CHAPTER III
COLOURABLE LEGISLATION

SCOPE OF THE DOCTRINE

3.1 Legislation passed by a legislature in excess of its powers allowed by the Constitution could 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. In addition to questions of excess of power openly exercised, there may arise questions of excess of power covertly exercised. A legislature may ostensibly be functioning within its limits. Nevertheless, it would be attempting to achieve something which it has no power to achieve. This attempt to do indirectly what it cannot do directly because of the limitations on legislative competence is described as colourable legislation.

3.2 It would be clear at once that the temptation for colourable legislation can arise only if there are limitations on the legislative power. In the case of a Parliament, like

1. Among the literature on the meaning and logical status in constitutionalism of the maxim "What cannot be done directly cannot be done indirectly" see D.K. Singh in (1966) 29 M.L.R. pp.273-278. The maxim is an instance of the application of the principle of "good faith" and is part of the body of logical principles whose existence is presupposed by any system of law.
the British Parliament, described as omnipotent with no limitations whatsoever arising from an entrenched Constitution, there can be colourful but never a case of colourable legislation. Limitations on the legislative powers arising from constitutional provisions are generally of four types.

1) The Constitution may have adopted the doctrine of separation of powers which might mean that the legislature should not exercise essential judicial or executive functions. If, for example, under the guise of exercising a legislative power, an attempt is made to exercise judicial power, it would be a covert attempt to overcome one of the limitations imposed on the legislature by the Constitution.

2) Very often, a Constitution may include a Bill or Charter of Fundamental Rights which would mean so many limitations on the legislative competence of the legislature. Covert or concealed attempt to overcome the limit so imposed by a Bill of Rights may attract the principle of colourable legislation.

3) In the case of federal constitutions, when exclusive legislative competence is allocated between the federal and the regional legislatures, attempts by one to legislate in a covert fashion in the exclusive field allotted to the other would be another instance of colourable legislation.

4) In addition to the three types mentioned above, there have been instances of colourable legislation where the legislatures have attempted to overstep the limits under the guise of exercising ancillary power.
LEGISLATIVE ATTEMPT TO EXERCISE JUDICIAL POWER

3.4 Though the Constitution of India is not based on a rigid doctrine of separation of powers as is found in the United States of America, it is clear that the Constitution envisages that the functions of the three great departments of the State, namely, the executive, legislature and judiciary should generally be exercised separately. Functional separation is better provided for as between the legislature and the judiciary than as between the legislature and the executive. It is true that the judicial power has not been vested in the Supreme Court as in the U.S.A. or Australia. But the detailed provisions of the Constitution regarding the higher judiciary, and particularly those governing its independence, amply bring out intention of the Constitution that the judicial power should be exercised subject to certain basic conditions.

Colourable legislation and the equal protection clause

3.5 There have been some instances where the Supreme Court has struck down legislation applying to a particular

person or case on the ground of discrimination under article 14. Though in the first of such cases namely, Chiranjit Lal v. Union of India the legislation was upheld on the ground that even a single instance depending upon peculiar circumstances could offer the basis for a reasonable classification for the purpose of article 14, in Ameerunnissa Begum v. Mahboob Begum, the Supreme Court struck down as offending article 14, an Act of the Hyderabad Legislature, the Waliuddowla Succession Act, 1950, which had deprived two ladies and their children of their alleged rights to succession under the Muslim law. Speaking for the Supreme Court, B.K. Mukherjea observed:

"The continuance of a dispute even for a long period of time between two sets of rival claimants to the property of a private person is not a circumstance of such unusual nature as would invest a case with special or exceptional features and make it a class by itself justifying its differentiation from all other cases of succession disputes. As appears from the Preamble to the Act, the only ground for depriving the two ladies and their children of the benefits of the ordinary law is the fact that there was an adverse report against them made by the State Legal Adviser.

3. A.I.R. 1951 S.C. 41. This decision cannot be considered authoritative on this point. The dissenting judgment of Patanjali Sastri J. is unanswerable. The majority decision was rendered ineffective by the immediately subsequent decision in Dwarakadas v. Sholapur Spinning and Weaving Co., A.I.R. 1954 S.C. 119.
5. Others on the Bench were Patanjali Sastri C.J., Chandrasekhara Aiyar, Bose and Ghulam Hassan, JJ.
This ground in itself is arbitrary and unreasonable. The dispute regarding the Succession to the estate of the Nawab was a legal dispute pure and simple and without the determination of the points in issue by a properly constituted judicial tribunal a legislation based on the report of a non-judicial authority and made applicable to specific individuals who are deprived thereby of valuable rights which are enjoyed by all other persons occupying the same position as themselves, does, in our opinion, plainly come within the constitutional inhibition of Article 14.

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".  

3.6 The reference to non-determination of the points in issue by a properly constituted judicial tribunal and the reference to British private Acts show that it was the covert attempt on the part of the legislature to exercise judicial power that prompted the court to hold the legislation to be unreasonable and offending under article 14.

3.7 In Ram Prasad v. State of Bihar, the validity of the Bihar Sathi Lands Restoration (Act 1950) (34 of 1950) was in question. This Act was passed on the basis of a recommendation of the Congress Working Committee. The Act cancelled the settlements made in favour of a person of the lands involved

6. Ibid, at p.94.
in that legislation and held by the State under the Administra-
tion of the Court of Wards. Sarjoo Pershad J., one of the
judges of the Division Bench in the High Court, had expressed
considerable doubts as to whether a legislation of that type,
which was in "form and substance nothing but a decree of a
Court", was within the competence of a legislature and
warranted by the Constitution. The Supreme Court struck down
the Act as violating article 14 as in the Ameerunnissa Begum
Case and B.K. Mukherjea J. observed as follows:

"It cannot be disputed that the legislation in the
present case has singled out two individuals and one
solitary transaction entered into between them and
another party, namely the Bettiah Wards Estate and has
declared the transaction to be a nullity on the ground
that it is contrary to the provisions of law, although
there has been no adjudication on this point by any
judicial tribunal. It is not necessary for our present
purpose to embark upon a discussion as to how far the
doctrine of separation of powers has been recognised
in our Constitution and whether the legislature can
arrogate to itself the power of the judiciary and
proceed to decide disputes between private parties by
making a declaration of the rights of one against the
other". 10

Patanjali Sastri C.J. in his concurring judgment
observed:

9. See ante n.4.
"This is purely a dispute between private parties and a matter for determination by duly constituted Courts to which is entrusted in every free and civilised society, the important function of adjudicating on disputed legal rights, after observing the well-established procedural safeguards which include the right to be heard, the right to produce witness and so forth. This is the protection which the law guarantees equally to all persons, and our Constitution prohibits by Art. 14 every State from denying such protection to any one. The appellants before us have been denied this protection."

3.8 The above excerpts provide a basis for suggesting that it was the colourable attempt on the part of the legislature to exercise judicial power that invited invalidation of the legislation under article 14. This solution would avoid the difficulty of reconciliation of the three cases on the principle of equal protection. In Ameerunnissa Begum v. Mahboob Begum, the court held that the object of the Act as stated in the Preamble "of ending protracted litigation" was not sufficient to make the case a class by itself to be differentiated from other cases of succession. In the Ram Prasad Case, the court said that it had singled out two individuals and one solitary transaction alleged to be contrary to law for special treatment. However, this would seem to be in accord with the Court's doctrine in Chiranjit Lal v. Union of India, of "a case being a class". The real trouble with the

court's doctrine of equality is that the test of reasonable classification based on "intelligible differentia" and "nexus to the object of the Act" do not afford any guarantee of equal treatment if the object of the legislation is unequal. The object of the legislation if accepted, on the basis of the above test, the law, it is submitted, seems to be sustainable in all the above three cases.

