pen ACCLAIMS

Volume 4, December 2018 ISSN 2581-5504

"The Transition of Laissez Faire to Welfare State and the Institutionalization of Rule of Law – A Note"

-Harshitha Gudipudi1
BBA LLB,
Symbiosis Law School,
Hyderabad

ABSTRACT:

The relation between welfare state and globalization is quite complex, it changes from time to time. The "welfare state" nowadays encompasses and connects a large number of policy fields, and some parts of the welfare state are likely to be affected differently by globalization from others.[2] This paper focuses on understanding the transition of the concept of laissez faire to welfare state. We shall also see the impact of globalization of in the sovereignty of a state. We shall see how rule of law is institutionalized in a modern welfare state.

Keywords: ***Laissez faire, welfare state, globalization, sovereignty, rule of law.***

INTRODUCTION:

"The welfare state has always been judged by its good intentions, rather than its bad results."
- Thomas Sowell

Aristotle defines state as "a body of citizens sufficing for the purposes of life." Max Weber defines the modern state as - "A modern state is a system of administration and law which is modified by state and law and which guides the collective actions of the executive staff; the executive is regulated by statute likewise, and claims authority over members of the association (those who necessarily belong to the association by birth) but within a broader scope over all actively taking place in the territory over which it exercises domination".

1 BBA, LL.B; Symbiosis Law School, Hyderabad.
[2] MARIUS R. BUSEMEYER, Globalization and the welfare state (July 15,2017;03:48PM), http://www.oxfordbibliographies.com

Volume 4, December 2018 ISSN 2581-5504

The aim of a modern welfare state is to protect and promote the social and economic welfare of the people. Principles of equality of opportunity and equitable distribution of wealth, etc., are considered to be some of the most important roles of a government.

Transition of the doctrine of Laissez faire to welfare state with special reference to India

The concept of welfare state came up in the British historical setting from the ideas of liberalism, socialism and conservatism. The formative period of the concept involved an interesting application of empiricism and ideology to the problem of poverty. The welfare state, conceived within the liberal framework, involved a social consensus on a wide spectrum of socio economic policies. Two sociological factors largely contributed to the growth of the concept: first, increasing prosperity that produced a revolution of rising expectations; and second, the hope and the fear generated by the newly acquired manhood franchise. The faith in piecemeal social engineering, bereft of dogma, set the precedent for expanding municipal activity and government's interest in social reform. This, indeed, was an ominous beginning.[3]

State help and self- help, in this context, became the two focal points of the 'principled' discussion on the subject of the welfare state. Herbert Spencer's liberalism, an apotheosis of self-help, as a deductive system, had deeper implications for welfare state activity. The notion that Spencer was opposed to welfare state is a false one. His doctrine of non- intervention and positivistic connotation, prima facie inconsistent with laissez- faire, but consistent with the view of state help as complimentary to self- help.[4]

The concept of Laissez - Faire describes and environment where transactions between private parties are free from state intervention, including restrictive regulations, taxes, tariffs and enforced monopolies.[5] The literal translation of this French phrase is "let it be". The British Political system, while bringing into force, the concept of a welfare state, has acquired a remarkable capacity of preserving a liberal identity against the ideas of the French and the German socialism. British resistance to utopian ideals and adaptation to new challenges and

[3] M.M. SANKHDHER, *The Welfare State,* (Delhi: Deep and Deep Publications) 17.
[4] Ibid.
[5] Ibid.

Volume 4, December 2018 ISSN 2581-5504

responsibility was phenomenal. Political leaders of all hues and complexions were falling prey to democratic compulsions and were redefining their ideals. In relation to matters affecting the labor and the poor, they were abandoning their pitched positions in response to pragmatism. Transport, banking, agriculture, industry, trade; in a word, a large segment of economy, were subject to regulation.[6]

In India, there are various judgements that have explained the concept of Laissez faire. In *Vishnu Agencies versus Tax Officer*[7], the court said: "The maxim Laissez faire is derived from the 18th century in France. It expresses the desire on the part of the mercantile community for non-interference by the state."
In *Bombay Telephone Canteen Employees' Association versus Union of India*[8], it was held that the principle of Laissez faire has been dealt a lethal blow by article 14 of the Constitution which assures to every person, just, fair, and reasonable procedure before terminating the services of an employee.
In *Government Branch Press versus D.B. Belliawpa*[9], "The doctrine of Laissez faire has been eroded by the judicial decision and the legislation particularly in its application to persons in public employment to whom the constitutional protection of Article 14 and Article 311 is available."

