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RELEVANCE OF CONSTITUTIONAL ECONOMICS IN INDIA'S POST-NEOLIBERAL ERA

**SONY PELLISSERY AND
BABU MATHEW**



**NATIONAL LAW SCHOOL OF INDIA UNIVERSITY (NLSIU)
BANGALORE
www.mpp.nls.ac.in**

Relevance of Constitutional Economics in India's Post-Neoliberal Era¹

Sony Pellissery and Babu Mathew²

Abstract

Traditionally, constitutional economics prefers a constitutional constraint legitimized by rule of law over economic constraint when public policy decisions are made. However, pragmatic politics considers both these types of restraints as too feeble in the electoral games. Very often, ideologies drive the passions for political decision making. In this paper, we examine why electoral logic and economic logic may not be sufficient for the transformative vision of constitution in contexts where huge social inequalities prevail. We show this through demonstration of the interplay of Indian economic policies and constitutional values. We argue that in the build up towards neo-liberal era, constitutional values were systematically sidelined. However, the crisis of neo-liberalism forces us to look for alternative policy making approaches, and the Constitutional economics can provide some viable options.

Introduction

We begin with an enigmatic counterfactual. If India did not have its Constitution adopted on 26 January, 1950, what would have been the trajectory of Indian development? Would regional states in India have achieved more convergence without a Constitution for the Union of India? If each of the regional states was allowed to write its own Constitution, how

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²Both are Professors at the Institute of Public Policy, National Law School of India University, Bangalore. Contact Address: National Law School of India University, Nagarbhavi, Bangalore. Correspondent author email id: sonyp@nls.ac.in

close would it have been to the Constitution of the Union of India? This counterfactual is extremely important, since the very idea of India was carved out of a post-colonial context (Khilnani 1997). Prior to the colonization, the region had multiple kingdoms, and the various rules and regulations which the kings and feudal lords in those kingdoms exercised, continue to shape administrative laws, property rights and social norms. The Constitution was a historical break from this traditionalism (though interposed with colonialism for a brief period). In this paper, we make an argument that Constitutional governance can provide answers when the state has almost given up neoliberal paradigm, and searching for alternate viable frameworks.

We develop these arguments through four sections in the paper. In the first section, we examine the theoretical basis for the constitutional governance, by reviewing the concepts of constitutional economics and rule of law. Then, we distinguish the unique characteristics of development agenda that is at the heart of Indian Constitution, distinguishing the same from Western nations' constitutions. This will enable us to appreciate why liberal constitutions may not be able to address the question of inequality as compared to Indian Constitution. In the third section, we review the institutions required to strengthen decision making from the perspective of Constitutional economics. In the final section, we review India's major economic decisions and point out how economic reasoning dominated over constitutional economic reasoning.

Roots of Constitutional Governance

Theoretical grounding on constitutional governance is founded on two types of literature. First, the works of James Buchanan culminating in the Nobel Prize lecture (1986) titled *The Constitution of Economic Policy*. Second, the principle of rule of law enables us to understand the need for Constitutional governance. We will examine these two strands of literature and relevance for Indian context, before proceeding to the main arguments of this paper.

In order to understand the concept of Constitutional governance, we need to first comprehend the idea of Constitutional Economics, as argued by James Buchanan and other theorists. Two levels of Public Choice are distinguished to demonstrate the central tenets of Constitutional Economics. The first level sets the rules of the game through the constitution while the second/post constitutional or operational level deals with playing the game within the rules defined (Tullock & Buchanan, 1962). In other words, while orthodox economics or public choice dealt with choices and decisions of economic or political actors within the constraints of defined rules in the market and government, Constitutional Economics would deal with the process of setting up those very rules which restrict and control the actors. Constitutional Economics offers potential for normative constitutional study, unlike the more practical study of ordinary economics and Public Choice.

Tullock (1959) formally demonstrated that under any voting system which required less than unanimous consent, majority coalitions will seek to ensure public provisions of special interest projects. The way a constitutional constraint differed from economic constraint while making a policy decision was through the universal consensus test, which the former had obtained (Wicksell 1896). This gives the constitutional choice its justification in consent whereas public or economic choice would find its meaning in mutually beneficial exchanges and self-interested behaviour. At the same time, unavailability of coercion in the process to implement what was constitutionally consented comes in conflict with the ideas of liberalism³. Buchanan (1993) argued that to advance 'public interest' by the politicians, the best way is to have a constitutional framework that restricts differential treatment, which often led to rent seeking behavior. However, as we will see in the next section, when we distinguish liberal Constitutions

³ Buchanan and Tullock (1962) were convinced that unanimous consent, which was required as a prerequisite for the constitutional contract, was nearly impossible to be achieved. The problem was dealt by a version of the Rawlsian veil of ignorance. They argued that because people were unlikely to foresee their future interest, they would prefer rules that did not favour any particular interest (Rawls, 1971). Others have recognized that this is not practical and have suggested other means of ensuring a constitutional contract, including Hirschman's exit, where the probable or threatened exit limits the power of one party over the other (Hirschman, 1970).

