

# Why India Needs a New Constitution

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**T**he factors that affect and determine the prosperity or poverty of nations are many. Some of them are necessary although none of them individually or severally are sufficient.<sup>1</sup> The heterogeneity of people in various nations, the diverse geographical and environmental conditions, the different historical routes followed, the diversity of cultural practices, the technology available to them, and the nature of competition for resources, all differ in space and time for individual nations. This partly explains why it is so difficult to arrive at some formula for the economic growth and development of any particular nation.

## **There are Always Rules**

There are a few facts that are incontestable. First, some nations are rich while others poor. Second, some poor nations have been able to escape the poverty trap even though others in almost identical situations have failed to do so. The primary question is: is there a basic necessary condition that contributes to prosperity? This essay attempts to state that necessary condition. The claim in the following is that the set of rules that govern the nation determine its fate necessarily (although not sufficiently).

An economy essentially is a collection of interacting human beings. For any group of two or more people, this collective interaction requires rules. These rules could have evolved naturally, in which case they are part of the culture, or they could have been codified through some formal procedure,

which itself could have been arrived at organically or by borrowing from others. In all cases, however, there always are rules.

### **Rules are Powerful**

Rules fundamentally determine the nature and outcome of the interactions that go to determine the game. An economy is a very large, multi-generational complicated game played by a very large number of people. It is easy to see that rules determine the game.

A board game like chess differs from checkers or draughts because the rules are different. It is not the shape of the pieces that make them different games. The same pieces under different rules define a different game. Similarly, the same set of players following different rules could play a game of soccer or a game of cricket. Rules define all games, including the great games of politics and economics.

All political entities are defined and distinguished by the rules. Two entities following different set of rules have different outcomes. Natural historical experiments across the world point to the truth of this proposition. Following WWII, East and West Germany's fortunes diverged. The people in the two nations had similar endowments—history, culture, material and social. They followed different sets of rules. The outcomes were markedly different. The same story can be told for North and South Korea, and many other parts of the world. Another example relates to the US and Argentina.

A short century ago the US and Argentina were rivals. Both were riding the first wave of globalisation at the turn of the 20th century. Both were young, dynamic nations with fertile farmlands and confident exporters. Both brought the beef of the New World to the tables of their European colonial forebears. Before the Great Depression of the 1930s, Argentina was among the 10 richest economies in the world...

A hundred years later there was no choice at all. One had gone on to be among the most successful economies ever. The other was a broken husk.

There was no individual event at which Argentina's path was set on a permanent divergence from that of the United States of America. But there was a series of mistakes and missteps that fit a general pattern. The countries were dealt quite similar hands but played them very differently. The similarities between the two in the second half of the 19th century, and in fact up to 1939, were neither fictional nor superficial.<sup>2</sup>

The different outcomes of the two countries depended on a variety of factors, no doubt, but the one single factor that necessarily differed was in the different rule sets the two countries followed.

### **Rules Determine Trajectories**

The trajectory that an economy takes is dictated by the rules. If the trajectory has to change, the rules have to change. If the rules don't change, the trajectory does not change. This fact simply explains the persistence of prosperity or poverty of nations. Generally, the rules persist and therefore the trajectory persists.

People make the rules. But in a bit of circular causation, rules make the people. Of course, it is only the "leaders" of the group make the rules. But the rules themselves determine who the leaders are. Rules provide the constraints within which the rules are made and by whom. Rules choose leaders and leaders choose rules (although this is not simultaneous.)

### **The Persistence of Policies**

Consider a familiar example: the US. Every so often the leadership of their government and that of the state governments change. Power alternates between the Democrats and the Republicans. The two parties' policies differ but only within narrowly defined limits. And from a far enough remove, they are indistinguishable. There's a continuity and commonality of purpose regardless of which party is in power. There is always talk of change but nothing essential changes. For example, take the present administration: it is just an extension of the Bush administration—which

was itself an extension of the Clinton admin, which was an extension of the Bush Sr. policies...

