Constitutional Law and Public Administration in India

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Week- 07

Lecture-04

Law Making & Legislative Interpretation

There are certain legislative interpretations which are used in the process of lawmaking. Law making is of three different types. One is legislative lawmaking, second is executive lawmaking and third is judicial lawmaking. But, most important of all is the legislative law making through the parliament and the state legislatures. The executive lawmaking is through the delegated legislation whereby the parliament has already framed law in a broader perspective and has left certain areas for the executive to make certain laws, rules, and regulations for its functioning and this is called the executive lawmaking. Judicial lawmaking is a trend through judicial activism where the higher courts of the land have made certain decisions and that has become the law. That is called judicial lawmaking.

The word sovereign in the preamble of the Constitution, means that it is the power of the parliament to make law. Sovereignty is a political science term. India has territorial sovereignty means, within the territory of and the boundaries of its nation, the country has an absolute power of lawmaking that is the territorial sovereignty. And therefore, India has a territorial sovereignty of what constitutes the union of India to make lawmaking in its sphere of the nation. So, the word sovereign is a very important source of power for legislation and lawmaking for any country and therefore the preamble states India is a sovereign country.

Legislation consists of the declaration of legal rules by a competent authority and who is a competent authority. An elected government is a competent authority. The parliament is a competent authority which has the sovereignty to make law regarding its subjects. Therefore, sovereignty is an essential aspect to make legal rules which is to be followed. Now in India the sovereign and competent authority is the parliament under Article 245(1) of chapter 11 of the Indian Constitution, subject to the provisions of the Constitution.

Parliament may make law for the whole or any part of the territory and the legislature of the state may make law for the whole or any part of the state. This is the constituent power and the source of power for the legislature for its lawmaking. In the words of Salmond, who was a pioneer in political science, ‘legislation is a source of law which consists of the

declaration of legal rules by a competent authority'. Competent authority in a bicameral legislature can also be a state government. In a federal structure it can also be a state government or a central government.

Legislation is an important source of law like any other source of law but legislation forms the primary and main source of law as it derives power from the people for its lawmaking. Article 245-254 of the Indian Constitution talks about the legislative powers.Dr B.R. Ambedkar who was the president of the drafting committee stated that the states are autonomous and they are not entirely dependent on the centre for legislative or executive authority. They are on equal footing with the centre. Article 246 of the Constitution grants to the union and states their authority in the spheres of their legislative, executive and financial functions. There is separation of power in the strict sense of legislative, executive and judiciary but in India there is no strict separation of powers between legislative and executive but there is a division of power between the states and the centre in the matter of legislatures. The central government has its own sphere of lawmaking, the state government has its own sphere of lawmaking.

The Indian federal system as like many other countries was not founded by the treaty or an agreement among the princely states. After independence, all the princely states agreed and acceded to the sovereignty of the nation and therefore their accession to the union was absolute and this is precisely the reason why Indian system of federalism is more unitary in character for the sake of unity and integrity. No states or the formerly princely states which became the states later does not have any power to secede from the union government. The division of powers are under state list, central list, and the concurrent list under the seventh schedule. This reflects the unitary characteristics of the Constitution. The unitary list has more subjects for legislation than the state list.

The concurrent list is a list where both the state government and central government have the power to make law but the parliament takes predominance over the state legislations for the sake of unity, integrity and uniformity in certain legislations which is required. The parliament can enact legislations on the subject matter of state list in case of state emergencies or the governor's rule in the circumstances prescribed by the Constitution and therefore after reading the provisions under seventh schedule, Indian Constitution is unambiguously in the favour of centralization within the federal framework. Now Article 246 clause 1 states that in the Indian Constitution, the parliament can make law enumerated in list 1 of the seventh schedule. This list contains matters such as foreign affairs, defence, war, railways etc.

Article 246 clause 2 states that the state can also make law on the matters enumerated in list 3 in the seventh schedule. State list is a list where both the state and the central government can make the law. Article 246 clause 3 says that only the state has the power to make law with reference to the list enumerated in list 2 of the seventh schedule. This

contains matters such as agriculture, fisheries, water, public health, sanitation, police etc. Significantly the residuary powers are with the central government.

Any matter which is not listed in any three of the lists either state list, union list or concurrent list is called the residuary powers and that is under the central government. This forms one of the basic centralizing tendencies of the federal structure of India. The Supreme Court in a very famous case held that if the said statute is not relatable to any of the subject matter in the state list then it is a matter of legislation for the central government. Either it must be the union list, concurrent list, or the residuary powers. When we are having three different lists there is always a question of interpretation as to what are the matters that categorically fall under the difference. In this very famous case *Union of India v. Dhillon* the Supreme Court held that the test for a central government whether it has the powers to legislate is to see in the list 2 of the state list if any of the provisions or related provisions is the subject matter of the state list and only the state can make the law. If not, then the legislation can be made, on the subject matters of union list, concurrent list or it shall be under the residual powers under Article 248.