(typically in the Western countries) from the Constitutions of Global South, we will see how the notion of 'public interest' acquires a different dimension.

The second strand of literature to understand the nature of Constitutional governance pertains to Rule of Law. This principle functions as a counter-veiling force when legislative power of the political class tends to be anti-people. The way aggregative democratic order provides an incentive structure for the political class (through re-elections), there is a tendency for making legislations against the long term 'will of the nation' for short-term gains (Fukuyama 2011). Sometimes, excessive governmental power may erode the principle of rule of law, and legislature may need to restrict the government. At other times, the governmental power may need to be checked by judiciary.

It is here that rule of law is invoked through a process of judicial review of the actions of the executive. Indian Constitutional history has a salient example of this judicial review process. When there were attempts by the legislators to drastically amend the Constitution, Indian judiciary, in a landmark judgement, defined the Basic Structure of the constitution. Seven principles of 'rule of law', 'equality', 'fundamental rights', 'secularism', 'federalism', 'democracy', and 'judicial review' were defined as constituting the basic structure of Indian constitution and on these, the parliament would not have legislative power⁴. This is not a settled position, and there are debates whether judiciary has power to curtail the powers of the parliament. In other words, Parliamentary Sovereignty is a legal paradigm that is in direct conflict with the Rule of Law paradigm through judicial review. However, in the case of India, what judicial review process has done is to enable citizens to approach court to get justiciability, when parliamentary lawlessness occurs (Baxi 2004). This aspect of judicial review is central to rule of law, since the principle aims to protect citizens when legislative power goes against the spirit of law.

⁴*Keshavananda Bharati Case* (AIR 1973 SC 1461)

So far we have seen the foundational principles of Constitutional governance⁵. However, these general principles are challenged when we examine the empirical cases of constitutions across the world. In the next section, we examine these different patterns of constitutions.

Transformative and Liberal Constitutionalism

The constitution of India evolved in a very different historical context from the liberal constitutions of the West, which were written before it. The Western constitutions were framed on a conception of rule of law which ferociously guarded individual liberties and protected property rights. Framed in the backdrop of revolutions against tyrannical rule, they were designed to put restraints on governments. Separation of powers was institutionalised through independent judiciary, legislature and executive, along with negative rights to citizens which protected freedoms of speech, property and trade. This created strong institutions which would protect democracy better than it had ever been in the past. Simultaneously, the rule of law framework of the Western traditions, led to a great expansion of enterprise and commerce which would create more wealth. They did not however, entail any affirmative obligation upon society or governments to address inequality, destitution, discrimination and exclusion faced by sections of citizens or whole regions.

However, constitutions framed in the developing world, in countries like India, South Africa or Brazil became more than just a means to restrict governments. They were inspirational texts and vision documents, with a mandate to transform society and correct historical wrongs. The expression of 'Transformative Constitutionalism' refers to this broader mandate given to the Constitution. At the heart of the transformative Constitutional vision, is an aim to break away with "old forms of state, society, and culture (social formations) and inaugurating a new order of things" (Baxi, 2013: 22). This was the dream of the founding fathers of the nation-state of India. The first

⁵It is also good to note that when the Constitutional review commission was constituted in 2000, a non-negotiable was to protect the basic features of the Constitution.

prime minister of the country, Jawaharlal Nehru, viewed the objective of the Constitution as “the removal of all invidious social and customary barriers which come in the way of the full development of the individual as well as of any group”. On the other hand, the architect of Indian Constitution, B. R. Ambedkar (1948) viewed the Constitution of India as a trust with destiny, to live with contradictions of political (formal) equality and social inequality.

