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Public Policy and Judiciary: An Analysis of Class-Bias

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Abstract
This essay is about what public police is and its different types and how states frame public policies. It also discusses the laws embodying public policies and judiciary and specifically Supreme Court responds towards the public policies. There are economic policies, social policies and policies in regard to political rights such as right to protest from which right to strike is derived. This essay deals with how judiciary has reacted to the contradictions between right to life and individual's liberty. In A. K. Gopalan v. State of Madras, which was the first constitutional case brought the Supreme Court of India to the task of judging if the doctrine of substantial due process can be read into Article 21, Constitution of India. Scholars have found that the majority decision in this case has been set aside later on in Maneka Gandhi case. This essay also looks into the fact that when a matter of liberty versus preventive detention rises, the Court often sides with the state. On the other hand, a few cases such as Mohini Jain and Unikrishnan show that the Court has properly analyzed the question whether educational institutions run by private organizations can be made to enjoy complete freedom of immunity from state-interference and the Court has said that education is a sovereign responsibility and education can not be made trade and commerce. But contrary to this, in TMA Pai case, the Court reversed its earlier stand and said that state can not interfere in the management of the educational institutions fully run by private organizations. It means that the private educational institutions can impose sky rocketing price for admission and this decision of the Supreme Court went against the conscience of the constitution. So also, in respect of economic policies, the Court remained silent and it has never been assertive. This is how the Court is found biased in favour of the big business houses.

Keywords: Public policy; Judiciary; Class bias; Supreme Court

Introduction

Let's take on a common conditional inference that if there rises demand, there rises price. A conclusion may be derived here from that rise in demand for goods causes rise in price of the goods so demanded. Here the occurrence of the cause-effect relationship between demand and price is half told. An economy of truth is not the truth, but half of the truth. Supply plays a vital role which determines demand-price relationship. On the other hand, the role of state can't be ignored as no cause-effect relationship between demand and price occurs in heaven. It is a human act which can't be independent of acts of the State. Interference of state happens to be the determining factor. A state consisting of the societies fractured into multiple layers of inequality can't escape its responsibility of bridging the gaps meaning minimization of inequality. If market forces are made scot-free to regulate prices of goods with intent mala fide, even

though demand does not rise and even though supply does not fall, but prices do rise, the silence of state is obviously a bias against the populace suffering from inequality. Justice economic is not protected by the state's silence as silence is also a kind of inference. State's silence or interference is indicative of what public policy is formulated by state to accomplish welfare of the people living in the state as constitutionalism mandates welfare of people. Thus, the constitutional mandates to accomplish welfare of people is what is called public policy. In the age of globalization-liberalization-privatization, states guarding interests of ruling classes live like homo economicus who attempt to maximize utility as consumers and economic profit as producers and the responsibility to regulate the economic life of citizens is largely abandoned to market forces. Economic life and political life are simultaneously built up to develop institutions, the rules and the customs.

The Concept of Public Policy

What is public policy? It happens to be "a system of laws in regard to regulating measures, guidelines and funding priorities determined by state or governments or their representatives to fulfil the goals or public interests mandated in the constitution."[2] Either to regulate market forces or to deregulate them is a public policy. The public policy framework decidedly taken up by state or its governments may be classified into the categories such as economic policy, social policy, environmental policy, education policy and health policy etc. History is witness to benevolent autocracy across the globe since time immemorial and the states which was embodied in their rulers had been found having certain measures for ascertaining public welfare. In the Indian context, Chandragupta Maurya, Ashoka the Great and Akbar the Magnanimous had all had certain measures in respect of public welfare. Union of India is vested with power as well as responsibility under Article 14, Constitution of India, to render to any person equality before the law or the equal protection of the laws. What is "equal protection"? The principle of equality is itself a broader spectrum that every law must not be universally applied for all.[3] It is so because all the people are not in the same position by their nature, attainment and or circumstances and as because different classes of people have their varied and varying needs and hence different classes of people require different treatment. Therefore, when the matter comes up as market forces versus general public who are vulnerable, state has to interfere with certain public policy, so as to have price under state-control, so that the strata with low income can afford for their right to life to sustain. This is known as reasonable classification. This public policy is required within the framework of the constitutional mandate enshrined in Article 14, Constitution of India. Further, to accomplish equality is to minimize inequality and hence public policy ought to be devised to minimize inequality. "The concept of equality before the law contemplates minimizing the inequality in income and eliminating inequalities in status, facilities and opportunities not only amongst individuals, but also amongst groups of people, securing adequate means of livelihood to citizens of India, with special care to promote educational and economic interests amongst the weaker strata of populace such as scheduled castes and tribes. This is in good accord with the Part-IV of Constitution of India.[4] This doctrine of equality affirmed in Constitution of India adheres to Article-7 of the Universal Declaration of Human Rights, 1948. Along with, Articles 38,39,39A, 41 and 46 do illustrate the concept of "equality before the law".

