



The General Concept of Public Policy and Law

Gauri NIRWAL

PhD Student

Géza Marton Doctoral School of Legal Studies, University of Debrecen
(Debrecen, Hungary)

Email: gauri.nirwal23@gmail.com

Abstract. This paper provides insight into the concept of public policy and its relationship to the law. The purpose of this paper is to describe how public policy is applied in the legal world, particularly in the field of internal commercial arbitration. The paper identifies the public policy dynamic and its applicability in various jurisdictions. The major issue confronting countries that use arbitration as a dispute resolution mechanism is the defence of public policy and its ever-changing complexities. The public policy process is said to be versatile since it operates under a variety of social, political, and economic situations. The guiding role of public policy forbids regulatory authorities from enacting legislation against it. This study uses a literature analysis to assess and draw conclusions about the general concept of public policy and law.

Keywords: public policy, international commercial arbitration, international law, policies

1. The General Notion of Public Policy

Public Policies are said to be as long-standing as governments. To put it simply, whenever and wherever governments have existed, public policies have been made and implemented. To handle the requirements and diverse predicaments of the population, policies are created; further known as public policies. Public policy is a course of action created and/or enacted, typically by a government, in response to public, real-world problems. Carl Joachim Friedrich, a German-American professor and political theorist was of the opinion that: ‘Public policy is a proposed course of action of a person, group, or government within a given environment providing opportunities and obstacles which the policy was proposed to utilize and overcome in an effort to reach a goal.’¹ From the above definition, public policy is a set of activities the government opts to take when

1 Friedrich 2000.

tackling a problem that concerns society as a group, rather than on an individual level. Furthermore, public policy insinuates policies that the government forms on the public's behalf to settle a certain issue. Public policy process is a dynamic and complicated process that occurs through public forums. These policies can be political, economic, cultural, or social in nature. Public Policy plays an important role in the society as it helps to understand the intentions of the government for a particular sector, department. Through this, the public can even measure the achievements made by the government to resolve their issues.

Politics plays a critical part in the implementation process since it determines the results of the activities. Woodrow Wilson published an article on public administration in which he argued for a complete separation of politics and administration. However, the awareness of the degree to which politics influences the administration and the acts done by the administration sparked interest in the execution of public policy. Thus, the concept of public policy and its execution have changed throughout time. There are many key significant public policy documents that facilitated the shaping of the modern approach to how policy is formed. The evolution of public policy is marked by expansion of the power of the people as well as the government. After the Second World War, the development of public policy received substantial attention, as the analytical approaches to social problems were combined into formal policy processes. The importance of analytical approach was highlighted by several other disciplines to get a better understanding of the policy-making process, for cognizant decisions. Economists in the 1960s developed many different cost-effective analysis theories as a method of problem solving. Other related disciplines of social sciences gave additional inputs, added several other approaches to confront the tribulations through the system approach.²

In the 1950s and 1960s, the process of policy followed a wider policy analysis approach and included political attention by sociologists and economists, centred on the Keynesian Economic Model.³ Many important historic events, such as the War on Poverty, the Vietnam War, the Watergate Scandal, or the Energy Crisis of the 1970s, were first proposed as the events that formed the development of the policy sciences. In the case of lack of tangible results, measurable indicators were considered important especially during the implementation of a programme for professions in social sciences. This dispute led to policy analysts to take up a more rational approach that focused on achieving maximum social improvements that surpassed costs. Public policy puts down overall orders rather than thorough directions. After the lines of action have been determined, specified sub-policies that convert the general theory into a concrete one are required to implement it. It initiates the rudiments of ambiguity and doubtful prediction that establish the basis of all policy making. It is made and implemented to attain the objectives that

2 Mokhaba 2005.

3 Moran–Rein–Goodin 2008.

the government has thought for the crucial advantage of the people. The reason for the formulation and execution of these policies is for the welfare of the citizens.

According to the researchers, public policy encompasses all government acts, beginning with the intention to perform a specific action and ending with the outcome of that action.⁴ Public policy is interconnected with public administration and other fields of study such as political science and law.⁵ If we believe that state politics have full influence over bureaucracy, we may assume that implementation process starts when policy is turned into action. The early research on the subject focused on bureaucracies since the concept aligned with Max Weber's paradigm. It included concepts from the goal-setting and rational decision-making processes.⁶ It is up to a government to decide how precisely it wants to define the essence of its public policy in a particular sector and how 'vast, qualitative, and complicated' might the public policy be in nature.⁷

Public policy is the most widely used ground or exception to avoid enforcement of arbitral awards when it comes to the international commercial arbitration. It remains a highly debated and controversial topic. The purpose of public policy is to protect the fundamental principles of the society. It is defined as 'a mechanism that corrects the choice-of-law designation for substantive reasons, namely the defense of the forum's fundamental legal principles and moral values'.⁸ But the application of this ground is based on the interpretation of national courts. Public policy is always an 'unsafe and treacherous ground for legal decision'.⁹ The prominent role of national courts in international arbitration has been recognized in almost every country, enjoying greater recognition in some than in others. Although the researchers utilized a variety of approaches to investigate the nature of public policy, a well-defined conceptual framework for it can only be developed through an in-depth examination of the policy implementation process,¹⁰ which is critical for comprehending the nature of public policy.