In the light of these concerns raised about Constitutional framework that governs societies, which are diverse and unequal, politics becomes the source for balancing the value systems of the society and the Constitution. It is here, the principles of Constitutional Economics and Rule of Law are challenged. When government fails in positive action to achieve the Constitutional values, ‘the principle of least action’ will allow societal values to dominate the political and economic decision making. Nussbaum (2003) provided a framework to understand this. Interpreting different constitutions with respect to rights, using Amartya Sen’s (1999) capability framework, she argued that any right, be it freedom of speech or political participation, is only secured to people, when the relevant capabilities to function are also present. Governments, therefore, must consider the obstacles that exist for exercising these rights, due to existing social structures. This would require institutional support and positive action from the side of government, rather than merely abstaining from intervention. On Rule of Law, Baxi (2004: 29) extended this perspective more succinctly: “Conceived not just as a sword against State domination and violation and historic civil society norms and practices but also as a shield empowering an encyclopedic regime of “progressive” state intervention in the life of civil society”. In the context of inequality created through historical injustice, negative rights against discrimination alone do not change the skewed degree of access to resources and opportunities. Yet, the Indian Constitution largely left economic and social rights essential for redistribution to the non-justiciable Directive Principles of State Policy.

The challenge was regarding the mechanisms and administrative arrangement⁶ to translate these ideal constitutional values and visions into development programmes.

Institutions to translate constitutional vision

The principles of constitutional economics of India could be summarized through “three trinities”. Expression of trinity is to indicate the interdependence of these values, and their meaninglessness, when each of these values stands as silo. These trinities are identified through examination of constitutional provisions that has provided guiding light for policy decision making.

The first trinity is unambiguously referred in the preamble of the constitution, namely Equality, Liberty and Fraternity⁷. These ideals have been elaborated as fundamental rights, and court has reinterpreted them in changing times. In more recent times, Supreme Court has reiterated these three values are essential to realise ‘right to life’⁸. Practice of these ideals nurture ‘deep citizenship’ among Indians. Courts and justice delivery systems constitute the institutional arrangement to strengthen this segment of constitutional value.

Second trinity originates from the ideals as enunciated in the Directive Principles. These comprise the values of progress (often referred as development), security and transparency. In this trinity, we have deliberately emphasized the term ‘progress’ to transcend ourselves from the debate on growth vs development (see Sen vs Bhagwati debates for this)⁹.

⁶Ambedkar, during his speech on November 4, 1948, delivered in the Constituent Assembly in the process of drafting the constitution for modern India said: “The form of the administration must be appropriate to and in the same sense as the form of the Constitution ... [It] is perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution ... Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it.”

⁷Bhatia (2018) identifies this trinity at the heart of the transformative constitutionalism.

⁸In the judgement on privacy, rights for transgenders and that of equal treatment between men and women in marriage, these arguments have come forcefully.

⁹These ideas are delineated respectively in Sen (1999) and Bhagwati and Panagariya (2012). A summary of the debate can be found in Bhattacharya (2013).

The idea of scientific temper listed as a fundamental duty in the Indian Constitution (51A of Part IVA), gives a constitutional mandate that the country needs to move away from traditional feudal values and move towards those of reason. To achieve this aim, along with progress and economic growth, the livelihood opportunities need to be created to fulfill the objectives of security. This balancing is possible when economic growth is subjected to the Article 39 (c) “that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment”. Present crisis of crony capitalism, that undermines the economic growth in India, is primarily by neglecting the transparency principle. There are three institutions that require to be strengthened to realise this trinity. These are Finance Commission, Central Bank (Reserve Bank of India) and the office of Comptroller and Auditor General. Each of their roles as delineated in the Constitution provides ample space for translating the constitutional values to the economy.

