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A STUDY ON COLOURABLE LEGISLATION IN INDIA

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INTRODUCTION

The foundation of the Indian Constitution lies in the idea of dividing powers among its key parts: the legislative, executive, and judiciary. It clearly defines “the roles and responsibilities of each, playing a crucial role for the smooth functioning of a democracy. This federal structure operates by making sure that each part uses its authority within its specific limits. By doing so, it establishes a system of checks and balances, preventing any one branch from making decisions alone”.² The goal is to avoid one-sided decision-making and foster a sense of unity and diverse thinking. The main responsibility of the legislature is “to create laws, but there are specific restrictions on its ability to make laws, and these limitations form the fundamental basis of the 'Doctrine of Colourable Legislation.’”

When the legislature gets involved in areas it shouldn't or makes laws outside its power, it invokes the Doctrine of Colourable Legislation. This doctrine helps the court understand constitutional powers, especially those concerning legislative competence.³

Furthermore, “The Seventh Schedule of the Indian Constitution divides the power to make laws between the central and state legislatures. If Parliament or State Legislature creates a law in List II or List I of the Seventh Schedule, it will be deemed invalid for going beyond Constitutional limits. However no interpretation is needed, if the competence is clear. And if a law seems valid but, upon examination, it turns out the legislature isn't actually competent, it's called colourable legislation.”⁴

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² S. Sri Ganesh Prasad, *How colourful can legislation be?*, 2 JLRJS, 456

³ Insaf Ahamad T.K, *Understanding the Doctrine of Colourable Legislation: An Indian perspective*, 3 IJLMH, 862, 862-863 (2020)

⁴ VEPA P. SARATHI, *INTERPRETATION OF STATUTES*, 694,

DOCTRINE OF COLOURABLE LEGISLATION

The doctrine of colourable legislation is a legal idea that aims to stop the government from using its legislative power too much and unconstitutionally. The theory behind colourable legislation is simple: “if the government can't do something directly, it shouldn't be able to do it indirectly either”. This idea is derived from a Latin saying, *"Quando aliquid prohibetur ex directo, prohibetur et per obliquum"*.

“The Black’s Law Dictionary defines the word ‘colourable’ as:

1. Appearing to be true, valid or right.
2. Intended to deceive; counterfeit.
3. Appearance, guise or semblance.”

In simple terms, the doctrine means the government is making laws pretending to have the authority when it actually doesn't.⁵ When the Parliament or State Legislature will pretend or colour the law in something else but in reality they are doing an ultravires act. The power is vested on judiciary to stop the government from misusing its legislative authority. If the government misuses its authority, the judiciary can review them and cancel them if they break the constitution.

The doctrine of colourable legislation is also called “Fraud on the Constitution because the government is tricking by not following the Constitution properly. The government makes it look like it's following the rules, but in reality, it's not.” The main goal of this doctrine is to “maintain transparency and assure that laws are made for the good of everyone and not for the benefit of a few, keeping the legislative process transparent and fair”.

EVOLUTION OF COLOURABLE LEGISLATION

The Doctrine of Colourable Legislation is connected to the principle of "Separation of Powers," which says that there should be a balance of powers among the three branches of government. This doctrine is based on the idea that “if something can't be done directly, it shouldn't be done

⁵ Sai Shriya Potla, Doctrine of colourable legislation, IPLEADERS, (2023), https://blog.ipleaders.in/doctrine-of-colourable-legislation/#Article_246A_of_the_Indian_Constitution

indirectly either. It comes into play when the Legislature indirectly does something that it cannot do directly. In India, the impact of the colonial British system led to the formation of three pillars of democracy: Judiciary, Legislative and Executive.”

“The development of the doctrine of Colourable Legislation goes back to the British era when self-government expanded in various parts of the British Empire.” It was introduced during British rule in India, which initially practiced a unitary form of government but later shifted to a federal mode. This doctrine helped in determining the authority of different government bodies, by ensuring a balance of power between them. The British government borrowed this concept from Canada and Australia.⁶

In India, “the Judiciary was given the power to apply this doctrine to determine the legislative competence of Union and state bodies. The concept was discussed in the Constituent Assembly by Jus Alladi Krishnaswami Ayyar, who emphasized that the Court should not question legislative acts unless they are a fraudulent exercise of power or a colourable device to exceed limits.”⁷

“It is an accepted principle of Constitutional Law that when a Legislature, be it the Parliament at the Centre or a Provincial Legislature, is invested with a power to pass a law in regard to a particular subject matter under the provisions of the Constitution, it is not for the Court to sit in judgment over the Act of the Legislature. Of course, if the legislature is a colourable device, a contrivance to outstep the limits of the legislative power or to use the language of private law, is a fraudulent exercise of the power, the Court may pronounce the legislation to be invalid or ultra vires.”