International commercial arbitration is often conducted in a neutral country. It is customary for the prevailing party to seek enforcement of the judgment in other foreign jurisdictions. Enforcement occurs when winning parties attempt to get the arbitrator's award in their favour. When the losing party fails to comply, the parties may seek help under a variety of international conventions such as the New York Convention. Arbitration cannot be considered successful unless and until the award is enforced. Public policy is one of the New York Convention's grounds for challenging the execution of a foreign arbitral decision. It is mostly tainted by the

4 Cairney 2019.

5 Hogwood 1995. 59–73.

6 Hogwood-Gunn 1993. 217–225.

7 Sunday 2013.

8 Guedj 1991. 661–697.

9 Case *Janson v. Driefontein Consolidated Gold Mines Ltd.* (1902) AC 484, 500.

10 Meter–Horn 1975. 445–488.

facts that this defence is incapable of being defined precisely, is entirely reliant on the rules of different nations for applicability, and varies by state.

Public policy can be generally defined as a system of laws, regulatory measures, courses of action, and funding priorities concerning a given topic promulgated by a governmental entity or its representatives. The concept of public policy originated as early as the fifteenth century.¹¹ It reflects a common law origin and initial definitions of public policy focused on acts injurious to the public interest or immoral or illegal actions. Public policy is a concept that is adapted periodically in order to meet the changing societal needs, including political, social, cultural, moral, and economic dimensions. Courts often refer to public policy as the basis of bar.¹² Thus, if the court feels that such an issue falls within the scope of public policy, it may interfere to protect the interest of the public. Commonly, public policy is used to describe the authoritative or mandatory rules that parties cannot exploit.¹³

2. Elements of Public Policy

Although the majority of research on public policy implementation is based on the generalized theory of policy implementation, which confines the concept of policy implementation to a top-down connection, the study recommends that a more democratic approach should be used.¹⁴ This method is effective and is also referred to as the bottom-up technique.

The intermediate factors have an effect on the process of policy implementation.¹⁵ Due to intermediate factors, the results of government public policy may differ from the policy objective. Researchers anticipate that public policy implementation will be 'dynamic and complex', yet a study of public policy implementation instances shows that the degree of complexity may vary¹⁶ According to the researchers, under certain circumstances, it is conceivable for some factors to have a more complicated impact on the public policy implementation process, thus affecting the efficacy of the policy results.

The researchers identified three drawbacks to the central (top-down) approach to public policy implementation. The first problem that arises when a central method is used to execute public policy is whether top management is clear about its objectives. The second problem is how policy is conveyed from the top to the bottom. The third issue is about the difficulty that the traditional approach

11 Knight 1922. 207.

12 Shore 2009.

13 Kossuth-Sanders 1987.

14 DeLeon-DeLeon 2002. 467-492.

15 Hupe 2011. 63-80.

16 Brynard 2005. 649-664.

to the problem faces, since it becomes problematic for the democratic method when input for goal formulation comes directly from top management.

Researchers found three possible explanations for the disconnection between organizational performance and policy results. These include disagreements over facts, values, and policy.¹⁷ According to the social exchange theory, if public policymakers fail to achieve a good social exchange because of their actions, they risk being labelled 'illegitimate' by the public. Some academics have referred to it as the government's reputational risk or political risk.¹⁸

Due to the fact that it works under a variety of social, political, and economic circumstances, the public policy process is said to be 'dynamic' in nature.¹⁹ Policymakers work under a variety of circumstances in order to provide services to the public. Due to the dynamic nature of public policy making, it becomes complicated. Consider the time value of the money argument, for example. If the value of a policy varies over time, it becomes very difficult for policymakers to predict its future value, particularly given the qualitative character of the policy. This is often referred to as the subjective risk that policymakers confront as a result of the dynamic character of public policy in a given scenario. Researchers believe that economic feasibility is critical for public policymakers because it allows them to determine the value of a public policy for both the general population and the government. It aids in the decision-making process for the formulation of public policy.²⁰

Occasionally, policymakers will continue to use the same old methods in new situations. This results in policy failure, since the process of policy implementation is dynamic, wherefore not every policy will be effective in all circumstances. While public input is critical for making policy decisions, under a central decision-making system, decision makers often disregard it. This explains the disconnection between governmental policy and popular expectations. Policy analysis is necessary to guarantee that policies are implemented smoothly. The implementation process is entirely responsible for the policy results that may determine the government's and its activities' legitimacy. A government may be branded illegitimate by the people if it fails to implement a policy. As a result, the government's legitimacy is contingent upon the effectiveness of its public policies.