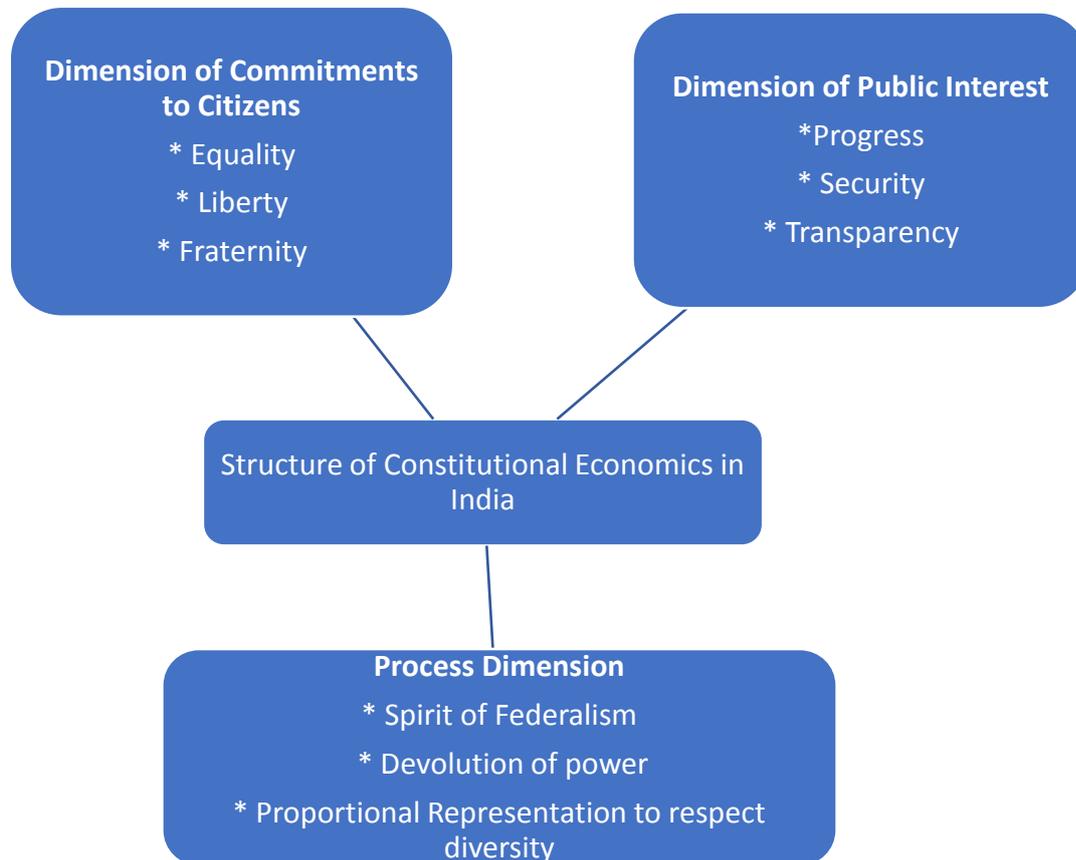
Third trinity is how the first and second trinity could be achieved through a participatory process – nature of democracy. Here, the first component refers to the spirit of federalism and how Centre-State relations are to be organized to allow sufficient autonomy¹⁰ for the states as well as to reduce inter-state inequality (Articles 245-255 in Part XI). Second component is the principle of devolution in Indian polity (73rd and 74th amendments to the Constitution). It is important to note that the journey to realize the same began only in 1992¹¹. The third component is how social diversity in India could be incorporated in the decision making process. This is the least realized component. Currently, this is limited to a set of political reservations in the electoral process. However, several law commissions

¹⁰ Scholars who may enlighten scholarly debates on the question of federalism are Ghosal (1969), Rudolph and Rudolph (2010) among others. This literature will show how federal system that was originally envisioned in the Indian constitution has been changed into confederation, and subsequently to competitive federalism rather than the space for autonomy.

¹¹DeSouza (2002) articulates these two amendments as the process of deepening democracy.

have made recommendations for proportional representation – an ideal yet to be realized. We present these three trinities in Figure 1.

Figure 1: Trinity of Trinities of Constitutional Economics in India



Source: Authors

How neoliberalism dumped constitutional economics

So far, we have shown conceptually how the idea of constitutional economics could be translated towards policy decision-making through a web of institutional arrangements. In the rest of the paper, we will show how constitutional values were systematically subordinated to economic orthodoxy.

In Table 1, we present possible policy options which were considered by Indian republic. The option that was pursued shows whether economic reasoning or constitutional values prevailed. Immediately after independence, characteristics of constitutional economics could be observed in the policy choices that were made by the polity. However, by 1970s, the planned approach to growth and distribution was given up¹². Planning as an ideal required the state to be in command of the social forces. However, in Riggsian prismatic society (1964), this was nearly impossible. In many ways, social forces reversed the planning ideals for strengthening same forces¹³. These social forces affected the planning process, Constitutionality and Rule of Law very differently in different states.

Since the abandonment of planning ideals and process, a downward spiral effect is seen. This is culminated in the adoption of neo-liberal policies. A set of economic policies were introduced without sufficient constitutional consideration. In other words, through budgetary speeches, policy options are announced without deliberations through constitutionally mandated institutions (see the discussion in the previous section). This leads to an imbalance in the trinities discussed above.

Table 1: Stylized presentation on how economic reasoning overshadowed constitutional economy approach¹⁴

¹² Some of the debates on why planning exercise in India did not survive could be gained from the literature (e.g. Lokanatha 1945; Kudaisya 2014).