Colourable legislation and the validation and overriding of judicial verdicts

3.9 When a legislature nullifies the decision of a court by passing new legislation, the question has been raised whether it does not amount to an attempt to exercise judicial power. It has been held that when the legislature retrospectively validates what has been declared invalid by a court of law, and the basis of the earlier judicial decision is changed, and there is no restriction preventing the legislative power from doing it, there is no interference with the exercise of judicial power.

3.10 In Shri Prithvi Cotton Mills v. Broach Borough Municipality Hidayatullah C.J. stated the position in the following terms:

"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 must always bind unless the condition on which
it is based are so fundamentally altered that the decision
could not have been given in the altered circumstances.”

It is therefore well accepted that when the basis of
the decision is validly changed by the legislature there is no
case of an exercise of judicial power by the legislature.

3.11 If however, the legislative attempt at validation
merely says, without changing the basis of law, that the
judicial verdict shall not apply, that would be declared an
attempt to exercise the judicial power, and therefore, invalid.
Thus in the Municipal Corporation of the City of Ahmedabad v.
New Shrock Spinning and Weaving Co. Limited, the validity of
section 152-A of the Bombay Provincial Municipal Corporation
(Gujarat Amendment and Validating Provisions) Ordinance 1969
was in question. This section authorised the Municipal Corpora-
tion to withhold refund of the illegally collected taxes till
reassessment and determination of tax notwithstanding the
judgment of any court to the contrary. Criticising this
 provision, K.S. Hegde, J. observed:

405; M/s. Hiralal Ratan Lal v. The Sales Tax Officer,
For some of the earlier High Court cases see, Potti
Gulab Rao v. Pandurang, A.I.R. 1957 Bom. 266 (F.B.);
M.P. 245. Paragraphs 9 to 13 of the judgment of this case
contains a useful review of the earlier cases.
"Prima facie that provision appears to command the Corporation to refuse to refund the amount illegally collected despite the orders of this Court and the High Court. The State of Gujarat was not well advised in introducing this provision. That provision attempts to make a direct inroad into the judicial powers of the State. The legislatures under our Constitution have within the prescribed limits, power to make laws prospectively as well as retrospectively. By exercise of those powers, the legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective. But no legislature in this country has power to ask the instrumentalities of the State to disobey or disregard the decision given by courts".19

3.12 In Amalgamated Coalfields Limited v. Janspada Sabha, Chhindwara the Supreme Court held that the levy of certain cess on coal was invalid as it was imposed without the previous sanction of the Government as required by law. The Madhya Pradesh Koyala Upkar (Manyatakeran) Adhiniyam (M.P. Coal Cess Validation Act 1964), (18 of 1964) was passed to validate the levy declared illegal by the Court. But the provisions did not indicate the nature of the amendment made in the Act nor did they say that the notification issued without the sanction of the State Government must be deemed to have been validly issued in terms of the amended law. When the question of validity was taken to the Supreme Court in Janspada Sabha Chhindwara v. Central Provinces Syndicate Limited, J.C. Shah J. said that

22. Other judges on the Bench were K.S. Hegde, A.N. Grover and I.D. Dua.
it was not for the court to supply the omission, and held that what the legislature did was simply to overrule the decision of the court without changing the basis of the decision. It was pointed out 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 a precedent or between the parties.  

3.13 Another illustration of the courts striking down legislation as an inroad into the judicial power is provided by the decision in State of Tamil Nadu v. M. Rayappa Gounder. In this case, the Madras Government attempted to reassess certain theatre owners in respect of escaped entertainment tax. The Madras High Court held that the Madras Entertainment Tax Act 1939 did not authorise a reassessment. Thereupon the Madras Entertainment Tax (Amendment) Act 1966 (20 of 1966) was passed to validate the reassessment. This Act having been struck down by the High Court the matter was taken in appeal to the Supreme Court by the State of Tamil Nadu by special leave. In the Supreme Court, K.S. Hegde J. referred to section 7 of the Act which validated the assessment and observed:

"The effect of this provision is to overrule the decision of the Madras High Court and not to change the law retrospectively. What the provision

23. Ibid, at p.61.  
25. Others on the Bench were J.C. Shah and A.N. Grover, JJ.

Colourable legislation by the exercise of judicial power by the constituent power

3.14 That the legislative power cannot in the guise of passing legislation exercise judicial power may now be taken as a settled doctrine. Hence in order to validate something declared invalid by the judgment of a court of law, the legislature should change retrospectively the law that was the basis of the judgment and such a change is not now construed as an encroachment on the judicial power. The constitutional disability on the part of the legislatures to exercise judicial power also extends to the constituent power. In *Smt. Indira Nehru Gandhi v. Raj Narain*, the validity of sub-articles (4) and (5) of Article 329A was in question. These provisions were as follow:

"(4) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith shall apply or shall be

27. It might be remarked by the cynic that this view installs form in the place of substance. But this is not so. To reformulate an initial base acceptable to common-sense and the common people there must exist a fairly presentable factual situation.
29. Introduced by Section 4 of the Constitution Thirtyninth Amendment Act 1975, with effect from 10-8-1975.
deemed ever to have applied to or in relation to the election of any such person as is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void, or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order is based shall be and shall be deemed always to have been void and of no effect.

(5) Any appeal or cross appeal against any such order of any court as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirtyninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4)".

3.15 The effect of these provisions was to make the pre-existing Parliamentary law inapplicable to the election disputes regarding the Prime Minister's election. The election was never to be held void with reference to any ground existing in such law and in spite of the pronouncement of any court to that effect. Any order of the court holding the election to be void was itself to be void and pending appeals had to be disposed of on that basis.

3.16 It was clear that what was attempted was the validation of election by use of constituent power, without any change in the law and in the face of judicial
pronouncement. And if the legislative power had attempted such validation without changing the law which formed the basis of the judgment, it would have been held to be a colourable legislation attempting to exercise judicial power. The important question raised was whether the constituent power was so prevented from exercising judicial power. The decision of the court shows that the constituent power cannot exercise judicial power in an arbitrary way without certain functional restrictions.

3.17 A.N. Ray C.J. held that at the level of the constituent power, the powers could not be differentiated into legislative, executive and judicial powers and that the constituent power was sovereign. If the constituent power was itself disposing of an election dispute it should do so by applying the law or norms. Holding against the attempted validation of the election by the constituent power His Lordship observed as follows:

"Clause 4 of Article 329-A in the present case in validating the election has passed a declaratory judgment and not a law. The legislative judgment in Clause 4 is an exercise of judicial power. The constituent power can exercise judicial power but it has to apply law."

30. The Allahabad High Court had held that the election to the Lok Sabha of Smt. Indira Gandhi, Prime Minister, from Rae Bareilly Constituency in 1971 to be void on account of certain corrupt practices under the Representation of Peoples Act 1951. An appeal and a cross appeal from this judgment were pending in the Supreme Court when the Constitution (Thirteenth Amendment) Act, 1975 was passed.
The validation of the election is not by applying legal norms. Nor can it be said that the validation of election in Clause 4 is by norms set up by the constituent power.

Clause 5 in Article 329-A states that an appeal against any order of any court referred to in clause 4 pending, before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court, shall be disposed of in conformity with the provisions of Clause 4. The appeal cannot be disposed of in conformity with the provisions of clause 4 inasmuch as the validation of the election cannot rest on clause 4."31

The result was that the election of the Prime Minister was upheld on the merits of the case and in the light of the legislative changes in the law governing elections, made with retrospective effect and protected by the Ninth Schedule.

