
Schrödinger's Constitutional Cat: Limits of the High Court's Declaration of Unconstitutionality

Author(s): Shivprasad Swaminathan

Source: *National Law School of India Review*, 2013, Vol. 25, No. 1 (2013), pp. 100-118

Published by: Student Advocate Committee

Stable URL: <https://www.jstor.org/stable/44283623>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



is collaborating with JSTOR to digitize, preserve and extend access to *National Law School of India Review*

JSTOR

SCHRÖDINGER'S CONSTITUTIONAL CAT: LIMITS OF THE HIGH COURT'S DECLARATION OF UNCONSTITUTIONALITY

SHIVPRASAD SWAMINATHAN*

Following the confusion created regarding the territorial reach of the Delhi HC decision in Naz Foundation, Mr. Swaminathan argues that a thorough analysis of Article 226 of the Indian Constitution leads to one conclusion: a declaration of unconstitutionality of a Central statute by a state High Court renders the statute invalid only in that state. Likening it to Schrödinger's cat, the article highlights why the analysis cannot be restricted to Article 13 alone, but requires a larger jurisprudential and ontological justification. While the decision in Kusum Ingots is the current position in India, Mr. Swaminathan argues why this deserves to be reconsidered.

I. THE SCHRÖDINGER'S CAT IN PHYSICS AND LAW	100
II. THE PULL OF LOGIC, INTUITION AND THE LAW	102
III. A BRIEF HISTORY OF ARTICLE 226.....	106
IV. THE ONTOLOGY OF LAW AND DECLARATION OF UNCONSTITUTIONALITY....	109
V. WHAT THE LAW IS AND WHAT IT OUGHT TO BE.....	117

I. THE SCHRÖDINGER'S CAT IN PHYSICS AND LAW

Let's begin with a brief description of Erwin Schrödinger's famous theoretical experiment by a dummy, for the dummy. The experiment involved leaving a cat in a box, along with a bit of radioactive material, a vial of poison, a hammer and a Geiger counter (a device for detecting radiation). The Geiger counter would be so calibrated that when it sensed the decay of the radioactive material, it triggered a hammer which was so placed as to break the vial containing the poison, which, when released, would kill the cat. The decay of the radioactive material, being

* B.S.L, LL.B (Pune); B.C.L (Oxford); D.Phil (Oxford), Associate Professor (Jindal Global Law School). The author can be contacted at shiv.swaminathan@gmail.com.

Schrödinger's Constitutional Cat

a purely contingent event, may or may not happen; and there is no reliable way of predicting it. According to the Copenhagen interpretation of quantum physics, which the experiment was meant to illustrate, there are, in this case, two superpositions, both equally 'real', namely, the decay and non-decay of the radioactive material. It is only at the moment of observation that one of the two superpositions materialises by what was technically described as the 'collapse' of the wave function. Until the box is opened and the observation happens, "*there is a radioactive material that has both decayed and not decayed, a glass vessel of poison that is neither broken nor unbroken and a cat that is neither dead nor alive*".¹ The counterintuitive result of the experiment is that the cat is simultaneously both alive and dead in quantum superimposed states.

It is all very well for the quantum physics, notorious for its quirkiness, to throw up a paradox of coterminous being and not being, but could such a thing ever be possible in constitutional law? The equivalent of the cat in the constitutional context being a law enacted by the Parliament and equivalent of death here being the declaration of invalidity of the statute. The puzzle when translated to constitutional law comes to this—could a statute enacted by the Parliament be valid in one state and invalid in another? Would it be possible for the statute to be invalid only for the state, the High Court of which struck it down while remaining constitutionally valid for the rest of India? Can constitutional law allow for the equivalent of the Schrödinger's paradox?

In a legal system with 24 High Courts, one would expect this crucial question to rear its head often and thus to have been settled a long time ago. To be sure, the question does arise often. Surprisingly, however, for long there has been very little clarity on this subject and the area has been marked by a paucity of authoritative case law dispositive of the issue. The practitioner, perennially troubled by this question, has been happy to rest content with classifying it as one of those ubiquitous grey areas of the law which are universally acknowledged for their indeterminacy. The problem should be an even more pressing one for law enforcers. Should an official based in, say, Mumbai, charged with the task of enforcing a central statute, disregard it because the Madras High Court has declared the statutory provision in question to be unconstitutional? Indeterminacy here would necessarily lead to either official overreach or abnegation of a legal duty.

