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Analyzing Legislative Flexibility: Exploring the Doctrine of Colourable Legislation

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ABSTRACT

The courts across the country through judicial interpretation develop numerous principles which have a different connotations, this article highlights one such doctrine ie, “The Doctrine of Coloured Legislation”. With the expansion and evolution of constitutional jurisprudence, a variety of new approaches emerges and one such concept is Colourable Legislation. This article examines the literal meaning of Colourable legislation. After formulating and understanding the concept, this article propounds the historical aspect of this doctrine comprehensively and lucidly. The foundation of Constitutional federalism plays a very pivotal role in the smooth functioning of the country. The balancing approach between the central government and the state government should be tackled in a sophisticated and liberalized manner providing legislative flexibility along with considering legislative ramifications. This article through analyzing the judicial precedents, and constitutional literature develops a guiding principle for judicial outcomes. The findings of this article will help to analyze the federal structure of the government and explore the horizon of interpretation of legislation. This article explores the constitutional provisions ascertaining the application of the Doctrine of Coloured legislation. This article holistically concludes with the synchronize application of this principle by deeply analyzing its violative ramification.

Keywords: Federalism, Colourable Legislation, Constitutional Fraud.

I. INTRODUCTION

It is very pertinent to understand that in a constitutional democracy, the utmost responsibility of the guardian of the constitution is to smoothly run the principles laid down by our framers of The Constitution of India. It is in the interest of well-being that the true intent of the framers needs to be assessed and any discrepancy in the laid down principle must be eradicated. There are certain subjects assigned to the centre and the state Government and they have provided a different set of functions respectively however there is a high chance of ambiguity while adjudicating the subject matter, So to revamp the jurisdiction concern over the subject matter, The concerned government comes up with ill intentions of interference by surpassing the

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constitutional objectivity of federalism which is in common parlance known as a "Colourable Legislation" or Constitutional Fraud. Federalism has emerged as a basic structure doctrine enshrined by the Hon'ble Supreme Court of India and smooth functioning and control over the different subjects has been explicitly provided in the seventh schedule of The Constitution of India. The role of Constitutional court plays a pivotal role in safeguarding constitutional principles and declaring any law ultra-vires after analyzing the applicability judicially.

This doctrine is simply based on the principle that if anything is prohibited directly then it is also prohibited indirectly. This article explains this principle more comprehensively along with creating some vacuum for the applicability of this doctrine by providing certain Legislative flexibility.

II. MEANING OF COLORABLE LEGISLATION

Colourable legislation as a doctrine is based on the Latin maxim "*Quando aliquid prohibetur ex directo, prohibetur et per obliquum*" which means you cannot do indirectly the things which are prohibited directly. This principle is very pertinent In the constitutional landscape because the misuse of jurisdiction by The government through colourable legislation diminishes the federal structure of government. On the face of it the subject matter might look to resonate with the provision but the purpose or effect of it is outside the purview and merely introduced with an ill intention. The role of Judiciary plays a significant role while adjudicating and also providing limits to such extent as not to violate the federal structure.

III. HISTORICAL BACKGROUND

This doctrine's origins can be traced back to the colonial era when self-government began to gain importance over much of the British Empire and the Commonwealth. The Centre and provincial units were given different legislative responsibilities, and the adopted Act was examined in light of this principle to detect any violations. As both nations' constitutions lack a bill of rights, allowing for greater room for the concentration of power, Indian courts have consulted those of Australia and Canada when dealing with colourable laws. But in 1982, Canada added a bill of rights to its Constitution².

The doctrine of Colorable Legislation can also be traced back from the constitutional debate where The first Prime Minister of India Jawahar Lal Nehru dealt with this doctrine and partially uphold the legislative flexibility restricting the absolute power for such colourisation. He said

² Article 370: What the SC Will Have to Consider While Examining the Centre's Move, THE WIRE, <https://thewire.in/law/supreme-court-article-370-doctrine-of-colourable-legislation> (last visited May 25, 2023).