Another important feature of centralizing tendency for law making and legislative interpretation is that it is a rigid Constitution. Indian Constitution is a very elaborate Constitution in terms of law making and in terms of amendment. The states do not have the power to amend the Constitution; it can be done only by the parliament and among the three lists, the central government takes precedence over subject matters.

The judiciary is independent, the Supreme Court is the highest court of appeal in the country but the states have high courts but there is only a single unitary Supreme Court in the centre. So, the central government has the power in the matter of international relations and diplomacy; the state government does not have such powers. The boundary of the state is determined by the central government. The states reorganization is done by an act of parliament though it revolves around the states subjects and only a few have the bicameral legislature and therefore the representation to the parliament is more of a centralized nature.

Regarding the matter of election, the election commission is a central authority and all the legislation relating to the elections is done by the central government and not the state government. Though the provisions are provided in the Constitution for the state government to make law relating to the election, predominantly the law or regulations relating to the election for the sake of uniformity is made either by the parliament or by the delimitation commission or by the election commission.

Emergency is another important provision in the Constitution which has the most distinguished feature of a unitary structure. Why it is important to understand whether Indian federalism has a unitary structure with the federal feature is because the division of power under the three lists gains a prominence in the legislative sphere. The deployment

of armed forces into the state territories is prerogative of the central government. The taxation aspects like GST makes the central government have financial supremacy.

The union government has sweeping powers in the economic terms and in terms of allocation of resources to the different states of the country. Now this significantly signifies the structure of the Indian federal structure of division of powers. The state government is a little on the lower side for legislative spheres of lawmaking. The central government has an upper hand in the lawmaking. This is called a strong unitary feature in the federal structure.

Article 249 in the Indian Constitution says that if there is a matter in the state list which has become the matter of national importance then the Union can make law. Article 250 also speaks about how the union can make law on the matters included in the state list in times of national emergence. The best example and the recent example are the goods and service tax as to the usage of Article 249. The GST was meant to amalgamate many central and state taxes into one single window of common tax to prevent cascading or double taxation.

This was also a matter of shifting the economy from an informal to a formal one. This taxation of GST did not exist before. The taxes relating to goods were under the state list of entry 52 of the Seventh schedule which was the tax on the entry of goods into the local area of consumption. The 54th entry in the schedule was about the tax of sale of goods or purchases. So, it essentially meant that these taxes were under the state list and not under the central list. The government had the powers to make laws regarding taxation.

Therefore, the government had to amend the Constitution to avoid the ambiguity and get the importance of tax under their control. Now with the Constitution 101st Amendment of 2016 the government amended a few Articles in the Constitution to execute the imposition of tax. Article 246A was inserted under this amendment which states that the Parliament has the exclusive power to make law with respect to certain goods, services tax where supply of goods or services or both takes place in the course of interstate trade and commerce. The word supply gained significance because it was inserted instead of the word sale or purchase of goods.

By the usage of the word ‘supply’ it was made into an exclusive list of the union government because as stated above, the 54th entry in the state schedule list was regarding the state purchase or sale. A similar thing can be seen in the amendment of Article 286 where the words sale or purchase of goods were replaced by the words supply of goods and services. This was done to get the services along with the goods under the ambit of the union government. Article 249 was also amended to add the words service goods and service tax provided under Article 246 (a). This gave the centre with the more power to

enact any law applicable to the states mentioned in the state list including the goods and services tax.

Article 279 (a) was also added to the Indian Constitution which described the formulation of GST council. The council would be a joint forum for centre and states. GST council is an important Constitutional authority formed making an amendment to the Constitution and inserting the section, inserting the Article of 279 clause (a). The final Article with reference to the goods and services tax is Article 269a added through this amendment. So, this was also pertaining to the goods and services tax.

All these are the powers of the union government where though there is a legislative sphere for the state, the union government can always take over certain subjects for its legislative law making and thus this characteristic is called the strong unitary structure with federal characteristics. Now moving on to another doctrine called the doctrine of pith and substance for a legislative interpretation. This enactment substantially falls within the powers conferred by the Constitution on the legislature. Now it says that it cannot be held invalid merely because it incidentally encroaches on the matter assigned to another legislature.

