²¹

The crux of the decision was the observation that an *existing law* inconsistent with a fundamental right, though inoperative from the date of commencement of the Constitution, is not dead altogether. According to some authors, it "is a good law if a question arises for determination of rights and obligations incurred before the commencement of the Constitution, and also for the determination of rights of persons who have not been given fundamental rights by the Constitution."²² In this context, Das, C.J., held:

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.²³

He reiterated that such laws remained in force *qua* non-citizens, and it was only against the citizens that they remained in a dormant or moribund condition. This case was thus the foundation of the Doctrine, which has since been the subject of judicial contemplation in numerous decisions.

²⁰ *Bhikaji Narain Dhakras*, *id.* at 782.

²¹ *Bhikaji Narain Dhakras*, *supra* note 19, at 784. See also Dr. Pam Rajput, *Articles 14 to 18*, in *CONSTITUTIONAL LAW OF INDIA* 213 (M. Hidayatullah ed., 1986).

²² SHUKLA, *supra* note 5, at 31. According to Seervai, this judgment in substance overrules the judgment of Mahajan, C.J., in *Behram*, A.I.R. 1951 S.C. 123. See SEERVAI, *supra* note 16, at 413.

²³ *Bhikaji*, A.I.R. 1955 S.C. 781, 784-85.

III. THE UTILITY OF THE DOCTRINE OF ECLIPSE IN THE REALM OF POST-CONSTITUTIONAL LAWS

A. Can the Doctrine be Applied to Post-Constitutional Laws?

In the author's opinion, *three* questions must be answered, in order to gauge the applicability of the Doctrine to post-Constitutional laws. First, can a post-Constitutional law be revived by a subsequent Constitutional amendment removing the Constitutional bar to its enforceability? Second, if a post-Constitutional law violates rights conferred on citizens alone, (and thus becomes void *qua* them), does it remain valid and operative *qua* non-citizens like foreigners and companies? Finally, can amending the Act in question so as to remove the blemish revive the law in question, or will it have to be re-enacted as a whole? This Part will examine each of these questions in detail.

In *Saghir Ahmed v. State of U.P.*,²⁴ a Constitution Bench of the Apex Court unanimously stated that the Doctrine could *not* applied to the impugned post-Constitutional law. A legislation that contravened Article 19(1)(g) and was not protected by clause (6) of the Article, when it was enacted after the commencement of the Constitution, could not be validated even by subsequent Constitutional amendment.²⁵

However, the following observation of Das, C.J. in *Bhikaji*, has generated much perplexity on the issue:

But apart from this distinction between pre-Constitution and post-Constitution laws on which, however, we need not rest our decision, it must be held that these American authorities can have no application to our Constitution. All laws, existing or future, which are inconsistent with the provisions of Part III of 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

²⁴ A.I.R. 1954 S.C. 728.

²⁵ In this context, Prof. Cooley has famously observed:

A statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted.

See COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES 201 (1927). This contention was accepted in this case as sound.

purposes. They existed for the purpose of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against non citizens.²⁶

The “American authorities” referred to in this case by the Supreme Court involved only post-Constitutional laws which were inconsistent with the provisions of the American Constitution, and which were held to be “still born”, as it were. Thus, these American rulings clearly could not apply to the case of pre-Constitutional laws that were perfectly valid before the Constitution’s provisions took effect. Nevertheless, this observation has been used to contend that the Court has not drawn any distinction between pre- and post-Constitutional laws.²⁷ The author submits, however, that in the latter part of the observation, the Court had in mind only the pre-Constitutional laws, otherwise it could not have stated that the laws existed for the purpose of pre-Constitutional rights and liabilities and that they remained operative *even after* the Constitution as against non-citizens.

In *Deep Chand v. State of U.P.*²⁸ it was held that there is a clear distinction between the two clauses of Article 13. Under clause (1) a pre-Constitutional law subsists except to the extent of its inconsistency with the provisions of Part III, whereas as per clause (2), no post-Constitutional law can be made contravening the provisions of Part III and therefore the law to that extent, though made, is a nullity from its inception.

*Mahendra Lal Jaini v. State of U.P.*²⁹ is the most authoritative decision for the impossibility of reviving post-Constitutional laws by a Constitutional amendment. The Court based its finding on the two grounds. First, the language and scope of Article 13(1) and 13(2) are different. Clause (1) clearly recognizes the existence of pre-Constitutional laws which were valid when enacted, and therefore could be revived by the Doctrine. Clause (2) on the other hand begins with an injunction to the State not to make a law which takes away or abridges the rights conferred by Part III.³⁰ The legislative power of Parliament and State Legislatures under Article 245 is subject to the other provisions of the Constitution and therefore, subject to Article 13(2). Second, “contravention” takes place only once the law is made. This is because the contravention is of the prohibition to make

²⁶ *Bhikaji*, A.I.R. 1955 S.C. 781, 783.