Even Jawaharlal Nehru, while advocating administrative supremacy, acknowledged that “Parliament's power should not be challenged unless there is a gross abuse of the law or a fraud on the Constitution.”⁸

⁶ Id.

⁷ Amisha Sah, *An Overview Of Doctrine Of Colourable Legislation*, Legal Service India,

⁸ Constituent Assembly Debates On 10 September, 1949 Part I

CONSTITUTIONAL FRAMEWORK

As per the Indian Constitution, the legislature is not allowed to use a power granted for one purpose as a cover or pretext to fulfill a different purpose that falls outside its scope. The roles and authority of the legislature are outlined in “Part XI of the Indian Constitution, which discusses the interactions between the union and the state.”

“Article 245 of the Indian constitution states, the extent of the powers of the laws made by parliament and the legislatures of the states.

Additionally, Article 245 specifies that the parliament has the authority to enact laws for the entire country or any specific region, and the state legislature can formulate laws for the entire state or any specific part of it. It's important to note that laws passed by the parliament cannot be considered invalid on the grounds of having an extraterritorial function”⁹

“Article 246 of the constitution distributes the power between the Parliament and State legislative assemblies on the basis of the subject matter of laws.” Additionally, “the Seventh Schedule of the Indian Constitution classifies legislative matters into the Union List, the State List, and the Concurrent List. States and the central government must adhere to their respective legislative domains. When the law is enacted by the legislatures on subjects outside their authority as per the seventh schedule or exceed limitations under Part III of the constitution, the law is considered ultra vires, and colourable legislation comes into play.”¹⁰

“Article 248 deals with the residual powers of legislation, explicitly stating that the parliament is empowered to make laws on any subject not specified in the State or Concurrent List of Schedule VII of the Indian constitution.”¹¹

⁹ Ekta Khatri, *Doctrine of Colourable Legislation*, 2 JCLJ, 324 (2021)

¹⁰ Supra note 1 at 457

¹¹ Supra note.8 at 324

JUDICIAL PRONOUNCEMENT ON THE DOCTRINE OF COLOURABLE LEGISLATION IN INDIAN COURT

The Supreme Court explained how the Doctrine of Colourable Legislation can apply when the government makes laws that go against court decisions, even though making laws is not a judicial function. There might be exceptions due to evolving ideas and powers.

In the case of “*State of Bihar v. Kameshwar Singh*”¹², the validity of The Bihar Land Reforms Act 1950 was challenged. This is the only landmark judgment where the statute has been proclaimed clearly invalid on the ground of being colourable legislation”. In this instance, the petitioner challenged “the validity of the Bihar Land Reforms Act 1950, contending that although it purported to establish guidelines for compensation, it did not actually provide any such rules. This was alleged as a veiled attempt to deprive the petitioner of his right to compensation. The court also upheld the unconstitutional nature of the Act.”¹³

In the case of “*KC Gajapati Narayan Dev v. State of Orissa*”¹⁴, Justice Mukherjee explained that the entire concept of colourable legislation is based on the idea that if you can't do something directly, you shouldn't try to do it indirectly. If a legislature has the power to do something directly, attempting to do it in a roundabout or disguised way doesn't make the act invalid. He also emphasized that the examination should focus on understanding the real essence and features of the questioned legislation. It is the outcome of this scrutiny, rather than just the external appearance, that decides whether the legislation falls within the jurisdiction of legislative authority.”¹⁵ It was opined that:

“If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to

¹² AIR 1952 SC 252

¹³ Supra note. 4

¹⁴ AIR 1953 SC 375

¹⁵ M.P.TANDON, INTERPRETATION OF STATUTE, 212, (Allahabad Law Agency 2005)

this latter class of cases that the expression 'Colorable Legislation' has been applied in certain judicial pronouncements."¹⁶

In the case of "*Sbri Prithvi Cotton Mills v. Broach Borough Municipality*"¹⁷, when the issue of validity was taken to the Supreme Court in *Janapada Sabha Chhindwara v. Central Provinces Syndicate Ltd.*, it was held that it was not for the court to supply the omission and the legislature just overruled the decision of the court without changing the premise of the decision. It was pointed out that Article 141 which made the Supreme court judgment binding on all the courts in India, the legislature could not say that declaration of law by the court was imprecise, invalid, or ineffective either as a precedent or between the parties".¹⁸

LEGISLATIVE ATTEMPT TO EXERCISE JUDICIAL POWER

Although the Indian constitution doesn't follow a strict separation of powers like the U.S.A., it distinctly outlines the roles of the Legislature, Executive, and Judiciary. In various cases in Indian courts, attempts by the legislature to take on judicial powers have been rejected by the judiciary under Article 14.

