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LAW MAKING-BALANCE OF CONFLICTING INTERESTS

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Abstract :- The law making is a tedious job. The law maker has to balance conflicting and sometimes contradicting interests. The law of marriage and law of divorce are many a times self-contradictory. Society seeks marriage whereas divorce becomes the necessity for the individual spouse. As rightly said by Jurist Roscoe Pound law is social engineering.

{ Key-words:- Social Engineering, Interests, Balance }

Recently there is a heated ongoing debate on many decisions taking by the present Modi regime. As opposed to his previous two terms in which BJP had full majority the present Modi govt is far away from majority. This change in the position of Modi govt had lead to difficulties in passing the many bills and the Modi govt had to backtrack. The proposed amendment to the waqf board had to be referred to parliament committee and the proposed social media bill had to be shelved. In his previous regime Modi hardly had to face any difficulties in passing any bill. Most bill were passed in parliament without any debate. The voice of the opposition was muzzled and protest by opposition was hardly taken note of. Opposition leaders were suspended on silly pretext. The law-making process hardly had any semblance of democratic

process. The arrogance of regime was self-evident. Even the contentious three farm bill were passed without any debate. First the govt brought an ordinance when the house was not in sessions. Then they brought a bill and passed it without any debate. The govt did not budge for almost one year to the farmer's street protests. The govt went to great length to prevent the protesting farmers from entering the capital state. Now there is a sea change in the attitude of the present regime. The govt has suddenly awoken to the interests of different groups in society. Previously the govt had the attitude of my way or highway.

Although Law making is the job of the legislature according to the positive school of law there is another school of thought which postulates that the law is made by the judges. Law making by the legislature as well as by the judges is nothing but a balancing of conflicting interest. Every society has various pressure group who wish to protect their interests. There are personal interests, family interests, community interest, state interests etc.

Roscoe Pound, the famous jurist, gave the concept of “ social engineering”. He is the most prominent jurist of the Sociological School of Jurisprudence. The positive school of jurisprudence was dominant before the emergence of the Sociological school. The positive school believed that law was whatever made by the legislature. Bentham and John Austin being the most famous proponent of the positive school.

Sociological school argues that law is not about a man but the association of a man with another man in society. The conflicting interests must be balanced for the smooth functioning of the society. The Lady Justice holds a scale in her right hand and she has to balance the interests of various competing interests.

India is the second largest country in terms of population but the largest in terms of democracy. India has the second largest population of Muslims Indonesia being the largest one. India has people of almost all faith, different culture, language, etc. India has been able to survive and prosper as democratic nation because it has been able to balance interests of diverse group. Time to time groups assert their demands and India has been able to fulfil it till date. National and assembly elections are held regularly Except for a short period when emergency was imposed by Indira Gandhi in 1975. Later Indira Gandhi lost the general Election post lifting of emergency. She had to finally seek apology for her act of subverting Democracy. This brief period of Emergency shows us why balancing of conflicting interest is needed in society.

In this article we shall try to see how the legislature and the judiciary have tried to resolve the conflict of balancing interests.

Reservation In India:-

In recent times one of the most controversial matters in India has been the issue of reservation. The Leader Of Opposition Mr Rahul Gandhi has been seeking caste census while the present Government has maintained a stoic silence on it. The Supreme Court in its recent landmark judgment has made observations on applying creamy layer criteria on SC/ST too as it has been applied to OBC¹. In the famous landmark Mandal Commission judgement the Supreme Court laid down the criteria of Creamy Layer to be applied in cases of reservation for OBC. Prior to this judgment OBC community was given benefit to the person inspite of having better economic condition. The opponents of the mandal commission had challenged the Office memorandum which laid to implementation of few provisions of the MANDAL commission² report by the then VP Singh govt. Indra Sawhney and others had challenged the office memorandum on various grounds. One of the main contentions was that even financially well-off person availed the benefits of reservation. While passing the judgment the SC had to balance the interest of two competing interests. It was not an easy job. The court had to look into the valid claims of the upper caste as well as the OBC. Finally the SC did the balancing act by allowing reservation to OBC but with a caveat. The OBC person belonging to Creamy layer were debarred from availing the benefits of reservation. But in the same judgment the concept of creamy layer was not made applicable to the SC/ST group because it had a constitutional guarantee.