Policies persist in rich and poor countries alike. Consider the case of India. The British raj ended in 1947 and the Indian raj took over. The people were ruled by the British government until August 15, 1947 and then the people were ruled<sup>3</sup> by the Indian government, essentially under the same rules. The rules did not change and therefore the trajectory that the country was on did not change either.

Going back to the US: in 1776, the 13 British colonial states in America declared their independence and formed the United States. The most important change that they made was that they changed the rules. Under the old rules, the people were subjects of the British crown; the new rules made them a republic in which the people were the principals and the government was their agent. The new rules - the Constitution of the United States of America<sup>4</sup> - reversed the relationship between the people and the government. That set the US on a different trajectory.

Coming back to India: like in the US, in India too political power is held by different political parties and by different people (even within the same political party) at different times. The policies, however, are broadly consistent across time and political affiliation. India's persistent economic trajectory can be explained by the persistence of the rules of the game.

The big lesson in this is for there to be change, the rules of the game have to change. Of course, there's the problem of how change can happen if there is a circular causation in play: the rules are changed by leaders who themselves have been selected through the rules and therefore have little incentive to change the rules.

## **Constitution**

In any sufficiently complex system, rules exist in hierarchical structures. The top level has axiomatic rules that are generally collected in the constitution of the state. The constitution is a set of rules on how to

make rules, and to determine which rules will be allowed and which disallowed. The broadest set of rules are defined in the constitution and all other rules are elaborations of those broad rules. The granularity of the rules increases as the levels increase and therefore the derived rules are more specific and detailed.

For example, a constitutional rule may say that “All people are to be treated equal before the law.” A lower level rule that says “Only males can hold the office of the registrar of an university” will be disallowed because it conflicts with the rule about equality before the law.<sup>5</sup>

This hierarchy of rules is important for practical reasons. First, it is easy for a citizen to understand the small set of top-level rules. One does not have to a law degree to understand the broad rules. Second, it makes it possible for the lower level rules to be more targeted to specific situations. It is not possible to anticipate the details of any specific situation. The ability to flexibly create new rules to deal with the specific lies in the lower levels.

These lower - level rules have to be consistent with the higher-level rules but they can be changed as circumstances arise. Citizens don't have to know all the lower level rules. All they should be assured of is that no rule is being made that conflicts with the constitutional rules. Because of its hierarchical branching structure of the total set of rules, it is generally not possible for the average citizen to know all the detailed rules. To know the detailed rules one has to specialise in it—that is, study law.

The essential points here are that (1) if the constitution is comprehensible by the citizen, and (2) if all other rules are consistent with the constitution, then even without detailed knowledge of the entire set of rules, the citizen is assured that his agreeing with the constitution translates into an agreement of the more detailed rules or laws.

### **Consistency and Completeness**

The basic set of rules encoded in the constitution have to be consistent. That is the first requirement. Any constitution that has to be in effect for

decades cannot aim to be complete because people do not have perfect foresight. The attempt to make a constitution complete by specifying to the tiniest details what's to be done in every contingency is going to lead to inconsistency and even worse, it could invalidate its universality.

To keep up with changing circumstances, if the constitution is too detailed, it will have to be amended frequently. Another problem is that citizens cannot even hope to comprehend the constitution if it is too detailed.

### **The Constitution is Really Important**

For the United States, the most important document ever written has to be the Constitution of the United States.<sup>6</sup> The head of the executive branch of the US government is the President of the US. The oath of the president is

I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.

Note, *not* “defend the country” or “preserve the country” or “protect the citizens” but defend the *Constitution*, protect the *Constitution*, preserve the *Constitution*. This is so because the Constitution is supreme and all other things such as the preservation of the country and all its citizens necessarily flow from it.<sup>7</sup> The prosperity of the US flow from its constitution more than any other reason.