¹³ See Myrdal (1968) and Migdal et al (1994) for theoretical conceptualisations on how state-society relations take place in planning context. See Pellissery (2014) and Pellissery et al (2016) on applications of these conceptualisations in Indian context. Classic case in Indian context is that of attempt for land reforms. Constitution of India accorded the status of fundamental right to property. However, in a context where more than 30% of population was landless, such a right was against the poor people (Pellissery 2016). When the government aimed to take land from large landlords to give to the landless, the ‘fundamental right’ came on the way, and typically judiciary favoured the landlords. Thus, very first constitutional amendment was to facilitate land reforms. However, the way land reform is operationalized in different states of India was hugely different. Primarily this difference was explained through the feudal nature of society and their ability to collude with administrative functionaries (refer Pellissery et al, 2017).

¹⁴ Empirical evidence for this comes from the review of papers on India’s development trajectory. Key papers are, though not exhaustive: Nagaraj 2012; Balakrishnan and Parameswaran 2007; Patnaik and Chandrasekhar 1995;

Policy Question	Economic reasoning	Constitutional economy reasoning
How to transform country as 'modern nation'? (Typically through 1950s-70s)	Policy option 1: Growth as primary route through public sector investment (1950s)	Planned approach (true to Constitutional values) to growth undertaken initially which was given up during 1970s.
	Policy option 2: Developmental approach particularly focusing rural economy (1960s)	
How to deal with raising inequality? (Typically 1970s and 1980s)	Policy option 1: Distribution of factors of production (land reform feebly attempted)	Constitutional values require the first option to be pursued to realise Article 39 (c).
	Policy option 2: Basic needs approach (welfare state approach becomes handmaid to higher production in some sectors e.g. green revolution leading to food self-sufficiency stabilizes the Public Distribution System for food)	
How to achieve growth? (late 1980s and 1990s)	Policy option 1: To avert the balance of payment crisis, integrate with global economy	Growth without the agenda of distribution is against constitutional values (agenda of redistribution foregone)
	Policy option 2: Preference of competition as a method of organizing economy rather than planning as a method	
How to achieve the status of	Policy option 1: One nation, one market	Constitutional value

global power? (since 2000)	Policy option 2: Gain the power through valorization. Here, the culture is valorized as superior and marketed to rest of the world.	commitments to the nation subordinated to international interests (principle of federalism sacrificed)
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Note: This is stylized presentation rather than aiming to be comprehensive about policy options available in each period. The stylized presentation enables one to compare between different periods and what option was adopted and what was rejected.

Source: Authors.

As we see through the progressive stages in Table 1, neo-liberal policies are no longer seen as the panacea for growth and development. Each nation aiming to ascend as ‘global power’ is against the logic of integration into global economy. Further, economic crisis since 2009 has brought planning back to the economic thinking. Particularly in India, how pursuing neo-liberal policies led to the crisis of non-performing assets in banking sector and Infrastructure Leasing and Financial Services are excellent instances to search for alternative paradigms. It is here, Constitutional economics could play a creative role. It is unlikely that planning approach which was moderately pursued in 1950s and 1960s could be replicated in today’s complex world. Yet, values as informed by the Constitutional economics could provide guiding light to the decision making process rather than purely considering economic logic.

Conclusion

Y. V. Reddy (2017) makes a distinction of economic ideas and economists’ ideas to critically reflect on the role of economists in policy making. “One role of a trained economist in public policy is to clarify and dispel notions that intuitively appear to be right but actually cause adverse consequences (i.e., counterintuitive but rational); they also evaluate the consequences of lobbies for various causes (neutral analysis or counting the cost). To

describe the role of economists in policy-making, Reddy uses the term ‘technopols.’ A successful technopol needs to combine two very different types of skill. One is that of a successful applied economist, able to judge what institutions and policies are needed in specific circumstances in order to further economic objectives. The other is that of a successful politician, able to persuade others to adopt the policies that he or she has judged to be appropriate” (Mathur & Bjorkman, 2009: p. 128). In this paper, we have shown how both these are not sufficient to be true to the Constitutional mandate. We have argued why Constitutional values should guide an economic technopol.

Further, in this paper, we have explicated a dilemma in welfare governance. On the one hand, within a liberal framework, what rule of law could achieve is only limited in a country with diverse cultural orientations as well as inequality. It is here, values as infused by the Constitutional economics play a central role to take the country to transformative functions. While Constitutional Economics prefers constitutional constraint over economic constraint as an overarching framework for governance, in contexts where positive rights (transformative constitutionalism) are emphasized, a policy framework that facilitates the constitutional framework needs to be pursued. When nation-states are engaged in the firefighting to deal with the aftermath of neo-liberalism, constitutional values could be the hidden treasures that could help solve several problems.

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