²⁷ SEERVAI, *supra* note 16, at 413.

²⁸ A.I.R. 1959 S.C. 648.

²⁹ A.I.R. 1963 S.C. 1019.

³⁰ *Id.* at 1029.

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any law, which takes away or abridges the fundamental rights. It is no argument to say that simply because the Amendment removes any subsequent scope for contravention, the law is no longer in conflict with the Constitution.

However, the scope of the principles established above stands drastically curtailed in view of the Supreme Court decision in *State of Gujarat v. Shree Ambica Mills*,³¹ wherein Matthew, J. held that like a pre-Constitutional law, a post-Constitutional law contravening a fundamental right could also be valid in relation to those, whose rights were not infringed upon. For instance, when a post-Constitutional law violates a fundamental right like Article 19 which is granted to citizens alone, it would remain valid in relation to non-citizens.³² Thus the term "void" in both the clauses of Article 13 makes a law only relatively void, and not absolutely void.

This judgment has been used to contend that the Doctrine has finally been extended to all post-Constitutional laws as well, since it recognizes that the law is not an absolute nullity and can operate against non-citizens.³³ The author submits that this is not the correct proposition of law. It is evident that a law which abridges the rights of only citizens will remain enforceable against non-citizens, and thus, there is no question of the Doctrine of Eclipse even entering the picture. However, as regards citizens whose rights were infringed, the law must be regarded as still-born and void *ab initio*, and therefore, in order to make it apply to citizens, the law would have to be re-enacted afresh.

From this arises the final question: When a post-Constitutional law is held inconsistent with a fundamental right, can it be revived by amending the Act in question so as to remove the blemish, or will it have to be re-enacted as a whole? The Delhi High Court in *P.L. Mehra v. D.R. Khanna*,³⁴ has held that the legislation will have to be re-enacted and that it cannot be revived by mere amendment. This view appears to the author to emanate logically from the position adopted by the Supreme Court in treating such a law as void *ab initio*. There is, therefore, no need to apply the Doctrine of Eclipse to post-Constitutional laws, as discussed above. There is no direct Supreme Court ruling on this point. The closest authority on this issue is *Shama Rao v. State of Maharashtra*,³⁵ wherein an Act was challenged on the ground of excessive delegation, and pending the decision, the Legislature

³¹ A.I.R. 1974 S.C. 1300.

³² *Id.* at 1309-11.

³³ See generally V.S. DESHPANDE, JUDICIAL REVIEW OF LEGISLATION (1977).

³⁴ A.I.R. 1971 Del. 1.

³⁵ A.I.R. 1967 S.C. 480.

passed an Amendment Act seeking to remove the defect. The Supreme Court ruled by a majority that when an Act suffers from excessive delegation, it is still-born and void *ab initio*. It cannot be revived by an amending Act seeking to remove the vice, and must be re-enacted as a whole. It is submitted that this ruling supports the proposition that an Act held invalid under Article 13(2) would not be revived merely by amending it, but would have to be re-enacted. Hence, we may safely infer that *Ambica Mills* does not destroy the force of the judicial pronouncements in *Deep Chand* and *Mahendra Jaini*, but merely limits the scope of their operation, and that the Doctrine, as of now, cannot be extended to post-Constitutional laws.

B. The Repercussions, if any, of the “Degree” of Unlawfulness of the Impugned Legislation

It must be noted that underlying the Doctrine of Eclipse is the fundamental distinction mandated by the rule of law, i.e., the distinction between the lawful and the unlawful. Given that the *ultra vires* doctrine is the “central principle of administrative law”,³⁶ the obvious way in which the distinction between lawful and unlawful is expressed, is through the proposition that a decision-maker who decides unlawfully, does an act which he has no power to do; this act is therefore, in law, no act at all. It is invalid or simply void, and hence incapable of being revived posthumously, so to speak.

However, at this juncture, we might also take note of a particular strand of opinion being voiced in England, according to which it is “apparently equally clear that an unlawful decision is often effective until set aside by a court of competent authority. And, if that unlawful decision is not successfully challenged, it will turn out to be as good as the most proper decision.”³⁷ As Lord Radcliffe put it, in the leading case of *Smith v. East Elloe Rural District Council*,³⁸ unless “the necessary proceedings are taken at law to establish the cause of invalidity [an unlawful act] will remain as effective for its ostensible purpose as the most impeccable of orders.”³⁹ Thus, it is claimed, that in this sense every unlawful administrative act, however invalid, is merely voidable.