1 John Gribbin, *IN SEARCH OF SCHRÖDINGER'S CAT: QUANTUM PHYSICS AND REALITY*, 203-4 (1984).

II. THE PULL OF LOGIC, INTUITION AND THE LAW

It must be admitted straightaway that our intuitions pull strongly against allowing for the equivalent of the Schrödinger's paradox to infest constitutional law. Bracketing practical considerations for the moment, it would be neat and logical to hold that a statute declared unconstitutional by a High Court is unconstitutional for the rest of the country. The declaration of unconstitutionality assails the constitutional competence of the lawmaker in making the impugned law;² and once the lawmaking authority has been declared constitutionally incompetent, it is arguable that the law in question remains without constitutional sanction, irrespective of the part of India it is sought to be enforced in. Logically, nothing could be tidier. Our intuitions in this area are reinforced – and perhaps to a certain extent, induced – by the spatial metaphors we use in describing the effect of the declaration of unconstitutionality of a statute. A statute is thought to be – and is so described in the language of lawyers – ‘struck down’, when declared unconstitutional. The spatial metaphor suggests to us the image of an artefact (the impugned law) being struck down or annihilated. The sum of our intuitions here might suggest that a central statute when struck down by a High Court is annihilated and goes out of existence completely. What else could ‘striking down’ mean? Shouldn't the case of striking down of a statute be like lightning striking a tree in the middle of the field so that regardless of where on the field you look from, the tree is not in existence? Once in the sway of this metaphor, it is only a little step to holding that a legal norm which is struck down by either the Supreme Court or the High Court is annihilated. Just like a tree standing in the middle of a field brought down by lightning is annihilated; and that remains to be the case regardless of which corner of the field you happen to observe it from. Having supposed the spatial metaphor it would then be nothing short of fanciful to argue that despite being knocked down by lightning, the tree continues to stand if you are standing to the north of the field and looking from an angle of 45°, but not so if you standing to the south of the field. The spatial metaphor overwhelmingly discredits the Schrödinger's paradox in constitutional law. However, even a cursory glance at some of the effects of the unconstitutionality should cast the doubts on the plausibility of the picture suggested by the spatial metaphor. For instance, when a statute is struck down (let us assume, for the sake of simplicity, by the Supreme Court) for violation of Article 19(1)(a), the statute is not void for all effects and purposes. The statute continues to remain valid for non-citizens,

2 Here, for want of a better expression adequately capturing both, cases of lack of legislative competence and violation of Part III, I use the idea of ‘constitutional competence’ compendiously to include both types of cases.

since the protection of Article 19 is available only to citizens. Instances such as these should give pause to unreserved endorsements of the annihilation picture of unconstitutionality suggested by the spatial metaphors; and hint at something a lot more complex in play in a declaration of unconstitutionality. Furthermore, the scenario presented by a statute struck down for citizens remaining valid with respect to aliens at the very least illustrates the plausibility of a situation similar to the equivalent to the Schrödinger's paradox in constitutional law – where the law is simultaneously valid and invalid. Despite the familiarity of the situation described above, it would not be unfair to say that the annihilation picture of unconstitutionality underlies the intuitive understanding of what must transpire when a statute is struck down by a High Court.

This understanding can be sought to be placed on the secure footing of two constitutional provisions, namely, Article 13 and Article 226(2). It could be argued that when it comes to effect *qua* Article 13, the declaration of unconstitutionality by the High Court is no different from that of the Supreme Court. The effect of a declaration of unconstitutionality under Article 13 would have to be *in rem* i.e. binding on the world at large – and what kind of an *in rem* judgment would a High Court's declaration of unconstitutionality be if it were to have effect against the world at large, but only within the territorial confines of the state that it is a High Court of. Article 226(2) too could be invoked by reading it in a way that backs this thesis. Article 226(2) seeks to give extra territorial effect to the writs of the High Court in cases where part of the cause of action, at least in part, arises within the territorial limits of the state that it is the High Court of.³ Article 226(2) was inserted by the Fifteenth Amendment in 1963 specifically to make the central government (whose legal *situs* is in Delhi) amenable to the writs of High Courts throughout India. It could be argued that since Article 226(2) specifically extends the High Court's writ jurisdiction to the central government a declaration of unconstitutionality by the High Court, should not its obvious effect be to render a declaration of unconstitutionality of a central statute applicable throughout India?

From the background of nebulousness of authority on this issue, which has prevailed for long, one can discern the outlines of some kind of judicial opinion emerging favouring what has been described here as the intuitive position and

3 Article 226(1) provides that the writ of a High Court ordinarily runs only within the territorial limits of the state; Article 226(2) provides that the High Court has extra territorial reach over persons and authorities outside the state territory where the cause of action upon which the writ issues arises within its jurisdiction. The judgments which support unlimited territorial reach of a High Court's declaration of unconstitutionality, explicitly or implicitly rely on Article 226(2).

dismissing the possibility of something like the equivalent of the Schrödinger's paradox in constitutional law. The first is a judgment of the Bombay High Court in *Commissioner of Income Tax v. Godavari Devi*⁴ [*Hereinafter*, "Godavari Devi"] holding that the Madras High Court's declaration of unconstitutionality of a provision of the Income Tax Act has effect on income tax assessments in Maharashtra; then after a long gap of three decades, an *obiter dictum* of the Supreme Court in *Kusum Ingots v. Union of India*⁵ [*Hereinafter*, "Kusum Ingots"] which holds in the abstract, without reference to the earlier Bombay judgment, that the declaration of unconstitutionality of a central statute by a High Court has effect throughout India; and the most recent, a judgment of the Madras High Court in *Textile Technical Tradesmen Association v. Union of India*⁶ following the *obiter dictum* of the Supreme Court holding that the declaration of unconstitutionality of a central law by the Andhra Pradesh High Court has the effect of rendering the law unconstitutional throughout India. Each of these judgments seek to avoid the equivalent of the Schrödinger's paradox in constitutional law by holding that a declaration of unconstitutionality of a central statute by any of the 24 High Courts has the effect of rendering the law null and void for the rest of the country as well.⁷ The contrary proposition, allowing the paradox by holding that the declaration of unconstitutionality by a High Court has effect only within the territorial limits of the state that it is a High Court of doesn't have the backing of any direct authority.⁸

