



# INSTITUTIONAL REVIEW OF THE CONSTITUTIONAL POLICY MAKING DOMAIN

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## ABSTRACT

*This Paper has as its theme 'institutional review of the constitutional policy making domain'. The trajectory followed in expounding this theme involves, first, to look at the background and working of the Indian constitution and then explain the possible institutional analysis of the existing structure. The paper then proceeds to the proposed hypothesis as evident from the working of the constitution of India and discusses the real-time means of testing it, whereby exploring the ways of evolving constitutional safeguards in the policy making regime. The study proposes to penetrate behind the verbal formulae of constitutional law, to the social realities, which stand behind them and with which they deal.*

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## Introduction

Etymologically, the constitution is so named because it is supposed to make essential structures through which sovereignty is created and will function. It is a frame work of higher order legal rules which provide the ground for specific legislation and subsequent adjudication as would oversee contests for political power, economic activity including production and commerce etc. Constitutions are to enable as well as to constraint government.

Many societies have enacted constitutions that are formally in congruence with the concepts of constitutionalism and the rule of law. However, constitutional provisions are enforced to varying degrees in different States as also the economy of different states fares differently. Constitutions will rarely be so clear-cut that they allow a simple determination of whether an action lies within their confines or not. The problem is especially severe when we are dealing with a newly enacted document that does not come with a long history of interpretation. The social and cultural back ground of the people and their value systems and the institutions also play a dominant role in the working of the constitution. This study is proposed as an enquiry from an institutional point of view, to look into the origin and reasons for such problems, evident in the working of the Indian constitution during the past sixty years, and to evolve possible constitutional safeguards to ensure stable and equitable growth of the Indian Economy.

## The Present Indian Context

We are passing through a phase of major world wide constitutional changes. To cope with the emerging global scenario, Government of India has instituted a national commission, to review the working of the constitution vide Government resolution dated 22<sup>nd</sup> February 2000. The terms of reference of the Commission is to *examine, in the light of the experience of the past fifty years, as to how best the constitution can respond to the changing needs of efficient, smooth and effective system of governance and socio-economic development of modern India within the framework of parliamentary democracy and to recommend changes, if any, that are required in the provisions of the constitution without interfering with its basic structure or features.*<sup>1</sup> The commission, in its final report, has observed, "All political theories are united on the question of the principle against arbitrary government. When a democratic system is chosen, a nation

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<sup>1</sup> The 'resolution of the government of India, Ministry of law, Justice and company affairs (Department of legal affairs) of 22<sup>nd</sup> February 2000.

cannot be impatient with democracy. Democracy has its own defects. It is not the best or the most beneficial form of political organization of human beings. But it is accepted as the least hostile amongst all other systems. The slackness in jettisoning the heavy baggage of inherited social evils in India has produced pervasive disenchantment with the institutions of democracy. Collective action that promises vast benefits is retarded by special interests that hold strategic control (P.8, Para.2.4.1)<sup>2</sup>. The commission also identified a systemic flaw, in the democratic process. "That the democratic process has not promoted self governance. People of India, under the dispensation, have no effective control over their social, political and economic destiny or emancipation. The system of administration designed and participated by the political executive with the active support of the permanent civil services has reduced and limited the sovereignty of the people to a mere right to exercise their franchise at the elections. The remedy is to widen the base of democratic debate. As Jefferson observed , I know of no safe depository of the ultimate powers of the society but the people themselves. And if we think them not enlightened enough to exercise their control with a wholesome discourse, the remedy is not to take away from them but to inform their discretion (Para 2.4.3. (b))<sup>3</sup>. The commission observes, "maladministration has paralyzed the creative energies of the people and has pushed people and their day today living more and more into extra legal systems. Owing to opportunistic and self-seeking politics and politicians and an increasing scenario of politician, criminal, and bureaucratic nexus, the political climate of the country has been polluted bringing in its wake enormous corruption - electoral, political and bureaucratic (Para 2.19 2)<sup>4</sup>. The report in the chapter on 'Executive and Administration', calls for institutional changes to be made to rectify the systemic defects. "The present situation is characterized by a pervasive disenchantment with the way things have worked out. It is futile to debate whether it is the institutions provided by constitution that has failed or whether the men who work these institutions have failed. While we cannot abolish the men and women who command the strategic heights of governance, we can improve and update the present institutions, which have devolved valuable fault lines"<sup>5</sup>.