³⁶ CHRISTOPHER FORSYTH & H.W.R. WADE, ADMINISTRATIVE LAW 41 (1994) [hereinafter WADE & FORSYTH].

³⁷ Christopher Forsyth, *The Metaphysic of Nullity*, in THE GOLDEN METWAND AND THE CROOKED CORD: ESSAYS IN HONOUR OF SIR WILLIAM WADE QC 142, 144 (Christopher Forsyth & Ivan Hare eds., 1998) [hereinafter Forsyth].

³⁸ [1975] A.C. 295.

³⁹ *Id.* at 366.

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[T]he truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances...[Otherwise], the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another... 'Void' is therefore meaningless in any absolute sense. Its meaning is relative depending upon the court's willingness to grant relief in any particular situation.⁴⁰

Simply put, the crucial idea is that "unlawful acts, which are undeniably non-existent *in law*, do exist *in fact*. That factual existence may be perceived as legal existence; and individuals may understandably take decisions on that basis."⁴¹ The obvious implication for our purposes is that a post-Constitutional law in contravention of fundamental rights must therefore be seen not as void *ab initio* or a nullity, but merely voidable, and hence, capable of being revived under the Doctrine.

However, even if one accepts that a piece of legislation can be treated as void only after an affirmative declaration to that effect by a court of law, the author submits that once a court has declared that an act is legally a nullity, the Doctrine of *Ultra Vires* necessarily implies that the resultant situation is "*as if nothing had happened*."⁴² Thus, to hold that the mere fact of the existence of a particular unconstitutional law on the statute books, prior to its being challenged and struck down, gives it a *de jure* status that can subsequently be revived by the Doctrine of Eclipse, would, in the author's judgment, render the core of the Doctrine of *Ultra Vires* - which is the all important distinction between the lawful and the unlawful - superfluous and nugatory. Such an interpretation is best dismissed outright.

However, it must be noted in this connection, that Indian courts have in the past tried to draw a distinction between laws void due to lack of necessary competence on the part of the Legislature, and those void due to constitutional prohibitions. According to Venkatarama Ayyar, J. in *Behram*, the legal effect of the declaration of unconstitutionality (and by implication, the applicability of the Doctrine), differs depending upon whether the constitutional prohibition that has been infringed affects the competence of the Legislature to enact the law, or whether it merely operates as a check on the exercise of a power which is within

⁴⁰ WADE AND FORSYTH, *supra* note 36, at 341-344 as cited in Forsyth, *supra* note 37, at 144.

⁴¹ Forsyth, *id.*

⁴² WADE & FORSYTH, *supra* note 36, at 43.

its competence.⁴³ It is only if the unconstitutionality is due to legislative incompetence, that such a law will be an absolute nullity. A distinction was also drawn between a Constitutional prohibition enacted for the benefit of the public generally, and that for individual benefit, the former being a nullity, the latter merely unenforceable.⁴⁴ However, Mahajan, C.J., speaking for the majority in *Behram*, had rejected this distinction outright. He was of the opinion that both declarations of unconstitutionality go to the root of the legislative power, and that there is no distinction between them. The rationale for this was that the legislative power of the Parliament and State Legislatures, conferred by Articles 245 and 246, are curtailed by Part III of the Constitution, dealing with fundamental rights, as has been clearly stated in Article 13(2). This sufficiently indicates that there is no competency in the Parliament or State Legislatures to make a law which comes into clash with Part III.⁴⁵

Nevertheless, Venkatarama Ayyar's, J. distinction was reiterated in *M.P.V. Sundararamier & Co. v. Andhra Pradesh*⁴⁶ and has been concurred with by the Bombay High Court. in *C.R.H. Readymoney Ltd. v. Bombay*.⁴⁷ After *Sundararamier*, however, the Supreme Court has disregarded this distinction. In *Basheshar Nath v. Commissioner, I.T.*,⁴⁸ Subba Rao, J. negated it, and reiterated this view in *Deep Chand v. State of U.P.*⁴⁹ He followed the same reasoning as was given by Mahajan, C.J. in *Behram*.

⁴³ *Behram*, A.I.R. 1955 S.C. 123, 156.

⁴⁴ An example of a constitutional prohibition enacted for the benefit of the general public is Article 301, in Part XIII of the Constitution, prohibiting restrictions on interstate trade and commerce, a law in violation of which would be a nullity. See *Behram*, *id.*

⁴⁵ *Behram*, *id.* at 145-146.