Public Policy in Constitutional Democracy

In a constitutional democracy like that of India which insures and ensures justice-economic, social and political, all the organs of the state- legislature, executive and judiciary are bound to Constitution, the

supreme law of the land. In this essay, a little attempt is made out to look for how judiciary has been responding to various public policies progressive or regressive. Judges have always been involved with public policy and they (judges) in their role as in interpretation of statutes as well as in the selective application of precedents have always involved in the development of law.[5] Essentially, judiciary has to play a vital role in the making of public policies.[6] John V. Orth writes that a hundred years ago, in the novel Billy Budd, Herman Melville depicts a fictional character named Captain Vere and the very name connotatively means truth. Once he was called upon to perform as a judge to try a matter in a court. The fact was that a crewman unintentionally killed one of the ship's officers. Captain Vere the judge recognized that that the defendant accused was innocent, but he passed the order, so that the accused was executed. Even the judge declared that the accused was innocent in the eyes of God, but he said that law must be enforced. Captain Vere was a type of judge who never went beyond the letters of the law. It shows that judicial response to public policies depends on what kind of a judge one is and interpretation of statutes depends on and varies from one type of judges to another. V.R. Krishna Iyer was sworn in as a judge of Supreme Court of India on 17 July, 1973. Soli J. Sorabjee, a prominent advocate, led a team of 150 lawyers and gathered to protest justice Krishna Iyer's appointment. The cause of this protest was that Justice Krishna Iyer was popular as a Marxist within the legal fraternity, even though he had never claimed himself to be so.[7] As a matter of public policy, he had initiated free legal aid for the poor during his tenure in Law Commission. When he was the law minister in Kerala, he set up the nation's first comprehensive legal aid programme. It was he who, during his tenure as law minister of the state of Kerala, initiated the appointment of Anna Chandy, the first woman to be a high court judge in India's history. Justice Krishna Iyer fell under scanner when as the single vacation judge at Supreme Court of India in June, 1975, he gave less than what the then prime minister of India had prayed for. His ruling was that she had lost her status and privileges as a member of Parliament, but she was allowed to retain her position as prime minister since her appeal against Allahabad high Court's judgement was pending. A few days later, the infamous dark days under the Article 356, Constitution of India came down heavily on the freedom and liberty of Indians across the subcontinent. This little illustration as above depicts the relationship between public policy and judiciary. Therefore, it may be derived from the above discourse that the judicial interpretation of the laws embodying public policy takes place according to judges' ideologies. The judges who incline towards socialism differ in their interpretation from those inclining towards capitalism. There may be some judges who may have opted for some kind of middle path, so as to satisfy the both of the schools. The Supreme Court of India of 1970s and 1980s had very serious but interesting ideological divisions among its judges. In 1983, Justice Pathak witnessed three different and distinct groups of judges in the Court.[8] The conservative judges were those who were British-style legalists looking only at the law and who never look at social and economic conditions. There used to be a group of judges who were centrist and very sensitive to the changing circumstances and they needed change, but they remained confined and loyal to the law and Constitution. They did not want to be judicial legislators. The third group of judges considered themselves as judicial law-makers and they went beyond what the legislatures had envisioned. Hence, deep and thorough study is needed to look into whether these ideological divisions among the judges of Supreme Court has infringed what the part-III and the Part-IV of the Constitution of India combinedly do mandate.

Indian Constitution and Public Policy

The Preamble to the Constitution of India is called and honoured by the Supreme Court of India as the

"conscience of the Constitution". The Part- III and the Part-IV of the Constitution together form the conscience of the Constitution. Although the Part-IV is not enforceable by the court, it is nonetheless binding.[9] So, the judicial interpretations of the statute embodying public policy must not infringe the conscience contained in Fundamental Rights and the Directive Principles of State Policy read together. Law's primary purpose is the quest of justice.[10] When the administration of justice demands fairness and uniformity of treatment and its result is left to the length of the Judge's foot,[11] the Judge is expected to keep his foot necessarily strong and steady so as not to get justice pulped thereunder. But the length of the Judge's foot got split in A. K. Gopalan v. State of Madras. Union of India. This was the first case to be decided by the first Constitution Bench of Supreme Court of India. The verdict was handed on 19 May 1950. This was the first ever case in which the Supreme Court of India got the opportunity to make out the meaning of Article 21. The contradiction was whether substantive due process could be read into it. The majority in the bench did not read due process thereinto, but Justice Fazl Ali (minority in the Bench) struck his discordant note[12] that although due process guarantee was not encompassed within Article 21, the ordinary procedural safeguards could not be denied that when a person was proceeded against under a law, his constitutional entitlements such as issuance of a notice, a fair hearing to be judged by neutral persons and to otherwise be proceeded against in accordance with the procedure contained in the law (Preventive Detention Act, 1950). However, the length of the judge's foot in majority denied the appellant his right to life and personal liberty and allegedly the preambular conscience got infringed and it took the Court more than a quarter of a century to amend itself in Maneka Gandhi. A. K. Gopalan who was a communist leading labourers and peasants and who sacrificed although his life as a freedom fighter was arrested by the British-India authorities, was denied right to life and liberty by Union of India and had to languish in jail for the crime he had not committed. Evidences show that bot Pt. Nehru and Sardar Patel took communists for potential dangers. An assumption may be built up that denying Gopalan his right to life and liberty was nonetheless the politics of judiciary.

