

HOW COLOURFUL CAN A LEGISLATION BE?

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ABSTRACT

“You cannot do indirectly what you are prohibited from doing directly.” This is the essence of the doctrine of colourable legislation. For countries that pride themselves on their federal democratic structures, this doctrine plays a crucial role in maintaining those coveted structures. Countries, especially India have seen and still continue to see constant tussle for power among different bodies of this federal structure, each one trying to establish one’s legitimacy and dominance over the other, though their jurisdiction is constitutionally enshrined. Therefore, the doctrine aims to uphold the ideals of checks and balances in a democracy, wherein it emphasizes the competency and autonomy of bodies, especially the legislature to take decisions independently. This article seeks to explore and understand the concept of colourable legislation and analyse the shortcomings and gaps in the applicability of the doctrine in varying contexts. It further seeks to examine its impact on legislative and judicial authority, in varying contexts when the expectations from these two pillars are different.

Keywords: Colourable Legislation, Separation of Powers, Judiciary.

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INTRODUCTION

The Constitution of India is premised on the concept of separation of powers amongst its vital organs, the legislative, executive, and judiciary, and outlines each of its powers and functions which are vital to the functioning of any democracy. This Federal structure is premised on the exercise of authority within the limits of each of its functions and thereby develops a system of checks and balances to safeguard against unilateral decision-making and promote unity and diversity in thoughts.

WHAT IS THE COLOURABILITY OF LEGISLATION

The doctrine is born out of the legal maxim, “*Quando aliquid prohibetur ex directo, prohibetur et per obliquum*”, which translates into “What cannot be done directly, should also

not be done indirectly.” The constitution has laid out the division of powers in black letters. But despite this, the legislative body could exploit certain grey areas to enact legislations that are out of its purview of powers. Therefore, it could do something that it couldn’t have accomplished directly, or indirectly. This is a colourable demonstration of the power of the legislative authority. This doctrine limits the scope of the legislature’s ability to enact laws and is a principle applied in cases dealing with the question of legislation that seems to wander out of the boundaries of the legislature, thereby limiting any overarching powers or abuse.

POSITION OF THE INDIAN CONSTITUTION

According to the Indian Constitution, the legislature cannot demand to fulfill a purpose that is not within its purview under the cover or pretext of a power granted for another purpose. When it indirectly or discretely violates said provisions of the constitution by claiming any act falls within its purview when it doesn’t, it is referred to as “*fraud on the constitution.*”

Article 246¹ of the constitution outlines the division of power between the Parliament and State legislative assemblies based on the subject matter of law. In addition, the Seventh Schedule of the Indian Constitution categorises legislative issues into the Union List, the State List, and the Concurrent List. The states and the centre must operate within their respective legislative jurisdictions. When legislatures enact laws on subject matters which they have no authority over under the seventh schedule or limitations under Part III of the constitution, the law is deemed to be *ultra vires* and colourable legislation emerges. Sciences

LIMITATIONS ON THE APPLICABILITY OF THE DOCTRINE

Not applicable in two scenarios:

1. *cases of subordinate legislation*
2. *when the power of legislatures is not limited by constitutional provisions*

Subordinate legislation is enacted by a person or body using the powers granted by a statute. Since the question of colourability arises only based on the competency of the legislative body, which doesn’t arise in the case of subordinate legislation, the doctrine doesn’t apply in this context. The onus is on the petitioner/appellant to prove the colourability of the impugned act.

¹ Constitution of India 1950, art 246

i.e., there will always be an assumption of constitutional legitimacy for legislative action. This was held by the Supreme Court in *Ram Krishna Dalmia v. S.R. Tendolkar*² wherein the court held that “there is always the presumption of constitutionality in favour of an enactment” and the burden of proof is on whom who attacks to prove the transgression of constitutional principles. Hence, this gives it the authority to legislate on auxiliary and ancillary issues as well.

This judgement was important in clarifying the position of law under **Article 14** as legislation must not only be rational but also ensure equal protection under the law in its application³.

