T02P06 / Interface of Law and Public Policy

Topic : T02 / Comparative Public Policy sponsored by Journal of Comparative Policy Analysis

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GENERAL OBJECTIVES, RESEARCH QUESTIONS AND SCIENTIFIC RELEVANCE

Transformative Constitutionalism and Public Policy

Our research is focused on a comparative question of differences in Public Policy orientation between countries following 'Liberal Constitution' and 'Transformative Constitution'.

The nature of the formation of the State is critical to the role and function of public policy for those contexts. The process of the State formation is hugely different in Global North and Global South. Enlightenment and subjugation of feudal forces to democratic and capitalist process explain the origin of the modern state in Global North (Moore 1966). In most of the Global South, where colonialism was critical to the State formation, what brought the society together is through two processes: a) mobilisation against colonial forces, and b) process of the making of the Constitution. The second aspect is what makes Law inseparable from Public Policy question in the countries of Global South.

Western Liberal Democratic Traditions (where the discipline of Public Policy originated) gave shape to traditional Liberal Constitutions, which emphasized negative rights (Nussbaum 2006). Within this framework, typically the judiciary is engaged in an adjudication process involving private interests. The relevance of judgements for public interest is incidental. On the other hand, new Constitutions in the Global South gave space for positive action from the state. The literature on Transformative Constitutionalism (Vilhena, Baxi and Viljoen 2013) show that 'public interest' was deliberately built into legalism in those constitutions. Interestingly, in Global South where impunity is high, largest number of court cases are against the State.

Thus, in public problem solving, the role of judiciary is hugely different in contexts where Liberal Constitution is followed compared to Transformative Constitution. Pro-active judiciary in various countries of Global South have directed and monitored how the State deals with public policy questions of education, health, food security, access to land and water, corruption etc. This line of inquiry takes us to area which is less studied, namely the interface of law and public policy (Kreis and Christensen 2013). This inquiry could reveal some of the unique features of public policy in Global South and countries of transitional development. Such finding would challenge the dominant models of public policy conception as emanating from the Western world, and would have great relevance to contextualise the discipline for teaching, research and practice.

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CALL FOR PAPERS

Judiciary has played a critical role in Global South while defining the Public Policy agenda. This is because countries in the Global South primarily have 'Transformative Constitution' (TC) that empowers the citizens while dealing with the State. Yet, in the study of public policy, the intersectionality of law and policy is astonishingly under researched. Very often law is treated as an instrument to gain compliance to policies through sanctions. Beyond this instrumental function, many judges functioning with the framework of TC, have acted as 'norm entrepreneurs' and directed the State to design policies to enhance citizens' quality of life. These developments have been backed up by global institutions (e.g. OHCHR, ILO, WHO, UNICEF) that have monitored the nation-states to adopt global standards.

We are looking for papers that demonstrate how public policy and law are interfacing while dealing with public

problems. Though not exhaustive, following are the tentative questions to which authors could respond while proposing a paper as part of this panel.

1. What are the similarities and differences in the orientation towards the concept of justice from the discipline of Law and Public Policy? Papers that could answer this question by presenting evidence using case laws and substantive public policies from the contexts of Liberal Constitution and Transformative Constitution are specifically welcomed.
2. Is there any evidence for policy convergence among nation-states due to the work of International agencies, multi-lateral and bi-lateral agreements? Or does the evidence support the convergence of sectoral laws (e.g. labour laws) across nation-states since there is convergence of economic policies across border?
3. What are sub-domains of Law (e.g. administrative law, planning law, regulatory law) that have shown high intersectionality with the questions of Public Policy? Among these sub-domain and other cases, under what conditions have judiciary acted for policy change? What are the situations in which law has been an impediment for policy change?

These questions are suggestive. Any paper that addresses the issue of interface of Law and Public Policy is relevant for this panel.