In the case of "*Ameerunnissa Beegum vs Mahboob Begum*"¹⁹, the Supreme Court rejected the Walioudowlah succession act because it went against Article 14 of the constitution. This act deprived two Muslim women of their inheritance rights in a prolonged property dispute between two private parties. Although the act aimed to resolve the lengthy litigation, the court declared it in violation of Article 14. The respondents brought up the Private Acts of the British Parliament, but the court dismissed this argument", stating that

"The analogy of Private Acts of the British Parliament...is not at all helpful. The British Parliament enjoys legislative omnipotence and there are no constitutional limitations on its authority or power".

Moreover, in this particular case of "*Ram Prasad v. State of Bihar*"²⁰, the Bihar Sathi Land Restoration Act was deemed invalid because it exceeded the legislative authority of the

¹⁶ Supra note.3 at 695

¹⁷ 1970 1 SCR 388

¹⁸ Supra note.10 at 328

¹⁹ AIR 1953 SC 91.

²⁰ AIR 1952 Pat. 194.

legislature. The Act, based on the congress working committee's decisions, annulled the settlement made in favor of an individual for lands under the administration of the Court of Wards. A judge in the high court expressed the view that the act resembled more of a decree than a legislation. Ultimately, the Supreme Court also invalidated it, citing that it fell outside the legislative competence of the legislature.”²¹

(B) COLOURABLE LEGISLATION AND OVERRIDING OF JUDICIAL VERDICTS

If the legislature replaces a court decision with a new law, it could invoke the doctrine of colourable legislation, even if the law doesn't have a judicial nature. However, there's an exception to this rule. If the grounds of the earlier court decision have changed over time, the new legislation may not be considered invalid.

The exception was clarified in the case of “*Shri Prithvi Cotton Mills v. Broach Borough Municipality*”²². It was held that:

*“Granted legislative competence, it is not sufficient to declare merely that the decision of the court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A Court's decision met always bind unless the condition on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances”*²³

Further, in “*Janapada Sabha Chhindwara v. Central Provinces Syndicate Ltd*”²⁴, the legislature is explicitly given the power to create or enact laws on any subject, along with all ancillary and incidental powers essential for the effective implementation of those laws. Therefore, the doctrine is crucial for addressing legislative responsibility in making necessary adjustments to the functions of the legislature.”²⁵

²¹ Supra note.2 at 866

²² AIR 1970 SC 192

²³ Id

²⁴ AIR 1971 SC 57

²⁵ Supra note.9 at 459

LIMITATIONS ON THE DOCTRINE OF COLOURABLE LEGISLATION

1. “The concept of colourable legislation comes into play when the legislature goes beyond its authorized powers or designated jurisdiction as outlined in the Constitution. However, this doctrine loses its effectiveness when the legislature is restrained by a constitutional limit. The principle of colourable legislation is not applicable when there are no limitations imposed on the legislature by the Constitution”.²⁶
2. “The doctrine of the colourable legislation is not applicable in the cases of subordinate or delegated legislation. Once the authority of the legislature is delegated, and a bill is endorsed by the assigned legislative body, it is not subject to the colourable legislation concept. The burden lies on the petitioner/appellant to prove the colourability of the impugned act. In other words, there is always a presumption of constitutional validity for legislative actions.”²⁷
3. “The condition is grounded on the logical assumption that the legislature will not act based on extraneous considerations. There is always a presumption of constitutionality in favour of the statute.”²⁸

In the case of “*Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors.*”²⁹, it was explicitly stated that: *There is always a presumption in favor of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles.*”³⁰ “The well-established rule of interpretation, 'construction ut res magis valeat quam pereat,' suggests that any statutory provision should be construed in a manner that makes the statute effective or operational. This explains why courts lean towards an interpretation that preserves the statute's competence within the legislature.”³¹

²⁶ Supra note.11

²⁷ Supra note.17 at 329

²⁸ Supra note.20 at 868

²⁹ AIR 1958 SC 538

³⁰ Id

³¹ CIT v. Teja Singh, AIR 1959 SC 352.