An example from the United Kingdom would suffice in respect of right to strike and the prudence of the court. It so happened in 1964 that the House of Lords delivered a judgement in Rookes v. Bernard[13] in which a threat to strike was taken for a threat of physical violence. The Law Lords such as Lord Devlin found nothing to differentiate a threat of a breach of contract from a threat of physical violence. Lord Hodson said that the injury and suffering caused by strike actions was no less devastating than a threat of violence. This judgement was found gone against provisions of Trade Disputes Act 1906. The right to strike is fundamental to the right to life and liberty, if its practice adheres to non-violence. The fact was that strike actions are often blamed for the most of the country's ills. Strikes are a form of protest and the right to protest is an inalienable right and it is a way to speak the truth to the power.[14] The politics of the judiciary in India right to protest is evident on several occasions. Supreme Court of India said that government employees had no right to strike.[15] The verdict in T. K. Rangarajan v. Government of Tamilnadu & others alienated constitutional rights of protest from government epmloyees.[16] By and large, protest is not a right to be claimed from the state, but it can, as a right be taken despite the state as most of the states were born from the wombs of the protests and strikes against colonial misrules.[17]

Public Policy on Education

Education policy is a public policy. The States parties to this Covenant[18] recognize the right to education and they agree that education shall be directed to the full development of the human personality and the sense of its dignity. Supreme Court of India in Mohini Jain v. State of Karnataka & others, 1992[19] raised

certain issues. These were (i) whether the right to education is guaranteed to the citizens of India in consonance with Fundamental Rights, and whether charging a capitation-fee infarcts the same? (ii) whether the capitation fee is violative of the equality clause enshrined in Article 14? (iii) whether the impugned notification permitted the charging of capitation under the guise of regulation? And whether the notification is violative of the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act 1984? The Court on 30 July,1992 ruled that charging of capitation fees in consideration of admission to educational institutions is a patent denial of citizen's right to education. In regard to private institutions, the Court ruled that whether it is state-owned or state-recognized, students take admission thereto according to their right to education and the act of imparting education is a sovereign duty. In Unikrishnan v. State of Andhra Pradesh, 1993, the Court ruled that imparting education could not be treated as trade and business. It stood opposed to entrepreneurship in education. The Court further said that making education a commerce was against the ethos, traditions and sensibility of the Nation. But, the Supreme Court of India, in TMA Pai Foundation and Others v. State of Karnataka and others, 2002, reversed its earlier concepts of education and said that the State can't fix a rigid price for admission to private educational institutions and said that State can't interfere in the management thereof. To this ruling of the Court, Justice V. Krishna Iyer reacted that the latest pronouncement of the highest court in TMA Pai Foundation case is no exception to the proposition of subtle psychic bias influencing impalpably the interpretative perspective and subconscious conviction of those called upon to pronounce on contemporary issues and today, under the powerful impact of globalization and privatization, the mentality of the elite class has suffered a commercial conditioning even in jurisprudential understanding. The TMA Pai judgement discriminated those who are poverty-stricken and their right to education is infringed. According to Prof. Amartya Sen, poverty is "capacity deprivation". An American author[20] in 1950s said that if the formal policy of an educational system forbids discrimination against Negros but local school boards or administrators so zone school attendance show that negros are segregated in a few schools, the impartial laws as well as discriminatory practices must be considered part of the policy.

Conclusion

It is now evident that so far as the public policy of the right to strike is concerned, the Supreme Court chooses the road as the state wants. It is so because the state is afraid of the massive socio-economic and political movements and judiciary being one of the organs of the state, adheres to the fear of the state. When poverty eradication and equitable distribution of national wealth and income is a public policy, but still poverty hunts vast masses of populace causing deprivation of human capacity to live a life with dignity, it is then known that the state protects the interests of the rich. TMA Pai judgement is the example. According to Prof. Prabhat Patanaik[21] (JNU), judiciary has never been seen assertive against the regimes of economic policies which worsen the people's life with dignity.

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