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Understanding the Doctrine of Colourable Legislation: An Indian Perspective

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ABSTRACT

The doctrine of separation of power essentially demarcates between three organs of the state namely, legislature, executive and judiciary. The basic duty of the legislation is to make laws, however there are certain limitations to its law making power which is the basic foundation of 'Doctrine of Colorable legislation. The doctrine becomes handy for the courts to determine the legislative competence of the legislature when it comes out with a legislation. In this article the author shall explain the doctrine and trace the evolution of Indian jurisprudence on this doctrine. Further, he looks at the scope and limitations of the doctrine.

I. INTRODUCTION

Federalism is one of the basic features of the Indian Constitution. According to K.C Wheare, known political analyst federalism means “the method of dividing powers so that the general and regional governments are each within a sphere coordinate and independent”.² The sovereignty of the state is shared by the center and the states. It makes the mechanism of governance smooth and demarcates the power of the union and states as constitution mandates. In Indian constitution, Article 246 demarcates the legislative of the union and the states by differentiating the subject matters for Union under List I, states under list II and list III for both as mentioned in the seventh schedule.³

The doctrine of separation of power essentially demarcates between three organs of the state namely, legislature, executive and judiciary. The basic duty of the legislation is to make laws, however there are certain limitations to its law making power which is the basic foundation of 'Doctrine of Colorable legislation “Whenever legislature tries to interfere in the sphere of other components our legislates on any matter out of its jurisdiction , it attracts Doctrine of colorable legislation. Like any other constitutional doctrines, Doctrine of colourable legislation aides the court in interpreting various constitutional powers especially those

¹Author is a student at Gujarat National Law University, India.

² Samirendra N. Ray, Modern comparative politics: approaches, methods and issues (2004).

³ INDIA CONST art. 246.

related to legislative competence.

The origin of this doctrine in India can be traced back to the colonial times when self-governance was gaining importance in commonwealth and many parts of the British Empire. The provincial units were given certain powers under the watch of the Centre. Whenever there was a conflict of legislating powers of the centre and the provinces ‘ Doctrine of Colourable legislation ‘ was put to play.⁴

The doctrine of colourable legislation is also known as ‘fraud on the constitution’. In the constituent assembly debate on Jawaharlal Nehru dealt with this. On a debate on legislative competence he upheld the legislative supremacy but at the same time restricted its absolute power. He said

*“Parliament fixes either the compensation itself or the principles governing that compensation and they should not be challenged except for one reason, where in fact there has been a gross abuse of the law, where in fact there has been a fraud on the Constitution.”*⁵

II. DEFINITION OF DOCTRINE OF COLOURABLE LEGISLATION

According to Black’s law dictionary⁶ the term colourable means:

1. Appearing to be true, valid or right.
2. Intended to deceive; counterfeit.
3. ‘Color’ has been defined to mean ‘Appearance, guise or semblance’.

The literal meaning of the colourable legislation is that the ‘color’ or ‘guise’ of power given to legislature cannot be used to achieve some other purpose which it is not otherwise competent to legislate on.

The origin of the doctrine can be traced to the latin phrase “*Quando aliquid prohibetur ex directo, prohibetur et per obliquum*”⁷ which means whatever cannot be done directly, it cannot be done indirectly. Basically, if legislation is prohibited to something, it cannot be done indirectly by the legislature. It may appear that the legislature is ostensibly functioning within its limits, but it might be attempting to full an object out of its powers.

⁴ 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 30, 2020).

⁵ Constituent Assembly Debates On 10 September, 1949 Part I.

⁶ Garner BA, Blacks Law Dictionary (West Group 1999).

⁷ Quando aliquid prohibetur ex directo, Quando aliquid prohibetur ex directo | Definition of Quando aliquid prohibetur ex directo by Webster's Online Dictionary, [https://www.webster-dictionary.org/definition/Quando aliquid prohibetur ex directo](https://www.webster-dictionary.org/definition/Quando%20aliquid%20prohibetur%20ex%20directo) (last visited May 30, 2020).

When a legislature legislates outside its power it shall be struck down as ultra vires. However, we have seen that if the legislation is in pith and substance within the scope of its allotted field, and the exceeding of the power is only in regard to incidental matters, the legislation will not be held to be invalid.