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Session 1 Social Rights: Interface of Law and Public Policy

Thursday, June 29th 08:15 to 10:15 (Manasseh Meyer MM 3 - 5)

Discussants

Suzanne Bevacqua (La Trobe University)

ANSARI SALAMAH (Indian Institute of Management- Kozhikode)

Constitutionalisation, Liberalisation and Public Health in the European Union

Benjamin Hawkins (University of Cambridge)

The European Union constitutes a unique experiment in transnational institution building and the construction of liberalised markets. Premised on the creation of a single internal market, it incorporates a range of political, legal and economic institutions, which both bind its member states and facilitate their interaction. Less than a federation, but more than an intergovernmental organisation, it has been characterised as a complex system of multi-level governance. Often overlooked in public health analyses is the role of the EU's legal system. The European Court of Justice (ECJ) has played a key role within EU processes of 'constitutionalisation' and the 'judicialisation' of policy processes. Notwithstanding the elements of a 'social Europe', we argue that the key role of the ECJ has been to advance processes of economic integration and the functioning of the internal market via a series of judgements on the free movement of goods and services. In this paper, we analyse the ECJ's role in EU constitutionalisation and judicialisation processes with reference to relevant concepts and theories. We then analyse and compare two current sets of legal proceedings before the ECJ which have significant implications for public health. The first of these addresses the legality of specific aspects of the EU's Tobacco Products Directive; the second challenges legislation passed by the Scottish Government to introduce minimum unit pricing of alcohol. Finally, we discuss the similarities between the EU's internal legal processes and those of broader trade and investment agreements in terms of their liberalising principles and the implications of these for public health.

The constitutional 'right to health' and the difficulty of regulating publicly funded health services – experience from Germany

Stefanie Ettelt (London School of Hygiene and Tropical Medicine)

The relevance of constitutional social rights for access to health care is increasingly recognised internationally. Many countries have a right to health enshrined in their constitution and litigation can be a powerful means to progress the agenda for social development and expand access to publicly funded health services, especially in countries of the Global South. However, there can be tensions between right to health legislation and regulatory approaches that aim to improve value for money and to reduce harm from ineffective or insufficiently cost effective treatment. In these cases, two concepts of justice appear to collide: justice defined as individual rights enshrined in constitutional law and distributional justice that derives its relevance from the difficulty of having to allocate finite resources so that they maximise benefits for the population as a whole.

Germany has an established social welfare system and a comprehensive health care service, with almost 90% of the population being covered by social health insurance (the remainder has taken out private insurance). In recent decades, cost pressures arising from technological advances and demographic ageing has made it necessary to increasingly scrutinise social insurance funded health service coverage, leading to the emergence of new regulators, especially the Federal Joint Committee as the key decision-maker, and new regulatory practices such as the use of health technology assessment to generate evidence on treatment effectiveness. Yet while these developments are in line with approaches taken in other high and middle income countries, and are even more

lenient (e.g. cost criteria are not taken into account in Germany, with decisions only based on evidence of effectiveness), patients tend to disagree with decisions that lead to treatment not being funded and take sickness funds to court to enforce what they see as their entitlement.

This paper examines how courts in Germany struggle to reconcile the two legal norms underpinning decisions on access to health care: the use of evidence from health technology assessment and the ‘right to health’. The analysis is based on a sample of court cases involved in decisions relating to three types of cancer treatment (Avastin, Hyperthermia, Brachytherapy). It specifically analyses the application of a landmark judgement by the Constitutional Court that conditionalises the ‘right to health’ by stipulating that sickness funds have an obligation to fund treatment if (1) the condition is life threatening, (2) no alternative treatment is available, and (3) if there is a ‘not entirely remote prospect of curing or noticeably improving the condition’, i.e. some indication to suggest that the treatment may be effective. However, the threshold of proof is notably lower than those often applied in decisions based on health technology assessment, leading to some treatments made available through courts that are ineffective or insufficiently proven to be effective. This suggests that it may not be easily be possible for courts to reconcile the two perspectives.

Making Space for Rehabilitation and Recovery: Examining India's Legal Policies Against Human Trafficking

Deya Bhattacharya (Swasti Health Resource Centre)

Shama Karkal (Swasti)

The extant human rights legal framework in India for the prevention and mitigation of trafficking of persons is nascent. Yet, trafficking as a human rights violation is understably an egregious problem, and needs robust implementation of legal policies. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the UN Trafficking Protocol) puts forth a roadmap for enacting and implementing effective domestic laws against human trafficking. In May 2011, India ratified the three protocols of the United Nations Convention against Transnational Organized Crime, including the UN Trafficking Protocol. However, there was no comprehensive unified legal policy or guideline for combating human trafficking. The current laws and policies that forms that backbone of India’s anti-trafficking regime is piecemeal, at best, addressing only components of human trafficking such as slavery, prostitution and child labour and child marriage.