3.18 H.R. Khanna J. referred to the Supreme Court cases holding the exercise of judicial power by the legislature invalid and quoted from American Jurisprudence to show the

31. Ibid, at p.2321.
prevailing position in the United States of America.

3.19 The attempted validation of the election making the previous law inapplicable and without creating new law to govern the case, but simply on the basis of the declaration in clause (4) violated "the principle of free and fair elections which is an essential postulate to democracy and which in its turn is a part of the basic structure of the Constitution" which the Supreme Court was bound to protect in view of the

33. The passage quoted from the American Jurisprudence, Vol.46, pp.318-19 was the following:-

"The general rule is that the legislature may not destroy, annul, set aside, vacate, reverse, modify, or impair the final judgment of a court of competent jurisdiction, so as to take away private rights which have become vested by the judgment. A statute attempting to do so has been held unconstitutional as an attempt on the part of the legislature to exercise judicial power, and as a violation of the constitutional guarantee of due process of law. The legislature is not only prohibited from reopening cases previously decided by the court, but is also forbidden to affect the inherent attributes of a judgment. That the statute is under the guise of an act affecting remedies does not alter the rule. It is worthy of notice, however, that there are cases in which judgments requiring acts to be done in the future may validly be affected by subsequent legislation making illegal that which the judgment found to be legal, or making legal that which the judgment found to be illegal".

"10.- Judgment as to public right.

"With respect to legislative interference with a judgment, a distinction has been made between public and private rights under which distinction a statute may be valid even though it renders ineffective a judgment concerning a public right. Even after a public right has been established by the judgment of the court, it may be annulled by subsequent legislation". (Ibid, p.2347)."
judgment in *Kesavananda Bharathi Case*. Clause (4) was struck down as a result.

3.20 K.K. Mathew J. stressed the Blackstonian distinction between the law and the particular command which was accepted by the Privy Council and several writers on jurisprudence. He held:

"I cannot regard the resolution of an election dispute by the amending body as law; it is either a judicial sentence or legislative judgment like the Bill of Attainder".

3.21 He also pointed out that the amending body did not ascertain the facts of the case (which should have been collected not by employing legislative process but by employing judicial process) and also did not change the law which formed the basis of the judgment given by the High Court.

3.22 The amending power (the pro-sovereign) could not act arbitrarily by picking and choosing particular cases for its

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35. Ibid, at p.2355.
38. Ibid, at p.2377.
39. "If clause (4) was an exercise in legislative validation without changing the law which made the election invalid, when there ought to have been an exercise of judicial power of ascertaining the adjudicative facts and applying the law, the clause would damage the democratic structure of the Constitution, as the Constitution visualises the resolution of an election dispute by a petition presented to an authority exercising judicial power...." (at p.2376).
disposal ignoring the legislative and judicial processes. If the adjudicative facts regarding the election dispute had to be gathered through the judicial process and a decision given by applying the law, what the amending power could do to settle a dispute was to authorise the judicial and legislative processes to dispose of the election dispute. The amendment in the present case without these formalities would "damage or destroy an essential feature of democracy as established by the Constitution namely, the resolution of election dispute by an authority by the exercise of judicial power by ascertaining the adjudicative facts and applying the relevant law for determining the real representative of the people".

3.23 M.H. Beg J. held that it was a basic constitutional principle that in the purported exercise of law-making power, legislatures were precluded from exercising essential judicial functions by withdrawing a particular case pending in the court for legislative disposal. According to the majority view in Kesavananda Bharathi Case, the supremacy of the Constitution and the separation of powers were part of the basic structure of the Constitution.

3.24 The principle of separation of functions was not new but was embedded in our own best traditions and dictated by commonsense. That the judicial and law making functions

40. Ibid, at p.2383.
41. Ibid, at p.2395.
43. Ibid, at p.2428.
44. Ibid, at p.2431.
were not meant to be interchangeable and had to be differentiated in any constitutionally prescribed sphere of operation of powers including that of the constituent power seemed to be beyond any shadow of doubt. Because the Constitutional power necessarily carried with it the power to constitute judicial authorities it did not follow by implication that the Parliament acting in its constituent capacity could exercise the judicial power itself directly without vesting it in itself first by an amendment of the Constitution. Though this appeared to be a procedural matter, as a matter of interpretation of the Constitution and from the point of view of correct theory and principle, it was highly important. To make a declaration of the rights of the parties to a dispute without first performing a judicial function was not included in the "Constituent Power" or any other law making power. In the result, His Lordship held that article 329-A(4) was invalid and the case on hand had to be considered on merits under the election law applicable.

3.25 Y.V. Chandrachud J. striking down clauses (4) and (5) observed as follows:

"In the instant case the Parliament has withdrawn the application of all laws whatsoever to the disputed election and has taken upon itself to decide that the election is valid. Clause (5) commands the

45. Ibid, at p.2432.
46. Ibid, at p.2435.
47. Ibid, at p.2499.
Supreme Court to dispose of the appeal and the cross-appeal in conformity with the provisions of clause (4) of Article 329-A, that is, in conformity with the "judgment" delivered by the Parliament. The "separation of powers does not mean the equal balance of powers", says Harold Laski, but the exercise by the legislature of what is purely and indubitably a judicial function is impossible to sustain in the context even of our co-operative federalism which contains no rigid distribution (sic) of powers but which provides a system of salutary checks and balances.

I find it contrary to the basic tenets of our Constitution to hold that the Amending Body is an amalgam of all powers—legislative, executive and judicial "Whatever pleases the emperor has the force of law" is not an article of democratic faith. The basis of our Constitution is a well-planned legal order, the presuppositions of which are accepted by the people as determining the methods by which the functions of the government will be discharged and the power of the State shall be used".49

3.26 Colourable exercise of the judicial power by the amending power therefore is not envisaged by our Constitution. It may seem novel that the principle of separation of powers has been made applicable to the constituent power. But in accordance with the modern concept of sovereign power—if the amending power can be called that—not as despotic but as broadly limited by "rule of law", such a notion is acceptable.

3.27 It is well-known that the rules identifying sovereign and prescribing its composition and the manner and form of

49. Ibid, at p.2472.
law-making by the sovereign constitute limitations.

3.28 In the light of the contribution made by the principle of the separation of powers to the realisation of a well developed notion of rule of law, our Supreme Court has added a new dimension to the limitations on the sovereign power, namely, the sovereign power cannot directly exercise the functions of the constituted organs, the legislature, the judiciary and the executive. The constituent power should constitute these organs and leave them to function at their respective levels. This is a contribution to the development of constitutionalism in general of which our Supreme Court and Indian legal theory can justly be proud.

ATTEMPTS TO OVERCOME THE LIMITS IMPOSED BY THE FUNDAMENTAL RIGHTS

3.29 The legislative powers of the legislatures are subject to the provisions of the Constitution. The restriction imposed on the legislative power by the fundamental rights and other provisions constitute a second type of limitation on legislative competence. A legislature may defy the limitations openly, but in such an instance the law would be struck down as ultra-vires the legislature. But attempts may be made to overcome the limits in a concealed way. In that case, the doctrine

50. See particularly the judgment of K.K. Mathew, J. at pp.2390–91.
51. For example, the provisions governing the freedom of trade and commerce.
of colourable legislation would be attracted.

Confiscatory legislation

3.30 In State of Bihar v. Kameswar Singh, certain provisions of the Bihar Land Reforms Act, 1950 (30 of 1950) had to be scrutinised as they were attacked as instances of colourable exercise of legislative power. This Act was passed in exercise of the legislative power conferred by entry 42 of List III which as then existed was as follows:

"42. Principles on which compensation for property acquired or requisitioned for purposes of the Union or of State or any other public purpose is to be determined and the form and the manner in which such compensation is to be given".