Does not consider necessity and intentions.

In this regard, the Supreme Court in *K.C. Gajapati Narayan Deo v. State of Orissa*⁴, 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.

If an act appears to be colourable but is not in reality, the court investigates the true nature of the law and pays attention to the object of the law as it deems the purpose, but not the motive to be relevant in that scenario. This was affirmed by the Supreme Court judgement in two judgements namely, *Jalan Trading Co. Private Ltd. v. Mill Mazdoor Union*⁵ and *Nageshwar v. A.P.S.R.T Corp*⁶, and held that insofar as the legislature has the authority and competence to sanction laws on the impugned subject matter, any motive good or evil is irrelevant.

The doctrine is thus unrelated to the bona fide or mala fide intentions of the legislature, which is precisely why it is a concern. Even if for example, the legislature intends to bring in laws that are practically speaking, in the betterment of the interests of the citizens of a state or the country, if the legislature is deemed to not be competent to legislate on the subject matter, the doctrine would apply. And on the flip side, in a growingly polarising relationship between certain states and the centre, any law enacted with a mala fide intention to dominate one another, would still be held constitutional. This applies regardless of the relevance of the said law.

² *Ram Krishna Dalmia v. S.R. Tendolkar*, AIR 1958 SC 538

³ Constitution of India 1950, art 14

⁴ *K.C. Gajapati Narayan Deo v. State of Orissa*, 1954 SCR 1

⁵ *Jalan Trading Co. Private Ltd. v. Mill Mazdoor Union*, 1967 SCR (1) 15

⁶ *Nageshwar v. A.P.S.R.T*, AIR 1959 SC 308

Considering the fast-paced changes in technology and societal needs, the test of colourability must be consistently evolved on a case-to-case basis. This is particularly stark and was previously observed in the sphere of cybersecurity laws which is classified as a residuary subject currently but would require adequate regulation on the state level as the technology levels vary. This is a development that couldn't have been reasonably foreseen by the makers of our constitution.

Further, since the legislative actions in principle are construed as the will of the people as the lawmakers are said to be representatives of the people, the intention be it good or bad is crucial to be considered by courts when deciding colourability.

JUDGEMENTS AFFIRMING THE MERITS OF THE DOCTRINE

In the case of *State of Bihar v. Kameshwar Singh*⁷, the validity of **The Bihar Land Reforms Act 1950**⁸ was challenged. The impugned act was a land reform system aiming to abolish the landlord's custom from the state. The State provided the landlord with half of the outstanding rent as compensation through **entry 42** of the Concurrent List which refers to the compensation for acquired property. The Supreme Court ruled that, rather than determining compensation, the Act indirectly removes the petitioner from his property without adequate compensation. The Act prevented the petitioner from directly requesting compensation even though it purported to establish a standard for calculating compensation. Hence the doctrine of colourability is applied to provide fair compensation and aid in the just implementation of necessary land reform policies.

Further as observed in *Janapada Sabha Chhindwara v. Central Provinces Syndicate Ltd*⁹, the legislature is explicitly granted authority to enact or legislate on any matter including all ancillary and incidental powers related to the proper enforcement of that law. Thus, the doctrine is necessary to resolve legislative accountability concerning necessary modifications in the functions of the legislature.