4. “If the legislature has the authority to make laws on a specific subject, it is entirely within its scope to possess incidental and ancillary powers to ensure the effectiveness of that law.”³²
5. “The doctrine of colourable legislation does not involve any question of any bonafides or mala fide intention on part of the legislature. The intention could be either malicious or have genuine motives. The intent of the legislature while passing the law is not relevant; rather, the theory centers on the legislature's capability to pass a specific bill. Therefore, the constitutionality of the law always revolves around the issue of authority. Consequently, the doctrine does not apply to questions of the legislature's arbitrariness.”³³

In this regard, the Supreme Court in “*K.C. Gajapati Narayan Deo v. State of Orissa*”³⁴, observed that: The fact that the legislature attempted to do something indirectly or in a covert manner cannot render a piece of legislation invalid if it is within its power to do so.”³⁵

6. “The doctrine of colourable legislation applies when the transgression of the constitutional power is covert, disguised and indirect too, not just patent, direct or manifest.”³⁶

CRITICAL ANALYSIS

The concept of colorable legislation plays an important role in scrutinizing the actions of the legislature to ensure they align with the constitutional framework. This analysis emphasizes the need to examine whether the legislature, in creating laws, stays within the limits established by the constitution.

When the state's constitution distributes the authority to make laws among different bodies, questions arise about “whether the legislature, is exceeding its constitutional powers concerning

³² I.N. Saksena v. The State of Madhya Pradesh AIR 1976 SC 2650.

³³ Suora note.29 at 867

³⁴ 1954 SCR 1

³⁵ Supra note. 24 at 458

³⁶ The State Of Bihar v. Kameshwar Singh 1952 1 SCR 889

the subject of the statute or the methods used to validate it. This exceeding may be evident or noticeable, and the expression "Colorable legislation" has been serviced upon in judiciary."

The concept is that, although a legislature may outwardly claim to operate within the limits of its abilities while passing a law, in reality, it exceeds and violates these powers. This violation is hidden by what appears to be a mere presence or concealment. "This doctrine is also termed as a fraud on the constitution", highlighting the violation of constitutional conditions, whether overt or covert.³⁷

If the legislature overtly disobeys the constitution, the law is considered clearly bad and ultra vires. However, if the noncompliance is covert, then it is fraud on the constitution, accusing the legislature of pretending to act within its powers when, in reality, it isn't.

"Legislative transparency, as outlined in Article 50 of the Indian constitution, is crucial." Colourable legislation helps address this transparency, preventing legislators from abusing their powers. It ensures that laws are created for the betterment of the country, not for personal or economic gains.

The doctrine also connects with the separation of powers, as discussed in the case of "*Ram Jawaya v. the State of Punjab*"³⁸ C.J. Mukerjee said and held:

Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently, it can be very well said that our constitution does not contemplate assumption by one organ or part of the State of Functions that essentially belong to another."

While India may not strictly follow the doctrine of separation of powers, the functions of different government branches are sufficiently differentiated. Colourable legislation helps maintain this balance by checking the legislature's actions, ensuring they work for the welfare of the people within the constitutional limits.³⁹

³⁷ Deeksha Sabharwal, Hemangini Shekhawat, Analyzing the Constitutional Doctrine of Colourable Legislation, 2 Lex Research Hub Journal, (2020)

³⁸ AIR 1955 SC 549

³⁹ Supra note.26 at 331

ANALYSIS OF CONTEMPORARY ISSUES AND CASE STUDIES INVOLVING THE DOCTRINE

Jallikattu: The Constitutional bench of the Supreme Court in the case of “*Animal Welfare Board of India & Ors versus Union of India & Ors*”⁴⁰ reviewed a case regarding the practice of Jallikattu, a bull-taming sport in Tamil Nadu. The petitioners argue based on the doctrine of colourable legislation”. They contended that “the Tamil Nadu Amendment Act, including the Prevention of Cruelty to Animals (Tamil Nadu Amendment) Act, 2017, and Prevention of Cruelty to Animals (Conduct of Jallikattu) Rules, 2017, is a deceptive form of legislation. This act aims to overturn the 2014 Supreme Court Judgment that banned such practices. The petitioners claim that the amendment fails to remove the defects of the Act. They contended that as the state government lacked the power to pass this legislation under List II of the seventh schedule, the government opted for enactment through Entry 17 of List III of the seventh schedule, which was considered a deceptive exercise. They argued that overturning the judgment went against the principle of separation of powers. It was also presented to the court that despite the stated goal of preventing cruelty, the amendments actually perpetuated it.”⁴¹

Here the issue was “whether the judiciary have the authority to invalidate legislation for failure of people to comply with it?” And “whether the impugned Acts introduced by the state legislatures colourable legislation?”