Section 4(b) of the Act provided for the acquisition by the State, along with the estates, of all the arrears of rent due to the owners of the estate, and, then, for the payment of 50% of such arrears to the expropriated owners. Mahajan J. referred to certain Australian decisions and held it as

52. Thus in M.R. Balaji v. State of Mysore, A.I.R. 1963 S.C. 649, the Mysore Government's order reserving 60% of the seats in educational institutions for the socially and educationally backward classes of citizens under article 15(4) of the Constitution was struck down as a 'fraud on the Constitution'. Any reservation in excess of 50% was a communal distribution, under the guise of making the reservation, and is forbidden by the Constitution.


accepted law that a Parliament with limited powers could not do indirectly what it could not do directly, and that in the case of legislation by such a Parliament it was necessary for the courts to examine the legislations with some strictness to detect disguised or colourable trespass of constitutional provisions. Section 4(b) in the guise of laying down a principle of compensation was a device to acquire property without compensation.

3.31 Similarly section 23(f), which provided for deductions varying from 4 to 12½% from the compensation towards cost of works beneficial to the ryots, was not really concerned with any principle for the payment of compensation, but had the effect of non-payment of compensation and was therefore "unconstitutional legislation" made colourably valid under exercise of legislative power under entry 42 of List III.

3.32 B.K. Mukherji J. agreed with Mahajan J. regarding the invalidity of section 23(f). As regards section 4(b) he thought that acquisition of money and other choses in action under the power of 'Eminent Domain' was not contemplated. Though the court was not concerned with the justice or propriety of the principles upon which the assessment of compensation was to be made under a particular legislation, nor with the justice or otherwise of the form or manner in which such compensation was to be given, entry 42 did not envisage a

55. Ibid, at p.277.
legislation which did not provide for any compensation at all. "Taking up of whole and returning a half means nothing more or less than taking half without any return and this is naked confiscation, no matter, whatever specious form it may be clothed, or disguised". Section 4(b) therefore in reality did not lay down any principle for determining the compensation to be paid for acquiring the arrears of rent, nor did it say anything relating to the form of payment, though apparently, it purported to determine both, and was a fraud on the constitution, and made the legislation colourable and hence void and inoperative. Though the court was not concerned with the benefides or malafides of the legislature it was really concerned with the question of competence.

3.33 Chandrasekhara Aiyar J. in his concurring judgment held that stripped of their veils or vestments, the provisions in the Act about 'arrears of rent' and the 'cost of works of benefit' amounted to naked confiscation.

3.34 The legislation which under the guise of legislating for acquisition was attempting to perpetrate confiscation in effect, had exceeded the limits of legislative powers and was therefore unconstitutional.

3.35 Patanjali Sastri C.J. and S.R. Das J. however, held in their partly dissenting judgments that the provisions in

56. Ibid, at p.280.
57. Ibid, at p.296.
question related to the payment of compensation under article 31(2), and that its validity could not be gone into by the courts in view of the protection afforded in article 31(4).

3.36 Section 73 of the Kerala Land Reforms Act, 1964 (as amended by Act 35 of 1969) which provided for the discharge of substantial portions of the arrears of rent was invalidated as the measure partook the character of forfeiture or confiscation of the discharged arrears.

Vagaries of the doctrine


59. S.R. Das J. observed as follows:-

"Again, take the case of the acquisition of non-income-yielding properties. Why, I ask, is it called a fraud on the Constitution to take such property? Does the Constitution prohibit the acquisition of such property? Obviously it does not. Where, then, is the fraud? The answer that comes to my mind is that it is fraud because the Act provides for compensation only on basis of income and, therefore, properties which are at present non-income-yielding but which have very rich potentialities are acquired without any compensation at all. Similar answer becomes obvious in connection with the deduction of 4 to 12½ per cent of the gross assets under the head "Works of Benefit to the Rayats". On ultimate analysis, therefore, the Act is really attacked on the ground that it fails to do what is required by the Constitution to do, namely, to provide for compensation for the acquisition of the properties and is, therefore, 'ultra vires'. This, to my mind, is the same argument as to the absence of just compensation in a different form and expressed in a picturesque and attractive language". (Ibid, at p.292).


the Orissa Estate Abolition Act, 1952 compensation for estates taken over had to be calculated on the basis of net income and in computing the net income the agricultural income tax had to be deducted. The impugned Act had greatly increased the rates of agricultural income tax. It was challenged that this was a device to reduce the net income and, therefore, the compensation payable. The Act had therefore to be struck down on the analogy of the decision in State of Bihar v. Kameswar Singh.

B.K. Mukherjea J. speaking for the Supreme Court examined the scope of colourable legislation in the light of the principles laid down in Canadian, and Australian Constitutional law cases,

62. For the actual increase see n. 69 infra.
64. Others on the Bench were Patanjali Sastri, C.J. S.R. Das, Ghulam Hassan and Bhagwati, JJ.
65. Union Colliery Co. of British Columbia Ltd. v. Bryden, 1899 A.C. 580. In this case section 4 of the British Columbian Coal Mines Regulation Act 1890 prohibited the employment of Chinese men in underground coal mines. It was held that the Act was not really aimed at the regulation of coal mine but was in truth a device to deprive the Chinese naturalise or not (naturalisation of aliens being within the exclusive authority of the Dominion Parliament) of ordinary rights of inhabitants of the British Columbia and in effect to prohibit their continued residence in that Province.

(2) In Re Insurance Act of Canada, 1932 A.C. 41, the Privy Council held that sections 11 and 12 of the Canadian Insurance Act which required foreign insurers to be license invalid since under the guise of legislation as to aliens and immigration (both within the exclusive dominion authority) the Dominion Legislature was seeking to intermeddle with the conduct of insurance business which was a subject exclusively within the provincial authority.
66. Moran v. Dy. Commissioner of Taxation for New South Wales, 1940 A.C. 838. In this case the allegation was that a Commonwealth Financial Assistance Scheme contemplated in the Commonwealth legislation was a colourable device to overcome the prohibition against discriminatory taxation. Though this was not accepted by the Privy Council it was conceded that such instances might arise.
"...the doctrine of colourable legislation does not involve any question of 'bonafides' or 'malefides' on the part of the legislature. The whole doctrine resolves itself into the question of competence of a particular legislature to enact a particular law.... If the Constitution of a State distributes the legislative powers among the 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. 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". 67

3.38 It was held that the Orissa Act was certainly a legislative measure coming within entry 46 of List II- Taxation of agricultural income. Though the rates were increased, it did not affect the competence of the legislature. The liability for paying agricultural income tax was an existing liability

when the Orissa Estates Abolition Act came into force. The impugned Act was therefore an agricultural income tax legislation within the competence of the State Legislature and deduction of agricultural income tax was certainly a relevant item of deduction in the computation of net income of estate and was not as unrelated as in the case of section 23 of the Bihar Act. Even assuming that the purpose of the State Act was to accomplish an ulterior purpose namely, to inflate the deductions for the purpose of reducing the compensation payable to as small a figure as possible, it could not be regarded as colourable legislation unless the ulterior purpose which it was intended to serve was something which lay beyond the powers of the legislature to legislate upon. "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 anything directly, then the mere fact that it attempted to do it in the indirect or disguised manner, cannot make the Act invalid".

3.39 If as a result of the deductions which were not based on something which was unrelated to facts, the compensation would be reduced, it was within the legislative power to achieve that objective and its motives could not be questioned. The legislation was therefore held not to be a colourable one.