Through the policy-making process, decision makers often opt for the most cost-effective option when developing a policy.²¹ Harold Lasswell is credited with developing the five-stage policy process model.²² The first step of this procedure

17 Heath-Palenchar 2008.

18 Power 2004. 58–65.

19 Simon 2016.

20 Aven-Renn 2010. 121–158.

21 Simon 2016.

22 Howlett-Giest 2012. 35–46.

is referred to as ‘agenda setting’. This stage identifies the issues and proposes remedies to them. The second stage is referred to as ‘policy formulation’, and it is at this step that policymakers examine a collection of possible solutions to a specific issue and eliminate the infeasible ones. At this point, decision makers often undertake a comprehensive cost–benefit analysis. A decision is only viable if the advantages outweigh the costs. Policymakers who have received training in strategic management tend to limit down policy options using a ranking system to find the most viable alternatives. This is the third stage of ‘decision making’, during which the government determines the course of action to follow. Thereafter, the tools of public administration are employed to carry out the policy. This fourth step is referred to as ‘policy implementation’ and the fifth step as the ‘policy assessment stage’.²³

Not only is it the government’s duty to assess the ability of public policy, but it is also the people’s responsibility in a democracy to provide feedback on the execution of public policy. For example, with the advancement of telecommunications technology brought about by the Internet and cable, academics have shifted their emphasis to ways for increasing public involvement in policymaking. This is sometimes referred to as ‘e-democracy’,²⁴ which allows the public to use a variety of technologies to give input to the government. This increases the degree of public involvement in the process of developing public policy.

Political scientists conduct four kinds of policy research: substantive area research, evaluation and effect studies, policy process research, and policy design research. The substantive field of study is concerned with policy formulation in a particular area of politics, which may include health, the environment, and others. For instance, the study of social security politics may be considered a substantial research area.²⁵ While conducting a thorough examination of policy implementation in relation to the politics of a particular region, researchers noted that Aaron Widavsky did not define policy analysis.²⁶ According to the researchers, policy analysis is a multidisciplinary endeavour that may be accomplished via the following four strategies:

1. ‘prospective and retrospective analysis;
2. descriptive and normative analysis;
3. problem finding and problem solving;
4. the segmented and integrated analysis’.²⁷

The approach in which policies are conveyed to the organization’s lower levels, particularly the government, influences their execution since the bureaucracy

23 Ibid.

24 Macintosh 2004. 10.

25 Derthick 1979. 94.

26 Nelson 1996. 559–594.

27 Dunn 2015.

reacts differently when political masters' express policies in a formal manner.²⁸ While organizational hierarchy is critical for policy implementation, when seen through a democratic perspective, it becomes a barrier. According to experts, public policy makes use of laws to influence the interaction between the government and the general population. Advocates of a democratic approach to public policy think that disparities between policy goals and growing concerns cannot be bridged without resolving such disparities.

3. Domestic and International Public Policy

Domestic public policy impacts the internal affairs of a country's citizens, but when the government's activities in the international arena begin to affect the public, it becomes international public policy. International public policy may also be referred to as 'global public policy'. In an international context, the policies pursued by one government may have an effect on the policies pursued by another, complicating matters. When it comes to the distinctions between domestic and international public policy, it is recommended that management adopt an aggressive approach at the policy level, since the issue may affect many sectors, including social, political, and economic ones.²⁹ Domestic public policy is stated to be formed from enactments of statutes, constitutional restrictions, or any other judicial procedures inside a given state. The term is used to describe a variety of issues such as personal rights and freedom, social welfare, healthcare, education, legislation, law enforcement, etc. Since the arbitration is connected to only one nation, only that nation's public policy is considered. Domestic public policy has an impact on the life of every citizen in the nation since it shapes issues such as environmental protection, legislation, education, social welfare, and law enforcement.³⁰

