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Doctrine of Colourable Legislation

Ekta Khatri^a

^aMIT World Peace University, Pune, India

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This article is prima facie on “doctrine of colourable legislation”, the paper gradually states different aspects of the particular given doctrine, the first and the foremost the paper talks about the fundamental powers and authorities of all the organs in parliament, given to them by the constitution of India. In addition to that, the paper states genesis of doctrine of colourable legislation, limitations of the respective doctrine and how it has been perceived by the Indian courts in numerous landmark cases.

One instrument that the Supreme Court applies to comprehend the legality of the legislative laws and assure the competence of the legislature when ratifying these impugned legislation is the doctrine of colourable legislation. It is a guiding concept of great use in the development of legislation. Colourable legislation theory says, “Whatever the government is unable to do directly, it cannot do indirectly.” The theory is utilised in instances to assess problems of competency to pass legislation when a legislature exceeds its granted jurisdiction and indirectly legislates on something it cannot directly legislate on.

Keywords: *doctrine, legislation, constitution.*

INTRODUCTION

To understand the concept of the doctrine of colourable legislation, it is pertinent to understand the workings, functions, and overall administrative powers of the legislature. Legislation is also known as the legislative body and is a part of parliament, in simpler terms,

the legislature is delegated with the function of legislating laws for all of India, and such inception of the statutes must be within their legislative powers. The other two components of parliament are:

Firstly, the executive body; their primary function is to implement the laws formulated by the legislature on every individual who is a citizen of that country, and parliament consist of the judicial body; when any dispute arises in the matter of the question of law or some cases on the subject of the question of fact, the judicial body is entrusted with the powers to resolve such differences judicially along with the implications of the natural justice.

The powers and the function of the legislature are mentioned in part XI of the Indian constitution which states the relations between the union and the state. Article 245 of the Indian constitution¹ states, the extent of the powers of the laws made by parliament and the legislatures of the states. In addition to that, article 245 also mentions that the parliament may make legislate the laws for the whole of India, or any part of India and the state legislature may make formulate the laws for the whole of that particular state or any part of it. It is relevant to mention that the laws formulated by the parliament cannot be deemed as invalid citing that they would have an extra-territorial function.

Furthermore, article 246 of the Indian constitution also mentions that the legislature of the state can legislate laws on the subject matter which are enumerated in List II of the VII Schedule of the Indian constitution. In chapter XI of the Indian constitution talks about the relations between the union and the state, there are numerous provisions written on the aspect of the powers and the functions of the legislature of the union and the legislature of the states. Some of them being, Article 248 which talks about the residuary of the legislation, which explicitly states that the parliament has the power to legislate laws on any subject that are not mentioned in the state of the concurrent list of the Schedule VII of the Indian constitution².

Whereas, Article 246 talks about the Subject-matter of laws made by Parliament and by the Legislatures of States, mentioned that the union can only make laws on those subject matter

¹ Constitution of India

² *Ibid*

which are mentioned in list I of the seventh schedule of the Indian constitution, in addition to that, a state can make the laws which are mentioned in the List II of the seventh schedule of the Indian constitution³. Furthermore, the union as well the state can legislate laws on those subject matter which are mentioned in the List III the seventh schedule of the Indian constitution which they have the capacity onto, or on those subject matter, the constitution has given them to power to legislate the laws on.

THE DOCTRINE OF COLOURABLE LEGISLATION

The doctrine of colourable legislation is also one of the tools, which is applied by the supreme court to understand the validity of the legislated laws and to ensure the competence of the legislature while ratifying such laws. It is a guiding principle of immense utility while construing provisions relating to legislative competence. Colourable legislation theory says, "Whatever the government is unable to do directly, it cannot do indirectly." Which is derived from the Latin maxim "**Quando aliquid prohibetur ex directo, prohibetur et per obliquum,**"

Further elaborating on the doctrine of colourable legislation, any legislation is said to be colourable when the legislature passes legislation that is outside of their competence or the powers granted by the constitution by camouflaging it to look to be within their competency to legislate the laws. In layman's words, the concept states that if the legislature is not expressly or implicitly granted the right to legislate, then they cannot go beyond their competent powers and indirectly pass such laws. This is associated with the doctrine of colourable legislation. As a result, it refers to the legislature's ability to pass certain legislation. If the challenged law comes within the legislature's purview, the question of doing something indirectly that cannot be done directly does not arise.