In a recent judgment the Supreme Court applied the creamy layer criteria to SC³/ST⁴. The application of creamy layer has been opposed by the allies of NDA⁵ govt. Leaders like Chirag Paswan and Majhi have openly opposed while few allies have not been open. Not surprisingly the NDA has maintained silence and their stand might come in the near future. This episode shows how a govt is faced with dilemma in making law. The govt has to make a balancing of interest. In the above case we notice how the competing interest have brought the govt to a fix. We have all seen how the previous two regime of Modi govt was adamant and it hardly ever took its allies into confidence. But there has been a mark change in the attitude of the present govt because of its reliance on the allies for survival.

HIJAB ROW⁶

There was a similar episode few days back. The then Karnataka govt under Bommai brought a law about banning hijab in schools in the name of bringing uniform code in schools. Few affected girls stopped going to schools. the Karnataka govt did not budge in spite of raising

pressure. Finally a writ petition was filed in Karnataka High Court. This writ was finally decreed in favour of the govt. This order of Karnataka High Court was challenged in Supreme Court before a bench consisting of Justice Dhulia and Justice Gupta. Both the parties gave arguments to support their interests. Finally, the Court gave a split verdict. Justice Dhulia gave verdict in support of the Muslim girl students on grounds of Right to education whereas Justice Gupta gave in favour of the Karnataka govt. So, in order to settle the issue this case was referred to Third judge appointed by CJI. This judge has not decided the contentious issue. Meanwhile the govt in Karnataka changed and Siddaramaiah Govt took over in May 2023. This govt withdrew the govt notification on Hijab ban. The details of the Hijab row are evident in showing how various govt and judiciary have tried to balance the conflicting interests.

The Hijab row is also a fine example to show why separation of power is necessary for a vibrant democracy to function. As rightly observed by Montesquieu democracy won't survive without a proper separation of power. India has been able to survive as a democracy because of this healthy separation of powers between the legislature, administrative and judiciary.

Electoral Bond Verdict⁷

On landmark case is about the judgment on the non-transparent electoral bond. The MODI govt of 2014-19 in 2017 brought a legislation by the then FM⁸ Mr Arun Jaitley on secret electoral bond. It was brought as a money bill. The Election commission of India as well as Reserve Bank of India had serious objection to the issue of electoral bond. Both the constitutional bodies had raised their objections. But the Modi Govt did not pay any heed to their objections and introduced the secret bond. A writ was filled against this secret electoral bond. Finally, it was heard in 2024 and a historic judgment was delivered by a full bench led by CJI Chandrachud. In this case the govt was proposing the need for maintaining secrecy on part of the donor. The govt contended that the donors of electoral bond needed to be kept secret because if there is a change of government then the donor would be adversely affected, The govt also contended that it was not completely secret because in case of criminal matters the names of donors could be obtained by the investigating officer and SBI had to maintain list of donors. On the other hand, the petitioners contended that the bonds were totally opaque and it always helped the ruling parties and not the opposition. The donors donated more than 75% to the ruling dispensation and only nominal amount to the opposition. This approach led to suspicion of quid-pro-quo. The full bench gave a patient hearing to both the parties. The govt in support of the bill brought in the mischief rule. It brought to the courts notice the situation with regards to

political donation prevailing before the electoral bond concept was introduced. Most political donation was in cash and the introduction of electoral bonds brought in accountability and transparency. The govt tried to show its bonafide interest in bring transparency by enactment of Electoral Bonds. The govt wanted to impress upon the court that it had made the electoral bond opaque in legitimate interest of the donor. It even went far enough to contend that there was no fundamental right to know the donors of political parties. The challengers, on the hand, showed how the so called remedy for the disease was worse than the disease itself. They also argued the interest of the general public to know the names of the donors. Finally the bench gave its judgment against the secret electoral bond and ordered SBI to reveal the details of the donors and the recipients. It also ordered the Election Commission to display the details given by SBI on its own website. The SC had to decide between to competing interest of Right to information and the need to keep the name of donors of political parties. Finally the petitioners argument prevailed and the govts argument failed to impress the Hon'ble Court. In this case the court leaned to the side of the petitioners. The law on electoral bond was found to be unconstitutional.