⁷ *State of Bihar v. Kameshwar Singh*, AIR 1952 SC 252

⁸ The Bihar Land Reforms Act 1950, s. 32

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

ANALYSIS OF CONTEMPORARY ISSUES INVOLVING THE DOCTRINE

Jallikattu: The Supreme Court's constitutional bench in the case of *Animal Welfare Board of India & Ors versus Union of India & Ors* reserved judgement regarding the practice of *Jallikattu*, a bull-taming sport in Tamil Nadu. The petitioners' arguments find their basis in the doctrine of colourable legislation. It was contended that the Tamil Nadu Amendment Act (consisting of the *Prevention of Cruelty to Animals (Tamil Nadu Amendment) Act, 2017* and *Prevention of Cruelty to Animals (Conduct of Jallikattu) Rules, 2017*) which sought to overturn the Supreme Court Judgement in 2014 banning such practices, is a colourable piece of legislation¹⁰. They argued that since the state government had no authority to enact this piece of legislation under List II of the seventh schedule, the government chose to enact it through **Entry 17** of List III of the seventh schedule which was a colourable exercise, and the overturning of the judgement violated the principle of separation of powers. It was further submitted before the court that though the objective of the said act is the prevention of cruelty, the amendments perpetuate it.

On the issue of colourability, the court must observe that the legislature of Tamil Nadu meets the tests of competency as laid by the aforementioned supreme court judgements. "*Prevention of cruelty to animals*" is a subject matter on the concurrent list and therefore the legislature is well within its rights to legislate on the same. Regardless as mentioned before, there is a presumption of constitutionality of the act and the intention, bona fide or mala fide is irrelevant to the issue of colourability. Therefore, the question now before the court becomes whether the act could be struck down based on its implementation assumed/found to be impractical. i.e., does the act in its exercise prevent cruelty or indirectly perpetuate it? This question falls outside the scope of the issue of colourability but is however relevant while determining the constitutionality of the said act.

This judgement also highlights the need for reform of the doctrine. The needs and practices of states in India vary tremendously owing to a largely diverse population bifurcated into states on linguistic and cultural backgrounds. Hence, some states may require competency to legislate on issues that are important to them but may be perceived differently by the centre. Insofar as it meets the test of constitutionality such legislation must be permitted.

¹⁰ Prevention of Cruelty to Animals (Tamil Nadu Amendment) Act 2017, s. 5

Article 370 of the Indian Constitution: Abrogation of Article 370 has raised the question of whether legislative competence should take precedence over the popular consent of the people. **Article 370(3)** makes it legally necessary for the J&K Constituent Assembly's approval to nullify Article 370.¹¹ Since this cannot be done directly, the interpretation clause in **Article 367** was changed to read "*legislative assembly*" instead of "*Constituent Assembly*." In addition, **Article 370 (1) (c)** states that **Article 1** extends to J&K as well which then brings J&K under the jurisdiction of Schedule 1 of the constitution owing to the usage of the phrase "*State of Jammu and Kashmir*."¹² This means that the state cannot be converted into a union territory as the powers of the legislature in this regard were limited by the constitutional provision of schedule 1 and Article 370 therefore the doctrine of colourable legislation will apply. However, the centre through **order 2**, revoked Article 370 and replaced it with the "**Jammu and Kashmir State Reorganisation Act 2019**" to convert it into a union territory. This raises an interesting question for the constitutional bench of the supreme court. Do the amendments mentioned above constitute an indirect means of achieving something which is prohibited? And is the legislative body competent to bring about the changes or does it transgress constitutional provisions?

The amendments prima-facie seem to be colourable but are something that the court needs to carefully consider as it involves complex constitutional provisions and a long history of statutes and amendments to evaluate. Once again there is a major drawback of the intent or necessity in this regard not being considered for the question of colourability of legislation as the consequences of this act are primarily driven by the intent of the law-making body and the necessity it foresees on the ground in J&K considering the socio-political scenario at hand.

CONCLUSION

The constitution is clear that there are boundaries that each pillar of democracy must observe and respect. When lawmakers attempt to go beyond the restrictions imposed by the Constitution, the question of their competence frequently arises, but these violations are occasionally blatant or obvious. It is the colourability of legislation that reinforces the system of accountability and balances that limits the overarching powers of the legislature. The doctrine therefore must be employed judiciously and needs flexibility in its application and

¹¹ Constitution of India 1950, art 370 (3)

¹² Constitution of India 1950, art 370 (1) (c)

reform. It is at the end of the day a vital tool of a federal structure that just has to catch up with time and its changes.