The rise of a welfare state proceeds from the political philosophy that the greatest economic and social good is the greatest number requires greater intervention of the government. *In Modern Dental college and research center versus State of Madhya Pradesh*[10], The Supreme Court held that the economic policy of this country has travelled from Laissez faire to a welfare state and then to a liberalized economy. The Indian economy experienced major policy changes due to the following reasons:

6 M.M. SANKHDHER, *Yogakshema: The Indian Model of Welfare State,* (Delhi: Deep and Deep Publications Pvt. Ltd.) 3.
7 (1978) 1 SCC 520.
8 (1997) 6 SCC 723.
9 (1979) 1 SCC 477.
10 (2016) 7 SCC 353.

Volume 4, December 2018 ISSN 2581-5504

1. Liberalization;

2. Privatization; and

3. Globalization.

The phrase "Salus populi est suprema lex" means that the happiness of the people is the supreme law. A welfare state has to serve the larger public interest. It denotes a concept of government in which the state plays a key role in the protection and promotion of the economic and social well-being of its citizens.

The doctrine of parens patriae refers to the power of the state to act as a guardian for those who are unable to take care of themselves[11]. In *Charanlal Sahu versus Union of India*[12], it was held: "It has to be borne in mind that conceptually and jurisprudentially, the doctrine of parens patriae is not limited to representation of some of the victims outside the territories of the country. It is true that the doctrine has been so utilized in America so far. In our opinion, learned Attorney General was right in contending that where citizens of a country are victims of a tragedy because of the negligence of any multinational, a peculiar situation arises which calls for suitable effective machinery to articulate and effectuate the grievances and demands of the victims, for which the conventional adversary system would be totally inadequate. The State in discharge of its sovereign obligation must come forward. The Indian state because of its constitutional commitment is obliged to take upon itself the claims of the victims and to protect them in their hour of need."

The interaction of empiricism and ideology- conservative, liberal and socialist- predicated the concept of the welfare state, embodying a consensus on a wide spectrum of socio- economic policies. The development had been distinctive in several ways. It occurred in a free society where men projected their interests and ideas into the arena of conflict and where governments tended to take decisions by discussions and empirical investigation of problems. The welfare

[11] Nolo's Plain-English Law Dictionary.
[12] 1988 SCC (3) 255.

Volume 4, December 2018 ISSN 2581-5504

state evolved in response to the peculiar conditions of a maturing economy, laissez- faire attitude and traditions of enlightened self- interest.[13]

The framers of our Constitution strived to achieve a welfare state by adding the Directive Principles of state policy. But these directives principles are not properly implemented as they are not classified as justiciable like the Fundamental rights. It is important for the law makers in the country to keep in mind, the directive principles while making or amending the laws. These directive principles are included in Part IV of the Constitution of India. These principles are said to be of social, welfare, and economic character. It is by enacting "directive principles of state policy" in part IV of the constitution that we endeavored to create a welfare state.[14]

India has made quite a number of efforts to implement the Directive Principles. The five year plans aimed at providing free basic education to every child up to 14 years. Article 21A was introduced in the 86th Amendment seeking to provide compulsory education to all children between 6 to 14 years. Many welfare schemes are implemented for the growth and welfare of the weaker sections of the society. The Prevention of Atrocities Act, 1995 was enacted by the government of India for the protection of the scheduled castes and scheduled tribes. Several land reform acts were enacted for the ownership rights of poor farmers. Similarly, there are many other acts which came into existence with the object of improvising the society.

Is rule of law institutionalized in the welfare states?