-
- 4 *Commissioner of Income Tax v. Godavari Devi*, [1978] 113 ITR 589 (Bom). In *A.M. Sali Maricar v. ITO* [1973] 90 ITR 116 (Mad), the Madras High Court struck down section 140A(3) of the Income Tax Act as *ultra vires* Article 19(1)(f) of the Constitution. The question in *Godavari Devi* was whether this was binding on the income tax officers in Maharashtra. The Bombay High Court held that unless the High Court of the state within which the authority operates hands down a contrary judgment, the declaration of unconstitutionality by the High Court of another state is binding. It was thus held that income tax authorities in Maharashtra are bound to proceed on the assumption that section 140A(3) is non-existent.
- 5 *Kusum Ingots v. Union of India*, (2004) 6 SCC 254, at 261:
The court must have the requisite territorial jurisdiction. An order passed on writ petition questioning the constitutionality of a Parliamentary Act whether interim or final keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act.
- 6 *Textile Technical Tradesmen Association v. Union of India*, (2011) 1 L.L.J. 297 (Mad).
- 7 None of the three judgments invoke Article 13.
- 8 One might be tempted to read Thakkar J.'s opinion in *Durgesh Sharma v. Jayashree*, (2008) 9 SCC 648 as supporting this contrary proposition. However, no such support is discernible. Thakkar J. only points out that the High Court doesn't have as extensive a jurisdiction as the Supreme Court; and that unlike the Supreme Court, there are territorial limits to the High Court's jurisdiction. From that observation alone, no

Despite the strong pull of intuitions and the weight of authority to the contrary, it will be argued here that something like the equivalent of Schrödinger's paradox ought to be the inevitable legal consequence of the declaration of unconstitutionality of a central statute by a High Court in India given the delineation of judicial authority in the Constitution. It will be argued that, on a proper jurisprudential analysis of the matter, when a High Court declares a central statute to be unconstitutional, like Schrödinger's cat it remains both valid (alive) and invalid (dead) concurrently: it is invalid in the state that the High Court belongs to, but remains valid in the rest of the country. The issue under discussion here gained some practical heat in the wake of the judgment of the Delhi High Court in *Naz Foundation v. Govt of NCT*⁹ [Hereinafter, "*Naz Foundation*"] partially striking down as unconstitutional, section 377 of the Indian Penal Code. In practical terms, the question under discussion here, then translated into whether the Delhi High Court's judgment in *Naz Foundation* prevented a police official in any of the other states from acting on section 377.¹⁰

It will be argued here that our intuitions in this matter tend to be scrambled and the spatial metaphors mislead. A statute doesn't exist like other objects in the physical world and the 'striking down' of the statute is not like the destruction of an object. Rather, it involves a complex web of interrelationship between agents in different functions of the government as a result of which we need not invoke something as mysterious and baffling as the Copenhagen interpretation to explain how a central statute remains simultaneously valid (in the rest of India) and invalid (in the state to which the High Court striking down the law belongs). A rather straightforward jurisprudential explanation would suffice. An explanation along these lines will be attempted in Section IV. The argument in Section IV however requires some scene setting by way of an explanation of the history of Article 226 which will be found in Section III.

inference can be drawn supporting the proposition that the High Court's declaration of unconstitutionality makes the central statute invalid only in the state which it is High Court of.

9 *Naz Foundation v. Government of NCT*, 160 Delhi Law Times 277.

10 See, Shivprasad Swaminathan, *All India Permit* INDIAN EXPRESS (9 July 2009), available at: <http://www.indianexpress.com/news/allindia-permit/487413/> (Last visited on 30 July 2013). I argued that the Delhi High Court's declaration of unconstitutionality of section 377 of the Indian Penal Code would be effective only for the territory of Delhi. Section 377 of the Indian Penal Code, I argued, remains intact for the rest of India until such time as the Supreme Court decides to strike it down. While I still continue to endorse that position, I support it with a different set of arguments and the addition of a qualification: what has been argued here ought to be the position of the law, though the actual position of law is the contrary, thanks to the Supreme Court's *obiter dictum* in *Kusum Ingots* which will remain binding until overruled by the Supreme Court itself.

III. A BRIEF HISTORY OF ARTICLE 226

In the present section it will be argued that the line of reasoning advanced in *Kusum Ingots* gives Article 226(2) a much wider scope than was intended by the Fifteenth Amendment which introduced it. For accomplishing this, tracing the history of Article 226 will be indispensable.

The original Article 226 was exhausted by what is now clause (1) of Article 226. It did not contain anything along the lines of clause (2) of Article 226. The Supreme Court was presented with the occasion to construe the original un-amended Article 226 for the first time in *Election Commission, India v. Saka Venkata Rao*¹¹ where it held that the power of the High Court to issue writs under Article 226 of the Constitution was subject to the two-fold limitation: (i) that such writs cannot run beyond the territories subject to its jurisdiction; and (ii) that the person or authority to whom the High Court is empowered to issue writs must be amenable to the jurisdiction of the High Court either by residence or location within the territories subject to its jurisdiction.

The issue came up for consideration again in *Lt. Col. Khajoor Singh v. Union of India*¹² [*Hereinafter*, "Khajoor Singh"] where a majority of a Constitution bench of the Supreme Court approved *Saka Venkata Rao*. Sinha C.J. delivering the judgment for the majority amplified on the reasoning inherent in *Saka Venkata Rao*. Sinha C.J., emphasising on the difference between 'location' and 'functioning' of the government, held that while the Union Government may be functioning all over India, only the High Court of the state within whose jurisdiction the government was 'located' could issue writs to it.¹³

A Government may be functioning all over a State or all over India; but it certainly is not located all over the State or all over India. It is true that the Constitution has not provided that the seat of the Government, of India will be at New Delhi. That, however, does not mean' that the Government of India as such has no seat where it is located. It is common knowledge that the seat of the Government of India is in New Delhi 'and the Government as such is located in New Delhi. The absence of a provision in the Constitution can make no difference to this fact.

11 *Election Commission, India v. Saka Venkata Rao*, 1953 SCR 1144.

12 1961 (2) SCR 828.