In India too, a similar oath<sup>8</sup> is taken by the Prime Minister of India, the head of the government.

I, <name>, do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will faithfully and conscientiously discharge my duties as prime

minister for the Union and that I will do right to all manner of people in accordance with the Constitution and the law, without fear or favour, affection or ill-will.<sup>9</sup>

The Constitution is what defines the state or the nation. It determines what it is and what it is going to be. A country's fortunes depend on how good its constitution is.

I am not a constitutional scholar. As a matter of fact, one should not have to be a constitutional scholar to be able to understand the constitution. If the constitution is too complex, too long, too incomprehensible for an average educated, literate citizen, there is a problem with it. Frequent amendments—justified or not—also point to inherent flaws.

In any civilised society with a democratic government, there exists an implied (explicit or implicit) contract between the people and the government they create for the specific purpose of the citizens living in harmony with each other. That contract is encoded in the constitution. The constitution is the DNA of the organism which is the nation or the economy.

There is a simple test that anyone can apply to figure out whether a constitution is good or not: if the nation is enjoying the prosperity that is consistent with its endowments and circumstances, then the constitution is good. That is, the goodness of the constitution is a necessary condition.<sup>10</sup> All other things being equal, if the constitution is bad, the country will be poor. If the constitution is good, it allows the possibility of prosperity.

### **Comparing the US and Indian Constitutions**

Fact is that India is in deep distress today. It has always been in deep distress for decades, certainly for the entire of the twentieth century, the first half of it under British Rule and then under 'self-governance' (which can be designated British Raj 2.0.) That fact alone argues for the claim that perhaps the Indian constitution is not good.

A bad constitution does not admit a good society although it is possible that a society could fail even though it has a good constitution. My main contention here is that for India to progress, it has to have a good constitution. How that could be achieved is a problem we have to acknowledge and then solve. Doing this a necessary step if India has to progress.

Over the years, I have asked around 10,000 Indians what they think of the Constitution of India. All of them were literate and fairly well educated by conventional standards. No one admitted to having read the constitution in its entirety. A few people have claimed that they read parts of it and that too to meet requirements as part of their formal education such as a law degree. In short, to a first approximation, no one has ever read the Indian constitution. By a first approximation, I mean that if in a population of say 3 billion people (the number of people who have lived and died since the constitution was adopted), about 10,000 people have ever read the constitution, it means that such a vanishingly small percentage have ever read it that it is zero for all practical purposes.

When asked what they know about the Constitution of India, many say that it is the longest written constitution in the world, as if it were some mark of high distinction. That is precisely the wrong thing to be proud of. The constitution should be brief and comprehensible to the average literate citizen.

### **Complexity**

I am not in favour of complexity—neither in writing nor in the design of systems. It does not help in comprehension and is a definite hindrance to good design and effective maintenance. Things should be kept as simple as possible. James Madison made this point succinctly in *The Federalist Papers* where he elegantly summarised the reasons a Constitution should be brief and to the point.<sup>11</sup>

It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot



be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known and less fixed?<sup>12</sup>

The Constitution of the United States was signed in September 1787. The Constitution came into effect in March 1789. It was four handwritten pages. The full text of the Constitution is around 4,300 words. It has seven articles.<sup>13</sup>

The Indian Constitution was adopted on January 26, 1950. It is over 500 pages long. Compared to the US's seven articles, the Indian Constitution has 444 articles in 22 parts, 12 schedules and 118 amendments.

### **Amendments to the Constitution**

The US Constitution has been amended 27 times in its 225 years. The first 10 amendments were adopted in one go on December 15, 1791. These collectively came to be known as the 'Bill of Rights' that protects citizens from the power of the federal government. Thus, aside from the Bill of Rights, there have been only 17 amendments to the US Constitution. Of these 17 amendments, two relate to prohibition of alcohol: one that prohibits it (the 18th Amendment) and one that repeals that prohibition (the 21st Amendment.) Therefore, one can say that there are 15 amendments that persist. That is, one amendment every 15 years.