According to the experts, the government confronts policy difficulties both domestically and internationally because of the development of newer technologies and shifting sensitivities. For example, although the management may face no threat to its sovereignty while formulating domestic policy, the process of public policy formation is influenced by foreign events. This prompts us to consider whether domestic public policy is really autonomous. International public policy, on the other hand, refers to the principles that govern a country's domestic policy that will also be applied in an international setting.³¹ International public policy encompasses the public policies of many jurisdictions; therefore,

28 Friedrich 2007. 49–75.

29 Bayvel–Cross. 2010. 3–12.

30 Team 2016.

31 Rashid 2018.

the domestic court must consider the arbitration's international aspects while enforcing its domestic public policy limitations. Certain nations, such as France and Switzerland, have even replaced their domestic public policy arbitration statutes with international ones. Indian courts made a distinction between domestic and international awards, indicating that domestic public policy is more limited in scope than foreign public policy under the Indian arbitration law.³² The distinction between domestic and international public policy, on the other hand, is very thin. Domestic and international public policy differ in their levels of enforcement. The arbitration at the International Court of Justice (ICJ) may reflect the differences between domestic and international public policy. For instance, the *Tampico Beverages, Inc. v. Productos Naturales*³³ at the Supreme Court of Colombia revealed the differences of enforceability between domestic and international public policy.

International public policy is directly related to the country's reputation in an international arena where countries engage, while domestic public policy is often concerned with the country's general welfare. International public policy enables a country to strengthen its ties with other countries. Domestic public policy enables the government to gain legitimacy from the country's domestic population. Transnational public policy is international in nature since it enables the participation of other nations. Domestic public policies are defined by domestic legislation, while international public policies are determined by international legislation. When researchers attempt to establish a link between domestic and foreign public policy, the idea of state sovereignty comes under criticism. While a country may operate independently on the international stage, it may have to surrender part of its sovereignty in order to join international agencies and organizations such as the World Bank and the United Nations (UN). For example, a government may accept stringent conditions in order to get a loan from the International Monetary Fund (IMF). It is still up to the IMF to determine whether to sanction the loan or not.

Today, the world is now referred to as a global community. Domestic public policy information is readily transferrable to the international level. International response may compel the government to reform or alter domestic policies. For example, UN General Assembly (UNGA) decisions have an impact on the domestic public policy of different countries worldwide. Civilian engagement is supporting governments in redefining the role of domestic and international public policy.³⁴ The connection between public policy and law becomes

32 Section 34 of the Indian Arbitration and Conciliation Act 1996 enables the court to set aside an arbitral award if the court finds that the award conflicts with the public policy of India, whereas Section 48 of the Act enables the court to refuse the enforcement of foreign awards if the court finds that the enforcement of the award would be contrary to the public policy of India.

33 Case *Tampico Beverages, Inc. v. Productos Naturales de la Sabana S.A.* Alquería, 12 July 2017.

34 Deibert 2000. 255–272.

apparent at the implementation stage of public policy. Usually, laws are the tools utilized to carry out public policy. Domestic policies are governed by domestic law, while foreign policies are governed by international law. As a rule, the general population is interested with domestic laws inasmuch as they influence the planning and implementation in the social, economic, and other spheres of a citizen's life. The quality of governance can get better by improving the level of implementation of both domestic and international laws.

4. Public Policy and Law

'With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice.'³⁵

Public policy is always more expansive than the laws that define it. The relationship between law and public policy can be described as a 'hand in glove', where laws protect the private interest while the public policy pursues social justice and mediates the competing interests.³⁶ While legislation may be utilized to provide for reward or punishment in a particular sector, public policy is constantly pursuing larger goals. The public expects the government's public policies to effect change in society. Civil courts may address the first nature of conflict, and the law of takings or regulatory laws may deal with the second aspect. Public policy may shape the legal plane of bureaucracy or public administration and guarantee the rule of law ideals. It plays as an enabling authority and monitors arbitrariness and unfairness in the bureaucratic government.³⁷ Jacob Dolinger in his article states that the character of public policy may have a damaging effect due to its diverging nature, and it has a 'barrier effect'.³⁸ Therefore, the different interpretations of public policy add numerous layers of complexity in determining the validity of arbitral awards. Without laws, a public policy may exist. For example, even if the government does not outright prohibit smoking, it may nevertheless establish a public policy against it, since public policy can reflect societal preferences.