⁴⁶ A.I.R. 1958 S.C. 468, 489. What is interesting to note here is that for substantiating the argument that a law contravening the rights conferred upon the individual for his benefit is merely unenforceable and not a nullity, American authorities such as *Pierce v. Somerset Railway*, 171 U.S. 641, were used. However, that case dealt with a different issue, and the question of whether a subsequent change in the Constitution could revive the impugned law, did not arise.

⁴⁷ A.I.R. 1958 Bom. 181, at 187. It is pertinent to mention two American cases, which are believed to have laid the foundation for this distinction. In *Newberry v. United States*, (1921) 256 U.S. 232, it was held that if a statute is beyond the Legislature's legislative power, it is not valid without re-enactment (if subsequently, by constitutional amendment, the necessary legislative power is granted); whereas *Wilkerson v. Rahrer*, (1891) 140 U.S. 545, established that if an act within the general legislative power of the enacting body is rendered unconstitutional by reason of some adventitious circumstance, then it does not need to be re-enacted in order to be enforced, if this cause of its unconstitutionality is removed.

⁴⁸ A.I.R. 1959 S.C. 149.

⁴⁹ A.I.R. 1959 S.C. 648, 660.

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Amongst the eminent constitutional law jurists, Seervai initially seems to be unambiguously in favour of the distinction, and severely criticizes the decisions in *Basheshar and Deep Chand*.⁵⁰ However, it must be noted here that Seervai later makes a complete *volte-face* on this point while commenting on the case of *Minoos Framroze Balsara v. Union of India*.⁵¹ He not only appears to be against the very concept of eclipse, but also tries to play down the difference in unconstitutionality arising due to lack of legislative powers and constitutional prohibitions.⁵²

Thus, even Seervai has acknowledged that presently, the law *does not countenance* any such distinction, and hence, it may be unequivocally stated that the Doctrine, as presently envisaged, does not extend to the revival of post-Constitutional laws that have been struck down for infringing fundamental rights.

In this context, however, a reference may be made to the provisions of Article 31B, read with the Ninth Schedule of the Constitution.⁵³ In *A.K. Krishnaswamy v. State of Madras*,⁵⁴ the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 was struck down as unconstitutional for violating Articles 14, 19, and 31(2). Subsequent to the decision, the Act was added to the Ninth Schedule by the Constitution (Seventeenth Amendment) Act, 1964. The Act was again challenged in *L. Jagannath v. Authorised Officer*.⁵⁵ It was contended by the appellant that the Act, having been struck down as invalid by the Supreme Court in *Krishnaswamy*, was *non-est* and void *ab initio*, and that Article 31B could not validate it without the enactment of a separate validating Act. The Court held that such an Act, even though inoperative when enacted because of its inconsistency with a fundamental right, assumes full force and vigour retrospectively, as soon as it is included in the Ninth Schedule, and hence, it is not necessary to re-enact it.

Thus, the author submits that the same result will be achieved as regards the post-Constitutional laws by invoking Article 31B, read with the Ninth Schedule, as is achieved by the application of the Doctrine of Eclipse to pre-Constitutional laws.⁵⁶

⁵⁰ According to him, both these decisions of Subba Rao, J. were *per incuriam* because he had not referred to *Sundaramier*, which had clearly laid down this difference. See SEERVAI, *supra* note 16, at 251.

⁵¹ A.I.R. 1992 Bom. 375.

⁵² See 2 SEERVAI, *supra* note 16, at app. c.

⁵³ Article 31B, entitled "Validation of Acts and Regulations" may be invoked for curing the defects in a law enacted by the Legislature. This Article provides that any Act added to the Ninth Schedule shall not be deemed to be void or ever to have become void on the ground of its inconsistency with any of the fundamental rights, notwithstanding any decision of any court or tribunal.

⁵⁴ A.I.R. 1964 S.C. 1515.

⁵⁵ A.I.R. 1972 S.C. 145.

⁵⁶ See also, NARENDER KUMAR, CONSTITUTIONAL LAW OF INDIA 80 (1997).

IV. THE APPLICABILITY OF THE DOCTRINE TO CENTRE-STATE DISPUTES

Drawing upon the above analysis, the question of the operation of the Doctrine in the federal framework may now be considered. The Constitution of India envisages a singular mechanism for effecting adjustments in the framework of the distribution of powers, to introduce an element of flexibility in an otherwise inherently rigid federal structure. Some of these measures include the inclusion of a sizeable Concurrent List to break down to some extent, the impassable barriers between the exclusive Centre-State domains. A number of provisions (namely, Articles 249, 250, 252 and 253) that enable Parliament to validly legislate in the State sphere, are also in place.