The rule of law connotes basic notions of executive accountability – fidelity to constitutional and legislative authority, consistency in administrative decision-making, and transparency –- from which no one would exempt the welfare system. Moreover, the presumptive mode of enforcement of rule-of-law values in the administrative state – judicial review of administrative action – is well established in modern democracies.[15] On the other hand, the rule of law continues to act as a judicial protection, from the interference of the state, of the private rights of

[13] M.M. SANKHDHER, *Yogakshema The Indian Model of Welfare State,* (Delhi:Deep and Deep Publications Pvt. Ltd.) 5

[14] PARAS DIWAN, *Administrative Law*, (Faridabad: Allahabad Law Agency) 2004 p 124.

[15] NOONAN, K.G., SABEL, C.F. AND SIMON, W.H., The rule of law in the experimentalist welfare state: lessons from child welfare reform. *Law & Social Inquiry*, *34*, pp.523-89.

Volume 4, December 2018 ISSN 2581-5504

the individual. Strong versions of the "right/privilege" distinction that deny welfare rights more than minimal legal protection have been repudiated. Yet, many continue to doubt that the principles of executive accountability historically developed in connection with private rights can be coherently elaborated in the context of welfare programs. Moreover, there is no consensus among those committed to rule-of-law values in the welfare state as to how those values should be institutionalized there.[16]

The paradoxes in these concerns include[17]:

1. *Rules versus Standards:*

To promote consistent decision making, lawyers are drawn to rules for restraining the administrative discretion. But application of a rule can sometimes be arbitrary with respect to the relevant goals. As a result, lawyers tend to follow standards for the promotion of individualized consideration of how goals can be vindicated in the context of the particular claimant. The modern American welfare state developed in the early 20th century under the influence of a view that advocated discretion to individualize programmatic responses to the circumstances of the beneficiary. In juvenile courts, education, child protection, and public assistance, the ideal was decision by extensively trained professionals under standards. In the 1960s and 1970s, there was a reaction against this view. Critiques on the right and the left converged in harsh judgments on the performance of the street-level bureaucrats and therapeutic professionals who staffed welfare agencies. They were deemed intrusive, oppressive, and arbitrary.[18] This return to standards, discretion, and individuation arises from a sense of the inadequacy of rule-based governance to respond to the fluidity and diversity of the circumstances of beneficiaries. On one view, this dissatisfaction is a transient episode in an endless oscillation between categorical and contextual norms.[19]

Another view, however, sees the trend as more fundamental and secular. Surveying developments in Europe, the Irish National Economic and Social Development Office sees

[16] See *Supra.*
[17] See *Supra* at 14.
[18] ANTHONY PLATT, The Child Savers (2d ed. 1977).
[19] MICHAEL LIPSKY AND STEVEN RATHGEB SMITH, "Nonprofit Organization, Government, and the Welfare State," 104 Political Science Quarterly 625 (1989).

Volume 4, December 2018 ISSN 2581-5504

individuation, or what it calls "tailored universalism" as a key theme of an emerging "developmental welfare state." Its analysis emphasizes that recent social and economic change has upset traditional premises of European and American welfare systems.[20] Increased geographical mobility and immigration has made the populations served by welfare programs more diverse. Core beneficiaries of traditional welfare programs -- women and the elderly -- have been increasingly pushed and pulled into the labor market, requiring that the programs intended for them be re-designed to better accommodate the mixing of public support and employment. Economic development has increased the vulnerability of the less skilled segments of the workforce, calling for transitional public support that combines income transfers and training.[21]

2. *Discrete v. Systemic Judicial Intervention :*

Lon L. Fuller raised doubts about the role of courts in the welfare system by suggesting that "polycentric" claims were relatively ill suited for judicial intervention. Polycentric problems arise in complexly integrated systems where a judicial mandate with respect to one part would ramify in ways that might be unpredictable or controllable to other parts.[22]