Colourable legislation arises from limitations laid down on the power of the legislature. Generally Limitations on these powers arising from constitutional provisions are generally of four types:

- 1). If the constitution has adopted the doctrine of separation, it might mean the legislature should not exercise judicial functions. It means that under the guise of doing legislative functions, a covert attempt to exercise judicial functions or to overcome those limitations may attract the Doctrine of Colourable legislation
- 2). Most of the constitution contains a bill of rights and the power legislature might be limited in many ways regarding any law in contravention to the bill of rights .Any concealed attempts of the judiciary to overcome those limitations might attract the doctrine of colourable legislation.
- 3). In a federal constitution there might be demarcation of legislative power of the Union and the states as the sovereignty of the state is shared by them. Any concealed attempts of central or state legislatures to legislate out of its powers may attract the doctrine of colourable legislation.
- 4). The attempts of the legislature to exceed the limits under the colour of ancillary power may also attract the principle of colourable legislation in addition to the above mentioned conditions.

III. DOCTRINE OF COLOURABLE LEGISLATION IN INDIAN COURTS

While dealing colourable legislation, Indian courts have taken its inspiration from Canadian and Australian legislation as the absence of bill of rights in both of these countries give them wide scope of centralization of power. However Canada enacted a bill of rights as part of its constitution in 1982.⁸

While deliberating on legislative competence and the scope of the courts to check colourable legislation in the constituent assembly of India, Alladi Krishnaswami Ayyar said:

“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

⁸ CANADA CONST.

*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 ultravires ”.*⁹

The zamindari abolition act was challenged by the zamindars post-independence drawing inspiration from the constituent assembly debates. Even though the court did not consider their prayers, two provisions of Bihar Land Reform Act was struck down by the court in the name of Colourable legislation in **State of Bihar v. Kameshwar Singh**¹⁰ much to the victory of their cause. The court cited Canadian and Australian cases as precedents.

The Supreme Court has clearly elaborated the doctrine of colourable legislation in the case of **K.C. Gajapati Narayana Deo And Other v. The State Of Orissa**.¹¹ 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 ‘Colorable Legislation’ has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere presence or disguise”*¹²

(A) LEGISLATIVE ATTEMPT TO EXERCISE JUDICIAL POWER

Even though Indian constitution is not based on rigid separation of powers like the constitution of U.S.A, it clearly separates or distinguishes the functions of the Legislature, executive and judiciary. There have been several instances in Indian courts where legislature attempted to exercise judicial power which has been invalidated by the judiciary under Article 14.

⁹ Constituent Assembly Debates On 12 September, 1949 Part I.

¹⁰State of Bihar v. Kameshwar Singh, 1952 1 SCR 889.

¹¹ K.C. Gajapati Narayana Deo And Other v. The State Of Orissa, AIR 1953 Ori 185.

¹² Ibid.

In **Ameerunnissa Beegum vs Mahboob Begum**¹³ the Supreme Court struck down the Walioudowlah succession act as it violated Article 14 of the constitution. The act deprived two Muslim women off their succession rights. It was a long property dispute between two private parties. The object of the act was to end the protracting litigation. However the court struck this down and held it in violation of Article 14.

The respondents drew attention to the Private acts of the British parliament, however the court refused to take this argument and it was held 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”.¹⁴

Further, in the case of **Ram Prasad v. State of Bihar**,¹⁵ the Bihar Sathi Land restoration Act was held invalid as it was out legislative competence of the legislature. The Act which was passed on the basis of the congress working committee cancelled the settlement made in favour of a person of the lands involved under administration of Court of wards. One of the judges in the high court opined that the act was more of the nature of a decree than a legislation. Finally the SC too invalidated the as it was not within the legislative competence of the legislature.

(B) COLOURABLE LEGISLATION AND OVERRIDING OF JUDICIAL VERDICTS

When the legislature overrides a judgment with a legislation, it may attract the doctrine of colourable legislation even if the act is not of a judicial nature. However there is an exception for this. In cases the basis of the earlier judgment has changed in time, the legislation may not be rendered invalid. This was explained the case of **Shri Prithvi Cotton mills v. Broach borough Municipality**.¹⁶

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

¹³ Ameerunnissa Beegum v. Mahboob Begum, Air 1953 SC 91.