Thus in the present scenario, private interests and the search for individual gain is becoming the source of mutually harmful results in the working of our constitution. Indian political system has brought forth various kinds of post-contractual

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2 Report of the national commission to review the working of the constitution, Final report, P.8, Para.2.4.1

3 Ibid, P.9, Para 2.4.3. (b)

4 Ibid P.31

5. Ibid. Para.6.2.2.

opportunism such as rent seeking<sup>6</sup>, policy lobbying, special interest plundering etc, which ultimately reduce the value of post-contractual cooperation, undermine the constitution and hinders economic progress of the country itself. It is evident that distributional politics is viable and our system permits differential treatment. The provision of public goods to the population at large is significantly reduced in favor of greater transfers to interest groups. These transfers are financed by general tax collections, regulatory mechanisms and policy decisions and provide concentrated benefits to designated groups. Such collusion between political agents and special interest groups leads to the development of Leviathan state. Our governance framework, inherited from the colonial past has largely contributed to this shift. The review commission observes two issues of post independence era, which facilitated this process, one connected with path dependency and the other with structural defects: "The new administrative class, working under the mesmeric spell of colonial attitudes, was reluctant to consider the people as citizens. They continued to treat them as subjects or 'ryots' both owing allegiance to a superior master. This denial robbed them of power and made it possible for the executive to diminish the significance of the people"<sup>7</sup>. The structural issue as identified by the commission is also explained in the chapter on executive and administration. "Another fundamental flaw in governance outlined above is inherent in the centralized nature of the Indian state which lays down the parameters of the administration. There is an indissoluble link between the two. This was evident when the norms of colonial administration, with their long ancestry came early to stamp their features on the post independence dispensation. Colonial administration has created a top-down system of command and obedience in which state and local units of government were treated as subordinate to the central government"<sup>8</sup>. The dominant theme during our struggle for independence was individual freedom and issues connected with it. In the process we have paid little concern for the checks and balances required in the power structure and the colonial structural framework left behind by the British was superimposed on the new independent nation for its administration. This slowly paved the way for individuals and interest groups to engage in post-

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6. The theory of rent seeking began with the economist Gordon Tullock. Tullock's article "The Cost of Transfers" (1971) deals, as the title suggests, with the costs to government transfers. This article was written before the term "rent-seeking" was coined, but would otherwise, in all likelihood, have been titled "Rent-Seeking and the Cost of Transfers." Tullock, in his article, was pointing to the additional costs involved in transfers; costs additional to the simple middle-man cost. The term "cost of transfers," as used by Tullock in 1971, is therefore as applicable to the case here, as is the term "rent-seeking."
  7. Report of the national commission to review the working of the constitution, Final report, Chapter 6, para 6.26.
  8. Report of the national commission to review the working of the constitution, Final report, Chapter 6, Para 6.27.

contractual opportunism. Thus the present scenario warrants an imminent need for identification of proper constraints and a mechanism of constitutional maintenance so that the constitutional contract will be meaningful and effectively protected.

The problem as identified above has played a major role in the dismal performance of the country's economy. The constitution review commission has observed, "The state of Indian economy is disturbing. The economy is gradually sinking into a debt trap. The economic, fiscal and monetary policies coupled with administrative inefficiency, corruption and wasteful expenditure are increasingly pushing the society into extra legal systems, crime syndicate, mob-rule and hoodlum outfits. Black economy and even parallel governments are the overreaching economic and social realities. Legitimate governments will, in due course, find it increasingly difficult to confront them. In course of time these illegal criminal outfits will dictate terms to the legitimate governments"<sup>9</sup>.

## Theoretical Aspects of the Issue

Various approaches have been advanced in recent years to explain the poor economic performance of nations. More traditional approaches tend to focus on aspects like macroeconomic stabilization, capital formation, and the relative size of the sectors of the economy etc. Those explanations will not be discussed here. Rather, the focus will be on approaches that take institutions explicitly into account. Many of the approaches focusing on institutions have noticed that the dominant reason for the great differences in the wealth of nations is the differences in the quality of their institutions and economic policies. Many constitutional economists seek to explain the unsatisfactory development of a society by arguing that its constitutional provisions are inadequate. Cass Sunstein (1991, 1993),<sup>10</sup> for instance, argues that the constitutional provisions of a society should be directed to protect a society against the weaknesses of its own customs or political culture. A nation's customs and political culture are part of its internal institutions. Sunstein's proposal would thus mean that the most dangerous of the internal institutions of a given society should be made ineffectual by setting adequate counterbalancing external institutions. The (implicit) hypothesis is that an adequately drafted constitution enables a society to coordinate activities on radically different equilibria compared with what would be

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9. Report of the national commission to review the working of the constitution, Final report, para2.27. (i)

10. Sunstein, C. (1991) "Constitutionalism, Prosperity, Democracy: Transition in Eastern Europe." *Constitutional Political Economy* 2(3): 371-94. Sunstein, C. (1993) "The Negative Constitution: Transition in Latin America."

the case in the absence of a properly drafted constitution. It has already been discussed that there is good evidence for supposing that individual liberty and restrictive government are conducive to economic growth.