3.40 It is submitted that the reasoning of the court is somewhat weak. Though it may be conceded that the State

68. Ibid, at p.381.
legislature is competent to levy agricultural income-tax at an exhorbitant rate, whether by the exercise of such a power, it should be allowed to reach a result which could not have been achieved in the exercise of another power, deserves serious consideration. It is agreed that the legislature had no power to pass confiscatory legislation in the guise of paying compensation. The agricultural income tax in question could have been sustained only when considered in isolation as a taxing measure. But when it is considered along with the Estate Abolition Act the result achieved with respect to the latter seems to have been clearly colourable one. Instead of facing this question squarely, the Court avoided it by saying that when the legislature is competent to do a thing directly, there is no objection to its doing it in an indirect or disguised manner. But if the effect of such indirect doing is to achieve in another field indirectly what it cannot do directly, due consideration should be given to that consequence. May be, that in the conflict between the right of the expropriated estate owners to receive compensation and the right of the state to promote reform legislation cheaply, the Judges preferred the latter. A doctrine of "resultant colourable legislation" whereby, if by the exercise of one power within limits, what could not have been openly achieved with regard to another

69. In this case the rate of 4 annas in the rupee with the highest slab at Rs.20,000/- originally proposed was later on changed to 12 annas and 6 paise in the rupee for the highest slab resulting in greatly enhanced tax for incomes above Rs.15,000/-. 
power is achieved, that could be held to come under the prohi-
bition of colourable legislation ought to have been accepted
by the Court. The case discussed below is a clear instance
where the court really adopted a stand similar to the one
advocated here.

3.41 Sometimes confiscatory results have been achieved
by clever changes in law. Thus in Jayvantsinghji v. State of
Gujarat the validity of the Bombay Land Tenure Abolition Laws
(Amendment) Act, 1958 was in question. Tenants under Taluqdar's
whose estates were abolished could get occupancy rights by
paying six times the assessment in the case of permanent
tenants, and 20 to 200 times in the case of non-permanent
 tenants. By the amendment Act of 1958 the government converted
retrospectively the non-permanent tenants to the category of
permanent tenants. The burden of proving that a particular
tenant was not a permanent one was fixed on the ex-Taluqdar.
The procedure under which he could discharge this burden was
not a fair one. The effect of this legislation was to take
away substantially the right of the ex-Taluqdar to get any
price for his rights. Striking down the enactment S.K. Das J.
for the majority held that Act did not fall within the entries
in List II or List III of the Seventh Schedule to the Consti-
tution, and was a piece of colourable legislation.

71. For himself and B.P. Sinha C.J. N. Rajagopala Iyenger J.
delivered a separate concurring judgment. Mutholker and
A.K. Sarkar JJ. held that the impugned Act governed the
relationship between Landlord and tenant and was within the
competence of the State Legislature under entry 18 of
List II, Land....
This case also shows that a device to overcome a Constitutional limitation (in this case of the right to compensation under the fundamental right of property) may also be invalidated on the ground of lack of power in terms of the entries in the Lists of the Seventh Schedule to the Constitution.

Compensation and colourable legislation

The attitude of the Supreme Court in holding legislation colourable because of the failure to pay compensation has not been very consistent and was responsible for several constitutional amendments. As noted above, some provisions of the Bihar Land Reforms Act were struck down as colourable legislation because under the guise of providing for compensation the law provided rules which were really confiscatory in character. In Bhairebendra Narayan Bhop v. State of Assam a challenge to the Assam State Acquisition of Zamindaris Act 1951 (which was protected by article 31(4) as also by article 31-A) as colourable legislation on the ground of illusory or no compensation was repelled by the Supreme Court. It was held that there was legislative competence. The substance of the charge was inadequacy of compensation which could not be raised in view of the protection given by article 31-A.

To overcome the decision of the Court in State of West Bengal v. Bella Banerji that compensation meant a just equivalent, the Constitution Fourth Amendment purported to

make the question of compensation non-justiciable. Even after this amendment, the court gave expression to its doctrine that while the final quantum of compensation given might not be judicially scrutinised, if the compensation was based on irrelevant principles which led to illusory payment, or non-payment of compensation, that would be treated as a fraud on power and the offending provisions struck down.

3.45 Even after the Twentyfifth Amendment which substituted 'amount' for 'compensation' the Court does not seem to have given up its doctrine of colourable legislation with regard to compensation. Thus in Kesavananda Bharathi v. State of Kerala, though the court accepted the validity of the Twentyfourth Amendment, a majority of the judges have shown willingness to review the question of compensation on the ground that it should not be illusory or arbitrary.


76. Thus Sikri C.J.: "...the person whose property has been acquired shall be given an amount in lieu thereof, which...is not arbitrary, illusory or shocking to the judicial conscience or the conscience of mankind", p.1554.

Shelat and Grover JJ:— "the amount...should have a reasonable relationship with such property (and)...should neither be illusory nor fixed arbitrarily", p.1610.

Hegde and Mukherjea JJ:— "The question whether the "amount" in question has been fixed arbitrarily or the same is illusory or the principles laid down for the determination of the same are relevant to the subject matter of (contd...99).
3.46 Applying this principle of illusory compensation as one of the grounds in Chanak Mal v. State of Haryana, the Punjab and Haryana High Court struck down the Haryana Minerals (Vesting of Rights) Act, 1973 (14 of 1973). A person who had purchased a piece of land for mining salt petre for Rs.1,30,000 got only about Rs.5,000/- spread over a period of 10 years as compensation. The court held that this amount was illusory and hence violative of article 31(2).

3.47 The vitality of the doctrine of colourable legislation with regard to compensation shows the difficulty of allowing power to be used without a modicum of good faith, and seems to be an ample justification for the doctrine of colourable legislation itself.

(f.n. 76 contd.)

acquisition or requisition at about the time when the property in question is acquired or requisitioned are open to judicial review", p.1648.

P. Jagenmohan Reddy J:— "Once the Court is satisfied that the challenge on the ground that the amount or the manner of its payment is neither arbitrary or (sic) illusory or where the principles upon which it is fixed are found to bear reasonable relationship to the value of the property acquired, the Court cannot go into the question of the adequacy of the amount so fixed or determined on the basis of such principles", p.1776.

Chandrachud J:— "...Courts have power to question such a law (providing for acquisition) if (i) the amount fixed is illusory; or (ii) the principles, if any, are stated for determining the amount are wholly irrelevant for fixation of the amount....", p.2055.

Colourable use of taxing power

3.48 Taxing power, generally used for augmenting the resources of the Government, may be used as a cloak for confiscatory measures. In such instances, though they are rare, the court may strike down the law invoking the doctrine of colourable legislation. In K.T. Moopil Nayar v. State of Kerala, the validity of Travancore Cochin Land Tax Act, 1955 (15 of 1955) as amended by the Travancore Cochin Land Tax Act Amendment Act, 1957 (10 of 1957) which imposed a tax at the rate of Rs.2/- per acre for private forests was in question. The law was attacked on the grounds that it was violative of articles 14 and 19(1)(f) of the Constitution and was a device to confiscate private property without compensation. The government contended that being a taxing measure under article 265, articles 14, 19 and 31 had no application. The Supreme Court held the law invalid by a majority. There were three grounds for the holding, one of absence of classification, another of presence of unreasonable restrictions and third of confiscatory character amounting to colourable device. Sinha C.J. in his

79. Because the Act obliged everyone to pay the tax without reference to income actual or potential, and hence lacked classification and violated equality clauses.
80. The Act also imposed unreasonable restrictions on the right to property guaranteed by article 19(f) in as much as the tax liability was imposed without notice, without procedure for rectification of errors, with no procedure for obtaining opinion of civil courts on questions of law and with no duty on the assessing authority to act judicially.
majority judgment pointed out how the Act was confiscatory in character. He stated that, for example, a person who owned 25000 acres of private forests and got an annual income of Rs.3,100/- had to pay Rs.54,000/- as tax and that when an assessee of this type was unable to pay tax his property would be sold in auction which ultimately would have to be purchased by the government. According to the majority view it was therefore clear that the Act was confiscatory in character.