The framework does not contain a comprehensive definition of trafficking, leaving loose knots for judicial closure of cases. The Constitution of India prohibits trafficking of human beings and forced labour, but it does not define either term. There are legislations that prohibit and penalise various forms of forced labour under the Bonded Labour System (Abolition) Act, and the Child Labour (Prohibition and Regulation) Act, and the Juvenile Justice (Care and Protection of Children) Act, and one that criminalizes forms of sex trafficking (The Immoral Traffic (Prevention) Act or ITPA).

The ITPA does not criminalise sex-work per se, but penalises public solicitation and solicitation at brothels. The 2013 JS Verma Committee report provided for a list of comprehensive measures to combat trafficking. However, these measures were not fully implemented; instead since then, the number of brothel evictions have increased. Section 18 of the ITPA facilitates these evictions - it mandates the closure of alleged brothels and eviction of alleged occupants from the premises without providing any rehabilitation or alternative location to settle down. A number of petitions have pleaded with the judiciary to declare the section as unconstitutional and ultra vires. Currently, there is no legislative guidance on the implementation of Section 18, and in the absence of these, absolute discretion is vested on the police administration to follow any procedure, and there is an abuse of power. After being evicted, most women and girls rescued from these brothels either solicit on the streets, making them far more vulnerable to violence and stigma, or they are taken to government shelter homes where they find themselves detained for months without a hearing or order from a magistrate. So far, there has been no rehabilitation or livelihood strategies implemented in these areas.

This paper examines the gaps in the extant framework, that impede implementation of prevention and work, and attempts to find durable solutions. Firstly, the framework prioritises preventing and punishing sex trafficking over other forms of trafficking - current policies conflate trafficking with sexual exploitation. Secondly, there is an gaping absence of measures to ensure safety, rehabilitation and compensation of victims of trafficking. Thirdly, there is no legal provision that decriminalises and safely repatriates victims of cross-national human trafficking.

Interactions of pro-poor policy and Constitutional jurisprudence in Sri Lanka

RASIKA MENDIS (University of Colombo)

Interactions of pro-poor policy and Constitutional jurisprudence in Sri Lanka

- Rasika Mendis

Sri Lanka has a long tradition of endorsing and implementing pro-poor policies in some its key sectors of development, notably in the sectors of health and education. Sri Lanka's second Republican Constitution of 1978, popularly associated 'liberal democratic policies' endorses this policy ethos, especially in its 'directives of State policy'. In addition, the Constitution introduced a chapter on justiciable fundamental rights, setting out a human rights jurisprudence with immense potential for promoting the progressive well-being of the population. However, pro-poor policy implementation is confronted with several challenges, especially with Sri Lanka's transition to a 'middle income country'. And Sri Lanka's legal jurisprudence has had little interaction with the policy environment, and remains detached from any engagement with Sri Lanka's pro-poor policy implementation. This paper seeks to question the interaction and influence of Sri Lanka's Constitutional jurisprudence and pro-poor policy ethos, especially with respect to achieving a more equitable development in the future.

There is much learning from the past that can inform this inquiry, in view that the pro-poor policy ethos however has come into constant friction with the liberal economic policies associated with the 1978 Constitution. Sri Lanka has achieved considerable social development over the years, as measures by development indicators of the Millennium Development Goals, for instance. However in parallel, indicator for 'inequality' indicate rising development disparities among Sri Lanka's population, and among the different sectors (urban, rural and estate).

There is hence a need for the pro-poor policy ethos to capture the imagination of Sri Lanka's Constitutional and legal jurisprudence; such that the 'relevance' of pro-poor policy implementation is re-defined with Sri Lanka's dynamic socio-economic environment. In this regard, the paper will attempt outline the normative justifications for better legislative and judicial engagement with pro-poor policy implementation in Sri Lanka.