The Indian Constitution has had 118 amendments during its life of 63 years thus far. That is a rate of roughly one amendment every six months, or 30 times the rate at which the US Constitution has been amended. That should give us pause to ponder what exactly is the matter with it.

In addition, most of the Indian constitution is written in legalese. It was probably composed by people who have had a lifetime of

legal practise and it probably never occurred to those authors that perhaps the document should be such that the average person could understand it.

### **The Ruled and the Ruler**

Could it be that differences in the structure and form of the constitutions of the US and India point to a fundamental difference in the objective of the document? I claim that it does. The US Constitution is a document which establishes the people as the ruler and the government as its agent. It prescribes what the government is allowed to do and prohibits the government from infringing on the rights of the people (which are enumerated in the Bill of Rights.)

The Indian Constitution, in contrast, establishes the government as the ruler and the citizens as the ruled. It limits the rights of the citizens and gives enormous powers to the government. This difference in the basic power balance between the people and the government can be explained by examining the history of the two countries.

The US fought a war of independence and won their freedom from the British. Following that, the leaders of the newly formed state (1776) decided that they want a new form of government and to that end, they wrote an entirely new set of rules. They started almost from scratch. With the new set of rules that they themselves—Americans not Britishers—they set upon a new direction.

The Indian Constitution is a collection of rules and regulations that the British had crafted as the colonial rulers of India. The Government of India Act of 1935, crafted by the British, is largely incorporated in the Indian Constitution.<sup>14</sup> There were some changes but essentially the same set of rules continued to be in effect after 1947 as before. The rules that the British had created naturally placed the government over the people, and the same relationship continued after 1947. The same old set of rules, and the same old direction, the same old dismal outcome.

## **The Rumours About the Emperor's New Clothes**

That familiar fable of the emperor's new clothes goes that one kid blurts out that the emperor is naked and that he is not actually wearing any clothes at all. The rest of the people continue believing, quite contrary to the evidence of their own eyes, that the clothes are indeed fine, as that's what all the emperor's courtiers say. Who are they to contradict the more-worthy observers, they tell themselves.

In the case of India, the persistent belief by Indians in general is that the constitution is a fine work. Not that they have examined it themselves but they rely on other more learned people and have to uncritically accept their verdict. It is like the fable but in this case the people have not themselves seen the emperor in his new clothes: they have only heard of reports that the emperor has a new set of clothes and experts who have seen the new clothes have declared them to be wonderful. So the people have this persistent belief and will definitely reject any claims to the contrary.

## **The Indian Constitution is Deeply Flawed**

As I have mentioned before I am not a constitutional expert or even a lawyer. I cannot definitely claim that I have the proof that the Indian constitution is flawed. I can only go by the evidence of its effects on the Indian state and conjecture that India's distress can be ultimately traced to its constitution.

Let me reason analogically. I am not a nuclear power station engineer. But even without a degree in anything nuclear, if I see that a nuclear power station has failed spectacularly without it being bombed or intentionally destroyed, I can rightfully conjecture that design was flawed. From the evidence that conjecture is viable.

It could be claimed that the constitution is fine but its implementation is flawed. That is untenable. Here's why. The implementation of any constitution is in the hands of the leaders of the country. If the

implementation is flawed, it means that the wrong leaders are in charge. But it is the constitution that ultimately dictates who the leaders are. Leaders are chosen according to some set of rules—and these rules are primarily derived from the constitution, as are all rules ultimately derived from the constitution.

So if a process selects the most venal, the most morally compromised, the most unprincipled of people as the leaders of the nation, then the primary document that outlines the process and gives it legitimacy must be flawed.