Sarkar J. in his dissenting judgment held that the Act was not expropriatory nor the tax imposed really excessive, and, since the legislature had competence, no question of colourable legislation arose.

3.49 It has to be remembered that the majority holding on the point of colourable legislation in the K.T. Moopil Nayar Case is only one of the three alternative grounds and that if the majority had not found the Act to be violative of articles 14 and 19 it is doubtful whether the Act would have been struck down solely on the ground of the expropriatory character of the tax since, as pointed out by the dissenting judge, an argument about the excessive rate of the tax can hardly be raised in the face of clear legislative competence. This view is strengthened by the next case in which colourable use of taxing power was alleged. In Jagannath Baksh Singh v. State of U.P., the U.P. Large Land Holding Tax Act 1957 (XXXI of 1957) which imposed a tax, based on annual valuation,
on landholdings in excess of 30 acres was challenged as a colourable piece of legislation as well as violative of articles 14 and 19(1)(f) of the Constitution. Speaking for the Supreme Court, P.B. Gajendragadker J. held that the Act did not violate articles 14 and 19(1)(f). Nor was the tax imposed, on the facts of the case, unreasonably high. Referring to the decision in K.T. Moopil Nayar, His Lordship observed as follows:

"This decision illustrates how a taxing statute though ostensibly passed in exercise of legislative power conferred on the legislature can be struck down as being colourable exercise of the said power. In other words, the conclusion that a taxing statute is colourable would not and cannot normally be raised merely on the finding that the tax imposed by it is unreasonably high or heavy because the reasonableness of the extent of the levy is always a matter within the competence of the legislature. Such a conclusion can be reached where in passing the Act, the Legislature has merely adopted a device and a cloak to confiscate the property of the citizen taxed. If, however, such a conclusion is reached on the consideration of all relevant facts, that is a separate and independent ground for striking down the Act. There is no doubt that the decision in K.T. Moopil Nair, A.I.R. 1961 S.C. 552 is not an authority for the proposition that in testing the validity of a taxing statute, the Court can embark upon an enquiry whether the tax imposed by the statute is unreasonably high and whether it should have been fixed at a lower level."

82. Other judges on the Bench were A.K. Sarkar, K.C. Das Gupta, N. Rajagopala Ayyangar and J.R. Mudholkar.

83. Ibid at p.1572.
Therefore the chances of a court striking down a taxing measure as colourable on the ground that the rates of tax are unreasonably high and hence confiscatory are really remote. But a statute may, under the guise of a taxing measure, violate the equality provisions by unequal incidence, or have an unreasonable operation by leaving the question of machinery and procedure for the collection of tax to the unrestricted discretion of government. Such a statute is liable to be struck down as colourable tax legislation.

**ATTEMPT TO OVERCOME THE LIMITATION ARISING FROM THE DIVISION OF POWERS**

3.50 It has been noted earlier that the Constitution of India divides the legislative competence between the Union and the States and that any attempt by a legislature to overcome in a concealed way the limitation imposed would be held as colourable legislation. The taxing power has been divided amongst the exclusive fields of the legislation between the Union and the States. In addition, the Union is given power to levy fees in respect of matters mentioned in the Union List and the States are given power to levy fees in respect of the matters of the State List. The Concurrent List also envisages the imposition of fees in respect of matters in the Concurrent List. Since taxing power is limited, the States sometimes attempt to levy a tax by ostensibly imposing a fee.

84. Vide entries 82–92A and entry 97 of List I and entries 45–63 of State List.
85. Entry 96 of List I.
86. Entry 66 of List II.
87. Entry 47 of List III.
Such attempts to overcome the limitation arising from the division of powers constitute the colourable exercise of legislative power.

Distinction between tax and fee

3.51 Article 366(28) defines taxation as follows:

"taxation includes the imposition of any tax or impost, whether general or local or special, and 'tax' shall be construed accordingly".

This is a broad definition which would cover every type of impost by the State including fees. Though there is no generic difference between tax and a fee, in the context of certain specific provisions of the Constitution, it must be held that a difference has been made. Thus, the entries in the Lists, as noted above, confer separate taxing power and the power to levy fees. Articles 110 and 199 of the Constitution exclude from the definition of money bills, bills imposing payment of fees for licenses or fees for services rendered.

3.52 In Commissioner, Hindu Religious Endowment v. L.T. Swamiar, the first case before the Supreme Court regarding the distinction between the tax and fee, the validity of section 76 of Madras Hindu Religious and Charitable Endowment Act 1951 (19 of 1951) which levied a contribution "in respect of services rendered by the government" at 5% of the income of Maths etc. was in question. On behalf of the appellant it was argued that the contribution was a fee and not a tax. A

distinction between these two was clearly envisaged by the Constitution. The respondent contended that the levy, which was not a payment for services voluntarily received, was a tax. The Supreme Court upheld the defendant's plea. Speaking for a unanimous Bench B.K. Mukherjea J. adopted the following definition of tax given by Latham C.J. of the Australian High Court in Mathews v. Chicory Marketing Board:

"a tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered".

A fee has been held to be a reward for specific services. In other words, there is a quid pro quo in fees which is absent in the case of a tax. As a corollary, it follows that in the case of a fee there should be a reasonable correlation between the expenditure incurred by the State in providing the service and the money collected by way of fees for such service.

3.53 In the case on hand, since there was a total absence of correlation between the payment demanded and the expenditure incurred, it was held that the levy in question was a tax. This principle has been followed in subsequent cases and attempted levy of fees for want of correlation has been held to be a tax.

89. Others on the Bench were Mahajan C.J., S.R. Das, Bose, Ghulam Hassan, Bhagawati and Vanketerama Ayyar JJ.
90. 60 C.L.R. 263.
91. Ibid at p.276.
Compulsion

3.54 Both in the collection of tax and in the levy of fees compulsion may be present and therefore the element of compulsion cannot be made a distinguishing factor. B.K. Mukherjea J. observed in Commissioner of H.R.E. v. L.T. Swamier that "we think that a careful examination would reveal that the element of compulsion or coerciveness is present in all kinds of imposition, though in different degrees and that it is not totally absent in fees. This therefore cannot be made the sole or even a material criterion for distinguishing a tax from fees".94

In Sudhindra Thirtha Swamier v. Commissioner for Hindu Religious and Charitable Endowments, Mysore J.C. Shah J. also observed that "a levy in the nature of a fee does not cease to be of that character because there is an element of compulsion or coerciveness present in it".

3.55 If the element of compulsion, which would at first sight appear to be a more appropriate characteristic of the taxing power, is denied in the case of fee, the operation of schemes stipulating payment for certain services as fees, may become difficult. Thus in the case of levies on Maths etc. by the Religious Endowment Commissioners which have been upheld as fees, if the institutions were allowed the option not to

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94. Ibid at p. 95.
96. Ibid at p. 975.
pay the levies and not come under the statutory schemes, the uniform regulatory supervision by the State may be frustrated. But it is a moot point if the taxing power of the State should not be used for this purpose if permissible, or the regulatory schemes worked not on a payment basis but by defraying the expenses from the consolidated fund as part of the general expenditure incurred on governmental functions.