It is the policymakers' duty to comprehend the objectives of public policy. If policymakers determine that a policy conflicts with the country's laws, they replace or modify it. The policymakers understand that nothing becomes a law unless and until it is authorized by the legislative body of that country. It is

35 Refer Case *Enderby Town Football Club Ltd v The Football Association Ltd.* (1971) 1 All ER 215, p. 219.

36 Kim 2014. 137–143.

37 Kim 2015.

38 Dolinger 1982. 167–194.

the function of public policy as a guide that enhances its popularity among the people. Historically, the courts' role has been to interpret the laws, not to establish new ones. Due to the presence of regulatory agencies in the states, the function of public policy guidance role becomes critical. It is the regulatory authorities' responsibility to enforce the laws. These regulatory organizations are mandated to act in accordance with administrative law. Public policy's guiding function precludes regulatory agencies from adopting legislation against it. Public conduct is controlled in the nation via the enforcement of laws. The executive branch of government is accountable for implementing public policy that reflects popular preferences.

Government size has a direct correlation with the intricacy of the laws. Increased government size increases the complexity of the laws. At times, citizens accuse the government of implementing unconstitutional laws. This adds to the executive's workload. The diverse nature of public policy adds to its value for policymakers. If public policymakers formulate policies based on prior experiences, the public may not enjoy a steady result. This is because public policy is inherently dynamic. A particular policy may be applied to a particular social, economic, or political sector. For instance, a change in public policy resulted in the repeal of the United States' prohibition laws. The liquor business thrived in the United States after the shift in public opinion although many states continue to have laws prohibiting 'drink and drive'.

Public policy is used as the moral, social, and/or economic considerations that are applied by courts as grounds for refusing enforcement of an arbitral award. In civil law systems, references to good faith and good morals, as well as to public policy as a bar to parties' freedom are incorporated in codes. In common law, references to public policy are mainly included in judicial practice, but also in legal documents. The House of Lords of England in early 1853 explained that public policy is a 'principle which does not permit the doing of anything that could harm the basic principles of any society'. For international private law, public policy is a reaction to the foreign laws that are contrary to the *ius naturale principles*,³⁹ while, on the other hand, public policy appeals to the principles forming the 'political and social foundation' of a specific society's civilization or to the 'principles of preserving certain legislative policies'. While the dynamism of the concept of public policy cannot be denied, it is important to exercise extreme caution in applying the concept.⁴⁰ Public policy, by its nature, is a dynamic concept that evolves continually to meet the changing needs of society, including political, social, cultural, moral, and economic dimensions.

39 *Ius naturale* is a Latin term for natural rights, the laws common to all beings.

40 Case Kiran Atapattu v Janashakthi General Insurance Co. Ltd., SC Appeal 30-31/2005.

5. Conclusions

The concept of public policy is prejudiced by the old concept that it is against sovereign dignity to submit to any type of dispute resolution system not controlled by the state itself. Hence, it is a concept formed on the basis of public good. Lord Mansfield laid down the principle that ‘no court will lend its aid to a man who finds his cause of action upon an immoral or illegal act’, thus, in effect, laying the foundations for the refusal to enforce an illegal contract.⁴¹ A public policy outlines what a government ministry hopes to achieve and the methods and principles it will use to achieve them. It states the goals of the ministry. A policy document is not a law, but it will often identify new laws needed to achieve its goals. So, policy sets out the goals and planned activities of a ministry and department, but it may be necessary to pass a law to enable the government to put in place the necessary institutional and legal frameworks to achieve their aims. Laws must be guided by current government/public policy. Public policy ensures public safety, and it becomes even more critical as the regulatory function of the government expands. While developing public policy, public policymakers confront both qualitative and quantitative risks. Budgetary analysis, forecasting, and cost-benefit analysis may all be included in public decision making. Numerous variables, most notably public expectations, influence the formation of the public policy. Public policy mediates between the interests of transnational business and those of the State with the closest connection to the contract. Each state has its own concept of public policy. For example, in case of trade activities, what is legal in one state might be illegal in another one. In most countries, commercial whaling is a banned practice; however, countries such as Japan, Norway, and Iceland still practice it.⁴² Similarly, a dispute between a distributor and an alcohol producer is regarded as arbitrable in many countries, whereas easy enforcement of awards might be more difficult in Islamic states, where consumption of alcohol is prohibited; the rules will be stricter while enforcing an award, as it is against their public policy. It affects citizens directly or indirectly. It takes elements from various disciplines such as public administration, sociology, economics, history, cultural practices, and customs. If a government is unable to sustain an effective public policy, it loses public legitimacy. Though there is no precise definition of public policy, it is an accepted norm that states have the ultimate right to refuse to enforce an arbitral award on grounds of public policy.

41 Case *Holman v Johnson* (1775) 130 E.R. 294.

42 BBC News. 2019. *Japan Whaling: Why Commercial Hunts Have Resumed Despite Outcry*. Available at: <https://www.bbc.com/news/world-asia-48592682> (accessed on: 24 February 2020).

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