The primary objective of the doctrine of colourable legislation is to maintain transparency among Indian citizens and to focus on ensuring that laws that are legislated are for the collective good and development of the community so that members of the legislative body do not abuse the powers bestowed upon them for their self-interests or economic advantages.

³ *Ibid*

GENESIS OF THE DOCTRINE OF COLOURABLE LEGISLATION

The black law's dictionary⁴ defines "colour" as-

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

The literal meaning of the doctrine of the colourable legislation is that under the powers of power's "colour" or "guise" The legislature cannot strive to accomplish another goal if it has been granted for one reason only. It is then ineligible to legislate on a purpose for which it is not otherwise competent. The Doctrine of Colourable Legislation is based on the Latin maxim "Quando aliquid prohibetur ex directo, prohibetur et per obliquum," which states that what cannot be done directly should not be done indirectly as well. The theory is utilized in instances to assess problems of competency to pass legislation when a legislature exceeds its granted jurisdiction and indirectly legislates on something it cannot directly legislate on.

This doctrine is also known as the "fraud on the constitution," because when the legislatures validate an impugned law that is not covered by the subject matter power of the legislatures to enact such a law, which is granted to them by the provisions of the constitution in article 246, it is substantially evident that such laws are clearly in violation of the constitution and such ratified laws may be declared invalid. In India, the judiciary was given the authority to use this concept in determining the legislative competence of the Union and state legislatures. In the Constituent Assembly discussion, Jus Alladi Krishnaswami Ayyar⁵ stated the idea of colourable law as follows:

"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 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 legislature is a colourable device, a contrivance to outstep the limits of

⁴ Garner and others, *Black's Law Dictionary* (7th edn, West Group 1999)

⁵ 'Constituent Assembly Debates on 12 September, 1949 Part I' (*Indiankanoon.org*)

<<https://indiankanoon.org/doc/1362403/>> accessed 25 August 2021

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”

Laws can be called colourable when a body or administrative authority has no competent authority to legislate the laws, but they mask it in such a manner for it to appear within the ambit of its competence and ability. Such laws are ruled unconstitutional and void because the legislature exceeds the limited constitutional powers granted to them, and as a result, they violate the provisions of the constitution in the form of non-compliance with the functions specified in the constitution. The primary objective of this doctrine is that the legislature would not overstep the powers and the functions given to them by the constitution. And they must formulate the laws for the betterment of society. The majority of the Supreme Court judges in *Kesavananda Bharati vs the State of Kerala*⁶ were of the view that the federal features form the basic structure of the Indian Constitution. By mentioning all the essentials for a federal and unitary form of government, it could be safely concluded that India is a quasi-federal form of government. India does not in its strict sense follow through with federalism or a unitary form of government. It has is a blended feature of federalism and a unitary form of government.

If there are any additional subjects on which laws must be drafted that are not covered by one of the three lists in Schedule VII of the Indian Constitution. Then such subjects are known as residuary power. In the unitary form of government, such residuary powers are given to the central government whereas, in the federal form of government such residuary powers are given to the state. However, there are instances where the state might legislate laws that do not fall under list 2 of Schedule VII of the Indian Constitution, and they might encroach over the center’s authority, which thus, creating disagreements between the state and the Centre. So, in a nutshell, the state is only obligated to pass laws that fall within its defined authority and not beyond it. Furthermore, while legislating laws, there must be no invasion of the concerned authorities mentioned in the three lists in the VII Schedule of the Indian constitution, and the government must not enact a law in such a way that they are camouflaging their competence to be within their jurisdiction.