¹⁴ Ibid.

¹⁵ Ram.Prasad v. State of Bihar, A.I.R. 1952 Pat. 194.

¹⁶ Shri Prithvi Cotton mills v. Broach borough Municipality, AIR 1970 SC 192.

*not have been given in the altered circumstances”.*¹⁷

However in cases where the basis of law has not been altered in time, the legislation will be invalidated by the court under the doctrine. In the case of **Municipal Corporation of Ahmedabad v. New shrock Spinning and Weaving Co Limited**¹⁸, certain provision of Gujarat (Amendment and Validating Provisions) ordinance 1969 was struck down by Supreme Court. The relevant section authorized the corporation to do away with the refund of illegally collected tax until reassessment and determination of tax notwithstanding the judgment of any court to the contrary. However the provision was truck and the court observed that no legislation has the right to disregard or disobey the decisions by the courts.

Further, in **Janapeda Sabha Chindwara v. Central Provinces Syndicated Limited**¹⁹, it was held by Supreme Court that:

*“In the face of article 141 which made the Supreme Court judgment binding on all the courts in the territory of India, the legislature could not say that a declaration of law by the court was erroneous, invalid or ineffective either as e precedent or between the parties”.*²⁰

IV. LIMITATIONS ON THE DOCTRINE OF COLOURABLE LEGISLATION

1. Nothing will attract the doctrine in cases where the power of the Legislature is not limited by the constitutional provisions.
2. Further, The principle is not applicable in the cases of subordinate legislation
3. The intent of the legislature while passing a law is irrelevant. The doctrine does not involve any question of malafides or bonafides of the legislature. The only question considered will be if the law out the scope of legislative competency of the legislature. Hence the constitutionality of the statute is always a question of power. Hence the question of arbitrariness of the legislature cannot attract this doctrine²¹ It was held by the Supreme court in **Gajapati Narayana Deo And Other v. The State Of Orissa**²²:

“It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of bono fides or mala fides on the part of the legislature. The whole doctrine

¹⁷ Ibid.

¹⁸ Municipal Corporation of Ahmedabad v. New shrock Spinning and Weaving Co Limited, A.I.R. 1970 SC 1292.

¹⁹ Janapeda Sabha Chindwara v. Central Provinces Syndicated Limited, AIR 1971 SC 57.

²⁰ Ibid .

²¹ Gajapati Narayana Deo And Other v The State Of Orissa AIR 1953 Ori 185 ; Mohan Lal Tripathi v. District Magistrate, Rae Bareilly And Ors, 1993 AIR 204.

²² Gajapati Narayana Deo And Other v. The State Of Orissa, AIR 1953 Ori 185.

resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant.”²³

4. The above condition is based on the logical corollary that the legislature won't act on extraneous consideration. There shall always be a presumption of constitutionality tilted towards the statute. In the case of **Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors.**,²⁴ this principle of constitutionality presumption was clearly laid down. It was held that :

“That there is always a presumption in favour 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 the constitutional principles.”

The very well established rule of interpretation '*construction ut res magis valeat quam pereat*' which says any enacting provision or statute should be interpreted in a way which make the statute effective or operative explains why courts are tilted against a construction which makes the statute futile. Courts would tend to look for a construction which keeps the statute within the competence of the legislature.²⁵

5. When it is within the legislative competence of the legislature to legislate on a particular subject- matter, it is well within the ambit of the legislature to incidental and ancillary power to make that law an effective one.²⁶

6. For the doctrine of colourable legislation to be applicable, the transgression of the constitutional power should be covert, disguised and indirect too, not just patent, direct or manifest.²⁷

²³ Ibid.

²⁴ Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors, 1958 AIR 538.

²⁵ CIT v. Teja Singh, AIR 1959 SC 352.

²⁶ I.N. Saksena v. The State of Madhya Pradesh AIR 1976 SC 2650.

²⁷ The State Of Bihar v. Kameshwar Singh 1952 1 SCR 889.