In Goldberg versus Kelly[23], Justice Black expressed his dissenting opinion – "If courts require welfare programs to afford pre-termination hearings, the programs are likely to respond by making it more difficult to establish eligibility in the first place." Verification requirements were increased making the process even more burdensome. When a court ordered New York's special education program to improve its processing of eligibility determinations, it shifted staff away from providing services to existing beneficiaries, and service to them declined.[24] Polycentricity calls for systemic intervention, but systemic intervention involves a different problem. The courts despair of deriving and enforcing determinate norms for the conduct of an entire system.[25] The more narrow and specific the legal mandate, the more the court's

[20] *Id* at 14.
[21] NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT OFFICE, The Developmental Welfare State 203 (2005) pp. 197-231.
[22] LON L. FULLER, "The Forms and Limits of Adjudication," Harvard Law Review.
[23] 397 U.S. at 278-80.
[24] ROSS SANDLER AND DAVID SCHOENBROD, Democracy by Decree.
[25] See *Supra* at 14.

Volume 4, December 2018 ISSN 2581-5504

enforcement of it threatens to have unforeseeable or undesirable collateral effects. But comprehensive intervention is hard to ground determinately in legal authority.[26]

3. Negative v. Positive Rights

The canonical statement of the priority of negative rights in American constitutional law -- DeShaney v. Winnebago Department of Social Services -- arose in the child abuse-and-neglect area. The plaintiff was a child who suffered severe brain-injuries through repeated beatings by his father. Despite awareness over a long period of extensive evidence of the danger to the child, the state social services agency had intervened only ineffectually and failed to remove him from the home. The complaint alleged that this failure constituted a state deprivation of "life, liberty, and property" under the 14th amendment (and hence actionable under section 1983). The court rejected the claim, holding in an opinion by Justice Rehnquist that "the Due Process Clauses generally confer no affirmative right to governmental aid [against lawless private action], even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[27]

To those who think that the constitutional doctrine must be a grounded principle, the above opinion shall be unsatisfying as it only mentions the history and convention. The negative/positive distinction does not strongly track any plausible measure of the relative importance of a citizen's interests.[28]

However, in its final paragraph, DeShaney does refer briefly to a relevant concern: "In defense of [the defendants] it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection." [29] Here Rehnquist echoes the long-standing claim that principles of positive right are indeterminate. Theorists contend that government programs are not underpinned by a body of evolving but

[26] See *Supra.*
[27] 489 U.S. 189, 196 (1989).
[28] See *Supra at 14.*
[29] 489 U.S. 189, 196 (1989).

Volume 4, December 2018 ISSN 2581-5504

specifiable social norms comparable to those that give coherence to judicial decision-making about private rights. Welfare systems lack the self-adjusting properties of private markets; they have to be steered by bureaucracies under political supervision. Thus, judicial intervention along traditional rule-of-law lines disrupts political accountability and threatens rigidity or arbitrariness or both.[30]

To the extent that the indeterminacy claim is true, it implies a terrible trade-off. Either we must exempt from the strongest rule-of-law protection some of the most basic and important interests of a broad fraction of the population, or we must empower or burden the courts with the task of defining and enforcing standards that are not susceptible to coherent judicial elaboration.[31]

CONCLUSION AND SUGGESTIONS

This paper has briefly explained the concept of the modern states and how they came into existence – the transition from Laissez faire to modern states. We have seen cases like *Vishnu Agencies versus Tax Officer* where the concept of Laissez faire has been explained in the Indian Courts and we have seen the constitutional provisions in India that are aimed at achieving modernization in the country. We have also seen how rule of law and its importance and how it is institutionalized in the modern welfare states. This paper has also covered the impact of globalization in the sovereignty of modern welfare states.

It is important to note that for the modernization of a state it is important for the governments to make or amend the existing laws – like the labor laws, laws relating to taxation, social security, etc., as per the changing needs of the society. It is suggested that a country has to be in accordance (in making such laws) with the rest of the world, but at the same time, a nations' government has to be concerned about its people and the cultures prevalent in that nation.

[30] GUNTHER TEUBNER, "After Legal Instrumentalism?: Strategic Models of Post-Regulatory Law," in Dilemmas of Law in the Welfare State 299, 305-13.
[31] See *Supra* at 14.