It follows from the above that at times, repugnancy or inconsistency may arise between a validly enacted Central and State Act, thus resulting in a conflict. Repugnancy has been the subject of contemplation in many apex court judgments, and it may broadly be said to arise when the provisions of the two laws are fully inconsistent and are absolutely irreconcilable, such that it is impossible to obey one, without disobeying the other.⁵⁷

The framers of the Constitution, possibly mindful of such an eventuality, have provided certain inherent safeguards to resolve such inconsistencies and conflicts. The Constitution provides for resolution of inconsistency between a Union and a State law under two Articles, namely 251⁵⁸ and 254,⁵⁹ both of which

⁵⁷ *I.T.C. Ltd. v. Agricultural Produce Market Committee*, A.I.R. 2002 S.C. 852.

⁵⁸ CONSTITUTION OF INDIA, 1950, Article 251 reads:

251. Inconsistency between laws made by Parliament under Articles 249 and 250 and laws made by the Legislatures of States. – Nothing in Articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

⁵⁹ CONSTITUTION OF INDIA, 1950, Article 254 reads:

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States. – (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision

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indisputably establish that the Central law shall prevail over the repugnant State law.

However, the wording of these Articles has fuelled a raging controversy regarding the consequence of such repugnancy for the State law. Article 251 uses the expression “inoperative” and further qualifies it by stating “so long only as the law made by Parliament continues to have effect.” On the other hand, Article 254, uses the expression “void” in place of “inoperative” and does not contain any qualification like that contained in Article 251. *Prima facie*, this gives the impression that the effect of repugnancy in Article 251 is merely to render the repugnant State law inoperative, whereas under Article 254 the consequences are much more severe.⁶⁰ Indeed, in *M. Karunanidhi v. Union of India*,⁶¹ it was forcefully contended that repugnancy under Article 254 had the effect of impliedly repealing the subordinate law.

The pertinent questions to be considered, then, are: What is the effect of repugnancy? Does repugnancy result in the subordinate law (i.e., the State law, unless it has fulfilled the requirements of obtaining Presidential assent under Article 254(2)), becoming a total nullity, or does it make the subordinate law merely inoperative, such that it can again become operative once the repugnancy has been removed? Does it have the same outcome in the differing situations envisaged in Articles 251 and 254? Simply put, what is the scope for the applicability of the Doctrine of Eclipse, as enunciated earlier, in resolving such inconsistency between Union and State laws?

of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of State.

⁶⁰ ANIRUDH PRASAD, CENTRE-STATE RELATIONS 201 (1989).

⁶¹ A.I.R. 1979 S.C. 898.

A. The Interplay Between Articles 251 and 254(1)

Let us begin by dealing with the scope and effect of Article 251. According to Article 249, which allows Parliament to legislate on matters covered in the State List pursuant to a resolution passed by the *Rajya Sabha*, the law made by Parliament would cease to have effect six months after the resolution of the *Rajya Sabha* comes to an end (the resolution remains in force for one year, and may be renewed for a period not exceeding a year at a time). Similarly, no law of Parliament made under Article 250, which empowers the Parliament to legislate on matters covered in the State List during an Emergency, shall remain in force after six months from the expiry of the Proclamation of such Emergency. Hence, these provisions are necessarily of strictly temporary efficacy.⁶²

Though Parliament is thus empowered to legislate on matters in the State List, the State Legislature continues to have power to make laws, which it is empowered to make under the Constitution.⁶³ This is, however, subject to the rule of repugnancy laid down in Article 251, whereby the repugnant State law very clearly does not become void or *ultra vires*. It is merely inoperative and that too only to the extent of the repugnancy. When the Union law is repealed the State law will be revived.⁶⁴

The Supreme Court in *Mahendra Jaini*, has cited Article 251 as an example of the Constitution-makers using specific words like "inoperative" to express their intention of restricting the application of an Article to a particular time period. Hence, legislation by Parliament on a State subject under Articles 249 and 250 will be temporary legislation,⁶⁵ and laws passed by Parliament will not be kept on the statute book permanently. In other words, the repugnant State law has only been "eclipsed" by the temporary dominant Parliament law, and on its repeal, it automatically becomes operative once more, and need not be re-enacted.

However, there is disagreement over the fate of a State law that is repugnant under Article 254(1). While the decision in *M. Karunanidhi* is to the effect that no law found to be repugnant under Article 254 can be revived by a subsequent amendment or repeal of the dominant law,⁶⁶ the more common view is that such subordinate laws only remain in abeyance until the dominant law is repealed/

⁶² RAJPUT, *supra* note 21, at 274.

⁶³ SHUKLA, *supra* note 5, at 674.

⁶⁴ T.K. TOPE, CONSTITUTIONAL LAW OF INDIA 529 (1982).

⁶⁵ JAIN, *supra* note 3, at 630.

⁶⁶ See *M. Karunanidhi*, A.I.R. 1979 S.C. 898.