⁶ *Kesavananda Bharati v the State of Kerala* AIR 1973 SC 1461

DOCTRINE OF COLOURABLE LEGISLATION EXPLAINED BY THE SUPREME COURT

The Supreme court provided a thorough explanation of the developing connection between the doctrine of colourable legislation and court decision overriding. Although the enactment is not judicial, it may attract the doctrine's application when the legislature overrides court decisions with legislation. However, with changing conceptions and powers, exceptions may now be seen.

In the case of *Shri Prithvi Cotton Mills vs Broach Borough Municipality*⁷

“When the issue of validity was taken to the Supreme Court in *Janapada Sabha Chhindwara vs 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”.

In *K.C. Gajapati Narayana Deo And Other vs The State Of Orissa*⁸, It was observed so 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 the constitution in specific legislative entries, or if there are limitations on the legislative authority in the shape of Fundamental rights, the question arises 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 transgressions may be patent, manifest or direct, but it may also be disguised, covert or indirect, or and it is to this latter class of cases that the expression colourable legislation has been applied in judicial pronouncements.”

In *Janapada Sabha Chhindwara vs Central Provinces Syndicate Ltd*⁹

⁷ *Shri Prithvi Cotton Mills v Broach Borough Municipality* 1970 1 SCR 388

⁸ *KC Gajapati Narayana Deo & Others v State of Orissa* 1953 AIR 375

In this case, the issue of the validity of impugned legislation was raised, to which the SC observed that with the amendment brought to the Act, the legislature has attempted to set aside or overrule the decision of the court that is prohibited under the Constitutional scheme. Article 141 of the Constitution that lays down the power of the SC for all its order to be binding on all Indian courts implies that the legislature in no capacity can say that the declaration made by the court was invalid, imprecise, or erroneous either as a precedent or between the parties. The above cases suggest that the expressly conferred powers to the legislature to legislate on any issue are inclusive of related and supplementary powers in respect

LIMITATION OF THE DOCTRINE.

1. The doctrine of the colourable legislation does not apply to subordinate or delegated legislation. If the powers of the legislature have been assigned, and any such bill has been approved by the delegated legislature, it is not subject to the colourable legislation concept.
2. The doctrine of the colourable legislation is based on the competence of the capacity of the legislature to formulate a statute, it does take into consideration the motive behind ratifying any such legislation. The goal might be malicious or have legitimate motives. The motive for legislating the law is irrelevant. However, the theory focuses only on the legislature's capacity to approve a certain bill.
3. If the impugned law is within the competence and ability of the legislature to ratify such laws, then those laws are not subject to the idea of colourable legislation. If they have the authority to establish laws, they also have the authority to implement those laws throughout all individuals who are subject to them.
4. The doctrine of colourable legislation would be meaningless if the constitution did not limit the powers of the legislature when legislating the law. As the entire argument is founded on the authority of law, "what legislation prohibits explicitly, they cannot do

⁹ *Janapada Sabha Chhindwara v Central Provinces Syndicate Ltd* 1971 AIR 57

implicitly." If the legislature is granted less authority and there are no constraints imposed on them, the theory will not be relevant.

5. The Legislature's violation of constitutional power can be obvious, visible, or actual, but it can also be veiled, disguised, or indirect, and the phrase "Colourable Legislation" only refers to the latter. If the legislatures while ratifying any law go beyond their given jurisdiction and exceed their given powers by the constitution, they either camouflage such laws to be within their constitutional powers or guise it to appear within their given limits, thus violating the provision of the constitution. Hence the doctrine of colourable legislation only applies to those laws, which are enacted by legislation beyond their constitutional powers.

CRITICAL ANALYSIS

The word "colour" has been described in the black' law dictionary as a guise or anything that looks to deceive, and the working of the legislation in the parliament is to enact or legislate laws. When we combine these two terms, we obtain colourable legislation, which is a statute that looks to be deceptive or in disguise. In plain English, colourable legislation occurs when legislators create laws when they do not have the power to do so, and then obscure those laws to make them appear to be within their capacity and competence.