Credit to a separate fund

3.56 Since a quid pro quo is a sine qua non of a fee, often, at least for easier proof to establish the correlation between the expenditure incurred and the fee collected, the amount collected is credited to a separate account. In any case, it would be desirable if the money collected by way of fee is kept separately and not merged in the consolidated fund of the State. In *Commissioner for H.R.E. v. L.T. Swamier* Mukherjea J. holding the levy under the Madras Hindu Religious and Charitable Endowment Act, 1951 to be a tax observed as follows:

"But the material fact which negatives the theory of fees in the present case is that the money raised by levy of the contribution is not earmarked or specified for defraying the expenses government has to incur in performing the services. All the collections go to the consolidated fund....That in itself might not be conclusive, but in this case there is a total absence of any correlation between the expenses incurred by the government and the amount raised by contribution under

the provisions of section 76 and in those circumstances the theory of a return, or counter-payment or quid pro quo cannot have any application to this case". 

3.57 Therefore in subsequent similar cases, the levies were credited to a separate fund earmarked for rendering the services in question, and the courts definitely considered this as one of the elements in establishing the correlation between the expenses and the fees. In *Hingir-Rampur Coal Co. Ltd. v. State of Orissa* the levy of a cess not exceeding 5% of the value of the minerals at the pit's mouth under section 4 of the *Orissa Mining Areas Development Fund Act, 1952* was constituted into a separate fund, and Gajendragadker J. took this as one of the factors for characterising the levy as a fee. *Wanchoo J. in his dissenting judgment held that the levy in question was really an excise duty under entry 84 of List I. It was not permissible to convert a tax into a fee by the device of creating a special fund and then saying that the tax was for certain services to be rendered by using the amount in the fund. By fixing a very wide scope for the service, what was really a tax could be levied as a fee without limit.*

3.58 However, the fact that a levy is credited into the consolidated fund is no indication that the levy in question

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99. Ibid at p.296.
is clearly a tax. Thus in State of Rajasthan v. Sajjanlal Panjawat it was contended that levy of fee not exceeding Rs.5/- along with the application for registration of public trusts under the Rajasthan Registration of Public Trusts Act, 1959 (42 of 1959) and the Rules issued thereunder, should be held to be a tax as the Rules had provided that the fee should be credited to the Consolidated Fund. The High Court accepted this contention and held that to treat the levy in question as a fee there should have been a provision to the effect that its proceeds should not be credited to the consolidated fund, but should be kept separately for the up-keep of the machinery for registration. On appeal to the Supreme Court, Jaganmohan Reddy J. held that the mere fact that the amount was paid into the consolidated fund was not decisive of the character of levy. In this case, since the expenditure of the department in charge of the public trusts, namely, Devastan Department, was greatly in excess of the amount collected, as evidenced by the uncontroverted averment of the Commissioner of that Department, the levy was held to be a fee.

3.59 It would however, appear from article 266 of the Constitution, that only revenues received by the government, loans and loan-repayments should be credited to the consolidated fund of the State. A fee for services rendered does not seem to come within these categories and may have to be

103. Other judges on the Bench were S.N. Dwivedi and P.K. Goswamy.
credited to the Public Account of the State under article 266(2) of the Constitution.

Graded levy not material

3.60 In some of the cases that came up before the court the levy of the fees was on a graded basis which is generally done in the case of a tax. In Sri Jagannath Ramanuj Das v. State of Orissa, commenting on the graded levy prescribed in the Orissa Hindu Endowment Act, 1939, B.K. Mukherjea J. said "the fact that the amount of levy is graded according to the capacity of the payers though it gives it the appearance of an income tax, is not by any means a decisive test". In Hingir-Rampur Coal Co. Ltd. v. State of Orissa the levy of cess not exceeding 5% of the value of the minerals at the pit's mouth was upheld as fee.

3.61 In S.T. Swamiar v. Commissioner of H.R. & C.E., Mysore J.C. Shah J. held that a levy would not be regarded as a tax merely because of the absence of uniformity in its incidence. It was also held in that case that there was no restriction on the legislative powers to levy a fee retrospectively.

Nature of the service

Provision for no service

3.62 Since a fee is a payment for some special service rendered it is clear that, if the statute does not provide

105. Ibid at p.403.
a registered public trust, disputed its liability to pay this contribution on the ground of absence of quid pro quo. The Supreme Court, speaking through K.K. Mathew J. noticed that the Act provided for supervision and control by the Charity Commissioner of all public trusts and that such control was a special service for the benefit of the public trust. At the end of March 1958 (certain contributions demanded from the Salvation Army was in respect of a period prior to 1958) 62% of the collections were spent on to the services and it could be held that there was proper quid pro quo. But by the end of March 1970 after meeting all the expenses, including capital expenses, there was surplus of 54 lakhs in the Trust Administration Fund. So the levy at 2% after 31st March, 1970 undoubtedly assumed the character of a tax as that merely augmented the income of the charity organisation. The contribution after March 1970 therefore was a tax without the authority of law.

3.76 When the Punjab Agricultural Marketing Board and the Market Committees (created by the Punjab Agricultural Produce Markets Act, 1961, Punjab Act 23 of 1961) had substantial surplus incomes, the Punjab Agricultural Produce (Amendment) Act 1974, (13 of 1974) enhanced the fees leviable by these bodies from Rs.1.50 to Rs.2.25 for every hundred rupees. This enhancement was to enable these bodies to recoup

135. The other judges on the Bench were P.N. Bhagawati and N.L. Untwalia.
the contributions made by them, as per directions of the State government, to Guru Govind Singh Medical College at Faridkot.

Striking down the Amending Act, Tuli J. observed: "This enhancement is nothing but a colourable exercise of power to levy fee with a view to raise funds for extraneous purposes". Here it is clear that even if the increase was not for meeting unauthorised expenditure, it would not have passed the test of 'fees' in view of the substantial surplus income of the bodies in question.

Nature of court fees

3.77 In the Secretary, Government of Madras, Home Department v. Zenith Lamps and Electricals Ltd, the validity of the fee levied under rule 1 of the High Court Fees Rules 1956 and the provisions of the Madras Court Fees and Suit Valuation Act, 1955 (Madras Act XIV of 1955) was in issue. It was contended that the fees levied exceeded the cost of administration of civil justice and the levy of ad valorem fee was in effect a tax beyond the competence of the State legislature. The Madras High Court allowed the petition. On appeal by the State to the Supreme Court, Sikri C.J. speaking for the Supreme Court pointed out that the fees taken in the court, unless specifically mentioned in entry 77 of List I and entry 3 of List II would have fallen under the general entries relating to fees, viz., entries 96 of List I and 66 of List II. The specific

138. Others on the Bench were A.N. Ray, D.G. Palekar, M.H. Beg and S.N. Dwivedi JJ.
exclusion of court fees from these latter entries showed that they were of the same kind as other fees but related to the particular topic of administration of justice and courts. The history of court fees in India showed that it was levied sometimes with the object of restricting litigations, and sometimes with the object of increasing revenue. It was not permissible to levy fees for increasing the general revenues of the State. In the case on hand, there was not enough material to judge how the court fees collected compared with the expenses on administration of justice. From the supplementary affidavit submitted by the State it could not be said that the State was making a profit in the administration of justice; but the affidavit in question could not be accepted without giving an opportunity to the respondent to file affidavits in reply. It was for the State to establish that what was levied was court fees properly so called; and, if there was any enhancement, the State must justify the enhancement.

The appeal was therefore allowed and the case remanded to the High Court for disposal after giving an opportunity to the petitioners to file affidavits in reply.