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amended.⁶⁷ It is worthwhile to examine the latter contention in view of the preponderance of jurists' opinions in its favour.

At the outset it must be said that it would not be proper to draw any firm conclusions merely on the basis of the use of different expressions in Articles 251 and 254. As seen in detail previously, the term "void" - at least as interpreted by Indian courts - does not necessarily translate into "total nullity", and must be construed in reference to the context in which it has been used by the Constitution makers.⁶⁸

Coming to Article 254(1), both the Parliament and the State Legislatures have the power to pass a law on any matter in the Concurrent list. Therefore, laws that come within the purview of Article 254(1) are not such as to be invalid for lack of legislative competence. But when two laws, equally valid, conflict with each other, one is subordinated to the other and is rendered void. This, however, only means that such law has become inoperative and is kept in abeyance so long as the conflict lasts.⁶⁹ The conflict can be removed by an amendment of either law, or by the disappearance from the scene of the dominant law. In such a case, there is no reason why the law, once void, should not revive and become operative.⁷⁰ This much can be said on the basis of principle. It is also borne out by case law.⁷¹

In the U.S.A. as well, it has been well settled that while an unconstitutional legislation is not a law, and in legal contemplation as though never enacted, yet this dictum does not apply to State statutes becoming inoperative because of their repugnance to federal statutes in the concurrent field. As early as 1819, in

⁶⁷ Several stalwarts figure in this list. See D.D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA (1965); JAIN, *supra* note 3; TOPE, *supra* note 64.

⁶⁸ See § II (A) above.

⁶⁹ BASU, *supra* note 67, at 205.

⁷⁰ *Id.*

⁷¹ In *Srikant Lal v. State of Bihar*, A.I.R. 1958 Pat 496, the Patna High Court expressed the view that a repugnant State law under Article 254 shall "remain in abeyance" until the Central law is repealed by Parliament, and as soon as the Central law disappears from the scene the State law will revive. Ramaswami, C.J. observed:

The true position is that the Provincial law was eclipsed or overshadowed by the Dominion legislation and as soon as the Dominion legislation ceased to operate, the shadow was removed and the Provincial law was vitalised and revived and made free from all blemish or infirmity.

Id. at 500.

Sturges v. Crowninshield,⁷² the question was whether the power of the State to make laws in respect of bankruptcy came to an end in the event of a federal enactment on the same subject even when the federal enactment was subsequently repealed. It was held that the State's power to make such a law in respect of bankruptcy was only suspended and not extinguished by the enactment of a federal law and consequently, when the federal law was repealed the repeal resulted in the removal of the disability to the exercise of such a power by the State. Thus *Sturges* can be taken to have laid down the principle that in the concurrent field, the exercise of the federal power merely renders the state legislatures' power inoperative.

In *Tua v. Carriere*,⁷³ the dictum of *Sturges* was followed though no reference was made to it. On similar facts, the Court held that the operation of State laws relating to bankruptcy was merely suspended till the repeal of the federal law, which repeal revived them. The Court held that the fact that the State law was enacted during the operation of the federal law did not invalidate it. It simply meant that the State law would take effect only on the repeal of the federal law. Thus it can be stated that in the concurrent sphere where both federal and the state legislatures have power to legislate, unconstitutionality of a State statute for incompatibility with a federal statute does not have the effect of wiping the State statute off the statute book; it merely results in suspending its operation. However, the author submits that the above approach is flawed by reason of its dogmatic stance that the State law can *always* be revived by virtue of the Doctrine of Eclipse, irrespective of whether it was passed prior to or following the passage of the relevant Central Act.

Notably, on the question of whether "void" in Article 254 (1) means void *ab initio*, that is, still-born, or simply invalid, the Supreme Court has, drawn a distinction between the law of a State made prior to an existing law or a law of Parliament, and laws made subsequently. While in the former case, the law of the State shall become invalid from the date on which the existing law or the Parliamentary law came into force and will be valid for past transactions, in the latter, the law will be void *ab initio*, and cannot be revived. Thus, drawing an analogy from Article 13(1) the Supreme Court, in *Deep Chand*, held that the State Act was valid for the purpose of all transactions before the commencement of the Union Act. It observed:

⁷² *Sturges v. Crowninshield*, 4 Wheat 122 (1819), cited from Zubair Ahmed Khan, *The Doctrine of Eclipse*, 7 (1) COCHIN UNIV. L. REV. 16 (1983).

⁷³ *Tua v. Carriere*, 117 U.S. 201, cited from Zubair Ahmed Khan, *The Doctrine of Eclipse*, 7 (1) COCHIN UNIV. L. REV. 16 (1983).