A doctrine of colourable law, in my opinion, is highly crucial in a democratic nation. As in a constitutional democracy country such as India, where the separation of powers is observed strictly but not rigidly, all the pillars of the parliament keep each other in check as long as they do not misuse the powers granted to them by the constitution. However, there are occasions where legislators may create laws for their selfish enrichment and convenience, which may have a negative impact on the broader population.

It is a blatant violation of the Indian constitution to conceal the legislature's capacity to create laws that are not within their competent competence by going beyond the powers granted to them by the constitution. To protect the supremacy of the constitution, the theory of colourable law must be used. Because the Indian constitution is the supreme law and all other statutes and their provisions are drawn from it, the legislature must follow the provisions outlined in

the constitution. The doctrine of colourable legislation is of grave importance to maintain and uphold the concept of separation of powers, as the legislative body or any other body which comprises of the parliament would not abuse the powers which are granted to them by the constitution of India. The Doctrine of separation of power does play a vital role in the creation of a fair government and also fair and proper justice is dispensed by the judiciary as the judiciary is independent.

In article 50, of the Indian constitution states that all the three organs of the parliament should have independent powers, but they must keep a check on the other bodies so that they won't abuse the powers given to them by the constitution. To address legislative transparency for some improvements in the legislative system, colourable legislation is necessary to be studied. Legislative transparency is of utmost importance so the lawmakers or the legislatures would not abuse their powers for their personal or economic gains but the betterment of the country so that the citizens of India are known about the laws, rights, obligations they have for, all of them to come together and have a better working government.

In addition to that, if the impugned law is camouflaged or disguised to be under the authority of the legislative body then such a law would be considered void and unenforceable. Whereas, if the impugned law does fall to be under the "direct authority" of the legislative body then such laws would not be subject to the doctrine of colourable legislation as the law is not colourable in its essence. Although it is pertinent to mention the fact that, all the concepts regarding the doctrine of the colourable legislate revolved around the competency of the legislative body to legislate or formulate the laws, but there is also an indirect link of the doctrine of colourable legislation to the doctrine of separation of powers.

In *Ram Jawaya vs the State of Punjab*¹⁰

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

¹⁰ *Ram Jawaya v State of Punjab* AIR 1955 SC 549

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."

Although the doctrine of separation of powers is not followed in its strict sense or has a rigid essence, Each organ has to keep a check on the other organ, so that they do not abuse the powers given to them by the constitution and make sure with utmost certainty that they do indeed work in the welfare of the people. Thus, creating a balance amongst them. The doctrine of colourable legislation assists in maintaining the doctrine of separation of powers and keeps a check on the working and the functioning of the legislative body of the parliament so that they would not legislate any law which is ultra vires to their granted authority given in the Indian constitution.

CONCLUSION

In India, the 'colourable legislation theory' simply implies a restriction of the legislative authority of the legislature. While the government professes to be working within its legal authority, it appears to be cognizant that it has overstepped its bounds in several areas. As a result, the idea applies whenever a law seeks to do something it cannot explicitly and do indirectly. Legislative powers in India's national and provincial legislatures are delegated by Article 246 and given in the Indian Constitution's Seventh Schedule by lists I, II, and III.¹¹ The doctrine of colourable legislation has nowhere been defined in the Indian constitution, but there has been the evolution of such through judicial precedents to maintain the transparency and supremacy of the constitution. Although, if the impugned law does fall within the competent authority of the legislature and the question of colourable legislation does not arise. And the intentions behind the formulation or ratifying a bill could be mala fide or bona fide, but the intention is not taken into cognizance during the implication of the doctrine of colourable legislation or to deem a law as "colourable".

¹¹ Constitution of India, art 246

To conclude, the doctrine of colourable legislation aids in improving the democracy, and that the legislative body would not over-ride the powers which are granted to them in the Indian constitution, then any such enactment would be rendered void and unenforceable.