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Session 2 Constitutionalism: Interface of Law and Public Policy

Thursday, June 29th 10:30 to 12:30 (Manasseh Meyer MM 3 - 5)

Discussants

Stefanie Ettelt (London School of Hygiene and Tropical Medicine)

PRAVEEN TRIPATHI (National Law School of India University)

Labor constitutionalism and liberal constitutions: The rise of an anti global doctrine and a constitutional right to strike

Lilach Littor (Tel Aviv University)

Labor constitutionalism and liberal constitutions:

The rise of an anti global doctrine and a constitutional right to strike

Lilach Litor

The paper deals with the application of labor constitutionalism in collective disputes in public services within the reality of liberal western constitutions in which labor rights are not acknowledged in domestic constitutions. This raises the issue of the recognition of a constitutional right to strike by activist judiciaries against the background of Liberal constitutions which are based on individual liberal human rights discourse

The article distinguishes between three approaches possible - a global integrative doctrine, according to which labor constitutionalism is based on the application of International labor standards set by the International Labor Organization, a collective anti global doctrine and a liberal political doctrine. According to the liberal political doctrine, strike action is considered mostly as a negative freedom. The liberal political approach denies the application of a constitutional right to strike, as long as the freedom to strike is not included specifically in domestic constitutional documents. Whereas, a global integrative doctrine recognizes strike action as a constitutional right via the application of integrative global human rights governance.

The article suggests the embracement of an anti global constitutional doctrine by the courts. The application of the collective anti global approach is needed in order to counter balance the impact of a few processes that took place in the age of globalization -The decline in union density and in union political power, the rise of neo liberalism, and New Public Management reforms in which market approaches are adopted into the public sector.

CONSTITUTIONALISM, PUBLIC POLICY, AND GROUP INEQUALITY IN SOUTH ASIA

mushtaq malla (National Law School of India University)

Hassan Mohammad Sajjad (Centre for Equity Studies – Misaal,)

EXTENDED ABSTRACT

South Asia (India, Pakistan, Bangladesh, Nepal, Sri Lanka, and Afghanistan) is a mega diversity, with a number of cross cutting and overlapping social groups spread across caste, ethnicity, language, and religion. While it is well established that sub-continent is the most populous, has highest number of head count poor, and is among the parts of the world with large number of minority groups, little attention has been paid to understanding the plight of minorities at the regional level. This paper is trying to address this gap with the help of extensive literature review. The paper looks into the elements of transformative constitutionalism and public policy provisions for minorities in the sub-continent, their implementation, outcomes, threats, and challenges. The paper argues that even after embracing democratic polity and policy minorities are the most discriminated in each

country, and the region a whole is among the poorest parts of the world in protection and promotion of minority rights.

The findings show that there are differences in the basic foundations of constitutions across the region with some (Pakistan, Bangladesh, Sri Lanka, Afghanistan) having a declared or preferential state religion and language, whiles others (India, Nepal) professing secularism over a particular religion and language. But when we look at the constitutional premises of these countries, all of them guarantee a set of fundamental rights to all minorities such as right to equality of citizenship, security, opportunity, participation, non-discrimination, and freedom of religion. Some even profess group specific transformative constitutional provisions such as India for SCs, STs, and some linguistic groups, and Pakistan for religious minorities.

Notwithstanding these generic and specific rights and policy provisions, most of the minorities in the sub-condiment continue to be disproportionally discriminated, and fall at the bottom of human wellbeing. Surprisingly for some the condition is even worse than what it was at the time or before countries emancipation. The issues are not limited to de-facto and de-jury complexities in the definition and identification, and related exclusions, but spread across all spheres of human wellbeing such as life and security, culture and identity, socioeconomic development, and political and public service participation.

When we look at the minorities in the sub-continent, we are not talking about a diminutive population, but millions of people. While this poor compliance, and in some cases non-existence of rights and provisions for minorities is persistently increasing there catastrophes and distancing them from getting wedded into the national process, it is also spilling-over the nation state's and sub-continental development by hindering national development progress, and stability by persistent intra-state ethnic, linguistic, and religious conflicts.