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Article 13(1), so far as it is relevant here, is in *pari materia* with Article 254(1). While under Article 13(1), all pre-constitution laws, to the extent of their inconsistency with the provisions of Part III are void; under Article 254(1) the State law to the extent of repugnancy to the law made by Parliament is void. If the pre-constitution law exists for the post-constitution periods for all past transactions, by the same parity of reasoning, the State law subsists after the making of the Union law, for past transactions.⁷⁴

Though there is no direct ruling on this point, if this analogy is carried further, then the State law made prior to the Parliament law should automatically revive after the repugnancy has been removed by an amendment or repeal of the Union law. The State law is simply *eclipsed* by an inconsistent law made by Parliament and as soon as the inconsistency is removed, the State law should again become operative. This is so in the case of the (analogous) inconsistency arising under Article 13(1).⁷⁵

The author submits that this approach is sound in view of the fact that the State Legislature had the competence to make the law at time that it did, and subsequent repugnancy with a law of Parliament cannot have the effect of denying it this initial competence.

However, where the State Legislature lacks the initial competence to pass the law, there can be no question of its revival by the doctrine of eclipse. In the Australian case of *Carter v. Egg and Egg Pulp Marketing Board*,⁷⁶ section 109 of the Australian Constitution, which provides that “when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”,⁷⁷ was under consideration. Commenting on that section, Latham, C.J. observed, that this section applied only where both laws were valid at inception, and if “either is invalid *ab initio* by reason of lack of power, no question can arise under the Section.”⁷⁸ Hence, if the State Legislature did not have the initial competence to pass the law in the face of an inconsistent Commonwealth law, it would be stillborn and incapable of revival by the Doctrine.

⁷⁴ Deep Chand v. State of U.P., *supra* note 28, at 680.

⁷⁵ D.J. DE, THE CONSTITUTION OF INDIA 167 (2002).

⁷⁶ (1942) 66 C.L.R. 557, 573. *See also*, *Ex parte Daniell*, (1920) 28 C.L.R. 23, 33.

⁷⁷ CONSTITUTION OF AUSTRALIA, § 109, available at <http://www.apf.gov.au/senate/general/constitution/> (last visited March 18, 2006).

⁷⁸ *Carter*, *supra* note 76.

Further, it is submitted that if the State law is made while an inconsistent existing law or law of Parliament is *already* in force, it would be null and void *ab initio* as still-born because the State Legislature in that case lacks the initial competence to make that law. This is because *there is no distinction, as discussed earlier, between an absence of competence, and a restriction on its exercise.*⁷⁹ Hence, there is no question of such a law coming into operation by a subsequent repeal of the law made by Parliament.

B. The Position Regarding Article 254(2)

Article 254(2) provides that a subsequent State law repugnant to an existing law or an earlier Union law, shall, if it receives the President's assent, prevail in that State. This clearly implies that the Central law shall remain operative in other States, and is, therefore, eclipsed only in that State, and should become operative and effective again as soon as the repugnancy is removed by an amendment or repeal of the State law by the State Legislature.

This proposition has been doubted by the Supreme Court in, what may be considered an *obiter*, in *M. Karunanidhi v. Union of India*.⁸⁰ The question was whether subsequent repeal of a State law, inconsistent with a prior Parliament law, which had obtained the assent of the President under Article 254(2), revives the law of Parliament in that State. The Court said:

It is true that the doctrine of eclipse would not apply to the constitutionality of the Central law and the only question we have to determine is whether there was such an irreconcilable inconsistency between the State and Central Acts that the provisions of the Central Acts stood repealed and unless re-enacted the said provisions cannot be invoked even after the State Act was itself repealed.⁸¹ [emphasis added.]

The author submits that this is not the correct view of the law, because a law, valid when enacted, should automatically revive when the shadow of the supervening law has been removed, by virtue of the Doctrine. This is also necessary to avoid a vacuum that might be created in a State after a State law has been repealed in that State, without a fresh legislation being passed. It would also be

⁷⁹ See § II (B) above.

⁸⁰ A.I.R. 1979 S.C. 898.

⁸¹ *Id.* at 903.

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highly incongruous if an Act applicable in other States required re-enactment for the purposes of one State.

V. CONCLUSION

The Doctrine of Eclipse exemplifies a subtle, nuanced aspect of the theory of Constitutionalism and the rule of law; and the fundamental distinction that it postulates between lawfulness and unlawfulness. It is used, in exceptional circumstances, to save unconstitutional statutes from being totally wiped off the statute book, and to merely render them dormant or inoperative for the time being. While ordinarily, a statute held unconstitutional cannot be revived except by re-enactment, a statute under eclipse is revived by obliteration of the limitations generating the taint of unconstitutionality.