13 *Id*, at 840

Accordingly, Sinha C.J. opined that the Punjab High Court alone would have jurisdiction to issue writs against the Union Government, which was situated in Delhi.¹⁴ This position led to obvious difficulties for litigants in far flung parts of India seeking relief against the Union Government as Subba Rao J. noted in his dissenting judgment:¹⁵

If the contention of the respondents be accepted, whenever the Union Government infringes the right of a person in any remote part of the country, he must come all the way to New Delhi to enforce his right by filing a writ petition in the Circuit Bench of the Punjab High Court. If a common man residing in Kanyakumari, the southern-most part of India, his illegally detained in prison, or deprived of his property otherwise than by law, by an order of the Union Government, it would be a travesty of fundamental rights to expect him to come to New Delhi to seek the protection of the High Court of Punjab. This construction of the provisions of Article 226 would attribute to the framers of the Constitution an intention to confer the right on a person and to withhold from him for all practical purposes the remedy to enforce his right against the Union Government. Obviously it could not have been the intention of the Constituent Assembly to bring about such an anomalous result in respect of what they conceived to be a cherished right conferred upon the citizens of this country. In that event, the right conferred turns out to be an empty one and the object of the framers of the Constitution is literally defeated.

Subba Rao J. cited with approval, the opinion of Sapru J. of Allahabad High Court in *Maqbul- Un-Nissa v. Union of India*¹⁶ which he noted was decided 'without being oppressed' by the decision of the Supreme Court in *Saka Venkata Rao's*, having predated the latter judgment.¹⁷ In *Maqbul-Un-Nissa*, stating that the real test of jurisdiction under Article 226 ought to depend not upon where the headquarters or the capital of the government is situate but upon the fact of the functioning of the government whether union or state being within the territorial limits of this Court, Sapru J. noted that the words 'any government' in Article 226 indicated "that the founding fathers knew that more than one government would function within the same territory".¹⁸

14 The Delhi High Court came into existence in 1966. Before that, Delhi housed the circuit bench of the Punjab High Court.

15 *Khajoor Singh*, *supra* note 12, at 850.

16 *Maqbul- Un-Nissa v. Union of India*, I.L.R. [1953] 2 AR. 289.

17 *Khajoor Singh*, *supra* note 12, at 861.

18 *Khajoor Singh*, *supra* note 12, at 292.

With the Supreme Court's judgment in *Khajoor Singh* it was unequivocally settled that Article 226 granted jurisdiction on the basis of *location* of the government alone, regardless of its functioning or the effects of its actions. As a consequence, the fact that the cause of action arose within the territorial limits of the High Court, could not confer jurisdiction on it.¹⁹ To remedy the practical difficulties this caused – which were discussed by Subba Rao J. in his dissenting opinion – the Fifteenth Amendment Act 1963 introduced what now appears as clause (2) of Article 226. The Statements of Objects and Reasons of the Constitution (Fifteenth amendment Act) 1963 state:

Under the existing Article 226 of the Constitution, the only High Court which has jurisdiction with respect to the Central Government is the Punjab High Court. This involves considerable hardship to litigants from distant places. It is, therefore, proposed to amend article 226 so that when any relief is sought against any Government, authority or person for any action taken, the High Court within whose jurisdiction the cause of action arise may also have jurisdiction to issue appropriate directions, orders or writs.

The Supreme Court's reading of Article 226 in *Kusum Ingots* is unsatisfactory as it is not adequately sensitive to the history of Article 226. As discussed above, the sole purpose of Article 226(2) was to remedy the anomaly that arose due to the Supreme Court's restrictive interpretation of the original Article 226. The change made by Article 226(2) was to expand the High Court's jurisdiction to issue writs to the union government. It did this, not by making the union government amenable to the High Court's jurisdiction in all cases, but only in cases where the union government *functions* within the territorial limits of the High Court, regardless of the fact that the union government is *located* in Delhi.²⁰ Such a jurisdiction for the High Court had been specifically rejected by the Supreme Court's interpretation of the original Article 226 and this is precisely what the fifteenth amendment sought to introduce through Article 226(2). Article 226(2) certainly was not intended to give the High Court jurisdiction in all matters, regardless of whether it pertained to the *functioning* of the union government within its territories. More significantly,

19 *Surajmal v. State of Madhya Pradesh*, AIR 1958 M.P. 103. The Madhya Pradesh High Court held that the writ prayed for could not be issued so as to bind the Central Government because, "*the Central Government could not be deemed to be permanently located or normally carrying on its business within the jurisdiction of the High Court*". *Id.*, at 115.

20 To be sure, the language used in Article 226(2) is that of 'cause of action'. But this produces results identical to what would have been produced by use of the idea of 'functioning' of the government. The petitioner (appellant) in *Khajoor Singh* used the cause of action and functioning argument interchangeably.

Article 226(2) was not calculated to extend the High Court's jurisdiction to other state governments and its officials. Thus, a state government official in Maharashtra exercising powers (within Maharashtra) under a central statute does not become subject to the jurisdiction of the Madras High Court because the official does not *function* within the territorial limits of the Madras High Court. Underlying the Supreme Court's judgment in *Kusum Ingots* is a reading of Article 226(2) which extends the High Court's jurisdiction to cases *beyond* the ones where respondent government or official *functions* within its territories. If the proposition is taken to its logical conclusion, it would lead to the state official in Mumbai being subject to the jurisdiction of the Madras High Court.²¹ It will be argued in the following sections that this proposition is as unacceptable as the proposition which seeks to give the High Court's declaration of unconstitutionality effect throughout India as they both ultimately rest on the same premise. It will be argued in Section IV that to give effect to a High Court's declaration of unconstitutionality of a central statute, throughout the territories of India would amount to grant it jurisdiction over officials who do not *function* within the territories that it is the High Court of, in the teeth of the legislative history of Article 226(2). It will be argued that the territorial limits of a High Court's declaration of unconstitutionality are isomorphic with the territorial limits of its jurisdiction – because they both depend on the persons (officials) over which the jurisdiction extends. It will also be argued that the declaration of unconstitutionality does not have universal i.e. nationwide effect precisely because the High Court does not have nationwide jurisdiction.