A thorough review of the socio-economic, political, and legal policy processes from the central to the local levels, show a number of intertwined reasons for these poor outcomes in minority wellbeing, but the core bottleneck lies in the "concept of nation state" and "rule of Majoritarianism" adopted by the South Asian countries. Both of which sometimes go deeply against the democratic ethos and principles. The democratic base of nationalism recognizes diversity as an essential element in making a plural society, whiles in South Asia nationalism is based on the idea that territorial boundaries must coincide with homogenous cultural boundaries. This not only discourages an open-ended negotiation, but also leads to suppression of differences. Similarly the majoritarian model – democracy as rule of numerical majority with right to assert its will on others has become a model of fragmentations and disintegration instead of recognition and appreciation. The majority embodies a sentiment of superiority, and right to assimilate and homogenize, whiles minority is treated as a vulnerable sub-ordinate, anti-homogenizing, a distant and separate community in seek of accommodation. This model is gaining more prominence over the last two decades in the sub-continent with increased politicization along the cultural and community concerns and corporate media polarization, as a consequence any talk on minority rights is not only receiving backlashes from the majority groups and state actors but also getting delegitimized quickly.

The paper contends that while democracy in the region is fragile and there is democratic deficit, democracy per se is the only source of hope for minorities in the sub-continent. It provides space not only for fighting against the non-compliance of existing rights, but also for negotiating group specific rights and policy provisions. What is required is a process of deepening democracy that will assure fundamental rights to citizenship, and equality of access, opportunity, and participation; make anti-discriminatory laws to check differential treatments across all minorities; safeguard minority rights through establishing rule of law, entrenching an independent judiciary, accepting and promoting diversities, and establishing country based and regional minority protection regimes. Moreover, guarantee proportional representation in political and public spheres with recent constitutional development in Nepal being a yardstick, ensure disaggregated budget and budget reporting, and prioritize minorities in generalist welfare policy such as National Social Protection Strategies. In addition, ensure disaggregate panel data based documentation of the situations, policies, and outcomes to strengthen the factual understanding about minorities in the sub-continent and minutely measure their development progress.

ABOUT THE AUTHORS

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Dr. Sajjad Hassan Senior fellow at Centre for Equity Studies – Misaal, New Delhi. After resigning from Indian Administrative Services, he did PhD from London School of Economics and Political Science, and led the foundation of Misaal. His work is mainly focused on minority rights in South Asia.

Development Genocide and International Law: Curtailing Development induced Displacement through prohibition of Genocide?

Khushboo Chauhan (O.P. Jindal Global University)

For a long time now, sociologists and historians have argued that because of its devastating effects on both the physical and cultural existence of dislocated people, development-induced displacement may amount to “developmental genocide”, “cultural genocide” or “ethnocide.” Legal scholars, on the contrary, have traditionally focused on cases concerning conflict-induced displacement, such as forced dislocations of people that occur in conditions of armed conflict or civil strife as genocide. Only recently, some legal scholars have begun to evaluate forced relocations in the context of development projects through the perspectives of international law, in particular international human rights law. There is no doubt that a disproportionate number of people belonging to minority communities have been physically displaced in the context of development projects both in the developed and developing nations. This development induced displacement and forced relocation can give rise not only to severe risks but also results in disrupting the relationship between the social, economic, cultural and natural environments and the relocated community.

Given that this kind of displacement is a part of both their past and present in countries around the world, the concern about it’s implications becomes paramount. This displacement is of paramount concern especially in the global south, as developing nations such as China, India, etc. are taking on huge development projects resulting not only in mass displacements but also in judicial face-off between the state and the citizens. Hence, the paper aims to analyse some of these large displacements through the “lens” of public policy and international law. It is such incidents that arise the realization that special legal protection must be made available which seems to determine whether the international prohibition of genocide can curtail development based resettlement. The question of whether forced relocation can amount to genocide can be crucial in deciding whether victims of development-induced displacement have cases for redress, in particular in courts outside their countries. Hence, the paper aims to critically determine this question by analysing some of both past and present displacements and what protection does international law provide through the prohibition of genocide in the global south.

Judiciary in the Global South: Transgressing the Domain of Legislature in matters of Public Policy

Abhimanyu Singh (Jawaharlal Nehru University)

Arushi Bajpai (National University of Study and Research in Law, Ranchi)

Law and Public Policy are two disciplines which are complementary to each other and, when they work in tandem, provide immensely beneficial results for a society. However, the Global South seems to be in dilemma to decide upon the question of which organ of the State has the greater mandate to deal with these two crucial fundamentals of the public life.

Although, some scholars are of the opinion that some areas of law (e.g. administrative law, planning law, regulatory law) have greater overlap with Public Policy, the evidence suggests that there cannot be any sphere of Law which has less to do with public policy. The whole theory of the evolution of law rests upon the premise of ‘greater good’ of the society as a whole. Therefore, it is futile for any scholar to check whether some of sub-domains of Law have higher intersectionality with the questions of Public Policy than the other.