In the light of these experiences and premises, we need to identify the potential changes in political decision-making rules that might yield general benefits. The issue before us is to identify how, those who actually exercise the powers of government can be effectively prevented from misusing these powers so that the relationship between individual and the state makes economic sense.

The 'endeavor to contain the powers of government', which was the great aim of the constitutionalist movement in the seventeenth and **eighteenth** centuries, was, as Hayek (1979: 128)<sup>11</sup> suggests, 'almost inadvertently abandoned when it came to be mistakenly believed that democratic control of the exercise of power provided a sufficient safeguard against its excessive growth'. Because of this 'tragic illusion' the primary attention in the formation of modern democratic regimes has been focused, on the organizational rules of government, neglecting the rules that are designed to limit the powers of government, a fact that, as Hayek argues, has allowed these regimes to develop characteristics and to generate overall results with which hardly anybody can be satisfied.

Before we proceed further on the issue, it is important to clearly distinguish between constitutional rules, namely, on the one side, those that are concerned with the (internal) organization of the 'state' and its apparatus 'government', and on the other side, those that limit the authority of government, rules that constrain its actions. Stated differently, one ought to distinguish between the rules of organizations in the strict sense, i.e., those parts of the public law which constitute the 'state' and 'government' as decision-making and acting organizations, and the rules which impose constraints on the range and kinds of decisions and actions that the state is authorized to engage in. The organizational rules of government in essence determine how or in what manner the resources that are subject to governmental authority are to be administered. They determine, for instance, the procedures by which decisions on various matters are to be made, how representatives and public officials are elected or appointed, they 'establish a hierarchy of command' and determine 'the responsibility and the range of discretion of the different agents' (Hayek 1973:125)<sup>12</sup>. The failure to clearly recognize that these are two separate issues is, according to Hayek, the roots of the institutional deficiencies that he diagnoses in the prevailing form of modern democratic government.

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11. F. A. Hayek, *Law Legislation & Liberty* (Vol I, II, III Rules and Order), London & Henley: Routledge Kegan & Paul, 1973, 1976, 1979

12. F. A. Hayek, *Law Legislation & Liberty* (Vol I, II, III Rules and Order), London & Henley: Routledge Kegan & Paul, 1973, 1976, 1979

The same reasons, that make it advisable for a single individual to submit to rules can, also be applied to the realm of collective action in general and to the organizations, state and government in particular. In the same sense in which rules are necessary to give coherence to the several successive decisions and actions of an individual person, rules are also needed - and even more so - to guide decisions that are made by a group of individuals, in order to prevent the successive decisions from producing incoherent and undesirable overall outcomes. 'Even more so', because the 'natural unity' and intertemporal identity which characterizes the individual person as decision-maker is absent in the case of collective decisions, in particular in the case of majority decisions (Hayek 1960: 110,111; 1979: 7, 18,19)<sup>13</sup>. Thus it is important to make economic sense out of the relationship between the individual and the state. This could be done only by looking into the 'Constitution of economic policy' to examine the rules, the constraints within which political agents act. Our object of reform is the 'constitution of policy' rather than the policy itself (James Buchanan, 1986)<sup>14</sup>.

When an individual acts in representative capacity, in the political process, there are three fundamental issues, which necessitate evolving necessary constraints in the policy arena:

1. There is a fundamental difference in the point of "the economy" and "the polity". In the economic process, the individuals who choose and act in the market, generate outcomes that are value maximizing (within the given constraints), the nature and process itself insures that values are maximized. This value maximization perspective cannot be extended from the market to "politics", since the latter is not an incentive oriented activity. There is no political counter part to Adam Smith's invisible hand<sup>15</sup>.
2. Neither the executive nor the legislative body and even less the deciding majority are not pure organs of the community with no thought other than to promote the common weal. Members of the representative body are in the overwhelming majority of cases, precisely as interested as in the general welfare as are their constituents, neither more nor less (Kunt Wicksell: 1896)<sup>16</sup>.

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13. F. A. Hayek, *The Constitution of Liberty*, Chicago: University of Chicago Press, 1960

14. Buchanan James(1986) From the lecture delivered at Stockholm, Sweden on December 8 1986 when he received the Nobel prize on Economics

15. Buchanan James(1986) From the lecture delivered at Stockholm, Sweden on December 8 1986 when he received the Nobel prize on Economics

16. Kunt Wicksell, "A new principle of just taxation" included in R.A Musgrave and A.T.Peacock (19058.pp.86.87)

3. There is a tendency for all knowledge, like ignorance, to deviate from truth in an opportunistic direction. Our policy conclusions therefore could be found upon ideas about reality that are systematically, though unintentionally, falsified (Gunnar Myrdal: 1970)<sup>17</sup>.