The question of whether the Doctrine can be extended to revive post-Constitutional laws as well, has engendered acrimonious debate among jurists⁸² and judges⁸³ alike, and has also thrown up intriguing constitutional questions that beg for decisive judicial determination, such as the exact connotation of the word "void" in Article 13(1) and (2), and whether the American notion of "relatively void" is applicable to the Indian scenario. The fact of the matter is that there has been no unambiguous pronouncement by the Supreme Court on this issue following *Ambica Mills*, and thus far, the Doctrine of Eclipse has not been applied to post-Constitutional laws, a position with which the author is, as afore mentioned in this paper, inclined to agree.

It must be mentioned here that the Doctrine has been put to an entirely new use in our country, as compared to other Commonwealth jurisdictions. It has been extended far beyond the sphere of distribution of legislative power between the Centre and the States, and has been used as an instrument for harmonizing the pre-Constitutional legal order with the main dictates of the Constitution. It has

⁸² Seervai [SEERVAI, *supra* note 16], V.N. Shukla [SHUKLA, *supra* note 5] and T.K. Tope [TOPE, *supra* note 64] appear to be in favour of the revival of post-Constitutional laws by virtue of the Doctrine, whereas D.J. De [DE, *supra* note 75], M.P. Jain [JAIN, *supra* note 3], H.K. Saharay [SAHARAY, *supra* note 1] and D.D. Basu [BASU, *supra* note 67] have persuasively argued against it, citing the impossibility of reviving an Act which never had any valid existence.

⁸³ See, on the one hand, the decision of Matthew, J., in *Shree Ambica Mills*, A.I.R. 1974 S.C. 1300, which has been used to argue in favour of the revival of post-Constitutional laws, and on the other hand, the decision in *Mahendra Lal Jaini*, A.I.R. 1963 S.C. 109, which denies such a possibility. See also the majority judgment against the revival of post-Constitutional laws, in *P.L. Mehra v. D.R. Khanna*, A.I.R. 1970 Del. 1, and the dissenting opinion of V.N. Deshpande, J.

become an important tool of judicial interpretation, and has been applied to fields other than those contemplated by Article 13 as well - for example, in making a decree lying dormant executable,⁸⁴ or determining the caste of a person who reconverts to Hinduism from another religion,⁸⁵ or even to cases of rules, that is, subordinate legislation.⁸⁶ However, this is certainly at the expense of virtually ignoring its most significant application in contemporary times, that is, in the realm of pre-empting Centre-State disputes under Articles 251 and 254. Common sense also yields the inevitable result that after more than 50 years of the adoption of the Constitution, a Doctrine focusing on the fate of pre-Constitutional laws in contravention of the fundamental rights, will ultimately be consigned to the depths of obscurity. Furthermore, the true scope and implications of its application in the area of federal relations has not been fully comprehended as yet. It is the author's submission that, akin to the judiciary's interpretation regarding the use of the Doctrine to revive post-Constitutional laws, it should be conclusively laid down that in case the concerned State Legislature did not possess the initial competence to pass a law due to the prior existence of a repugnant Central law, the impugned law is to be treated as stillborn and incapable of revival.

We have seen that the Doctrine underlines the crucial distinction between "lawfulness" and "unlawfulness" in the sphere of constitutional law. However, it should also be noted that part of the rationale behind its invocation appears to have been to avoid the administrative hassles and the wastage of time and resources necessarily incurred in re-enacting a law or issuing a law afresh, by simply allowing an existing law, rendered unenforceable due to its contravention of fundamental rights, to revive automatically. However, it is pertinent to mention at this juncture that concerns might validly arise about whether the Doctrine *should* continue to be applied or not. This is simply because the Doctrine automatically revives laws. So, for example, were the Union to amend the Constitution with a particular goal, it would revive all the prior laws that were in conflict with the unamended Constitution, and these laws would be revived without having to pass through the debate and scrutiny which any law being re-enacted ordinarily has to undergo.

However, the author is of the view that despite such apprehensions, the potential benefits of the Doctrine, including economizing on the Legislature's time and expenditure, and, more importantly, resolving Centre-State disputes that are almost sure to arise under Articles 251 and 254, outweigh the "costs" associated with it. It follows, therefore, that the Doctrine has not outlived its utility.

⁸⁴ *Dularey Lodh v. III Additional District Judge, Kanpur*, A.I.R. 1984 S.C. 1260.

⁸⁵ *Kailash Sonkar v. Smt. Maya Devi*, A.I.R. 1984 S.C. 411.

⁸⁶ *Muhammadbhai v. State of Gujarat*, A.I.R. 1962 S.C. 1517.