Concerning the colourability matter, the court needs to recognize that “the Tamil Nadu legislature fulfills the competency criteria outlined in the mentioned Supreme Court judgments. Despite the presumption of the act's constitutionality, the intention, whether bona fide or mala fide, is irrelevant to the colorability issue.” Therefore, the court now needs to determine whether the act prevent cruelty or indirectly perpetuate it? This question goes beyond the colorability issue but is relevant in assessing the constitutionality of the act.

This judgment also underscores the necessity for reforming the doctrine. “The diverse needs and practices among states in India, stemming from linguistic and cultural variations, require some states to have the competence to legislate on issues important to them, even if perceived

⁴⁰ (2014) 7 SCC 547

⁴¹ Supra note.26

differently by the central government. As long as such legislation meets constitutional standards, it should be allowed.”⁴²

Article 370 of the Indian Constitution: The repeal of Article 370 has led to discussion on whether legislative authority should take precedence over the consent of the people. “Article 370(3) mandates approval from the J&K Constituent Assembly to nullify Article 370. Since a direct nullification is not possible, the interpretation clause in Article 367 was modified to replace "Constituent Assembly" with "legislative assembly.””

Furthermore, “Article 370 (1) (c) asserts that Article 1 extends to J&K, bringing it under the jurisdiction of Schedule 1 of the constitution due to the phrase “State of Jammu and Kashmir.” This implies that the state cannot be converted into a union territory, and the doctrine of colourable legislation would be applicable due to constitutional limitations on the powers of the legislature. However, the central government, through Order 2, abolished Article 370 and substituted it with the “Jammu and Kashmir State Reorganisation Act 2019” to transform it into a union territory.” This poses “a significant question for the Supreme Court's constitutional bench: do the mentioned amendments represent an indirect method of achieving something that is prohibited? Additionally, does the legislative body have the competence to make these changes, or does it violate constitutional provisions?”

The amendments initially appear to be deceptive, but it's a matter that the court must thoroughly examine due to its involvement with intricate constitutional provisions and a lengthy history of statutes and amendments. Notably, “the court should consider the intent and necessity behind the changes, as the consequences of this act are primarily influenced by the intentions of the legislative body and the perceived necessity on the ground in J&K, given the socio-political scenario.”⁴³

CONCLUSION

In India, the theory of colourable legislation simply signifies a restriction on the legislative authority. The constitution clearly establishes boundaries for each branch of democracy to

⁴² Supra note.34 at 460

⁴³ Id

follow. When lawmakers try to exceed or go beyond its limits set by the Constitution, questions often arise about their ability, although these violations are sometimes evident. This occurs when a law attempts to achieve something indirectly that it cannot explicitly do. The doctrine is “not explicitly defined in the Indian constitution but has evolved through judicial precedents to uphold transparency and constitutional supremacy.”

The concept of colourability in legislation is crucial for maintaining accountability and ensuring a balance that restricts the extensive powers of the legislature. This doctrine should be used carefully and be adaptable to changes, making it a necessary tool for a federal structure that needs to evolve with the times.

The doctrine of colourable legislation contributes to enhancing democracy by ensuring “that the legislative body does not exceed the powers granted to them by the Indian constitution.” If such overreach occurs, the enacted law would be considered invalid and cannot be enforced. We require this doctrine because the legislature is deviating from its proper conduct and violating the trust of citizens, making it difficult for the legislature to be accountable. The core idea is that even though a legislative body, in passing a resolution, claims to act within the limits of its authority, in substance, it often exceeds these powers, with the violation concealed under what seems, upon proper examination, to be mere pretense or disguise. If that is the case, the concerned legislation is deemed invalid.

This doctrine serves as a crucial tool for the judiciary to monitor the powers granted to the Union and State governments, determining the legitimacy of the legislation in question or under scrutiny.