FRAUD ON THE CONSTITUTION? EXAMINING THE DOCTRINE OF COLOURABLE LEGISLATION

Abstract

This paper includes an objective to study the doctrine of colourable legislation and the debates and discourses on its applicability. This doctrine attributes an impediment to the powers of the legislation and questions its competency to enact a provision of law. It is based on the principle of 'quando aliquid prohibetur ex directo, prohibetur et per obliquum', which dictates that if something is prohibited directly, such an act or law cannot be undertaken indirectly as well. The research also reviews landmark cases concerning the doctrine with regards to the stance of the Supreme Court on this subject. Consequently, this project aims to enhance understanding regarding the doctrine and trace its evolution and position in Indian jurisprudence. Moreover, it also attempts a comparative study of its position in Canada vis-a-vis India. It aims to critically analyse the limitations and benefits of this doctrine in safeguarding the constitutional system.

Keywords - Colourable Legislation, Constitution, Supreme Court, Doctrine, Separation of Power

INTRODUCTION

India as a nation is celebrated for championing democracy despite the myriad challenges it faces. Being a newly formed nation-state still feeling the repercussions of an arduous and exploitative rule of the British crown, India's lawmakers were ambitious yet cautious in bequeathing a legacy and government which could adapt and resolve the specific problems related to Indian society. Dr B. R. Ambedkar remarked, "The Constitution of India has been framed after ransacking all the known constitutions of the world." One such provision is the separation of powers, inspired by the American Constitution.

Separation of powers, which first appears in the works of French philosopher Montesquieu and subsequently incorporated by the American Constitution, is based on the premise that there are three organs of government - executive, legislature and judiciary. These organs must have autonomy in functioning and should be free from interference by the other organs. The responsibilities and powers of these organs are expressly detailed to prevent any conflicts from arising between the organs.

In the Indian Constitution, the legislature has been conferred with the responsibility to draft the primary legislation of the country. These legislations must be within the scope of the subjects on which the legislative body can make laws. Article 245 demarcates the legislative bodies of the state and the union, wherein the parliament makes law for the whole or part of India and, likewise, the state legislatures for the whole or any part of that state. The subjects on which laws can be formulated are given in Article 246 and divided into three lists. Accordingly, the parliament has within its ambit subjects mentioned in List I, and the state legislative assemblies can make laws on List II and its subjects. List III also known as the concurrent list, consists of subjects on which both parliament and state legislature can regulate as per the power given to them by the constitution. Furthermore, article 248 of the constitution mentions the residuary powers of the parliament concerning any subject not covered in the concurrent list.

However, these powers granted to the legislature are not absolute and unlimited; the constitution makers were mindful of the need for a system of accountability on the functioning of the organs to prevent arbitrary use of the powers vested in them. The doctrine of colourable legislation is based on the need for such limitations on the legislature's power. It impedes the legislature from overriding its powers and legislating on subjects that do not fall within its ambit.

The Doctrine of Colourable Legislation

The doctrine of colourable legislation is a tool at the hands of the judiciary, which is employed to maintain the scale of accountability and check on the legislature's powers. It assesses the competency of the legislature to make laws on a particular subject by scrutinising whether it is empowered to do so by the constitution and other statutes. Primarily the judiciary employs this instrument in ascertaining whether there has been any infringement of constitutional provisions or checking the legitimacy of the laws passed by the legislature.

The Black's Law Dictionary[1] defines the term colour as being -

An appearance, semblance, or simulacrum, as distinguished from that which is real.

A plausible, assumed exterior, concealing a lack of reality.

A disguise or pretext.

An appearance or semblance without the substance of legal right.

The doctrine of colourable legislation thereby means that the 'colour' or 'pretext' of power attributed to the legislature cannot be used to achieve a goal which the legislature has been expressly denied from. It proclaims that the government cannot do anything indirectly that it is denied from doing directly. It is derived from the Latin maxim, "Quando aliquid prohibit ex directo, prohibit et per obliquus".

Hence, the aforementioned doctrine occurs when the legislature ostensibly legislates on a matter outside its purview by camouflaging it to make it appear under its scope. However, if the act of the legislature is in consonance and proper use of its power, then such objections to the competency may not arise.