Broadcasting Regulation Bill, 2024⁹

The Modi govt has brought all the mainstream media under its control by deploying various dubious means. It could not prevent NDTV from showing against the Modi govt. So it tried it hands by raiding the owners of NDTV Mr Roy. But this act did not help the govt because NDTV still continued to telecast news unfavourable to BJP and Modi in particular. Finally Adani bought NDTV and news anchors like Ravish Kumar left the channel because he was not willing to toe the line of the new owner. Ravish Kumar and other anchors like him namely Punya Prason Bajpai, Abhisar Sharma etc started using Social media. This social media broadcast got better reach and viewers of mainstream media started losing viewership to social media. This pattern of change was happening because mainstream media had become an extended arm of the govt. It is no longer acting as fourth pillar of democracy. It was not catering to the needs and interests of the general people. A vacuum had been created for real news. This vacuum was fulfilled by news on social media especially Youtube by anchors like Ravish Kumar, Abhishar Sharma, Sakshi Joshi, Pragya Mishra, Sanjay Sharma, Ajit Anjum, etc.

This change in viewership worried the Modi Regime and it tried to bring Broadcasting Regulation Bill, 2024. The Modi regime wanted to curb the independence of the social media by bringing in legislation on the social media influencer. The govt had drafted a bill for the

same. The provisions of the bill came out in public domain leading to criticism from various groups who were likely to be adversely affected by the bill in its present form. The protest started growing by the day. The pressure on the govt was increasing with each passing day. The main point of protest was the likely curbing of freedom of speech in the garb of regulation. The Modi govt of 2014 to 2024 was totally different from what it is in present time. That govt hardly ever paid any heed to any kind of protest and bulldozed bill. But this Modi regime had to back step. It finally decided to drop the bill. This is a fine example to show how a govt has to balance the conflicting interest or competing interests. People of India have given a clear signal to the Modi govt that they were not happy with the means employed by the Modi govt. The brute majority which the previous regime enjoyed has evaporated and the present regime has to take all political parties into confidence.

Strong Govt Vs Weak Govt debate

As compared to the Modi govt one can see that many good social legislations were brought in by coalition govt be it the VP SINGH Govt, Narsimha Govt, DeveGowda, Atal Bihari Vajpayee or Dr Manmohan Singh.

VP Singh implemented in the Mandal Commission. The Narsimha govt brought in the wave of liberalisation. The Deve Gowda govt brought in the Golden Budget bringing a sea change in personal income-tax slab. The Vajpayee govt continued the good works of the previous regime. The Vajpayee govt never considered the opposition as enemies. It gave due credits to all the good works done by the previous govts. The Dr Manmohan Singh Govt needs a special mention. It brought social legislations like Right to Information 2005, Right to Education 2009, MNREGA¹⁰, Farmers loan waiver, Right to Food 2012. This coalition era shows that it is a coalition govt which has to balance the interests of various groups has done good work for the people. It is a misnomer to say that only a full majority govt can do good work for the people. It is true to say that power corrupts and absolute power corrupts absolutely. One can just imagine what would have been the situation if Modi had been able to get 370 seats on his own. Democracy is by the people, of the people and for the people.

Recent bail orders in UAPA and PMLA.

In recent times India has seen a spate of bail orders in the stringent act UAPA. Manish Sisodia the former Deputy CM of Delhi was arrested on 26 Feb 2023 by CBI for purported irregularities in formulation of Delhi Excise policy. The Enforcement Directorate (ED) arrested him on 9th March 2023 stemming from the same FIR for money laundering. He had already spent 17

months without trial. Arvind Kejriwal was too was arrested for the same offence. The bail provisions were very strict and getting bail was an onerous task because the burden of proof was on the accused to prove his innocence. The provision of bail under Sec 41(1)(ii) of PMLA¹¹ is against the basis rule of criminal jurisprudence. Under criminal law the burden of proving guilty is on the prosecution. But under UAPA¹² and PMLA the burden is on the accused to prove his innocence rather than the prosecution proving the guilt. This stringent provision makes it very difficult for the accused to get bail. Many accused are languishing in jail because of this harsh provision.

But in case of Arvind Kejriwal, Manish Sisodia and oths the Supreme Court again resorted to balancing the interest of the govt and the accused. The Supreme Court categorically laid down that Bail is the Rule and Jail is an exception even in stringent acts. AAP¹³ MP¹⁴ Sanjay Singh, CM Kejriwal Former Deputy CM¹⁵ Sisodia, Jharkhand CM of Hemant Soren, Kavitha, etc were able to get bail because of this liberal approach of the Supreme Court.