IV. THE ONTOLOGY OF LAW AND DECLARATION OF UNCONSTITUTIONALITY

The law does not exist like artefacts in the physical universe. Unpacking the specific ontology of law calls for attention to the web of social relations that constitute a legal system.²² In the present section, we will begin with an account of the existence of laws based on H.L.A. Hart's *The Concept of Law* before setting out an account of declaration of unconstitutionality of law along Hartian lines.²³

21 And similarly be subject to the jurisdiction of all other High Courts.

22 H.L.A. Hart points out that when we speak of the existence or ontology of the law we refer "*in a compressed portmanteau form to a number of heterogeneous social facts*". H.L.A. Hart, *THE CONCEPT OF LAW*, 112 (2nd ed., 1994).

23 To be sure, Hart's account has its detractors; furthermore, one also finds diverse readings of Hart's account. In the limited space available here, however, it would not be possible to launch a satisfactory defence of the Hartian project or of my particular reading of it. The account of declaration of unconstitutionality sketched here attempts to

Hart argued that law is the union of primary and secondary rules.²⁴ Primary rules impose duties on people to behave in certain ways. Secondary rules, by contrast, pertain to the primary rules. Primary rules do not themselves settle which of them meet the criteria of legal validity and thus are to count as primary rules in the first place, or the solution in the event of a conflict between two or more primary rules. This is where the secondary rules assume significance. They lend an element of dynamism to the legal system of which they are a part by permitting it to solve problems that would arise were it to comprise exclusively of primary rules alone.²⁵ Hart identifies three types of secondary rules: rule of recognition, adjudication and change. Rules of recognition provide conclusive methods for ascertaining which primary rules meet the criteria of legal validity. Rules of change enable and regulate the process of altering, and repealing primary rules. Rules of adjudication empower some officials (courts) to make authoritative determinations of departures and violations. These three types of rule exhaust the realm of secondary rules for Hart.

In addition to the distinction between primary and secondary rules noted above, Hart drew another distinction – between the fundamental rule of the legal system and every other rule that falls within it including primary and secondary rules. Unhappily, he calls this master rule, the fundamental rule of recognition. Because of this terminological oddity, what we understand as the secondary rules of recognition, would be a logically lower when viewed in relation to the fundamental rule of recognition. In other words, the fundamental rule of recognition, among other things, sets out what the rule of recognition of the legal system is.²⁶ The fundamental rule of recognition is not some rule that ‘exists’, which can be acknowledged or fail to be acknowledged by the officials. Rather the acknowledgment by the officials in fact constitutes the rule of recognition: “*the rule of recognition is not stated but its existence is shown in the way in which particular rules are identified either by the courts*

approach the question with the aid of tools which figure prominently in Hart’s account though Hart himself never had the occasion to turn his attention to the question of declaration of unconstitutionality.

- 24 For a discussion of primary and secondary rules see Shivprasad Swaminathan, *The Philosophical Foundations of the Basic Structure Doctrine: Entrenchment or Defeasibility?* in Sanjay Jain and Sathya Narayan, *BASIC STRUCTURE CONSTITUTIONALISM*, 257 (2011).
- 25 Hart argues that a legal system with primary rules alone would be entirely static: *Supra* note 22, at 92.
- 26 This is a point at which Hart is most liable to be misunderstood. The literature about Hart seems to sparsely notice the difference between the fundamental rule of recognition and the rule of recognition, adjudication and change.

or other officials".²⁷ Just as a multiplication table is the result of the application of rules of multiplication, the existence of the fundamental rule of recognition is to be "established by reference to actual practice: to the way in which courts identify what is to count a law".²⁸ Perhaps Hart could have avoided the terminology of 'rules' in describing what is, in reality, a 'practice' that forms the core of the legal system. Hart ties up the existence of the fundamental rule of recognition to the existence of the legal system. Where there is a fundamental rule of recognition practiced by the officials we have the conditions 'necessary and sufficient' for the existence of a legal system.²⁹ Thus, what Hart calls the fundamental rule of recognition is simply a catalogue of what laws the top officials of a legal system – in which the courts play a very significant part—actually identify, apply and acknowledge to be the law.³⁰

Hart characterised the fundamental rule of recognition as laying down the test of what the law is in a particular legal system. He described the British rule of recognition, at the relevant time, as "*whatever the Queen in Parliament enacts is law*".³¹ From Hart's depiction of the British rule of recognition one might be tempted to treat the fundamental rule of recognition as synonymous with the Constitution itself, but this would not be right. The Constitution, or at least a written Constitution, can be amended by following the procedure set out in the Constitution (the rule of change), but the fundamental rule of recognition being grounded in a social practice is not open to amendment in such a manner. The Constitution is the amalgam of the rules of recognition, change and adjudication. In a legal system where the Constitution is supreme, the fundamental rule of recognition would roughly be to the effect: "*whatever the constitution prescribes is law*".³² Where there is a written Constitution, the rules of recognition, adjudication and change

27 *Supra* note 22, at 101.

28 *Supra* note 22, at 108.

29 *Supra* note 22, at 116.