Thus when an individual acts in the political process, the existence of proper set of constraints ensuring that policy decisions are oriented towards overall progress, makes economic sense out of the relationship between individual and the state.

The enormous arbitrary power that our constitution bestows on the political agent can be made explicit by comparing the relevant provisions dealing with the executive power of the state in India and Australia. Article 61 of the Commonwealth of Australia Act provides as follows:

**“The executive power of the Commonwealth is vested in the Queen and is exercised by the Governor-General as the Queen’s representative and extends to the execution and maintenance of the constitution and of the laws of the Commonwealth”.**

Whereas, article 73 of the constitution of India provides:

“Extent of Executive power of the union: - (i) Subject to other provisions of this constitution, the executive power of the union shall extend –

- (a) to the matters with respect to which parliament has power to make laws; and
- (b) To the exercise of such rights, authority and jurisdiction as are exercisable by the government of India by virtue of any treaty or agreement: .....

The difference between the two articles lies in the fact that in Australia the executive power is limited to the enacted laws, whereas in India the executive power extends to the fields where there is power to legislate, even though no legislation is passed. This unbridled power enables the union to have arbitrary decisions without undergoing the stringent stipulations of enacted legislation and to orient its policies and programs without being scrutinized by the court of law. An interesting scenario which unfolded recently in the context of Indo American nuclear treaty has also its

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17. Gunnar Myrdal, (1970) “The Challenge of World Poverty” Penguin Books Ltd, Harmondsworth, Middlesex, England. P.21.



roots in sub clause (b) of Article 73 read with entry 14, List 1 of the Seventh Schedule wherein unbridled executive power is bestowed on the Union to carry out the provisions of any treaty entered into with any foreign country, without going through the parliamentary approval or legislative process. The vote of confidence to which the government opted to subject itself was not because of the constitutional requirement, but because of the unprecedented opposition and resistance which the treaty has attracted from different quarters.

Constitution in the philosophical sense is one that limits the powers of rulers by subordinating them to enduring laws, which the rulers themselves cannot abrogate<sup>18</sup>. By far the most important problem with respect to ensuring the self-enforcing character of a constitutional contract is that it must successfully constrain the power of the Leviathan state itself. We have to identify the set of restrictions that are in conformity with the traits of our civilization to restrain the system from indulging in post contractual opportunisms by limiting the powers of the Leviathan state. The process require to bring together the economic, social, political, philosophical and legal perspectives that were once part of the study of moral philosophy, and which the process of specialization in modern academia has fragmented into separate fields.

## The Hypothesis

Our hypothesis is based on the observation of the economic policy and regulatory measures implemented in the country during the past sixty years and the resultant social, political and economic structure, which has evolved; on the interconnection between macro level and micro level mechanisms. We content that micro- events and impulses in social, economic and political life of our country are manifestations of the macro or societal level economic and political relations and processes. Impulses are sent from the local level. However the final synthesis and moldings of the character of the operations of these forces emanates from macro to micro level. This process of macro impulse working downward to the micro level holds true of the politics adopted by the state to intervene and guide major economic forces.

We have already pointed out the inter linkages and interactions that exist between economic issues and the political process. We content that the economic and political mechanisms that operate in our country are shaped, moderated, regulated and dispersed from a central authority, the state. The present structure of this central authority namely state is established through a modified version of the Government of India Act 1935, the empowering document of the British rule. British established their superiority in India on the basis of military might. Their primary objective was

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18. Suri Ratnapala, The idea of a constitution and why constitutions matter

channeling resources outside the country. To assist this, they created a class of local allies, undertook measures to develop local resources and permitted creation of more surpluses. Local agents parted with a share of their appropriated surplus directly through the stipulated land and rent revenue, and indirectly through favourable terms of trade, maneuvered by the British through their absolute political and economic domination, particularly with regard to international trade and price of commodities based on the mechanism of unreal exchange.

After independence, the erstwhile local agents assumed political power. A new political system based on mass support and popular votes came into existence. The requirement of enormous economic clout for mustering the popular support to win the elections has become an emergent reality. The structure of surplus extraction, left behind by the British came handy for the newly emerged political agents to formulate new models of extraction under the new dispensation. Policy measures and regulations became two important instruments in this regard. Various kinds of post-contractual opportunism such as rent seeking, policy lobbying, special interest plundering etc, facilitated the emergence of a new ruling class, which even devised its own mechanism for transferring their membership in the class to subsequent generations is an emerging reality in the Indian economic and political domain. In ultimate analysis the ruling classes base their authority on their control over the means of production. At the macro level, our hypothesis is that, the nature, objectives and implementation of the economic policies in our country are adversely influenced by the ruling class to protect their interests and this process is enabled by the defects in the structural framework provided by the constitution.