If the constitution does not respect the right to private property, and the government can appropriate any property as it desires, then the people in charge of the government have an irresistible temptation to take away private property for their own gains. This possibility itself introduces the horrors of adverse selection (the most greedy would seek political office) and moral hazard (the tendency to steal when given the opportunity.) India's politicians are venal because the constitution does not bar criminals and the criminally inclined from seeking and holding office.

Unlimited expansion of government power at the expense of the freedom of the people is made possible—even encouraged—by the nature of the constitution. A Constitution that protects the individual from unreasonable oppression by the government is a necessary condition for free people. India's lack of prosperity is because Indians are fundamentally not free.

Individual freedom is the basis for a free society. Free individuals interacting freely within society is absolutely indispensable for social well-being and economic prosperity. It is well understood that economic prosperity requires free markets. But free markets cannot be had without individual freedom. Free markets emerge from the interactions of free people.

All laws regardless of their theatre of operation—labour markets, education, civil matters, criminal matters—derive from the constitution. If the courts are not operating effectively, where does the problem lie? If there are 30 million cases pending in the Indian judicial system and cases take decades to be resolved, to what institution can one trace the failure?

## Constitutions Matter

To reiterate, given all other things equal, the differences in the outcome of societies can be traced to differences in the set of rules they operate under. North Korea is different from South Korea because of differences in the rules. India is different from Pakistan for the same reason.

We keep hearing of revolutions around the world. Often times, though, the before and after images of those revolutions don't appear to be materially different. What we usually see is that one set of tyrannical rulers are replaced by another set. The reason that nothing changes is because the rules continue to be the same. Similarly, the US administrations change but the core policies do not change. The US continues to prosper (with minor hiccups) because at its foundation is a set of rules they follow that is good for the economy. India continues to fail and fall behind because the set of rules it has does not allow it to prosper.

When an Indian migrates from India to the US (like I did), the essential change lies in the new game that the migrant is part of. Same person, different rules, different outcomes.

## Change the Rules, Change the Game

Nobel laureate economist, James Buchanan Jr, wrote,

It is folly to think that 'better men' elected to office will help us much, that 'better policy' will turn things around here. We need, and must have, basic constitutional reform, which must, of course, be preceded by basic constitutional discourse and discussion. This is our challenge.<sup>15</sup>

Individuals differ. All humans are not created equal. But sufficiently large groups of people are quite similar to other large groups of people. It is not true that Americans by nature are intrinsically better than Indians, at least not to the extent that Americans have a per capita income 40 times that of Indians. What is different between Americans (or Germans or Scandinavians) and Indians is that they operate under different rules.

The conclusion has to be that India's problem is structural and systemic, and not idiosyncratic. If the Constitution were to change, the ultimate rules of the game would change, the policies (the derived rules) will change, and consequently the action on the ground (the play of the game) will change, and therefore the outcome will change.

India needs a new Constitution that is consistent with a nation of free individuals living in a complex, modern, large economy. This modern Constitution has to be one that guarantees economic freedom to the individual, prohibits the government from making any laws that discriminate among citizens, guarantees freedom of speech and the press, prohibits the government from entering into businesses that are properly the domain of the private sector, and so on. In other words, India needs a constitution that protects the comprehensive freedom of the individual: economic, social and political.

Therefore, for India to change its trajectory, to move out of the trap that it is in for so long, the rules of the game have to change. The constitution of India has to be re-written.