What needs to be researched is the intersection between the two and the effect it has upon the society in the Global South in the recent times. The evidence suggests that the sheer inaction among the Legislature and the Executive in the Global South has opened the doors for the Judiciary to step in and take into its hands those crucial matters of public policy which should ideally be left for the Legislature to deliberate upon as the latter, being a democracy, has the mandate of the people to work upon the critical areas of public policy. This development is not only antithetical to the concept of healthy democracy, but is deriding the spirits and aspirations of the pioneers of democratic struggle, whether Luis Gama in Brazil, Mahatma Gandhi in India or Nelson Mandela in South Africa.

In recent cases, one can find the trend in the Global South, where judiciary has gratuitously intervened in the matters of public policy. This development endangers the theory of separation of powers between different organs of the State and brings into fore the fact that as much the two spheres of Law and Public Policy are interrelated with each other, the differences between the two should be recognized and respected.

The judicial tyranny in a state like India has the intent and potential to blur the lines between matters of Law and Public Policy and usurp the domain of Legislature as per the whims and fancies of the Judiciary. This paper will make a sincere attempt to analyze this trend in various countries of the Global South, while keeping its central focus on India, with the help of case laws where the Judiciary has overruled the substantive public policy decisions without any substantial threat to public life or public order. In doing so, this paper will emphasize the fact that the Law and Public Policy being so intertwined with each other are also two entirely different subjects which

should be taken care of by respective organs of a State.

Indian Constitutionalism and Public Policy: A Case of Eminent Domain Law in India

Ramratan Dhumal (University of Delhi)

Eminent domain in India has been highly controversial since its inception in the Constitution in 1950. It is argued that the Constitution places ‘transformative’ agenda at its forefront as against the ‘liberal’ Constitutionalism of the West. Constitution of India determines dual roles of the State, first ‘positive acts’ as a part of transformative agenda, the State constitutionally obliged to undertake social reforms and second ‘preventive/negative acts’, the State not to transgress its constitutional boundaries i.e. not to act arbitrarily. These two contradictory ‘acts’ are embedded under Part IV of the Constitution as ‘Directive Principles of State Policy’ and Part III as ‘Fundamental Rights’ respectively. Although Part IV is not enforceable in any court, it is fundamental in the governance of the country as laid down under Article 37 of the Constitution. It is the prospective ‘social and economic’ policy that the State should follow.

Land reform was one of the social policies that received recognition under Part IV and the State immediately after independence was desperate to implement it. But equally important was the limitation on the State i.e. fundamental right to property under Article 31 and 19(1)(f) of the Constitution. Once the land reform laws were put into execution, Article 31 was used to challenge it. As a result, there was a tussle between judiciary and legislature/executive on the implementation of land reforms and other social reforms vis-à-vis right to property from 1950 to 1978. Finally, to settle this conflict, legislature repealed Article 31. But land reforms remained an unfulfilled task.

During 1990s India adopted economic liberalisation. As a result, government extensively used eminent domain to acquire enormous land to realise liberalise policies. The colonial Land Acquisition Act of 1894 was unabatedly used to acquire enormous land until it was repealed in 2013. Before its repeal, violent protests were witnessed in many parts of India. The protestors consistently demanded introduction of humane law as against the 1894 Act. As a result, the 2013 Act was introduced after extensive debate in the Parliament. However, the existing government has consistently made efforts to overcome the effectiveness of the new law by adopting alternative legislative manoeuvre.

Within this backdrop, this paper interrogates the framing of eminent domain policy of the two phases i.e. the application of eminent domain – to the land reforms in the pre-1978; and post-1990s liberalisation period until the repeal of 1894 Act. This interrogation examines the ‘transformative’ agenda of the Indian Constitutionalism both from the originalist and subsequent interpretative perspectives of legislature and judiciary. This paper argues that Indian Constitutionalism provides guiding principles for the policy framework, which has broader outreach as ‘social policy’ than mere ‘public policy’ for the welfare of the constitutionally identified groups that the eminent domain has failed to follow in true spirit.