The state government makes laws regarding the subject matter in the state automatically. Sometimes when it encroaches upon the matters assigned to states in the central subject it cannot be held invalid. Therefore, the doctrine of pith and substance comes into picture. To examine the true character of the enactments the entire act is required to be understood when there is any dispute between the union and state on the subject matter between the union list and the state list.

When you are making a law either by the state or by the center, there is always a situation where certain provisions encroach upon the territory of either the state list or the union list. At that time the doctrine of pith and substance is interpreted by the supreme court so that which is more predominant than the other so where the state government can make the law. If the center strikes down such a law saying that the state governments have encroached upon its legislative ambit it will be very difficult for the states to make any law and therefore the courts have evolved a situation or a procedure or circumstances where the doctrine of pith and substance is applied to see which is the most predominant subject matter so as to ascertain the list whether it is state list or central list or the concurrent list.

Now it also has made states more independent in its law-making sphere. One such important case is the Tamil Nadu exhibition case where the Madras High Court held the Act was invalid stating that the subject matter belongs to the central government and not the state government and therefore the Tamil Nadu state government did not have the jurisdiction or the validity to make such law. Now the theatres and dramatic performances were subject to the provisions of entry 60 of List 1 and held that Section 9(2) of the Act

was invalid as it specifically dealt with the copyright which is a matter included in entry 49 under the union list.

The court said that it agreed with the doctrine of pith and substance, it could encroach upon the federal government, but it did not support the Tamil Nadu Act stating that the pith and substance of the act essentially fell under the union list and not the state list. The Supreme Court said that the decision of the Madras High Court was reversed stating that the act was valid because the pith and substance was not the copyright, and it was held the cinema was the pith and substance; the cinematic performances were the pith and substance; and therefore it was the subject matter under the state list using the doctrine of pith and substance. The state list was ascertained as to what was the subject matter therefore in this case the Supreme Court held that essentially this was the subject matter of the state list and therefore the Tamil Nadu case was valid in its jurisdiction. Here the main purpose of the act was to curb the infringement of the copyright there were two subject matters essentially it was up to the court to decide which subject matter falls under which category therefore the court interpreted it to be cinemas and not copyright and therefore it was under the state list and not under the central list.

Another important feature is the doctrine of colourable legislation according to which, only when a legislature has no power to frame a legislation so that it appears to be within the competence is known as doctrine of colourable legislation. It states that it is a question of competency of the concerned legislature to enact the impugned legislation. The legislation cannot be transgressed, can't be covert, can't be indirect or disguised. Such legislation is colourable. Essentially it means that it does not have the power to make law on such matters but is making law in a colourable format.

Disguising a law in such a way that it must achieve the intended purpose without having the jurisdiction to do it. He says that the legislature can't make any law on matters indirectly if it can't do so directly. The important case in this aspect is *K. T. Moopil Nair v. State of Kerala*. In this case the petitioner owned some forest land in the Palghat taluk of the Palghat district which was a part of the state of Madras before it became part of the state of Kerala. The district was in Madras and therefore the Madras preservation of private forest Act of 1949 was applied. Under this Act the owners of the private forest couldn't sell, lease, mortgage or alienate their forest or part of their forest without the prior permission of the district collector. However, the collector in the exercise of his powers could allow the set of trees to be cut. The permit was brought by the petitioner for about 3000 rupees per year.

These were the facts of the case and as such there were many facts, many legislations involved. The Travancore Cochin Land Tax Act provisions stated 2 rupees per acre as tax and then the powers of the collectors, because of which the petitioner had to pay a huge amount of money in terms of land taxes. Now this was challenged in the Supreme Court. The Chief Justice in his judgment made few observations and said that the Act did not

prescribe any procedure to compel the government to conduct the surveys or assist the lands. So, he made few very important observations stating that the proposed procedure does not necessitate notifying the proposed assessee. This was a very important procedure to be followed by the state.

To ascertain whether the Act made by the state was colourable in nature. There were many errors in making the procedures by the Assessing Authority and then there was no procedure for obtaining the opinion of the civil court which is common in all taxing statutes and therefore the Supreme Court made few observations in the matter of procedural aspects. After having made an observation in such procedures the Supreme Court held that this Act was clearly confiscatory in nature and then he gave his analysis stating that by making the petitioner to pay a forced amount and for the surveyed proportions of the forest the Act was made in the guise of a colourable legislation. He believed that since the petitioner would not be in a position to pay the tax the government would have auctioned the land, and in case where there would be no bidders for the land for the auction the state would become the auction purchaser and take control of the land. In 1884 he held that the tax was confiscatory in nature and therefore the section 4 and 7 of the Act was declared unconstitutional for its nature of colourable legislation which was violative of the provisions of Article 14 of the Constitution and the violative of Article 19 as well.