ED¹⁶ has become a tool of harassment. The present regime has used it viciously against the opposition. Many opposition leaders have purportedly joined BJP to save themselves from CBI/ED/IT. It is alleged that the Udhav Thakrey led Govt in Maharashtra was brought down by fear of CBI/ED/IT¹⁷.

Perils of Authoritarian Govt

We are all witness to what is happening in neighbouring Bangladesh. The Shekh Hasina govt had just won a huge mandate by putting all opposition leaders. This finally led to huge protests against the govt and Sheikh Hasina had to resign and flee. Opposition leaders to should be accommodated in the law-making process. They too represent the voice of group. Govt and opposition are conflicting parties having conflicting interests. In such a situation the duty of the govt is to find a balance. Considering the opposition parties as enemies is hardly good for any nation. The people who voted for the opposition have given a mandate to the opposition leaders to raise their voice. It's the duty of the regime to take the opposition in confidence.

Power has to be balanced between the legislature, administrative and the judiciary. India strives to have an egalitarian society. Such a society is only possible by maintaining a fine balance between conflicting interests. Roscoe Pound has led down few guidelines to prioritise various interests. Similarly the great jurist John Rawls in his famous book "A THEORY OF JUSTICE"

published in 1971 has given an alternative to the theory of utilitarian proposed by Jeremy Bentham. John Rawls uses an updated version of the Kantian philosophy and social contract theory. We must remember that law is not justice. Law is a means to achieve justice. In India the department is called Law and Justice. This nomenclature shows that law is separate from justice.

Law and Justice

In the constitution a separate Article 142 has been provided for the Supreme Court for doing complete Justice. The framers of the constitution were aware that it was possible that the laid down laws might be sometimes insufficient to give justice and such situation could handicap the supreme court from giving justice to the litigant. Therefore the framers rightly provided for Art 142.

In the famous Ramjanmbhoomi-Babri Masjid title Suit the Supreme Court had to face this dilemma. The Court resorted to Art 142. After deciding in the favour of RAMLALLA Virajman the Court felt the decision was not giving justice to the other two litigants namely the Nirmohi Akhara and the Babri masjid. Hence invoking Art 142 Supreme Court directed the Govt to allocate 5 Acre land to the BABRI masjid. It also made specific direction that the Nirmohi akhara should be made member of the trust of Ramlalla. In compliance with this order the govt allocated 5 Acre land to the Babri masjid and accommodated member of the akhara.

This judgment demonstrates how law is different from justice and supreme court has tried to give justice by balancing the competing interests. In this case the interests were conflicting. But the supreme court tried to achieve a fine balance. Such fine balance will lead to lasting peace and harmony. When one only adheres to law and sidetracks justice then such law becomes a tool for harassment.

From the above discussion we can conclude that law is nothing but balancing of interests. If this balance is not maintained then the society will degenerate. It is necessary to balance interest for an ordered social world. Human beings are social beings and we need a society. The social contract to form a society was entered by surrendering some of the personal interest. So it is the duty of the society to balance the personal interest of individual and the interest of the society as a whole.

¹ Other Backward Caste

² Second Backward Caste commission formed by Janta Party govt formed under Chairmanship of B.P.Mandal

³ Schedule Caste

⁴ Schedule Tribe

⁵ National Democratic Alliance

⁶ [Hijab verdict: India Supreme Court split on headscarf ban in classrooms \(bbc.com\)](https://www.bbc.com/news/india-60844444)

⁷ By a judgment dated 15 February 2024, the Supreme Court declared the Electoral Bond Scheme and the provisions of the Finance Act 2017 which amended the provisions of the Representation of People Act 1951 and the Income Tax Act 1961, unconstitutional on the ground that the non-disclosure of information regarding the funding of political parties is violative of the right to information of citizens under Article 19(1)(a) of the Constitution.

⁸ Finance Minister

⁹ [Broadcasting Regulation Bill: Why online content creators are protesting \(scroll.in\)](https://scroll.in/latest/784444)

¹⁰ Mahatma Gandhi National Rural Employment Guarantee Act

¹¹ The Prevention of Money-Laundering Act, 2002

¹² Unlawful Activities prevention Act.

¹³ Aam Admi Party

¹⁴ Member of Parliament

¹⁵ Chief Minister

¹⁶ Enforcement Directorate

¹⁷ Income Tax Department