The legislature often attracts the limitations and doctrine of colourable legislation in cases arising primarily in four ways -

- When the act of the legislature violates constitutional provisions corresponding to the separation of powers, this means that if the power to exercise judicial functions is vested in the judiciary, then any act of the legislature, which though appears to be a regular exercise of power but is instead a covert endeavour violates the principles of separation of powers.
- The Constitution of India is termed as 'Quasi Federal in nature' and demarcates the powers and functions of the union and state governments from each other. Any such

[1] Garner BA, Black's Law Dictionary (West Group 1999)

act of either government transgressing the federal structure of the Constitution would employ the doctrine.

- Some of the constitutions contain provisions for the Bill of Rights. Any act of the legislature violating this Bill of Rights may require to be evaluated through the lens of colourable legislation.
- In addition to the circumstances mentioned above, the legislature's attempts to act outside of the bounds of its authority under supplementary power may also be subject to the principle of colourable legislation.

Origin of Doctrine

The development and genesis of the doctrine can be traced back to the period of British colonialism and the need for delegated legislation to meet the requirements of local needs. The division of the colonies into provinces for smooth functioning and administration also included the emergence of local self-governments. However, the powers given to the provincial units were not unlimited. They were required to be in congruence with the English laws and within the scope of powers and responsibilities given to them. Applying the doctrine of colourable legislation concluded any violation of these requirements. Indian courts have also taken recourse to the legal precedents of Canada and Australia. The countries did not have a bill of rights in their constitutions, leaving scope for greater centralisation of power. Canada later incorporated a bill of rights in 1982.[2]

The Constituent Assembly of India also deliberated on the inclusion of the doctrine above at stretch. The doctrine garnered support from various members of the assembly who agreed with the need to place restrictions on the legislature's power to prevent arbitrariness and a tyrannical form of rule.

Alladi Krishnaswamy Iyer, a member of the constituent assembly, approved the review by courts in case of colourable legislation,

"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 in regard to a particular subject matter under the provisions of the Constitution, it is not for the Court to sit in judgement over the Act of the Legislature…..The province of the Court is normally to administer the law as enacted by the Legislature within the limits of its power. Of course, if the

[2] Constitution Act, 1982.

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. The Court will have to proceed on the footing that the legislation is intra vires."[3]

This doctrine is also known as "fraud on the constitution" because when the legislators legitimise an impugned law that is not covered by the legislatures' power as granted by the provisions of the Constitution in article 246, it constitutes a "fraud on the constitution." It is, therefore, clear that such laws violate the Constitution, and such ratified legislation may be deemed void. Dr Jawaharlal Nehru has also supported this stance in the constituent assembly debate.

"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."[4]

Supreme Court's Interpretation of Doctrine

The Supreme Court has detailed the colourable legislation and its validity in numerous cases. The attempt by the apex court has been to analyse the validity of the acts, which are presumed to be an indirect approach on the part of the legislature to transgress the constitutional provisions.

The first case where the colourable legislation doctrine was applied to restrict the legislature's powers was the State of Bihar v. Kameshwar Singh.[5] In this case, the contention was over the competency of the Bihar state legislature to enact The Bihar Land Reforms Act 1950, which dealt with the acquisition of the property of the Zamindars and the compensation payable by the state for such acquisition. The appeal, as filed against the decision of the high court by the state of Bihar, was on the ground of the competency of the legislature to enforce such laws. At the same time, the respondents submitted that the act was a fraud on the Constitution whereby the state legislature has abused its power disguising it in the garb of being under the ambit of entry no. 42 of the Concurrent list in the Constitution. They further argued that the legislature's motive behind the act was to acquire the Zamindars' property while denying them any compensation. The apex court, though, ruled in favour of the legislature on the ground of the

[3] Constituent Assembly Debates, Vol. IX, 1 (Sep. 12, 1949)
[4] *Supra* note 3.
[5] 1952 1 SCR 889.

doctrine of severability, which provides to serve or separate the unconstitutional parts of an act of the legislature from the constitutional parts on the assumption that the legislature's act must be held valid and enforceable up to such extent that they can be.