30 In the postscript to the *Concept of Law*, Hart, overemphasising the role of the courts in constituting the fundamental rule of recognition, argues that the rule of recognition is constituted exclusively by the practice of the courts. But this cannot be right; the official functionaries in the other important organs of the government must play a role in constituting the rule of recognition: See *Supra* note 22, at 250, 258, 266-67.

31 *Supra* note 22, at 107.

32 In a legal system such as India's, the courts have a significant say in what the Constitution is. Thus the fundamental rule of recognition which effectively obtains in India could be characterised as: 'the Constitution as interpreted by the Supreme Court is Supreme'. This is a little less dramatic than Justice Charles Evan Hughes' statement of the American rule of recognition, "*We are under a Constitution, but the Constitution is what the judges say it is*". ADDRESSES OF CHARLES EVAN HUGHES, 185 (2nd ed., 1916).

are institutionalised since they are specified in the Constitution itself. The rules of recognition set out the criteria of legal validity, and hence pick out the set of legal rules for a particular legal system, because the law of a particular system just is the set of rules that officials of a certain system are under a duty to apply and the rules of recognition sets out the content of this duty.³³ As long as a rule bears the characteristics of legality set out in the rules of recognition, it exists and is legally valid. There is no requirement that each rule be separately practiced.³⁴ In addition to establishing the validity of all the primary rules, the rule of recognition of a given legal system exhaustively determines what count as laws of the legal system.

Since the legal system Hart had as his *analysandum* was the British one, he did not extend his analysis to declaration of unconstitutionality by the court.³⁵ However, though Hart did not turn his focus to constitutional review, the tools he employs to illuminate the nature of a legal system and the specific mode of existence of law are versatile enough to be profitably employed to yield an understanding of constitutional review and declaration of unconstitutionality of a statute. The analysis of unconstitutionality of statutes that follows here will be constructed from such Hartian tools. As we discussed earlier, the rules of recognition set out the criteria of legal validity, and hence pick out the set of legal rules for a particular legal system, because the law of a particular system is just the set of rules that officials of a certain system are under a duty to apply; the rules of recognition set out the content of this duty and impose on the officials a duty to apply the rules that pass the test of validity stipulated by the rules of recognition. The declaration of unconstitutionality involves the power to declare a norm to be *ultra vires* the Constitution; it is a declaration to the effect that the norm in question does not meet the criteria of validity specified in the rule of recognition and hence doesn't qualify to count as law.³⁶ Now, to whom is this declaration addressed and what is the content of this declaration? Being a directive that pertains exclusively to the rule of recognition, the declaration of unconstitutionality is addressed to the law officials who are under the duty to apply the rule in question and the content of the declaration is in the form of a directive to the officials to norm apply the rule in question.³⁷ In arriving at this result, the court applies the rule of recognition

33 Joseph Raz, *AUTHORITY OF LAW*, 93 (1979).

34 See, Kevin Toh, *Hart's Expressivism and his Benthamite Project* 11 *LEGAL THEORY* 75 (2005).

35 In the British legal system that Hart had before him, the notion of the sovereignty of the Queen-in-Parliament was axiomatic; constitutional review was thus something unthinkable in such a system.

36 This power or authority can be seen as deriving from the rule of adjudication.

37 It must be stressed that in arguing for this point, I do not seek to invoke the Kelsenian

to determine whether the statute meets the criteria of validity. Accordingly, a declaration of unconstitutionality involves a finding by the court that the legal norm in question does not meet the criteria of legal validity specified in the rule of recognition. Thus, contrary to the images that the misleading spatial metaphors such as 'striking down the law' invoke, the declaration of unconstitutionality is best understood as an exercise in negative law making; it can be understood as the promulgation by the courts, of a directive, to the effect that the law in question ought not to be applied. Now, how does all this apply to the case presently under discussion?

Perhaps the most important element of this analysis for our present purposes is likely to slip past unnoticed. To render the element conspicuous we need to zoom in a little on one of the aspects of our analysis, namely, the relationship between the issuers and recipients of the norm that constitutes the declaration of unconstitutionality. The analysis proposed here is likely to suggest that a declaration of unconstitutionality has the effect of issuance by the court of a norm to *all* officials in a legal system; or in other words, that all officials in the legal system are duty bound to comply with the declaration of unconstitutionality. It might also be thought to suggest that if a rule is declared as not passing the test of validity proposed the rule is invalid, *tout court*. It is of some significance to note that these conclusions are only reachable on one assumption that goes virtually unstated – and that pertains to the relationship of authority between the court and the officials. The assumption here is that the rules of recognition and adjudication combined give the court in question unquestionable authority over all the officials in the legal system; making all of them duty bound to follow the norm laid down by the court.³⁸ Perhaps this assumption can be seen as a vestige of the thrall in which the spatial metaphor of striking down a statute holds us. Let us for a moment

view that the law is an indirect system of guidance which does not tell subjects what to do but that it tells *officials* what to do to its subjects under certain conditions. For

Kelsen the legal duty not to steal is a norm addressed to officials to apply the norm which stipulates a sanction for stealing: See, Hans Kelsen, *General Theory of Law and State*, 61 (1945). What is being argued for here is the far less questionable claim that a determination of what primary rule does and does not counts as law under the rule of recognition is addressed to the officials, not the primary rule itself.

- 38 In strictly Hohfeldian terms, 'authority' is nothing but 'power' which is the jural correlative of 'liability', not 'duty'. Strictly speaking thus, the officials over whom the court has authority are 'liable' to follow the courts directives, not 'duty bound'. The use of 'liability' in this context however, is liable to cause some confusion. Hence, I will continue to use 'authority' and 'duty' as jural correlates. See, W.N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* 23 *YALE LAW JOURNAL* 16 (1913).

call this assumption into question. There is no *a priori* reason why a court which issues a directive of unconstitutionality should be thought to have authority over all officials in the legal system. This is purely a contingent matter for stipulation in the Constitution. It is perfectly possible for different courts to have authority in this matter over different officials, just as it is possible for a court to have authority over all officials in the system in the matter. This, delineation of authority in other words, is completely a matter of stipulation in the Constitution concerned.