This case shows that the ultimate decision would depend upon the proportion between the amounts realised by way of court fees. The stand of the Government regarding these matters through its affidavits, it will be very difficult for a complaining party to disprove. In any case, the administration of justice seems to be one of the principal functions of

139. Ibid at p.734.
the sovereign State which it should meet out of its taxation, and the levy of court fee seems to be a survival from the bygone days when the State used to tax litigation and cannot now be properly considered as fees.

Licence fees for liquor trade

3.80 The nature of the payments collected by the State for permitting liquor trade has been considered by the Supreme Court in some cases. In *Shinde Brothers v. Deputy Commissioner* it was held that the shop rent collected by public auction for securing the exclusive privilege of selling toddy or arrack from certain shops could not be treated as an excise duty for the purpose of levying a health cess under the Mysore Health Cess Act, 1962. A three-judge Bench of the Supreme Court held in *Nashiwar v. State of M.P.* held that the rental collected from liquor vendors was neither a tax, nor an excise duty, but consideration for the grant of a privilege by the government.

3.81 Following the decision in the *Nashiwar Case*, in *Har Shanker v. Deputy Excise and Taxation Commissioner* the Supreme Court rendered a decision which may have far-reaching repercussions on the tax-fee distinction. Having bid at liquor licence auctions for fabulous amounts under the Punjab Excise Act, 1914 and the Rules issued thereunder, the appellants

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141. A.I.R. 1975 S.C. 360. The Judges on the Bench were A.N. Hay C.J., and K.K. Mathew and N.L. Unwalia, JJ.
approached the Punjab and Haryana High Court and challenged the levy of the licence fees. The High Court held that what was involved was contractual rights which could not be adjudicated in a writ petition. On appeal to the Supreme Court it was held that though the petition could be disposed of on the ground taken by the High Court, namely, involvement of contractual rights, having gone into the merits of the case, the Court preferred to dispose of the case on merit.

Y.V. Chandrachud J. speaking for the Supreme Court, reviewed the case-law governing the grant of liquor licence and held that the liquor trade was of such a nature that it could totally be prohibited in the case of citizens. And when so prohibited all the rights of manufacture, possession, sale etc. in regard to liquor belonged to the State. It was open to the State to part with those rights for a consideration. The licence fees collected at auction were therefore neither fees in the strict sense nor excise duty or other tax but the price of the privilege of dealing in liquor. The State could validly sell the privileges through auction and collect the price.

3.82 This decision introduces a third category in the State's levies which is neither tax nor fee but what has been described as "sale price of the privileges". The privilege in this instance is created in favour of the State because liquor trade being obnoxious in character could be totally prohibited

143. Others on the Bench were A.N. Ray, C.J., K.K. Mathew, K. Alagiriswamy and A.C. Gupta, JJ.
in the case of citizens. It seems an irony that what is inherently harmful to the citizen, when prohibited and sold in the form of a State privilege for a price, becomes less harmful to the citizens. The logic of this decision could be extended to all licence-fees for regulatory activities because every kind of regulation might involve some kind of restriction on the citizens. It can be stated to the extent of restriction on citizen it becomes a state privilege which could in turn be sold back to the citizen for a price. The States are bound to welcome this decision as it provides them with a new method of collecting money neither by tax nor by fees, but by the sale of privileges.

Tax-fee distinction, a suggestion

3.83 The tax-fee distinction developed by the courts in India is not free from difficulty. It has been held that even if the element of compulsion is there it could be classified as a tax. It seems that the presence or absence of compulsion should be the principal distinguishing factor between tax and fee. Any compelled levy should be classified as a tax. Fee should be taken to be the price of the service voluntarily asked for and rendered, and if the quid pro quo element is lacking it should be struck down as a colourable attempt to levy a tax under the guise of a fee. The present trend under which if a quid pro quo is proved even compelled levies could be classified as fees seems to be without any constitutional basis and it needlessly increases the State's competence to levy tax under the guise of fees. The decision in Har Shanker
v. Deputy Excise and Taxation Commissioner may prove to be a case that has importance for the future development of the law governing the tax-fee distinction; it makes a third category, namely, the sale price of privileges and, if the idea of price is introduced, it is clear that a question of compulsion in the sale of the service cannot arise. It is therefore submitted that the courts should revise its characterisation of fees and hold all compelled levies to be tax to be dealt with on that basis.

ATTEMPT TO OVERSTEP THE LIMIT UNDER THE GUISDE OF ANCILLARY POWERS

3.84 It is a settled doctrine that the power to legislate on a specified topic includes the power to legislate in respect of matters which may fairly and reasonably be said to be comprehended therein. But the incidental and ancillary powers are to be exercised in aid of the main power. Any attempt by the legislature to achieve under the guise of ancillary powers that which it cannot achieve in exercise of the main powers would be categorised as colourable exercise of legislative power.

3.85 In R. Abdul Quader & Co. v. Sales Tax Officer, Hyderabad, it may be recalled that certain provisions of the Hyderabad General Sales Tax Act, 1950 (14 of 1950) were

145. See para 2.18 ante.
147. See para 2.23 ante.
struck down on the ground that the scope of the ancillary power
did not extend to the State retaining as sales tax what was not
leviable under the law as such tax. In his judgment for a
unanimous Bench Wanchoo J. observed:

"If a dealer has collected anything from a
purchaser which is not authorised by the taxing law,
that is a matter between him and the purchaser, and
the purchaser may be entitled to recover the amount
from the dealer. But unless the money so collected
is due as tax, the State cannot by law make it
recoverable simply because it has been wrongly collected
by the dealer. This cannot be done directly for it is
not a tax at all within the meaning of entry 54 of
List II nor can the State Legislature under the guise
of incidental or ancillary power do indirectly what
it cannot do directly. We are therefore of the opinion
that section 11(2) is not within the competence of the
State Legislature under entry 54 of List II". 149

3.86 It may also be recalled that on similar grounds
section 42(3)(1) of the Madras Sales Tax Act, 1959 which
authorised confiscation of the goods was struck down in
Checkpost Officer, Coimbatore v. M/s. K.P. Abdulla & Bros.

3.87 Sub-sections (3), (4) and (5) of section 20-A of
the Bihar Sales Tax Act, 1959 (19 of 1959), as introduced by
Act 20 of 1962, compelled a dealer, who had deliberately or

148. Others on the Bench were P.B. Gajendragadker C.J.,
K.C. Das Gupta, J.C. Shah, N. Rajagopala Ayyanger JJ.
149. Ibid at p.924-925.
erroneously recovered an amount from the purchaser on a representation that he was entitled to recover it to recoup himself for the payment of a tax, to pay over that amount to the State, though it could also be claimed as a refund by the purchaser in certain circumstances subject to some limitations. When the question of validity of this section, which had been upheld in the High Court, came up before the Supreme Court, J.C. Shah J. held that though a dealer could pass on to a purchaser, as incidental to sales tax legislation, the amount he had to pay to the government as sales tax, the government could not under the guise of such incidental power levy as tax that which was really not a tax. Allowing the appeal His Lordship observed:

"...in effect the provision is one for levying an amount as tax which the State is incompetent to levy. A mere device cannot be permitted to defeat the provisions of the Constitution by clothing the claim in the form of a demand for depositing the money with the State which the dealer has collected, but which he was not entitled to collect". 152

3.88 Instances of the type considered above will not appear to be instances of the legislature acting ultra-vires. What brings them under the principle of colourable legislation is the attempt to disguise them as exercise of ancillary powers when in fact they were beyond the scope of such ancillary powers.

152. Ibid at p.951.