Later in the landmark case of K. C. Gajapati Narayan Deo v. State of Orissa,[6] The Supreme Court expounded on the doctrine of colourable legislation and the nature of acts of the legislature, which may attract the application of this doctrine. The petitioners' contention was partly on the grounds of the Supreme Court's decision in the prior case of State of Bihar v. Kameshwar Singh in a similar case related to the acquisition of land and the competency of the legislature. They also contended that the act of the legislature was based on an objective to acquire land unconstitutionally. This case has become highly relevant for deciding the ambit of colourable legislation while questioning the competency of the legislature. It has been reiterated and sought assistance in applying the doctrine by the courts.

The Supreme Court has comprehensively clarified its position on the doctrine and remarked, "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 the 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. On the other hand, if the legislature lacks competency, the question of motive does not arise at all."

Furthermore, it held that "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. 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 pretence or disguise …… The whole doctrine of colourable legislation is based upon the maxim that you cannot do indirectly what you cannot do directly. If a legislature is competent to do a thing directly, then the mere fact that it attempted to do it in an indirect or disguised manner, cannot make the Act invalid."

Thus on these grounds, the appeals were dismissed by the apex court.

[6] AIR 1953 Ori 185.

In another case, R. S. Joshi v. Ajit Mills,[7] The court reiterated its stance and declared the doctrine a fraud on the Constitution.

"A thing is colourable which is, in appearance only and not in reality, what it purports to be. In Indian terms, it is Maya. In the jurisprudence of power, the colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution are expressions which merely mean that the legislature is incompetent to enact a particular law, although the label of competency is stuck on it, and then it is colourable legislation."

The Supreme Court has also contemplated the method which is employed by the legislature in achieving an objective which does not fall within its power. In the case of Hingir-Rampur Coal Co. Ltd. v. The State of Orissa,[8] it has been observed that under the disguise of levying fee by the legislature, it may be an endeavour to impose taxes, in such circumstances, the courts would have to conduct close observation of the provisions of the legislation and evaluate the nature of the fee imposed, and such imposition is related to the service which the state has fined. Similarly, in the case of K.T. Moopil Nair v. State of Kerala[9] wherein the apex court struck down the Travancore Cochin Land Tax Act of 19, imposing uniformity in taxes which were decided for all types of land irrespective of their yield and productivity as a result of which the collected tax was far exceeding the income recipient of these lands. The court struck down the provisions it considered confiscatory instead of taxation.

On the question of whether the cases of judicial decisions being overridden by the legislature through the enactment of new legislation would attract the doctrine of colourable legislation, the Supreme Court assessed it in the case of Janapada Sabah Chhindwara v. Central Provinces Syndicated Limited.[10] It held that though the enactment is not judicial overriding, the court's decision is a transgression of the legislature's power.

"In the face of article 141, which made the Supreme Court judgement 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 precedent or between the parties."

[7] AIR 1977 2279.
[8] AIR 1961 459.
[9] AIR 1961 SC 552.
[10] AIR 1971 SC 57.

However, the Supreme Court has also considered changed circumstances which may call for the need to have new legislation, as illustrated in the case of Shri Prithvi Cotton Mill v. Broach Borough Municipality,[11] "A Court's decision always binds unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances." As a result, it is agreed that when the legislature legitimately modifies the premise of the judgement, there is no case of the legislature exercising judicial power.

Comparative Study with Canada

This section aims to explore and do a comparative study of the position of the doctrine of colourable legislation in the Constitution of another commonwealth nation - Canada. India and Canada share the common law system bequeathed to them by the Colonial rule of Great Britain. India has also been, to an extent, inspired by the country's constitution and has adopted certain features.

Canada has adopted the doctrine of colourable legislation similar to that of India, but the application of the doctrine is much more dormant in the Canadian context. Though there is no express provision in the Constitution of Canada for the doctrine of colourability since the Constitution embraces features like cooperative federalism and separation of power, the recourse to the doctrine as mentioned above for interpretation of the acts of the legislature becomes inevitable.

In the case of Attorney General for Ontario v. Reciprocal Insurers it was held,[12]

"Where the law-making authority is of a limited or qualified character, it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing."

Furthermore, it has been remarked by Leafroy that the parliament of Canada cannot, under the guise of general legislation, deal with what are solely provincial matters and that provincial legislatures cannot, under the guise of legislating on one of the matters listed in section 92, actually legislate on a matter assigned to the jurisdiction of the parliament of Canada. This reflects the intention to provide autonomy to the provincial and union governments and protect them from encroachment by other authorities.