To find out the effect of declaration of unconstitutionality by a court in India, we must turn to an inquiry of the delineation of authority in this regard in the Constitution of India. In order to do this, we must pose the following questions: Which is the court issuing the declaration of unconstitutionality? Which are the officials over which the Constitution gives the court authority?³⁹ Let us first answer these questions in the case of declaration of unconstitutionality by the Supreme Court of India. Article 141 makes the judgments of the Supreme Court binding throughout the territory of India.⁴⁰ This gives the Supreme Court authority over all officials in India, wherever they may happen to be. When the Supreme Court declares a statute as unconstitutional, it has the effect of calling upon all officials in India to desist from acting on the statute in question. This has the effect of creating the illusion of total annihilation of the statute.

Now, what about the declaration of unconstitutionality by the High Court? We must once again put to ourselves the second of the two questions we looked into earlier, namely, which are the officials over which the Constitution gives the High Court authority? The answer to this question is to be found in Article 226. The answer which emerges from a combined reading of both the relevant clauses of Article 226 is that the High Court has jurisdiction over officials: a) who are within the territorial limits of the state it is High Court of; b) whose actions give rise to a cause of action within the territorial limits of the state it is High Court of even if they are ordinarily functioning outside the territorial limits of the state. This gives the High Court jurisdiction over all officials of the state government (of the state it is the High Court of) and officials of the central government who are situated in the territorial limits of the High Court, even on officials located outside (whether of the union government or another state government) provided their actions have the effect of giving rise to a cause of action within the territorial limits of state it

39 The second question is to be answered on a combined reading of the rules of recognition and adjudication.

40 Article 141, CONSTITUTION OF INDIA, 1950: "*The law declared by the Supreme Court shall be binding on all courts within the territory of India*".

is High Court of. Applying these principles we are in a position to test the effect of the declaration of unconstitutionality by the High Court. The declaration of unconstitutionality of a statute by the High Court is binding on all state government officials of the state it is High Court of. It is also binding on officials belonging to the union government who seek to enforce the statute so as to giving rise to a cause of action within the territorial limits of the state it is High Court of.

Let us now look at two situations to clarify the proposed principle: one, where the central statute is sought to be enforced by a state government official (of another state), like in the case of the Indian Penal Code; and second, where the central statute is sought to be enforced by officials of the central government like in the case of the income tax statute. In case of the Indian Penal Code, since it is enforced by police officers who are officials of the state government, the declaration of unconstitutionality by a high court should only have effect within the territorial limits of the state it is the High Court of.⁴¹ Hence, when the Delhi High Court partially strikes down section 377 of the Indian Penal Code, it ought to have effect only within the territorial limits of the state of Delhi, not beyond. The Income Tax Act is enforced by officials belonging to the union government. All income tax officials functioning within the state that the High Court belongs to would be subject to the High Court's jurisdiction. However, income tax officials functioning in other states would not ordinarily be subject to the High Court's jurisdiction unless their actions at least, in part, give rise to a cause of action within the territories of the state which the High Court belongs to. Thus, ordinarily, an income tax official in Mumbai is not subject to the Madras High Court's writ jurisdiction. Given this legal scenario, a High Court's declaration of invalidity of a provision in the Income Tax Act has effect only on income tax officials functioning within the State of Tamil Nadu. It could have effect on officials functioning in other states only in so far as their actions have the effect of creating a cause of action within Tamil Nadu. In other words the Madras High Court's declaration of unconstitutionality of a provision ought to have no effect on an income tax official functioning in Mumbai who is determining the liability of an assessee who also is based in Mumbai. To give a High Court's declaration of unconstitutionality effect throughout the territories of India has the effect of giving the High Court greater jurisdictional reach than was intended by the drafters of the fifteenth amendment.

It has, for long been accepted that the Delhi High Court's interpretation of a section of the Indian Contract Act would not have any force in Maharashtra.

41 'Public order' and 'police' being state subjects under List II of the Seventh Schedule to the Constitution.

If the state of Maharashtra is a defendant in such a suit—and assuming a part of the cause of action arose in Delhi – we would maintain that of course the state of Maharashtra as a party is bound by the ruling and would have to satisfy the decree. Even in future contracts, where a part of the cause of action arises in Delhi, the government of Maharashtra would have to remain bound by the Delhi High Court’s interpretation of the Indian Contract Act. However, it could not for a moment be suggested that the Delhi High Court’s interpretation of the Indian Contract Act on which the ruling was made becomes the law in the state of Maharashtra. We would not have the least hesitation in saying that a Civil Judge in Pune is not bound by the Delhi High Court’s interpretation of the Indian Contract Act where the cause of action wholly arises in Maharashtra or where the contract specifically confers jurisdiction on the courts in Pune, to the exclusion of all other courts. Even Sinha J. who authored the judgment in *Kusum Ingots* recognises this principle in respect of interpretation of a central statute by the High Court in *Ambika Industries*.⁴² The reason the High Court’s interpretation of a central statute would not be binding on courts in the rest of the country is that they fall outside the High Court’s jurisdiction, though the law being interpreted has effect throughout India. If we think in this fashion about a rule of contract law interpreted by the Delhi High Court why should a contrary principle present itself when we think about a declaration of unconstitutionality by the Delhi High Court? It has been argued here that the principles that limit the High Court’s jurisdiction in the case of the interpretation of a central statute also limit its jurisdiction in the case of a declaration of unconstitutionality. Declaration of unconstitutionality is, for want of a better phrase, an exercise of negative law making power. In reality, the striking down of a law amounts to the promulgation of a new norm calling upon the officials to not act upon the law which is being struck down. The recipients of this rule are the legal officials. Since the High Court has jurisdiction over some officials and no jurisdiction over others, it is inevitable that the High Court’s declaration of unconstitutionality would *not* have effect throughout India. The central statute declared to be unconstitutional by a High Court is invalid in some places (the state that it is high court of) and valid in others. On a proper analysis, thus we find that the equivalent of the Schrödinger’s paradox is an unavoidable consequence of the delineation of authority in the Constitution of India.