“Parliament fixes either the compensation itself or the principles governing that compensation and they should not be challenged except for one reason, where it is thought that there has been a gross abuse of the law, where there has been a fraud on the Constitution.”³

Later one Constitutional assembly member deliberated the interplay of Courts and Legislature. According to Alladi Krishnaswami Ayyar :

“ 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 the power to pass a law regarding 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 legislation 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.”⁴

IV. CONSTITUTIONAL PROVISION

The constitution of India through its various provisions fosters the federal structure of India and to cater for this there are numerous subjects on which they have complete control and also certain subjects were left where they can make their laws separately. Article 246 enunciates the power to make Laws to both Parliament as well as the Legislatures of State. So, according to Article 246, Parliament has exclusive power to make laws concerning any matter mentioned in List I in the Seventh schedule, subsequently, the Legislatures of any state has also exclusive power to make laws concerning the subjects mentioned in the List II in the seventh schedule and both centre and the State has the power to make laws to any matter enunciated in List III in seventh schedule.⁵ To maintain equilibrium it is pertinent that the federal structure must be maintained and both union and state list subjects must be dealt with separately and if there arises an ambiguity as to the jurisdiction to make Laws it is left to the parliament of India. The power is given to Courts to examine whether a particular legislation is coloured legislation or not notwithstanding that prime facie it looks within the exclusive power but later comes out to be colourised legislation, So it is predominant to mention that the true intention of the state needs to be examined. Article 254 is also an extensive form of the article where it talks about the repugnancy between a central Law and a state law and any provision made by legislation which is repugnant to any provision of the existing law made by parliament about concurrent List, then

³ Constituent Assembly Debates On 10 September 1949 Part 1.

⁴ Constituent Assembly Debates On 13 September 1949 Part 1.

⁵ INDIA CONST art. 246.

law made by Parliament shall prevail.⁶ Thus it is very crucial to make legislation by taking into consideration of their jurisdiction as to the subjects mentioned in the seventh schedule of the Constitution of India. The Hon'ble Supreme Court laid down a test of repugnancy between two statutes.⁷ Repugnancy would arise if there is a clear and direct inconsistency between the two enactments.⁸

V. JUDICIAL INTERPRETATION AND LEGISLATIVE FLEXIBILITY

• Judicial Interpretation

The Courts across the Country have time and again dealt with certain erroneous or invalid legislations and treated them as a 'Constitutional Fraud'. It is the competency of the legislature and not the intent or motive to quantify whether it is Colourable Legislation or not. the doctrine of Colorable Legislation can be tracked from the case of **State of Bihar v. Kameshwar Singh**⁹, The Supreme Court explicitly declared The provisions under the Land Reform Act as Unconstitutional, It was the understanding of the Supreme Court that the provisions namely Section 4(b) and Section 23(f) were Unconstitutional on the ground of Constitutional fraud.

The Supreme Court of India elaborated the Doctrine of Colourable legislation in the case of **K.C. Gajapati Narayan Deo v. State of Orissa**¹⁰ it was held 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 this latter class of cases that the expression “colourable legislation” has been applied in certain judicial pronouncements.”¹¹

• Legislative Flexibility or Limitation

When we talk about limitations on the doctrine of Colourable Legislation we need to understand that it provides the legislature an opportunity to not embark on the subjects that would fall under such limitation. These are some of the limitations or Legislative flexibility:-

⁶ INDIA CONST art 254.

⁷ M.Karunanidhi v. Union of India, AIR 1979 SC 898.

⁸ Ibid.

⁹ State of Bihar v. Kameshwar Singh, (1952) 1 SCC 528

¹⁰ K.C. Gajapati Narayan Deo v. State of Orissa, 1954 SCR 1

¹¹ Ibid.

1. Nothing will attract this doctrine when power is not limited by the provisions of the Constitution that is to say under the seventh Schedule.
2. It is also not applicable in cases when there is any case of subordinate legislation, there are certain incidents where powers are delegated to the executive to perform certain functions and under that, any law made will not fall under this doctrine.
3. It is also pertinent to understand the significance of malice intention which is considered irrelevant in the case of **Gajpati Narayan Deo v State of Orissa**¹² it was held that

*“It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law.”*¹³

VI. CONCLUSION

The Constitution of India provides for a federal Government and is assigned to make Laws under its constitutional competence. Colourable Legislation is the doctrine that prevents the legislature or the parliament to circumvent the Law and cross the prescribed boundary of competency as to the subject matter jurisdiction. this doctrine is simply based on the principle that what is prohibited directly, Legislature cannot exercise it indirectly. This doctrine plays a pivotal role to safeguard Individual Liberty at the same time prohibiting the Legislature to break the jurisdictional competency that somehow disrupts the federal Structure of the Constitution. An example of Colourable Legislation can be a Law which is neutral but discriminates based on Caste, religion or sex So, the Court must proactively examine the validity of it by understanding its competency as there is no single test to determine the validity and depend on various circumstances such as the purpose of such Law or the effect of introducing such Law, history as well as the precedents set out by the Apex Court.

¹² K.C. Gajapati Narayan Deo v. State of Orissa, 1954 SCR 1

¹³ Ibid.