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Session 3 Changing Role of the State: Interface of Law and Public Policy

Thursday, June 29th 13:30 to 15:30 (Manasseh Meyer MM 3 - 5)

Discussants

mushtaq malla (National Law School of India University)

RASIKA MENDIS (CENTRE FOR THE STUDY OF HUMAN RIGHTS)

Contextualizing Public Policy & Foreign Direct Investment in India

PRIYA MISRA (National Law School of India University)

PRAVEEN TRIPATHI (National Law School of India University)

Developing countries like India face tremendous pressure from their developed counterparts to open their economy to the ocean of globalization but what the developing countries fear are the waves of inflation and recession which erode their territories of all fertility and the receding of those waves, taking along with them their own domestic resources/finances. Foreign Investment was considered a taboo till it was introduced to the economy of India in 1991. Of course, the historical background warranted it. Some scholars suggest that when India relaxed its foreign investment policy, it compromised on its sovereignty to accommodate the contractual and property rights of the foreigners. When India entered the phase of international trade, it allowed foreign investment and foreign players into the domestic market while protecting certain sectors from the global trade winds. This was frowned upon but India did not budge until those sectors were capable of standing their ground and withstanding the lashes of the invisible hands of the market.

FDI, whether inward or outward, is a matter of public policy requiring an in-depth historical, financial, social and political analysis for every sector and its proper interface with law. When India was a protectionist state, it found several industries in the need of special treatment and therefore decided to cradle them while showering subsidies and priorities on them. Post liberalization, several measures were undertaken to increase attractiveness of India as a foreign investment destination like allowing FDI in new sectors, dispensing with the need for multiple approvals from government and/or regulatory agencies that exist in certain sectors, and extending the automatic route to more sectors.

It is well known that FDI can complement local development efforts in a number of ways, including boosting export competitiveness, generating employment and strengthening the skills and base, enhancing technological capabilities and increasing financial resources for development. However, despite these efforts, India was not been able to attract the investment in capital intensive manufacturing; rather mostly the inward investment flow is in information technology and communications centers. While India’s manufacturing sector has certainly undergone a renaissance in the last few years, foreign investors have not viewed India as major manufacturing hub. Further, the experiences show that inflow of FDI has not caused growth, instead, it has chased growth-oriented sectors in India. In fact, a preliminary research shows that direct investment from other countries has an uneven distribution in India, accumulating more in certain cities instead of a regular dissemination. The researchers will look into this aspect through empirical data and through a survey of incentives, subsidies and political manifestoes in order to determine the causes of the aforesaid pattern of FDI.

In several sectors, the law has acted as a hindrance. These laws have often been the reflection of public policies pertaining to that sector, protecting the domestic industries or the sector itself which the judiciary has also frowned upon from time to time. Researchers will make an analysis of such laws and the contribution of judiciary thereof in ensuring that sound public policies are echoed in the legislations and that the legislations are in harmony with the policy dictating a sector.

So, what goes into the decision making process with regard to capital inflow in a particular sector and how do the

government and legislators balance the need for investment with the need to protect the economic, social and political interest will be the focus of this paper.

SCRUTINY OF OPERATION SOVEREIGN BORDERS 'OPERATIONAL MATTERS' – A NEW POLITICAL ROLE FOR AN OLD LEGAL DICHOTOMY IN AUSTRALIA?

Suzanne Bevacqua (La Trobe University)

John Bevacqua (La Trobe University)

The Australian Government has consistently referred to the need to keep 'operational matters' associated with implementation of its 'Operation Sovereign Borders' offshore immigration control policies secret. This insistence has drawn significant and sustained criticism from media, academic commentators and refugee advocates who have called for greater transparency and scrutiny of operational aspects of these policies. This paper adds to these calls by examining the Government's use of the term 'operational matters' through the lens of the substantial body of legal precedent associated with the use of that term as part of the 'policy/operational dichotomy' a central tool for delineating the limits of sovereign immunity from suit and judicial scrutiny. It calls for the Government to adopt a use of the term more consistent with that body of legal precedent in delineating which aspects of its 'Operation Sovereign Borders' offshore immigration control policies should be disclosed for public scrutiny and which aspects justify continuing to be protected by a cloak of non-disclosure.