42 *Ambika Industries v. Commissioner of Central Excise*, (2007) 6 SCC 769: Sinha J. recognises that a High Court’s interpretation of a central tax statute is not binding on courts and tribunals in other states.

V. WHAT THE LAW IS AND WHAT IT OUGHT TO BE

It was argued earlier that those attracted by the spatial metaphor could invoke Article 13 in support of their position. It could be argued that Article 13 renders the entire jurisdictional debate otiose because it provides that any law that infringes Part III of the Constitution is unconstitutional and there is no territorial limitation to Article 13. It could be argued that when it comes to effect *qua* Article 13, the declaration of unconstitutionality by the High Court is no different from that of the Supreme Court. Surely, this argument, if right, discredits the central argument advanced in this paper. In response to this objection, it could be pointed out that all that Article 13 does is stipulate the effect of invalidity of the law in event of its conflict with Part III of the Constitution. It does not stipulate: a) who has the authority to invalidate such laws; and b) the limits of such authority's jurisdiction.⁴³ It has been argued here that a declaration of unconstitutionality is a fresh norm issued by the court not to act upon the impugned law. Now, relying solely on Article 13, we cannot determine the limits of the authority of the court in making declarations of unconstitutionality. In other words, Article 13 doesn't specify which officials are duty bound to give effect to the court's declaration of unconstitutionality. The question returns to stare us in the face, despite Article 13 – over which persons does the court have authority in issuing a declaration of unconstitutionality? That question cannot be answered by Article 13. It can only be answered by looking at the extent of the court's jurisdiction. In case of the Supreme Court that is to be found in Article 141. In case of a High Court it is to be found in Article 226; and bringing out its consequences has been the burden of this paper.

I have argued that on a proper understanding of the ontology of the law and delineation of authority under the Constitution something like the equivalent of Schrödinger's paradox is the inevitable legal consequence of the declaration of unconstitutionality of a central statute by a High Court. On a proper jurisprudential analysis of the matter, when a High Court declares a central statute to be unconstitutional, like Schrödinger's cat it ought to be understood as

43 In *A.K. Gopalan*, Kania C.J. thought that Article 13 was inserted out of abundant caution and only states what should in any case have been obvious without it: *See*, *A.K. Gopalan v. State of Madras*, 1950 SCR 88, 100. Hidayatullah J. questioned Kania C.J. on this point by arguing that Article 13 is hardly redundant, as Kania C.J. makes it out to be: *See*, *Sajjan Singh v. State of Rajasthan*, 1965 (1) SCR 933, 961. Whatever view one may take on the broader debate about the redundancy of the provision, there is no denying the fact that even in the absence of Article 13, the judiciary would have had the power of constitutional review; in fact, Article 13 doesn't even spell this out explicitly, let alone specifying the limits of the court's authority in exercise of such power.

remaining both valid (alive) and invalid (dead) concurrently: invalid in the state that the High Court belongs to, but valid in the rest of the country. A declaration of unconstitutionality of a central statute by a High Court ought not to have effect throughout India. It must be stressed this is what ought to be the case on a proper characterisation of the problem. This however is not the law, as it currently stands. The obiter dicta of the Supreme Court are binding on all lower courts.⁴⁴ As a result, the obiter dictum of the Supreme Court in *Kusum Ingots* giving a nationwide effect to a High Court's declaration of unconstitutionality of a central statute stands as the law. This means that the constitutional cat is dead. It is hoped however, that a fuller appreciation of the of the phenomena underlying a declaration of unconstitutionality could persuade the Supreme Court to revive it in one of the superpositions a la Schrödinger's cat.

44 It is now settled that the obiter dicta of the Supreme Court must be treated as binding on the High Courts. See, *Mohandas Issardas v. A.N. Sattanathan*, AIR 1955 Bom 113. Chagla C.J. opined that courts in India have always been bound by the obiter dicta of the Privy Council in variance with the general common law principle to the contrary, in the interests of judicial uniformity and judicial discipline. With the Supreme Court having taken the place of the Privy Council at the apex of the legal system, the Courts in India are required to treat the obiter dicta of the Supreme Court similarly. To the same effect are the judgments of the Supreme Court in *Commissioner of Income-Tax v. Vazir Sultan and Sons*, 1959 SCR Supl. (2) 375; *Amritsar Municipality v. Hazara Singh*, AIR 1975 SC 1083; and *Oriental Insurance Company v. Meena Variyal*, (2007) 5 SCC 428. In *Popcorn Entertainment Corporation v. City Industrial Development Corporation*, 2009 (6) Bom CR 53, the Bombay High Court held that: "*With the gradual erosion of the distinction between ratio and obiter the practice has gained ground for treating even the obiter dicta of the Supreme Court binding on the High Court*". *Id.*, at ¶ 93. See also, *Aswini Kumar Roy v. Kshitish Chandra Sen Gupta*, AIR 1971 Cal 252.