[11] 1970 1 SCR 388.
[12] 1924 AC 328 at 337.

In the case of Union Colliery Company of British Columbia Ltd. v. Bryden,[13] The Judicial Committee in Canada contemplated the provisions of the British Columbian Act Coal Mines Regulation Act, 1890, which prohibited Chinese men from being involved in mining work in the province of British Columbia. The question raised was whether the act of the provincial legislature was an encroachment of the powers of the Dominion Parliament. The answer recorded was assertive, and the court ruled, "The regulations in the British Columbian Act were not aimed at the regulation of coal mines at all, but were in truth a device to deprive the Chinese, naturalised or not, of the ordinary rights of the inhabitants of British Columbia and in effect to prohibit their continued residence in that province since it prohibited their earning their living in that province".

Akin to India, the judiciary in Canada also places preference on the presumption of validity and Legality concerning legislative acts. The unconstitutionality of any provision being challenged must be proved beyond doubt by the authority or the individual seeking this, and the onus of proof lies on such parties. As held in the case by the judicial committee, "in the absence of evidence to the contrary", a court will not make a finding that legislation is a colourable attempt to regulate outside the enacting body's powers."[14]

However, there is a lacuna in having constructive and codified statutes for accountability of the Legislature's acts, which contrasts the position in India.

Hence, the stance of the doctrine of colourable legislation in India and Canada is analogous with a few exceptions.

Critical Analysis of the Doctrine

The court often employs the doctrine of colourable legislation in cases where the intention and purpose of any piece of legislation come under scrutiny. Although the doctrine is resorted to by the courts frequently, its application may be restricted or limited in certain circumstances.

For instance, in cases where the supreme legislation delegates the power, the doctrine's application is heavily restricted. Thus it comfortably aids the perpetuation of acts of the delegated authority even though they may be in contrast to the limits of power assigned to the authority.

[13] 1899 AC 580.

[14] Kruger v. The Queen 1978 1 S.C.R. 104.

Furthermore, the legislature's intention behind such an act or legislation has also been refuted to be considered by the courts in applying this doctrine. Any malicious motive or malafide intentions of the legislation shall be overlooked by the courts in assessing the position of the legislative act. The apex court upheld the same in the case of K. C. Gajapati Narayan Deo v. State of Orissa[15] : "The whole doctrine 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 impelled it to act are irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all."

The doctrine of Colourable Legislation is only satisfied in cases where the encroachment has been disguised, covert and deceptive and not when the same encroachment is achieved directly, as held in State of Bihar v. Kameshwar Singh. The court also places preference on the constitutionality of the legislature's actions following the principle of harmonious construction and *'construction ut res magis valeat quam permeate'*,[16] which provides for interpretation of acts of the legislature with the assumption of terming them constitutional and enforceable to the extent they can be. Thus, prior support for interpretation gets involved, which would resultantly place the exercise of power within the competency of the legislature.

Conclusion

The 'colourable legislation theory' in India means the legislature's legislative authority is limited. While the government claims to be acting within its legal jurisdiction, it is mindful that it has overstepped in critical areas.

As a result, the concept applies whenever a law attempts to achieve something it cannot do expressly or indirectly. Article 246 entrusted legislative powers to India's national and provincial legislatures, detailed in Lists I, II, and III of the Indian Constitution's Seventh Schedule 11. The notion of colourable legislation is not specified in the Indian Constitution, but it has evolved via judicial precedents to safeguard the transparency and supremacy of the Constitution.

To maximise the benefits of comparable legislation while minimising its drawbacks, it is vital to ensure that laws and regulations are developed in a transparent and participatory manner, with input from all stakeholders. It is also essential to ensure that legislatures can implement and enforce these laws and regulations effectively and that there is a mechanism to address

[15] AIR 1953 Ori 185.
[16] CIT v. Teja Singh, AIR 1959 SC 352.

disputes and violations when they occur. Ultimately, the success of comparable legislation will depend on the willingness of the legislature to work together in good faith and the judiciary's ability to prioritise the citizens' collective interests.

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