Sovereign Debt Restructuring: Locating Indian Law and Jurisprudence in the contemporary international legal order

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Distressed sovereign debt ceases to be a rarity. Sovereign debt crisis has become a contemporary international problem affecting not just the state in crisis; but also the nations at large. Majority of the Asian countries grappled with financial crisis during the 1990s. Starting with Thailand in 1997 the debt crisis spread to Indonesia, South Korea, Philippines, Malaysia and Singapore. The crisis soon spread to Russia (1998). Brazil defaulted in 1980 followed by Mexico in 1982 (and 1995); several Latin American countries followed the suit in a decade long debt crisis. Other countries that faced similar distressed debt situations include Brazil, Cote d'Ivoire, Ecuador, Panama, Peru, Poland, Democratic Republic of Congo, Turkey and Vietnam.

Often sovereign debt crisis grows into a perpetual nightmare for nations as the process of sovereign debt restructuring is relegated to ad- hoc mechanisms of resolution. Debt restructuring is aimed at mitigating some of the problems caused by debt crisis and is a complex process as it involves various stake holders and their competing interests (Krueger, 2002: 2). Frequently a debt restructuring is triggered by the loss of market access and hence the primary aim is merely to restore market access (Stichelmans, 2015: 10). In absence of a comprehensive international regime, majority of the complications arising from sovereign default are frequently left to the uncertain market forces. The current system places excessive faith in the "virtues" of markets (Stiglitz and Guzman, 2015) thus making sovereign debt restructuring more of a political process than a rule based system, often guided by political and economic interests of few countries. Development or human rights criteria play no role. Despite a long history of financial crisis, there is lack of adequate safeguards and international policy framework to ensure timely and equitable restructuring of sovereign debt.

Sovereign debt restructuring has met with varied response from multilateral and domestic initiatives in the last few decades. However, majority of these initiatives are voluntary in nature, with no legal entity or statutory rules of procedure. Although geared towards debt relief, the process continues to be case based and ad- hoc; often left to the discretion of the creditors. Taking advantage of this inadequacy in the legal framework, several creditors have resorted to litigations. Such litigations undermine sovereignty and often impede development and realization of human rights. Prevention and management of unsustainable sovereign debt and subsequent litigations continue to baffle the international institutions.

Using doctrinal research methodology, the proposed paper is aimed at deciphering the question:

How to reform the legal aspects of sovereign debt restructuring process in order to safeguard sovereignty and ensure sustainable development?

Key cases of debt restructuring shall be used to explicate the problems faced by sovereigns during debt restructuring.

Krueger, A. O. (2002). A New Approach to Sovereign Debt Restructuring. International Monetary Fund.

Stichelmans, T. (2015). Why a United Nations sovereign debt restructuring framework is key to implementing the post-2015 sustainable development agenda.

Stiglitz, J. and Guzman, M. (2015, June 15). A Rule of Law for Sovereign Debt. Retrieved from

The end of banking secrecy? Comparing legal and policy evolution in Singapore and Switzerland

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In April 2009, under the mandate of the G20, the Organisation for Economic Cooperation and Development (OECD) released “white”, “black” and “grey” lists classifying selected financial centres according to how far they had implemented "internationally agreed tax standards" relating to the exchange of information. On the same day, the G20 declared that “the era of banking secrecy is over”.

In the eight years that have ensued since the G20’s declaration, the world has indeed witnessed a series of OECD-led policy initiatives that have chipped away gradually but significantly at the principle of national sovereignty in taxation, such as the development of exchange of information (EOI) and finally automatic exchange of information (AEOI). In January 2017, for instance, the launch of the Common Reporting Standard (CRS) set in motion the obligation for contracting states to exchange information automatically on a bilateral basis once a year.

Drawing from the twin domains of law and public policy, this paper traces the evolution of banking secrecy legislation in Singapore and Switzerland, with a focus on how limits to statutory banking secrecy have been gradually imposed, notably with the development of automatic exchange of information (AEOI). In the first part of this paper, I trace the sequential development of international legal regimes designed to facilitate the exchange of tax and banking information, such as the Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS). In the second part of this paper, I compare the evolution of banking secrecy legislation in Singapore and Switzerland and examine under what circumstances statutory banking secrecy can be lifted, both domestically and internationally. Finally, I will conclude with some preliminary observations on how policy convergence has led to legal convergence and the role of national courts in a context of global policy change.