## NOTES AND REFERENCES

- <sup>1</sup> The importance of the distinction between necessary and sufficient is underappreciated. Too often people tend to think that because something is not sufficient, it is not necessary. Free markets, for example, are not sufficient to guarantee prosperity because market failures are a reality. But that fact in itself does not invalidate the need to have free markets. Government intervention too is often necessary but that does not mean that government intervention is sufficient either. By themselves neither a free market nor government control is sufficient although both may be necessary depending on the specifics of a situation.
- <sup>2</sup> Alan Beattie, “Argentina: The superpower that never was,” *Financial Times* (May 23, 2009).
- <sup>3</sup> I note the distinction between ‘rule’ and ‘administration’. The British government ruled. Now we have the Congress rule, the UPA rule, etc. Compare that to the “Nixon administration”, the “Bush administration” etc.
- <sup>4</sup> The Constitution was adopted on September 17, 1787, by the Constitutional Convention in Philadelphia. It went into effect on March 4, 1789.
- <sup>5</sup> This happens all the time in the US. Laws are passed by the US Congress but they have to pass the constitutional test: Does the enacted law violate the constitution? As a consequence, sometime there is a vigorous public debate about the constitutionality of any laws passed by the state or the federal governments. This establishes in the minds of the people that it is a government of laws and that these laws are basically framed by the people. In essence, the citizens viscerally understand that their government is not of people but of laws. People come and go but the laws persist.
- <sup>6</sup> The other important document must be the Declaration of Independence written in 1776.
- <sup>7</sup> In a monarchy, the king is supreme and therefore they have ‘God Save the King’. In a constitutional republic, the constitution is the king. We need to note that a monarch is omnipotent and sovereign. The constitution is sovereign but not omnipotent. The people have rights that even the constitution cannot take away.
- <sup>8</sup> It is similar but wordy. Economy of words is not something that is valued by Indians in general. Even trivial announcements or public notices are wordy. People seem to confuse the length of a pronouncement with how important it is.
- <sup>9</sup> That oath has a redundant clause in it. In my view, defending of the constitution of India is tantamount to upholding the ‘sovereignty and integrity of India’. Furthermore, the duty and office of the PM is defined by the constitution. Therefore,

declaring that “I will faithfully and conscientiously discharge my duties . . . in accordance with the Constitution and the law” is redundant and superfluous.

- <sup>10</sup> But a good constitution is not a sufficient condition for prosperity. You could have a good constitution and yet be rendered poor by adverse circumstances.
- <sup>11</sup> James Madison, Jr. (1751 - 1836) was an American statesman and political theorist, the fourth President of the United States (1809–1817). He is hailed as the “Father of the Constitution” for being instrumental in the drafting of the United States Constitution and as the key champion and author of the United States Bill of Rights. After the constitution had been drafted, Madison became one of the leaders in the movement to ratify it. His collaboration with Alexander Hamilton and John Jay produced the Federalist Papers (1788). Circulated only in New York at the time, they would later be considered among the most important polemics in support of the Constitution. Source: Wikipedia
- <sup>12</sup> James Madison. The Federalist Papers. No.62. 381. New York, 1788.
- <sup>13</sup> The first three Articles embody the doctrine of the separation of powers, whereby the federal government is divided into three branches: the legislature, consisting of the bicameral Congress; the executive, consisting of the President; and the judiciary, consisting of the Supreme Court and other federal courts. The fourth and sixth Articles frame the doctrine of federalism, describing the relationship between State and State, and between the several States and the federal government. The fifth Article provides the procedure for amending the Constitution. The seventh Article provides the procedure for ratifying the Constitution.
- <sup>14</sup> The Cabinet Mission of 1946 was sent to India to hold preparatory discussions with elected representatives of British India and the Indian states about the method of framing of the Constitution, to set up a Constitution body and set up an executive council for the purpose. The mission consisted of Lord Pethick-Lawrence, the Secretary of State for India, Sir Stafford Cripps, President of the Board of Trade, and A. V. Alexander, the First Lord of the Admiralty. However, Lord Wavell, the Viceroy of India, did not participate. They held talks with the Indian National Congress and All-India Muslim League, which were the two largest political parties in the Constituent Assembly of India. The Constituent Assembly first met and began work on November 26, 1946. Hence, British involvement in framing of the Indian Constitution was central.
- <sup>15</sup> Notes on the History and Direction of Public Choice. From the book What Should Economists Do? Liberty Press, 1979.