However, regardless of the fact that an alternative way of earning the tax money could be devised the court held that the mere fact that there was no survey conducted of the land there were several shortcomings in the legal matters of the Act and it was very clear that the government wanted the petitioner to give up his land. Since they couldn't make him do it in a direct way they made it in an indirect way through the payment of the higher taxes. So, this type of legislation is called colourable legislation and this has been invalidated by the Supreme Court in its various cases. Another important aspect of legislative interpretation is the doctrine of eclipse. As per Article 13 clause 1 of the Indian Constitution it says all laws in force in the territory of India immediately before the commencement of this Constitution insofar as they are inconsistent with the provisions will to the extent of inconsistency be void. The Constitution came into force on 26th January 1950 therefore according to the Constitution any Article which was created before 26th January and which are violating any provisions of the Part III of the Constitution after its existence will be declared void.

An important case in this is *Keshav Madhav Menon v. State of Bombay*. In this case the petitioner was the secretary of the People's Publishing House titled the *Railway Mazdooran ke Khilaf Nai Zazish*. This was a pamphlet published in the book within the meaning of Section 1 of the Press and Registration Books Act of 1867. However, the Bombay government authorities considered this to be a news sheet under Section 2(6) of the Indian Press Emergency Powers Act of 1931 and said that it had been published without any authority. When the case was still ongoing the Constitution commenced in 1950. The

petitioner challenged the Act claiming that it was unconstitutional under Article 13 clause 1. Also, the concerns raised were whether section 15 clause 1 and 18 clause 1 of the definitions in 2 clause 6 or 2 clause 10 of the Indian Press Emergency Powers Act was inconsistent with the freedom of press under the Article 19(1)(a) read with clause 2.

The High Court in this case decided that the application was based on the second question. The High Court was of the opinion that the proceedings which had begun should have commenced, continued even though the Act was inconsistent, and the fundamental rights were conferred under Article 19 clause 1. The petitioner then approached the Supreme Court. Although the Act did not become void at initiation on 26th January 1950 it became void which meant that it no longer was effective. And therefore, he cannot be convicted after the commencement of the Constitution as there was no existing law to convict him for violation.

If a retrospective application was mentioned in Article 13(1) then he would have been a person convicted under the Act for an act done before commencement of this Constitution. Therefore the majority decision by the court the petitioner's petition was dismissed. Doctrine of waiver is another important aspect. To understand the doctrine of waiver we must first understand the meaning of the word waiver. According to the Webster dictionary is an act of intentionally relinquishing the or abandoning a known right or claim or a privilege.

The Supreme Court in its word says waiver involves a conscious, voluntary, and intentional relinquishment or abandonment of a known existing legal right where the party would have enjoyed it. Therefore, according to the doctrine of waiver whoever is entitled to some privilege or right can waive those rights if he is not coerced into doing it or does it with his free will.

In a very important case of *Baseshar Nath*, the Constitutional validity of the doctrine of waiver of a fundamental right was examined. The facts of the case were that the central government referred the appellant's case to the investigation commission and the commission directed the authorized official to examine the appellant's account. After the necessary procedures were conducted, it was held that a certain amount had to be paid for a settlement under section 8(a) of the Taxation on Income (Investigation Commission) Act, 1947. The central government was reported about the approval of the settlement and the said approval was accepted by the state government. The appellant was asked to pay some amount of money. It was contended by the respondent that the Act laid down the two separate procedures; one was for investigation the other was for settlement and therefore claimed that the appellant had waived his fundamental right founded in Article 14 by voluntarily entering the settlements. It was held that it was impossible to give up the basic right guaranteed by Article 14 of the Constitution, and it is incorrect to argue that by settling

under section 8(a) the appellant had given up his fundamental right. So, Article 14 is based on public policy and therefore it cannot be waived by a mere Act.

The language is authoritative and places an obligation of the state that no one can be relieved of his fundamental right and therefore the fundamental right cannot be waived. Any fundamental right cannot be waived because the fundamental rights are based on public policy which are valued and respected throughout the world. So the state has a duty to respect all fundamental rights and any waiver of fundamental rights cannot be merely an act of whims or fancies. So, the state has every duty to protect the fundamental right of every citizen and it can't claim through any Act that the citizen has waived his fundamental right. So, this becomes a very valid case in terms of doctrine of waiver of fundamental rights. Therefore, it is important to understand all the procedures, functions and legislative interpretations of the union legislatures and the state legislatures for the effective functioning of the government in the country.